EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 60
XA9/18

Lord Brodie
Lord Malcolm
Lord Glennie

OPINION OF THE COURT

delivered by LORD BRODIE

in the appeal
under section 13 of the Tribunals, Courts and Enforcement Act 2007

by

JAKUB GORALCZYK (AP)

Appellant

against

A determination of the Upper Tribunal (Immigration and Asylum Chamber)

Appellant: Caskie; MBS Solicitors
Respondent: Massaro; Office of the Advocate General

24 August 2018

Introduction

[1] It is one thing when the state seeks to withdraw a permission or privilege. It is a very different matter when it seeks to interfere with an individual's rights. Privileges are precarious. In the absence of good reason to the contrary, rights should be secure.

[2] This is an appeal on a point of law with leave of the Upper Tribunal ("UT") in terms of section 13 of the Tribunals, Courts and Enforcement Act 2007 against a determination of

the UT as constituted by Upper Tribunal Judge ("UTJ") Macleman, dated 23 January 2017. The appellant is Jakub Goralczyk. The respondent is the Secretary of State for the Home Department.

[3] The appellant was born on 21 April 1982. He is a citizen of Poland. As at October 2015 he had been resident in the United Kingdom for a period he estimated as nine years and which is accepted by the respondent was more than five years but less than ten. The appellant has two children with his partner, both of whom were born and have lived all their lives in the United Kingdom.

[4] The appellant has been convicted of three offences while resident in the United Kingdom. The first conviction was recorded on 30 June 2011 at Edinburgh Sheriff Court. The appellant was convicted of contravention of section 5 of the Road Traffic Act 1988. He was fined £200 and disqualified from driving for a period of 18 months. On 8 September 2015, at Dumfries Sheriff Court, the appellant pled guilty to two charges of contravention of section 4(3)(b) of the Misuse of Drugs Act 1971. The controlled drug in question was cannabis. The first offence was committed on 26 January 2015 and the second offence was committed on 5 August 2015. The second offence was committed while the appellant was on bail awaiting trial in respect of the first offence and, accordingly, was aggravated by a breach of bail conditions. The appellant was sentenced to a *cumulo* term of 14 months imprisonment in respect of both offences.

[5] On 12 October 2015 the respondent decided to make a deportation order against the appellant requiring him to leave the United Kingdom and prohibiting his return. That decision was made in terms of regulation 19(3) of the Immigration (European Economic Area) Regulations 2006. The appellant appealed the respondent's decision to the First-tier Tribunal ("FTT"). The FTT refused the appeal in terms of decision dated 1 October 2016.

The appellant appealed to the UT. That appeal was refused. The UT stated that the FTT determination should stand.

Relevant statutory provisions

[6] In terms of section 3(5) of the Immigration Act 1971 a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good. In terms of section 5(1) of the 1971 Act, where a person is liable to deportation, the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom, and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force.

[7] The UK Borders Act 2007 provides, *inter alia*, as follows:

> Section 32:
>
> "**Automatic deportation**
> (1) In this section 'foreign criminal' means a person—
> (a) who is not a British citizen,
> (b) who is convicted in the United Kingdom of an offence, and
> (c) to whom Condition 1 or 2 applies.
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
> …
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33)."
>
> Section 33:
>
> "**Exceptions**
> (1) Sections 32(4) and (5)—
> (a) do not apply where an exception in this section applies (subject to subsection (7) below), and

…

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention.

…

(4) Exception 3 is where the removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would breach rights of the foreign criminal under the EU treaties."

[8] The Immigration (European Economic Area) Regulations 2006 provide, inter alia, as follows:

Regulation 19:

"(3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—

(a) that person does not have or ceases to have a right to reside under these Regulations;

(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21; or

(c) the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with regulation 21B(2)."

Regulation 21:

"(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

…

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

> (6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

[9] The 2006 Regulations were revoked and replaced by the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") on 1 February 2017. In terms of paragraph 5(1) of schedule 6 to the 2016 Regulations, the respondent's removal decision in respect of the appellant is deemed to be a decision under regulation 23(6) of the 2016 Regulations.

