Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01771/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 27th April 2015	**On 5th May 2015**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JUSTIN EWENGUE
(ANONYMITY ORDER NOT REQUESTED OR MADE)

Respondent

Representation:

For the Appellant: Mr Walker, Senior Home Office Presenting Officer.
For the Respondent: Mr Hodson, Solicitor for Elder Rahimi Solicitors.

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal (Judge Aujla) promulgated on 20th January 2015. By its decision the First-tier Tribunal allowed the Respondent's appeal against the Secretary of State's decision dated 3rd September 2014, to deport him from the UK.

2. The Tribunal allowed the appeal on the ground that the deportation would breach the Respondent's right as a European citizen under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

3. Whilst this is an appeal brought by the Secretary of State, for the sake of convenience I will refer to the parties as they were before the First-tier Tribunal.

4. The Appellant is a national of France born on 3rd January 1991. His background history demonstrates that he entered the UK on 22nd December 1992 at the age of just under 2 years along with his mother and siblings. He has resided in the UK since that date. Between the years 1994-2007 he was educated in the UK, attended both primary and secondary education obtaining GCSE qualifications and after school, enrolling in a coaching course with the Football Association and coached local football teams.

5. On 8th April 2013 at Luton Crown Court the Appellant pleaded guilty at a PCMH to four counts of possession of control drugs (class A) with intent to supply and one count of possession of class A drugs. He was sentenced to four years 10 months on each count to run concurrently. The sentencing remarks of the judge (His Honour Judge Farrell QC), reflects the Appellant's criminality as having been committed over an eight month period between April-December 2012. The judge sentenced the Appellant on the basis that he and his co-accused were involved in the commercial supply of drugs at a street level basis; the term commercial being used in the context of the motivation being financial. The judge found it was not on a significant commercial scale and rejected the prosecution case that when considering the sentencing guidelines applicable that he fell within the category of a leading role. Nonetheless he found that he fell within the "significant role" under the guidelines in a street level dealing enterprise. In reaching the appropriate sentence the judge took into account an aggravating factor committing an offence whilst on bail, he took into account his plea of guilty and the stage that it was entered giving a discount of 25% and took into account his age of 22 at the age of sentence. The Appellant had previous convictions; in 2009 for possession of a class B drug for which he received a conditional discharge and in 2011 simple possession of cannabis for which he was fined. The judge stated that those previous convictions (one of which was a spent conviction) could not be regarded as a "significant record."

6. As a result of his conviction on 8th April 2013, on 3rd September 2014 the Respondent issued a decision to make a deportation order against the Appellant under the 2006 Regulations. The reasons for that decision were contained in a detailed decision letter that was subsequently summarised by the First-tier Tribunal at paragraphs 12-15 of the determination.

7. The Appellant appealed against that decision and the appeal came before the First-tier Tribunal (Judge Aujla) on 12th January 2015. He had the advantage of hearing oral evidence from the Appellant and from his mother, brother and fiancée who gave evidence in accordance with their statements and whose evidence was not

challenged in cross-examination by the Secretary of State (see paragraph 18 of the First-tier Tribunal decision).

8. The judge considered the issues before him and set out his findings of fact at paragraphs [23]-[35] of the determination. The First-tier Tribunal recorded at paragraphs [19] and [23] that it was accepted and conceded by the Secretary of State both in the decision letter and by the Presenting Officer at the hearing that the Appellant fell within the highest level of protection and that as such, a decision could not be taken except on imperative grounds of public security [Regulation 21(4) of the 2006 Regulations]. The judge also set out what he recorded as the common ground between the parties at paragraph [23] whether the Appellant's conduct together with the latest conviction constituted "imperative grounds of public security" and if it did, were they taking account the Appellant's personal circumstances and the assessment of any future risk of reoffending, his deportation would not be proportionate.

