Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01831/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 13 October 2015	**On 16 October 2015**

Before
UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS DARINA BALOGOVA
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Melvin, Senior Presenting Officer
For the Respondent: In person

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal.

2. The Appellant is a citizen of Slovakia. She appeals against the Respondent's decision dated 20 August 2014 to make a deportation order against her under

Regulations 19 and 21 of The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). The deportation order was made on 8 September 2014.

3. The Appellant was convicted on 4 November 2011 at Maidstone Crown Court of one count of conspiracy to commit fraud and two counts of money laundering and was sentenced to 54 months' imprisonment. A confiscation order was made against her and, due to non-compliance with that order, she served a further 16 months in prison. The Appellant's accomplices in this fraudulent enterprise were her husband and brother. Their appeals against deportation have since been dismissed and her brother has already been deported to Slovakia.

4. The Appellant is said to have been the organiser of the fraud which is reflected in the longer sentence which she was given. The fraud was against the public purse consisting of benefit fraud (working tax credit, child tax credit and child allowance) running to over £600,000. The conspiracy involved bringing approximately fifty Slovakian women to the UK and giving them false national insurance numbers. The Appellant and her accomplices then took control of their bank accounts and reaped the benefit of the public funds thereby obtained. The offences included money laundering. The money obtained from this enterprise has not been recovered and is thought to be in Slovakia. The Appellant and her accomplices pleaded not guilty and the Appellant has never admitted responsibility or remorse for her crime.

5. At one point in time, the Appellant applied to return to Slovakia under the Early Release Scheme but then changed her mind when the deportation decision was taken and she appealed the decision. Her appeal was allowed by First-Tier Tribunal Judge Tipping (albeit "with reluctance") in a decision promulgated on 18 May 2015 ("the Decision"). He found, based mainly it seems on the conclusion of the OASyS report, that the Appellant did not represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society.

6. The Respondent sought permission to appeal on two grounds. The first relates to the Judge's finding that the Appellant could not be deported solely on the basis of the offence for which she was convicted and imprisoned. It is said that this finding is perverse. Secondly, it is asserted that the Judge's finding that her conduct could not amount to a sufficiently serious threat because there was no evidence that other benefit claimants had been deprived of benefits was also perverse (as was measurement of the scale of the fraud by reference to the overall UK gross domestic product). Before me, Mr Melvin sought to add to those grounds and I will deal with that under the heading of "Submissions" below.

7. Permission to appeal the Decision was granted by First-Tier Tribunal Judge Grant-Hutchinson on 5 June 2015 on the basis that the Judge had arguably misdirected himself in his interpretation of the Appellant's conduct as not representing the requisite threat by not taking account of the scale of the conspiracy and the amount involved. The matter comes before the Upper

Tribunal to determine whether the First-tier Tribunal Decision involved the making of an error of law.

Submissions

8. Mr Melvin fairly accepted that the Presenting Officer before the First-Tier Tribunal submitted that the decision to deport was justified only by the scale of the fraud and that the Judge may therefore have been misled into ignoring the basis of the decision as set out in the deportation letter which noted not only the scale of the fraud but also the wider implications of fraud involving money laundering due to the potential destination of such funds. The decision to deport was therefore based not only on the impact of the fraud on the public purse by depriving the Exchequer of public funds but also on the impact of money laundering given the potential funding by that means of drug dealers, terrorists, illegal arms dealers and others and the enabling of their criminal enterprise. The Judge may, by the submissions made, have misunderstood the Respondent's case as being based solely on the offence for which the Appellant was convicted. In any event, however, Mr Melvin submitted that there was no legal authority for the proposition that an EEA country could not remove an EEA national for conduct based only on the offence for which that person was convicted.

9. In relation to the second ground, Mr Melvin drew attention to [11] and [12] of the Decision which included reference to no benefit claimants having been deprived of benefits. He submitted that this was not relevant to the issues which the Judge had to determine. In relation to the future threat, Mr Melvin referred to the OASys report and submitted that the Judge had erred in taking into account only the conclusion of that report and had failed to consider the substance of it. Mr Melvin pointed in particular in the report to the Appellant's refusal to take responsibility for the crimes she had committed and to show any remorse or appreciation of the impact of the crimes. The fraud was used to fund an extravagant lifestyle for the Appellant and her co-conspirators including a gambling habit. There was no evidence that the Appellant had undertaken courses whilst in prison to deal with her behaviours. There was no indication that the circumstances which led the Appellant and her co-conspirators to commit the offence had altered and the Judge erred in failing to take those matters into account. The Judge abdicated responsibility of deciding for himself whether the Appellant represented a genuine, present and sufficiently serious threat.