The FTT decision

[10] The FTT decision includes a detailed narrative of the evidence that was led at the hearing on 9 September 2016. However, what we take to have been the findings in fact made by the First Tier Tribunal Judge (the "FTTJ") can be stated quite briefly. The appellant, as we have already indicated, is a citizen of Poland. At the relevant date (the date of the respondent's removal decision) he had been resident in the United Kingdom for a little short of ten years. He is in a long term relationship with his fiancée who is also a Polish citizen. The appellant and his fiancée are the parents of and live together in family with their two children. At the time of the hearing before the FTT the children were aged, respectively, nine and seven. They were both born in the United Kingdom. They speak English. They can speak but cannot read and write Polish. The appellant's sister resides in the United Kingdom as do her children. The FTTJ accepted that the impact on the appellant's partner and children would be hugely significant and that the impact on his sister and his nephew would be significant.

[11] The FTTJ sets out the reasoning for his decision as follows:

> "46. The respondent was convicted of a drink driving offence at Edinburgh Sheriff Court on 30th June, 2011. He was fined £200 and was disqualified from driving for eighteen months. That conviction on its own would not in my view merit the appellant's deportation but the appellant being sentenced to fourteen months' imprisonment on 8th September, 2015, for two drugs offences is a matter of the gravest significance.
>
> 47. The respondent can deport an EEA national where it is decided that the removal of that person is justified on the grounds of public policy, public security or public health. Had the appellant been resident in this country for at least ten years then he could only be deported on imperative grounds of public security but because the appellant has been in the United Kingdom for between five years and ten years he can only be deported on serious grounds of public policy or public security.
>
> 48. The reasons for refusal letter says that a decision to deport a person has to be taken in accordance with certain principles. The decision has to comply with the principle of proportionality. The decision must be based exclusively on the personal conduct of the person concerned. The personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Matters isolated from the particulars of the case which relate to considerations of general prevention do not justify the decision.
>
> 49. I take into account all that has been said on the appellant's behalf but I regard the respondent's decision as being justified in the circumstances. When the appellant committed his third offence in the United Kingdom, that is to say his second drugs offence, he well knew that the person or persons approaching him were probably involved in criminality since these were the same individual or individuals who had involved him in his first drugs offence.
>
> …
>
> 51. The fact that the appellant committed a second drugs offence while he was on bail in relation to the first drugs offence in my view shows that the appellant cannot be trusted. When he was approached with a view to his committing his second drugs offence he could and should have gone immediately to the police.
>
> …
>
> 54. Of course, the impact on the appellant of deportation is going to be hugely significant. The impact on his partner and on their children will be hugely significant. The impact on the appellant's sister and indeed on the appellant's

nephew will be significant. Deportation of the appellant is not a step that can be taken lightly. The supply of drugs, however, is also a matter of enormous significance and the supply of drugs which is hugely harmful is only made possible by those who are willing to provide assistance to the main dealers in terms of transport.

55. It is not for me to say what the position would have been had the appellant committed one drugs offence only. The fact of the matter is that there were two offences. The fact of the matter is also that whatever the position may have been in relation to the first of these, by the time of the second offence under the Misuse of Drugs Act the appellant must certainly have been aware of what it was he was being asked to do and exactly why it was that he was being asked to do it. The appellant must also have been aware that he was in a position of trust as he was on bail and it was a condition of his bail, as he must have known, that he was not to commit any offence.

56. In my view, notwithstanding the weight of evidence about the personal and family circumstances of the appellant, his partner, his children and his sister the respondent's position is a justified one. I do not regard the respondent's decision to deport as being disproportionate. The appellant has shown that he was willing, admittedly when under pressure, to repeat his first drugs offence and he has shown that he cannot be relied upon to comply with bail conditions.

57. I quite accept that the appellant has contributed usefully to the United Kingdom economy and I do not doubt the appellant's commitment to his partner, his children and his sister. However, there is a public interest in this matter given the nature of the appellant's offences. I do not minimise the significance from a number of points of view for this family of the appellant's deportation but there are serious considerations in relation to drugs offences which outweigh the appellant's and his family's circumstances and I shall refuse the appeal."

The UT determination

[12] The UTJ's reasons for rejecting the appeal against the decision of the FTT and holding that it should stand, are encapsulated in paragraph 12 of the UT determination:

> "12. I am unable to derive from the grounds and submissions more than disagreement with the assessment reached by the FtT, firmly based on the facts and the evidence, and applying the correct test. It is plain the test was recognised, as that is what the case presented by both sides was all about, and it is quoted. There is no reason to think the judge had anything less in mind when reaching his conclusion."