9. After setting out his findings, the judge reached the conclusion at [28] that he was satisfied that any threat from the Appellant to the United Kingdom's public security was not of a particularly "high degree of seriousness" and also did not accept that the Appellant's presence in the United Kingdom represented a "genuine, present and sufficiently serious threat effecting one of the fundamental interest of society" as he found that the Respondent had not established that in the Appellant's case there were imperative grounds of public security which warranted his deportation from the United Kingdom (see [28]). At [29] the judge considered on an alternative basis that if his assessment on the imperative grounds of public security was erroneous, he went on to consider whether his deportation would be proportionate at paragraphs [30]-[34], and having taken into account the totality of the Appellant's personal circumstances, having balanced and gave his criminality the medium risk of reoffending, he found that the decision to deport would be disproportionate. He allowed the appeal in respect of the 2006 Regulations.

10. The Secretary of State sought permission to appeal the decision and on 19th February 2015, Designated Judge McClure granted permission for the following reasons:-

> "3. In the normal course of events where a concession is made the Tribunal has to act upon the concession (see **R (Ganidagli) v SSHD [2001] INLR 47**9 and **Carcabuk and Bla (TH01426)**. The concession may be withdrawn (see **Davoodipanah [2004] EWCA Civ 106**). There was no withdrawal of the concession and accordingly the judge was obliged to act upon it.
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> 4. As is evident from paragraph 14 there was no evidence to show that the Appellant had undertaken any rehabilitative work whilst in custody. A fundamental basis of public policy considerations in EEA deport cases of the prospect of rehabilitation. In assessing the element and in assessing the issue of proportionality it is clear from paragraph 30 that the judge did rely upon paragraph AG95 of **Tsakouridis**. In light of the comments in the Court of Appeal by Lord Justice Kay it is arguable that the judge has erred in relying on the paragraph in question in relation to the issues raised. That ground at least can be argued."

11. Thus the appeal came before the Upper Tribunal. Mr Walker on behalf of the Secretary of State did not seek to advance the first Ground of Appeal. That ground asserted that the judge acted on the concession contained within the reasons for refusal letter but that concession should not have been made and the judge should not have acted upon it and thus the Appellant was not entitled to benefit from the requirement that imperative grounds of public policy were required to justify his removal. Mr Walker referred the Tribunal to paragraphs [19] and [23] of the First-tier Tribunal determination and the Presenting Officer's acceptance of the concession and that at no time was the concession withdrawn and that in those circumstances, Mr Walker stated that the first ground was unarguable. Thus he did not seek to advance that ground on behalf of the Secretary of State.

12. As to the second ground, he submitted that the First-tier Tribunal Judge erred in assessing proportionality and in particular the judge at [30] was wrong to rely upon paragraph 95 of the Advocate General's opinion in **Tsakouridis [2011] 2CMLR 11** relying on the decision of **Essa R (on the application of) v UT & Anor [2012] EWCA Civ 1718** and also that [33] he equated the criminal licence arrangements with rehabilitation which was the wrong approach. He further submitted that the findings as to rehabilitation were speculative and the judge had diminished the circumstances and nature of the Appellant's offences. Whilst he relied on Ground 3 he made no further oral submissions in this respect.

13. Mr Hodson on behalf of the Appellant relied upon the Rule 24 response. Whilst the response dealt with the first ground at paragraphs [3]-[6], as Mr Walker did not seek to seek to advance that ground, it was not necessary for him to deal further with that issue.

14. He submitted that it was plain from reading the determination that the judge properly considered that there were no imperative grounds of public security capable of justifying the Respondent's deportation having applied the decision in **Tsakouridis** [as cited] and acknowledged at paragraph [25] that the conviction for drug trafficking was capable of amounting to imperative grounds of public security. He referred the Tribunal to paragraphs H7 and H8 of that decision. He referred the Tribunal to paragraphs [26]-[28] of the determination and the findings of fact made by the judge concerning the offence, the plea of guilty, his remorse that he had no previous convictions for supplying class A drugs, the contents of the OASys report and the consideration of the offence. In this respect as the Rule 24 response set out, the decision made by the judge at [28] that there were no imperative grounds of public security capable of justifying the deportation and his finding that the Appellant did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, was an unchallenged finding by the Secretary of State in the grounds. The only ground that was relied upon by the Secretary of State was that relating to proportionality and that the judge had considered proportionality in the alternative and in the event that he was wrong in his primary conclusion (see paragraph [29] of the determination). Thus he submitted that any error in the assessment of proportionality was not material.