10. Mr Melvin also sought permission to argue further grounds. I allowed him to do so without reaching a decision as to whether I would take them into account. He submitted that the Judge had also failed to take into account the Appellant's family connections i.e. the fact that her husband and brother were co-conspirators and the implications of that for the threat which she would present for the future and had also failed to make any finding as to the level of protection to which the Respondent was entitled based on her length of residence.

11. As to the latter, there was no challenge to the Respondent's finding in the decision letter that she benefited only from the lower level of protection because there was no evidence of her exercising Treaty rights. Mr Melvin confirmed that. In any event, that appeared to follow from the fact that the conspiracy in which the Appellant was involved had begun in 2005 and continued until her arrest. That criminal enterprise, on any view, could not amount to the exercise of Treaty rights. This was not therefore something on which the Judge needed to make a finding and the Judge rightly accepted that the Appellant benefited only from the lower level of protection.

12. In relation to the first of the two additional grounds, I accept that this may be relevant to the future threat posed by the Appellant and I therefore take this into consideration when reaching my decision whether the Judge made an error of law.

13. In response, the Appellant, who appeared in person and made submissions via an interpreter, noted that she had done some courses whilst in prison and had eight certificates as a result. Those are contained in the bail file and are educational courses linked to improving her English and mathematical skills and catering courses linked to her work whilst in prison. Those may have some impact on her risk of re-offending as her lack of English and inability to find work are identified as factors in her offending. The Appellant also told me that she had been working in prison in the kitchen and staff mess. From this, I understood her to be saying that she would not need to resort to crime as she may be able to find employment based on increased education and work experience.

14. The Appellant also indicated that she no longer objected to deportation. She wished to stay in the UK only until January when her eldest daughter, who has an 18 month old son, reaches her majority. She did not wish to leave her daughter to cope alone until she reaches adulthood. I noted that her daughters live with her mother who no doubt could help out with which she agreed. She also indicated that she was making an application for a passport to the Slovakian Embassy so that her children could return with her. Her younger daughter is aged fifteen. The Appellant presented me and Mr Melvin with a letter indicating that she was willing to return to Slovakia if my decision were adverse to her (although would stay if it were not) but she wished to be allowed to depart voluntarily if she was to return rather than via detention. Mr Melvin pointed out that the Appellant has given similar indications in the past and has changed her mind. In any event, as I explained to the Appellant, the mechanics of deportation assuming I were to decide against her, are a matter for the Home Office and she would need to discuss this directly with the Home Office. It is not relevant to my consideration but I place it on record.

Error of law decision

15. Having considered the grounds of appeal and oral submissions, I am satisfied that the First-Tier Tribunal Decision involved the making of an error of law. It

was for the Judge to decide whether the Appellant is a genuine, present and sufficiently serious threat. Whilst the conclusion of the OASys report is a consideration in that assessment and generally a weighty one, it is not the start and end point as the Judge seems to have thought. Indeed the Judge notes at [11] of the Decision, that it is not clear why the conclusion of the OASys report is reached but then fails to review the substance of that report for himself.

16. The Judge also erred in misunderstanding the threat to public order and public security of the Appellant's crimes in relation to money laundering at [11]. The fact that money laundering in the context of this crime was not directed to drugs or arms running does not mean that the funds generated from these crimes when laundered might not have ended up being used for that purpose. It is an integral part of the crime of money laundering that the end destination of funds is not the same as the source of those funds. The Judge also erred in taking into account when considering whether there were grounds of public policy and public security for deportation that individual benefit claimants had not been impacted by the fraud, the scale of the fraud when compared with the overall GDP of the UK and that there was no violence or drug peddling involved. The fact that the public resources of the UK have been depleted by over £0.5 million as a result of the Appellant's crimes (which has not been recovered) is clearly capable of justifying the Appellant's deportation on public policy grounds alone.

17. I indicated at the hearing that if I found an error of law, I was minded to go on to re-make the decision based on the evidence before me. The Appellant did not add to her evidence in submissions and there is no relevant evidence which I considered was required in order to re-make the decision. Mr Melvin handed in the Tribunal decisions in relation to the Appellant's husband and brother but other than that and the letter to which I refer at [14] above, neither party sought to adduce any documentary evidence. The parties agreed that this was the appropriate course and I therefore turn to re-make the decision.

Decision and reasons

18. The relevant provisions of the EEA Regulations are as follows. By regulation 19, the Secretary of State may exclude an EEA national if that is justified on grounds of public policy, public security or public health in accordance with regulation 21. Regulation 21 so far as material reads as follows:-

"Decisions taken on public policy, public security and public health grounds

21.—(1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(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.