Submissions

Appellant

[13] Mr Caskie, on behalf of the appellant, adopted his written note of argument which he supplemented with a brief oral submission. He emphasised that the circumstances in which an EU citizen can be removed from the United Kingdom are limited. Effectively, in transposing Directive 2004/38/EC of the European Parliament and the Council (the "Citizenship Directive") the 2006 Regulations created three levels of rights of residence and therefore protection against removal from the United Kingdom. The basic level of rights was that accorded to an EEA national who was in the United Kingdom as a job-seeker, a worker, a self-employed person, a self-sufficient person or a student (a "qualified person" in terms of regulation 6). In terms of regulation 14 a qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person. However, in terms of regulation 19(3)(b) he may be removed if the respondent has decided that the person's removal is justified "on grounds of public policy, public security or public health", in accordance with regulation 21. The requirement that the respondent's decision must be in accordance with regulation 21 is important: the decision must be taken in accordance with the regulation 21(5) principles and before it can be taken account must be taken of the regulation 21(6) considerations. However, for a qualified person who has only the basic level of rights, it is sufficient that the respondent's decision is based on grounds of public policy, public security or public health (without further qualification). The next level of rights is that of the permanent right of residence which is conferred by regulation 15 on an EEA national who has resided in the United Kingdom in accordance with the Regulations for a continuous period of five years. Again, a decision to remove such a person can only be taken in conformity with regulation 21(5) and (6), but an additional level of protection is

provided by the requirement, imposed by regulation 21(3), that the respondent's decision in the case of a person with a permanent right of residence can only be taken on "*serious* grounds of public policy or public security". The third level of rights and consequent protection is accorded to an EEA national who has resided in the United Kingdom for a continuous period of at least ten years. In terms of regulation 21(4) a relevant decision cannot be taken in respect of such a person except on "imperative grounds of public security" (in other words, according to Mr Caskie, association with terrorism).

[14] As a EEA national who has been resident in the United Kingdom for more than five years the appellant fell to be placed at the intermediate level of rights and protection (albeit that his period of residence was close to that which qualifies for the third and highest level). Accordingly, in addition to the regulation 21(5) and (6) requirements, regard must be had to the distinction between "grounds of public policy" and "serious grounds of public policy"; it was only if the latter were identified that a decision could be taken to deport the appellant from the United Kingdom.

[15] Moreover, regulation 21(5)(c) required that a decision to expel the appellant must be based exclusively on his personal conduct and his personal conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The onus was on the respondent to establish that: *Arranz (EEA Regulations – deportation – test)* [2017] UKUT 00294 (IAC) at paragraph 81. The only risk assessment available to the FTTJ in the present case was that contained in the Criminal Justice Social Work Report which had been prepared on the instructions of the sheriff at Dumfries prior to sentencing on the drugs charges and which had been put before the FTT by the respondent. That report recorded the appellant's family orientation as a protective factor. It assessed him at low risk of re-offending. The FTTJ's description of the appellant's offending as being

"of the gravest significance" was a mischaracterisation. Being satisfied that the appellant's circumstances met the criteria of the 2006 Regulations was an error in law on the part of the FTT and the UT had erred in law in failing so to hold. The appeal against the decision of the UT should be allowed and the decision of the FTT remade by allowing the appeal from the decision of the respondent to deport.

Respondent

[16] Mr Massaro, for the respondent, adopted his written note of argument. In oral submission, without making any concession, he acknowledged that the court might have concerns over the cogency or at least the clarity of expression of the FTTJ's reasoning. However, in para 40 of his decision the FTTJ had recorded the submission that the appellant could only be deported if there were serious grounds of public policy or public security supporting that outcome and at para 47 the FTTJ notes the distinction between the position of the appellant and that of an EEA national who had been resident for ten years. The FTTJ had understood the correct test. His reasoning was adequate as judged by what had been said in *YZ* v *SSHD* [2017] CSIH 41. While the FTTJ may not have explicitly identified the relevant serious ground of public policy, it could be read between the lines: the reduction of offences related to the misuse of drugs. The 2016 Regulations which had superseded the 2006 Regulations with effect from 1 February 2017, while not applicable at the time of the decision by the FTT, were helpful in articulating what were the fundamental interests of society in the United Kingdom in that they provided in schedule 1 a (non-comprehensive) list of such interests. That list included (at schedule 1 paragraph 7 (g)): "tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of

drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union)". The response of the Court of Justice to the second question in the reference *Land Baden-Wurttemberg* v *Tsakouridis (C-145/09)* [2011] 2 CMLR 11 at paras 39 to 56, was also instructive, albeit that what was there under consideration was "imperative grounds of public security". At para 46 of the opinion of the Court there is a recognition that illicit drug trafficking poses a threat to the health, safety and quality of life of citizens of the Union and to the legal economy, stability and security of the Member States.

[17] Again without making any concession, Mr Massaro indicated that while he did not intend to defend the FTTJ's characterisation of the appellant's offending, he was anxious to dissuade the court from finding that offending of this nature could never be the occasion for taking a decision to deport an EEA national with a permanent right of residence. It was all a matter of circumstances. Accordingly, the court should be slow to gloss the Regulations by offering a definition of what they required. Mr Massaro commended what had been said by Moore-Bick LJ when delivering the judgment with which the other members of the Court of Appeal agreed, in *Home Secretary* v *Straszewski* [2016] 1 WLR 1173 at paras 20 and 24: it would be unwise for the court to attempt to lay down guidelines.

Decision

[18] This is an appeal on a point of law. Mr Massaro's note of argument very properly reminded us of the role of this court when considering an appeal of this sort. It is not for this court to interfere with findings of primary (or "pure") fact where it was open to the FTT to make these findings: *YZ* v *SSHD* at para 42. Matters of evaluation of primary facts are similarly within the province of the FTT unless it makes an error of law. Further, what

Sir John Dyson JSC said at para 45 when delivering the judgment of the Supreme Court in *MA (Somalia)* v *SSHD* [2011] 2 All ER 65 is always apposite:

> "… the court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the AIT's assessment of the facts. Moreover, where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account."

[19] In this case there is no quarrel with the FTT's finding of primary fact. Little indeed was controversial. The FTTJ rejected some of what the appellant said about the circumstances in which he became involved in the events which were the subject of the charge of contravention of section 4 (3)(b) of the Misuse of Drugs Act 1971 on 26 January 2015. The FTTJ was entitled to do so. The appellant pled guilty to that charge. The conviction was properly taken at face value, albeit the FTTJ was prepared to accept the appellant's account of having been put under pressure to commit the second drugs offence.

[20] Equally, the FTTJ might be said to have been aware of the applicable law. He records submissions under reference to the 2006 Regulations and at paragraphs 47 and 48 of his decision and reasons he narrates the tests derived from these Regulations. The UT was satisfied that the FTTJ had applied "the correct test". We cannot agree with the UT. In our opinion it is very clear that the making of the decision of the FTT involved the making of an error on a point of law.

[21] Before going further it is convenient to note what parties before us agreed was the role of the FTTJ in these proceedings. On 12 October 2015 the respondent made a decision to make a deportation order in relation to the appellant. Because of the appellant's status as an EU citizen and therefore EEA national (with the right of permanent residence in the United Kingdom as explained by Mr Caskie in the course of his submissions) that was an "EEA decision" in terms of regulation 2 of the 2006 Regulations. The appellant appealed the

respondent's decision in terms of regulation 26 of the Regulations. That provision confers an unrestricted right of appeal to the FTT allowing for a hearing of evidence (as occurred in the present case). The effect of such an appeal is to put the FTTJ into the position of decision-maker. The decision must be taken in terms of the 2006 Regulations and, in particular, in terms of regulation 21. It is for the respondent to satisfy the FTTJ on the balance of probabilities that the decision to remove can and should properly be taken: *Arranz* at para 81. Unless the FTTJ is so satisfied he must allow the appeal. Returning to matters of substance, as Mr Caskie emphasised, the context for the decision-making process in this case is the importance of the rights conferred on all citizens of Member States and other EEA nationals by the Citizenship Directive, as transposed by the 2006 Regulations and underpinned by article 45 of the Treaty for the Functioning of the European Union. This is a case about individual rights and an attempt by the state to derogate from these rights. The appellant is a citizen of a Member State and, as such, an EEA national. At the time when the respondent made the decision to deport him the appellant had resided in the United Kingdom for a continuous period of more than five years. He had accordingly acquired a permanent right to reside in the United Kingdom by virtue of regulation 15 of the 2006 Regulations. Thus, while his conviction and sentence for two drugs offences mean that he is a "foreign criminal" in terms of sections 32 and 33 of the UK Borders Act 2007, as a "foreign criminal" who is an EEA national, his position is very different from a "foreign criminal" who is not an EEA national. The point was made by Moore-Bick LJ in *Home Secretary* v *Straszewski* at 1179:

> "12 One important purpose of the Citizenship Directive, was to protect and support the treaty right of free movement of nationals of member states and, by extension, nationals of other EEA states. The origin and purpose of the Regulations are, therefore, both fundamentally different from those of section 32 of the 2007 Act, which is directed to removing from this country aliens who have no right to be here

> other than in accordance with leave to remain granted by the Secretary of State. Leaving aside whatever protection against removal the European Convention may afford them, their position in law is inherently less secure than that of EEA nationals who are entitled to exercise treaty rights. In a case where the removal of an EEA national would *prima facie* interfere with the exercise of his treaty rights it is for the member state to justify its action. It is for this reason that I am unable to accept [counsel's] submission that in a case of the present kind the burden of showing that the decision is not in accordance with the law lies on the person who is to be deported.
>
> 13 Given the fundamental difference between the position of an alien and that of an EEA national, one would expect that interference with the permanent right of residence would be subject to more stringent restrictions than those which govern the deportation of nationals of other states. Moreover, since the right of free movement is regarded as a fundamental aspect of the European Union, it is not surprising that the Court of Justice of the European Union ("CJEU") has held that exceptions to that right based on public policy are to be construed restrictively: see, for example *Van Duyn v Home Office (Case C-41/71)* [1975] Ch 358 and *Bonsignore v Oberstadirektor der Stadt Koln (Case C-67/74)* [1975] ECR 297."

[22] Moore-Bick LJ's expectation that there should be stringent restrictions on a Member State's ability to remove an EEA national, including a "foreign criminal", who has acquired the right to reside in the United Kingdom is borne out by the terms of the 2006 Regulations. In particular, a decision to deport an EEA national with a permanent right of residence may not be taken except on serious grounds of public policy or public security: regulation 21(3). Regard has to be had to the word "serious", a point made by Mr Caskie when explaining the effect of the 2006 Regulations as being to establish three levels of rights and consequent degrees of protection against removal. A decision to remove a person who has resided in the United Kingdom for less than five years may be taken "on grounds of public policy" but a decision to remove a person who has resided in the United Kingdom for more than five years cannot be taken "except on serious grounds of public policy". It follows that "serious grounds" of public policy must mean something different from "grounds" of public policy, and it follows from that that the decision-maker must identify just what the relevant grounds are and then evaluate them as to their seriousness. Moreover, a relevant decision

must be taken in accordance with the principles set out in regulation 21(5). Finally, in terms of regulation 21(6), before taking such a decision the decision-maker must take into account considerations such as the age, state of health, family and economic situation of the person, his length of residence in the United Kingdom and the extent of his links with his country of origin.

[23] The FTT decision does not reflect the context in which it should have been taken. There is no recognition in the decision that what is in issue here is an attempt by a Member State to derogate from an EU citizen's treaty rights. Crucially, the decision-making process mandated by the Regulations is simply not followed.

[24] The FTTJ's reasoning is to be found at paragraphs 46 to 57 of the decision. At paragraph 49 the FTTJ states that he regards the respondent's decision as being justified in the circumstances. That might be a correct acknowledgement that the onus was on the respondent to justify the interference with the appellant's rights (see *Straszewski* at para 12 and *Arranz* at para 81). However, notwithstanding the FTTJ's quotation of the salient provisions of the 2006 Regulations it does not appear that he applied them in coming to the conclusion he expresses at paragraph 49 of his decision. He begins his reasoning by characterising the appellant's being sentenced to 14 month's imprisonment for two drugs offences as "a matter of the gravest significance." This attracted criticism on behalf of the appellant at the hearing before the UT, criticism which was repeated in the submissions to this court. It is a surprising and, as an example of English, a rather unusual expression. The UTJ saw a need to tone it down. At paragraph 10 of his determination and reasons he said this:

> "The clear and fair reading of the judge's comment at paragraph 46 is that he was evaluating the drugs offences in relation to the threshold of the regulations, and no

> more. It would be plain that, although serious, this is not the very highest category of criminal offending."