15. In the Rule 24 response and in his submissions Mr Hodson accepted that the judge had mistakenly referred to paragraph [95] of the Advocate General's opinion in **Tsakouridis** (as cited) but it was not a material error because there were no imperative grounds of public security capable of justifying the Respondent's decision which was unchallenged and it was open to the First-tier Tribunal to reach its own conclusion on proportionality whereby the judge took into account the prospects of his rehabilitation given the length of residence and the findings of fact that he made. As Mr Hodson submitted, the judge had made significant findings as regards the integration of the Appellant in the United Kingdom at [30] and at [31] that the Appellant's situation was "not much different from someone born in this country". The judge properly had regard to the circumstances of the index offence and properly took into account the risk of reoffending had been assessed as medium. He found the Appellant would be "virtually a foreigner in France", that whilst he spoke some French he had no social and cultural connections with France, had no material links with France whereas he was integrated into the UK. The judge also accepted that he was a changed man [33] and [27] thus he submitted that the submissions made by the Secretary of State amounted to no more than an attempt to reargue the assessment of proportionality and that no material error of law was thus identified.

Decision on the Error of Law:

16. The Appellant is an EEA citizen and accordingly a decision to remove him can be made only under Regulation 19 with Regulation 21 of the Immigration (European Economic Area) Regulations 2006 (as amended). As set out in the determination it was conceded at the hearing that he was someone who by reason of his length of residence could benefit from paragraph 21(4) of the Regulations thereby engaging the "imperative grounds" provision in paragraph 21(4).

17. Any decision taken under Regulation 19(3)(b) must comply with Regulation 21, which provides, so far as relevant:

> "(1) In this regulation a 'relevant decision' means an EEA decision taken on the grounds of public policy, public security or public health.
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> (2) A relevant decision may not be taken to serve economic ends.
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> (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.
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> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who -
>
> (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision ...
>
> (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."

18. The scheme of the 2006 Regulations in respect of those falling within their scope and who face removal as a consequence of a relevant decision, as defined, is to provide three levels of protection from removal. The lowest level of protection afforded is provided by Regulation 21(1) which requires that a relevant decision must include a decision to remove, is to be taken on the grounds of public policy and public security and public health. The intermediate level of protection, which applies to a person who has acquired a permanent right of residence under Regulation 15, such a decision can only be taken on serious grounds of public policy or public security (Regulation 21(3)). The third and highest level of protection applies to the person who has accumulated at least ten years' continuous residence prior to the date of the relevant decision. In this case such a decision cannot be taken except on imperative grounds of public security (per Regulation 21(4)).

19. It was accepted and conceded by the Secretary of State both in the decision letter and before the First-tier Tribunal (see paragraphs [19] and [23]) that the level of protection afforded the Appellant was at the highest threshold and that it was necessary to establish that the Appellant's deportation was warranted on the imperative grounds of public security.

20. Mr Walker on behalf of the Secretary of State did not seek to advance Ground 1 before the Tribunal and having abandoned Ground 1, that left Ground 2 in which the proportionality assessment is challenged. However, there is no challenge by the Secretary of State in the grounds as pleaded to the conclusions of the First-tier Tribunal that were set out at paragraphs [23]-[28].