(4) ……..

(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."

19. The first issue with which I deal is the level of protection which the Appellant can obtain by reason of her residence. The Appellant worked for a year or two when she first arrived picking fruit in Kent after which she was laid off. She claims to have been in receipt of jobseekers allowance and to have worked intermittently thereafter but there is no evidence of this. In 2005, about a year after coming to the UK, she became engaged in the criminal activity for which she was ultimately convicted. Her enterprise in making fraudulent claims on behalf of others could not on any view amount to the exercise of Treaty rights. The Judge who sentenced her found that she had never worked during the period from 2005 and therefore the claims made for working tax credits in her own name were fraudulent. On that basis, her residence after 2005 cannot be said to be lawful. She was however resident in the UK from 2004 until November 2011 when she was convicted which would be a sufficient period to count as permanent residence if it were lawful. Her fraudulent enterprise during those years does not constitute lawful residence but I do not discount the possibility that she might be considered to be lawfully resident if, for example, she were also working from time to time or claiming benefits as a jobseeker (although I emphasise that there is

a complete absence of evidence of that). In case I am wrong about whether the period between 2005 and 2011 were lawful, therefore, I have considered the issue of the protection which applies both at the lower level and on the basis that serious grounds are required.

20. The scale of the conspiracy in which the Appellant was involved was significant. The Judge in his sentencing remarks refers to 152 fraudulent claims committed over a period of five years from 2005 and netting sums of over £600,000 of public money. The Judge refers to the "blatant" nature of the fraud. In spite of "overwhelming and extremely incriminating" evidence, the Appellant and her co-conspirators pleaded not guilty. As the OASyS report indicates, the Appellant was the organiser behind the offence.

21. Although the offence is not one of violence or involving drugs it is nonetheless extremely serious, involving as it does the commission of fraud on the Exchequer and the depletion of public resources. I have no difficulty in finding that this constitutes a ground of public policy. In addition, the offences included money laundering and, for the reasons I give at [16] above, this raises also grounds of public security.

22. My decision must take into account not only the seriousness of the offences however but whether the Appellant poses a genuine, present and sufficiently serious threat to one of the fundamental interests of society. The Appellant's previous criminal convictions are relevant only in so far as the circumstances which gave rise to them are evidence of personal conduct constituting a present threat to the requirements of public policy (see, to that effect, inter alia, the case of Bouchereau [1977] ECR 1999). I turn therefore to consider that threat.

23. As noted at [15] above, the First-Tier Tribunal Judge was persuaded to allow the appeal based on the OASyS report dated 5 November 2014. The conclusion of that report is indeed to the effect that the Appellant poses a low risk of harm and a low risk of re-offending and that is a factor to which I have regard. However, that risk is measured on the basis of a series of scores which relate to a number of factors and the assessed risk does not therefore give a complete picture. I therefore consider the substance of that report. When considered as a whole, the report paints a different picture.

24. The Appellant's motivation is said to be an "opportunity to financially gain a luxurious lifestyle". Although this was the Appellant's first conviction, the offences continued over a number of years and would no doubt have continued for longer if she and her co-conspirators had not been caught. Furthermore, the OASyS report shows that the Appellant had been cautioned previously on one occasion for theft and that the current offences represent "an escalation in seriousness" and show a pattern of similar offending.

25. The Appellant's education and employability is linked to her offending behaviour. I take into account that her education and work experience whilst in

prison might have reduced the risk to some extent. However, her offending was with her husband and brother and so her relationships are linked to her offending behaviour. She remains in a subsisting relationship with her husband although her brother has returned to Slovakia. It is noted that "she allies herself with a criminal subculture". Her offending behaviour is also noted to be linked to her financial situation, her lifestyle and her thinking, behaviour and attitudes. She was motivated by her "immediate greed for money rather than finding legal means of getting finance". There is no evidence that, in particular her thinking, behaviour and attitudes have changed. That is reflected in her failure to acknowledge or take responsibility for her crimes. Although she is noted to have been a model inmate whilst in prison, the Appellant has consistently refused to recognise the implications of her offending or to express any remorse for it. Even now, the OASyS report notes that she will not discuss the offence, takes no responsibility for it and continues to deny it.

26. The OASyS assessment notes that the Appellant is "quite motivated" to change and "very capable" of doing so. However, in relation to inhibiting factors, it is said that the "risk will increase when associating with negative peers and family, language barriers, greed and lack of appropriate thinking skills". The report recommends the development of positive factors in those areas. However, the Appellant has undertaken no courses other than educational and said at the hearing before me that she did not see the need to do any further courses. It is also noted that the Appellant had not undertaken any work to address the concern about her lack of awareness of impact of her offence. Her English remains limited. There is no evidence that she is in work presently.