Exactly what the UTJ means by the first sentence of this paragraph is obscure, but we would agree with the assessment contained in the second sentence. The available information about the appellant's two convictions for concern in supplying cannabis is limited. We do not know for example what quantity was involved, but a 14 month sentence in respect of two charges (presumably discounted for the guilty plea and containing an element in respect of the bail aggravation in the second charge) does not suggest a large amount. Cannabis is a class B drug. We would understand each charge to relate to acting as courier on a single day. This is a subordinate role in what must have been an established operation organised and directed by others. It is not insignificant that a 14 month sentence is only marginally above the 12 month threshold for qualification as a "foreign criminal" in terms of section 32(2) of the UK Borders Act 2007. If by using the expression "a matter of the gravest significance" the FTTJ meant that the offences to which the appellant pled guilty were particularly serious relative to the sort of matters which are prosecuted on indictment, he was wrong. However, the FTTJ's error is not limited to his assessment of precisely where on the spectrum of seriousness the appellant's offending should be placed. It is more fundamental than that.

[25] Having characterised the conviction on the two drugs charges as a matter of the gravest significance, at paras 49 to 55 of his decision the FTTJ goes on to underline the blameworthy nature of the appellant's behaviour. He rejects the mitigation which had been put forward and emphasises the aggravating features of offending while on bail ("the appellant cannot be trusted") and assisting those dealing in controlled drugs ("the supply of drugs which is hugely harmful is only made possible by those who are willing to provide

assistance"). He concludes that the appellant's commission of these offences justifies the respondent's position "notwithstanding the weight of evidence about the personal and family circumstances of the appellant, his partner, his children and his sister". Thus, the approach adopted by the FTTJ is one of balancing, on the one hand, the heinous nature of the appellant's conduct, as against, on the other, the disruption to the lives of the appellant and members of his family consequent on the appellant's deportation. That might meet the case of a "foreign criminal" who is not an EEA national and is therefore liable to automatic deportation in terms of section 32 of the UK Borders Act 2007 (subject to Article 8 of the European Convention on Human Rights protection, as provided for by section 33(2)(a)). It does not begin to meet the present case.

[26] As we have already indicated, what is under consideration is a decision by the state to abrogate the appellant's EU treaty rights in relation to free movement of workers on the grounds of public policy. That is only lawful if the state demonstrates that the requirements of the 2006 Regulations are met. The starting point is the requirement of regulation 21(3) that a relevant decision may not be taken except on *serious* grounds of public policy, allied with the principle set out in regulation 21(5)(a) that the decision must comply with the principle of proportionality. Thus, a decision to remove must have not just a policy objective but a serious policy objective. Moreover, it must comply with the principle of proportionality. That brings into consideration a particular body of jurisprudence. As is explained by Lords Reed and Toulson in their judgment, with which the other members of the Supreme Court agreed, in *R (Lumsdon)* v *Legal Services Board* [2016] AC 697 at paragraph 24, proportionality is a general principle of EU law. It is enshrined in article 5(4) of the Treaty of the European Union, which provides: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to

achieve the objectives of the Treaties". However, it also applies to national measures falling within the scope of EU law where these measures interfere with protected interests, including the fundamental freedoms guaranteed by the EU Treaties, such as freedom of movement. That is why the requirement to comply with the principle of proportionality appears in regulation 21(5)(a).

[27] The nature of the test of proportionality is identified by Lords Reed and Toulson at paragraph 33 of *Lumsdon* (see also *Scotch Whisky Association* v *Lord Advocate* 2018 SC (UKSC) 94 at para [16]):

> "33 Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, sometimes referred to as proportionality *stricto sensu*: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately, as in *R v Minister for Agriculture, Fisheries and Food ex p Fedesa* (Case C-331/88) [1990] ECR I-4023."