21. The judge, after having set out the common ground between the parties at [23], at paragraphs [24]-[25] the judge considered the CJEU decision of **Tsakouridis** (as cited) and observed that following the European jurisprudence drug trafficking could constitute imperative grounds of public security. He went on to make an assessment of the Appellant's conduct and his conclusions were set out at [25]-[27] and at [28] he finally concluded that having taken into account all the circumstances the Appellant's conduct and criminality cumulatively, the assessment in the OASys report and the Appellant's claim that he was a changed man, that he was satisfied that any threat from the Appellant to the UK's public security was not of a "particularly high degree of seriousness".

22. In the circumstances he set out that he did not accept the Respondent's contention that the Appellant's presence in the United Kingdom "represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." Thus he found that the Respondent had not established that there were in the Appellant's case imperative grounds of public security which warranted his deportation from the United Kingdom. He went on to state that he did not need to consider whether the Appellant's deportation would be proportionate since he was not satisfied that it was justified in the first place. Nonetheless at [29] in the event that his assessment on imperative grounds was erroneous he proceeded to consider whether the deportation would be proportionate giving his reasons at [30]-[34] that having taken into account the totality of the Appellant's circumstances and having balanced them against his criminality and the medium risk of reoffending, he did not find that the Appellant's deportation would be proportionate.

23. Thus the judge properly considered the issue of imperative grounds of public security and whether his removal was so justified. In addressing the question the judge took into account that this was the very highest level of the calculus introduced by the 2006 Regulations and Directive 2004/38/EC (see **LG (Italy) v SSHD [2008] EWCA Civ 190** and that imperative connoted a very high threshold (**VP (Italy) v SSHD [2010]**. Imperative grounds of public security require not simply a serious matter of public policy but an actual risk to public security so compelling that it justified an exceptional course of removing someone who had become integrated by many years' residence in the host State.

24. Having considered all the relevant circumstances (including the personal conduct of the Appellant, the conviction and the risks of reoffending), the judge reached the conclusion under Regulation 25(5)(c) that the personal conduct of the Appellant did not represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" and that the Respondent did not establish that there were in the Appellant's case imperative grounds of public security which warranted his deportation from the United Kingdom and thus he found that the decision was not justified.

25. The Secretary of State has not sought to challenge those findings in the grounds and no application has been made either before the hearing or at the hearing itself for any permission to amend the grounds. In those circumstances as Mr Hodson submits the

judge having found that the threat was not made out on the evidence, it was not necessary to go on and address the way in which the Secretary of State had weighed in the balance the considerations set out in Regulation 21(6) to decide if removal was proportionate. In those circumstances he submits any errors in the assessment of proportionality are not material.

26. Whilst the Rule 24 response accepts that the judge was in error by referring to paragraph 95 of the Advocate General's opinion in **Tsakouridis** in the light of the decision of **SSHD v Dumliauskas [2015] EWCA Civ 145** at paragraph [40] and Morris K LJ at paragraph [14] of **Essa [2012] EWCA Civ 172**, in which it was found the European Court did not adopt the remarks of the Advocate General, it is not a material error the judge took into account the prospects of rehabilitation in the UK and France and did so in the light of his findings of fact as to his integration and his length of residence (family ties, responsibilities, education etc.) and did so in the light of the circumstances set out in **Essa** (as cited).

27. However in my judgment it was open to the judge to reach the conclusion that he did on proportionality. In the light of the unchallenged findings of the judge that there were no imperative grounds of public security to justify the removal of the Appellant and because the judge made sustainable findings that he was entitled to make and which are unchallenged by the Secretary of State that he was not a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, plainly in terms of proportionality, the assessment following the primary findings have the inevitable consequence of the decision being disproportionate, having found that his removal could not be justified.

28. For those reasons, I have reached the conclusion that the grounds of the Secretary of State are not made out and that the decision of the First-tier Tribunal shall stand.

Notice of Decision

The decision of the First-tier Tribunal does not involve the making of an error on a point of law. The decision shall stand.

No anonymity order was requested or made.

Signed Dated: 29/4/2015

Upper Tribunal Judge Reeds