27. There is nothing in the evidence which I have seen or the submissions which I heard from the Appellant which leads me to conclude that she has changed her attitude or behaviours so that she would be unlikely to offend in the future. In particular, her failure to recognise the enormity of her past offending and failure to show remorse even now points to a current risk that she will re-offend. Further, the Appellant's offences were motivated by greed and exacerbated by her lack of employment. Although her educational courses and work experience whilst in prison may have improved her ability to gain employment to some extent, she is likely to find it more difficult to find employment following her conviction, particularly in jobs which involve handling money. The OASyS report suggests that if she were to find herself in the situation of having no money and no legal way of obtaining it, she might well offend again. The Appellant has not taken any steps towards rehabilitation and continues to deny the offence and refuses to face up to the consequences of her action. Given the lack of evidence that the Appellant is taking steps towards rehabilitating herself in the UK, I am satisfied that her prospects of rehabilitation would not be adversely affected by return to Slovakia. On the basis of the OASyS report read as a whole, I am satisfied that the risk of the Appellant re-offending is significant and certainly much higher than the OASyS conclusion would suggest.

28. I now turn to consider the proportionality of deportation and in particular the countervailing factors in the form of the Appellant's family in the UK. The Appellant is married with two daughters. The eldest daughter will reach her majority in January. The youngest is nearly 15 years old. The eldest daughter has a son aged 18 months. Both daughters lived with the Appellant's mother whilst she was in prison and continue to do so now. They could continue to do so if the Appellant is deported. The Appellant's husband is due to be deported as his appeal has failed. The Appellant noted in her statement of 21 September 2014 that she wished to stay in the UK as it would be unfair to her daughters to have to return to Slovakia where they do not speak the language, having grown up, received education and formed their lives in the UK. The Appellant now indicates, however, that she would return to Slovakia with her mother, partner and daughters. That would inevitably lead to some disruption to the lives of the Appellant's children and her mother. The eldest daughter could remain in the UK if she so wished and she now has, it appears, a family of her own. The younger daughter could remain in the UK if she chose and if the Appellant's mother were to decide to remain. That is a matter of choice for them. In that event, therefore, the position for the Appellant's children and mother would be largely the status quo as they have known it whilst the Appellant was in prison. There would be some disruption if they chose not to accompany the Appellant as they would have to remain in contact with the Appellant (and her husband) via other means of communication and visits to Slovakia.

29. There is some evidence of other family members in the UK. As noted at [3] above, the Appellant's brother has already been deported to Slovakia but she also has a sister and cousin in the UK who have acted as her sureties whilst she has been on bail. However, there is limited evidence of the family relationships and circumstances. Those relationships are not therefore a factor which holds any weight in the proportionality exercise.

30. So far as the Appellant's private life is concerned, the Appellant has provided practically no evidence of integration in the UK beyond interaction with her direct family members and her involvement in the offences of which she was convicted. She says that she worked picking fruit in Kent in 2004 and 2005 and was then laid off. She claims to have worked intermittently since but there is no evidence of that and it appears from the evidence that from 2005, she was involved in the criminal activity of which she was convicted. The sentencing Judge found that she had not worked during that period. The Appellant speaks limited English. Her letter to me which I mention at [14] above, is written in English. She did however make her submissions mainly via an interpreter in Slovakian.

31. So far as my decision under the EEA Regulations is concerned, I am satisfied that the Appellant's removal is justified on grounds of public security and public policy and that is so whether judged on the basis of reasonable grounds or serious grounds (if I am wrong about length of lawful residence – see [19] above). I am satisfied that the deportation under the EEA Regulations is proportionate when

the countervailing factors are weighed against the seriousness of the offending and the risk which the Appellant continues to pose. I am wholly satisfied that the Appellant's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

32. So far as Article 8 ECHR is concerned, the same factors fall to be assessed in relation to proportionality of deportation as in relation to the EEA Regulations (see [28] to [30] above). For the same reasons, the Appellant's right to respect for her family and private life in the UK is heavily outweighed by the public interest in deportation in the interests of the prevention of crime and disorder. Deportation does not constitute a breach of the Appellant's Article 8 rights.

DECISION

The First-tier Tribunal decision did involve the making of an error on a point of law. I therefore set aside the decision

I re-make the decision in the appeal by dismissing it under the EEA Regulations and on human rights grounds (Article 8).

Signed  Date 15 October 2015

Upper Tribunal Judge Smith