Thus, in order to take a decision which complies with the principle of proportionality the decision-maker must have in mind the objective which the outcome of the decision is intended to achieve. Only then can the decision-maker determine whether the measure in question is suitable or appropriate to achieve the objective, whether it could be achieved by a less onerous method and whether the burden imposed by the measure is disproportionate to the benefits secured. Much the same can be said about taking a decision only on serious grounds of public policy; the decision-maker can only know if he is taking the decision on such grounds if he has identified and keeps in mind what these grounds are.

[28] This gives rise to a difficulty with the FTT's decision; nowhere does the FTTJ expressly identify what is the objective of the decision to deport the appellant. The reader of

the FTTJ's decision is left to guess. What then might be the serious ground of public policy which is put in play by reason of an EEA national having accumulated these three criminal convictions during a period of nearly ten years' residence in the United Kingdom? Some things can be excluded. Previous convictions of themselves do not justify a decision: regulation 21(5)(e). This is not a case where there is any need to respond to public revulsion at the appellant's wrongdoing, an objective which in *Straszewski* Moore-Bick LJ allowed as being permissible, albeit only in exceptionally serious cases. Punishment cannot be an objective. The appellant has been punished and, we must assume, appropriately punished. There is no information to suggest that in selecting the term of imprisonment the sheriff reduced what would have otherwise been the term of imprisonment having regard to the possibility that the appellant would be deported. Neither is general deterrence of relevance as a legitimate serious public policy justification. As Moore-Bick LJ pointed at paragraph 14 of *Straszewski*, regulation 21(5)(b) and (d) provides that a decision to remove an EEA national who enjoys a permanent right of residence must be based exclusively on the personal conduct of the person concerned and matters that do not directly relate to the particular case or which relate to considerations of general prevention do not justify a decision to remove him. Deterrence, therefore, in the sense of measures designed to deter others from committing similar offences, has of itself no part to play in a decision to remove the individual offender.

[29] The FTTJ hints that the relevant public policy objective in deporting the appellant has something to do with the risk of his reoffending. At paragraph 51 of his decision the FTTJ states that "the appellant cannot be trusted" and again in paragraph 56 he observes: "The appellant has shown that he was willing, admittedly under pressure, to repeat his first drugs offence and he has shown that he cannot be relied on to comply with bail conditions." It may

therefore be that the FTTJ took the view that there was a risk that, if he remained in the United Kingdom, the appellant would again offend, presumably in the same way as he had previously offended: by being concerned, in a subordinate role, in the supplying of class B drugs. Deportation would of course prevent that happening, at least in the United Kingdom, and thus if the objective is to prevent the appellant reoffending in the United Kingdom, deportation is a suitable measure to achieve that objective for the purpose of the first proportionality question. Deportation might also survive scrutiny by reference to the second proportionality question given the absence of any alternative measure being available to the decision-maker. That still leaves the third proportionality question and at that point there is a problem if the relevant objective is framed in terms of preventing the appellant from reoffending in the United Kingdom. If the FTTJ considered that the relevant objective was preventing the appellant from reoffending then there were questions he required to address by reference to that objective. Could the burden imposed by the deportation of the appellant be regarded as proportionate to the benefits to be anticipated from the relatively modest objective of preventing him reoffending? Separately, turning to regulation 21(3), could preventing the appellant reoffending in the United Kingdom be said to involve serious considerations of public policy? The FTTJ did not address these questions. It will be appreciated that much depends on precisely how the relevant policy objective (in more prosaic terms the point of deporting the appellant) is formulated. Referring to paragraph 7(g) of schedule 1 to the 2016 Regulations, Mr Massaro suggested that it was to do with tackling drug trafficking by organised criminal groups. That points to a more ambitious objective than simply preventing the appellant from reoffending. A decision aimed at such a more ambitious objective could well be regarded as proceeding on serious public policy grounds. Even if it were to impose a heavy burden it might not be considered

disproportionate by reference to the third proportionality question given the undoubted benefits associated with a reduction in drug trafficking by organised criminal groups but, on the other hand, a decision-maker with that objective in view would have to have regard to the first proportionality question: whether the measure in question (here the deportation of the appellant) is suitable or appropriate to achieve the objective pursued. Determining whether a measure is suitable involves considering how likely it is to be effective. If deporting the appellant was, for some reason, thought likely to contribute to a reduction in drug trafficking by organised criminal groups then it might more readily comply with the principle of proportionality. On the other hand, if it was unlikely to have any impact on the level of trafficking in the United Kingdom it is less likely to be proportionate, at least if the objective of his deportation is framed in the more ambitious terms suggested by Mr Massaro.

[30] There are further difficulties with the FTTJ's process of decision-making. It will be recollected that among the principles to be applied in the taking of an EEA decision is that expressed in regulation 21(5)(c): the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The word "threat" looks to the future. Therefore, if the deportation of an EEA national is to be justified, his continuing presence in the United Kingdom must in some way present a risk to one of the fundamental interests of society. Thus, if the FTTJ thought that the fact of the appellant's past offending indicated that there was a risk of the appellant reoffending, then, in addition to being satisfied that the decision to deport was based on serious grounds of public policy and respected the principle of proportionality, it was incumbent on the judge to consider whether the risk of reoffending was genuine, present and sufficiently serious and, further, that should the risk eventuate it would affect

one of society's fundamental interests. While it is perhaps self-evident that society has a fundamental interest in supressing the criminality associated with the supplying of controlled drugs, it is not quite so evident how the appellant's continued presence in the United Kingdom might adversely affect that; experience indicates that persons prepared to act as couriers in established drug supply networks are readily to be found. Moreover, if the FTTJ was concerned about the risk of reoffending, because the relevant threat must be genuine, present and sufficiently serious, the degree of risk must be evaluated. The FTTJ had one source of information which specifically addressed this issue. That was the Criminal Justice Social Work Report. By reference to standard risk assessment tools the author of that report had assessed the appellant as presenting at "low risk" of reoffending. It is true that the author of the report did not give evidence, either before the sheriff or the FTTJ. It is also true that a decision maker is not required to refer specifically to each piece of evidence that he has had regard to or, equally, necessarily to explain why he has rejected a piece of evidence (as the FTTJ would have been entitled to do with the Criminal Justice Social Work Report). Nevertheless, the FTTJ's silence on the risk assessment contained in the Criminal Justice Social Work Report, taken with the absence of any discussion of what the FTTJ saw the relevant threat to be and why he considered it genuine, present and sufficiently serious, leads us to the conclusion that the FTTJ simply did not apply himself to the issue of whether on the available facts deportation could be justified by reference to the regulation 21(5)(c) principle. That conclusion is reinforced when one notes, as did the UTJ who granted leave to appeal, that the FTTJ does not explain what he made of the submission which had been made to him and is recorded at paragraph 40 of the FTT decision: that the appellant had had an opportunity to reflect and had done all he could to rehabilitate

himself. Again, the FTTJ was not bound to accept that submission but he gives no indication of having considered it.

[31] We see there to have been a complete failure on the part of the FTTJ to engage with the requirements of the 2006 Regulations. That is very clearly an error of law. The FTT's errors were not corrected by the UT. We shall therefore set aside the decision of the UT in terms of section 14(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Mr Massaro submitted that we should remit to the FTT to allow it to reconsider the matter in the light of the court's directions and possibly further evidence as to the circumstances of the appellant's conviction. We are not inclined to do that. These proceedings have now been going on for quite long enough. The decision appealed against was made on 12 October 2015. Parties have had their opportunity to make their respective cases. Given that the facts are uncontroversial and straightforward and that this is not a matter calling for the exercise of particular expertise we shall remake the FTT's decision in terms of section 14(2)(b)(ii). In our opinion the high threshold for the deportation of an EU national is not met in this case. The appellant's conduct, as disclosed by his history of offending, is in no way to his credit but what the relevant provisions of the Regulations look to is likely future conduct. Past conduct has a bearing on that, but not just any risk will do. It must be such as to pose a genuine, present and sufficiently serious threat. That cannot be said to be the case here. The only available structured risk assessment indicates that the appellant presents a low risk of reoffending. That the regulation 21(5)(c) criterion is not met is sufficient for the purposes of our decision but in addition, in the circumstances of this case we do not see a decision to remove the appellant from the United Kingdom to be compliant with the principle of proportionality. We shall allow the appellant's appeal from the respondent's decision. The

result is that the appellant is not subject to a deportation order. We shall find the respondent liable to the appellant for his expenses in relation to the appeal.