Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00280/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 March 2019	**On 3 April 2019**

Before

LORD UIST SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE PITT

Between

VALENTINA [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Fraser, Counsel, instructed by the AIRE Centre
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision dated 10 December 2018 of First-Tier Tribunal Judge Parkes which refused the appeal of Ms [B] against deportation under the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations).

Background

2. The appellant was born in Italy on [~] 1978. She came to the UK in 2003 and worked continuously after arrival, paying tax and national insurance on her earnings.

3. On 26 October 2015 the appellant was convicted of 18 counts of theft from her employer and 16 counts of dishonestly making false representations for gain. On 20 June 2016 she was sentenced to four years' imprisonment.

4. The length of the sentence is an obvious indication of the seriousness of the offences. The thefts from her employer, totalling well over £100,000, began in 2012 whilst she was working as a bookkeeper. The sentencing remarks refer to the sophisticated nature of the thefts, significant amount of planning required and significant breach of trust. The appellant initially sought to conceal the thefts, only repaying all but £20,000 of the stolen money after the employer began an investigation.

5. After the employer began to investigate the thefts, the appellant went on to commit the VAT frauds of approximately £120,000. The sentencing remarks again refer to the sophistication of the offences and significant planning required to set up shell companies to make false VAT refund claims over a sustained period of time.

6. In response to these convictions, the respondent made a deportation order against the appellant on 2 March 2017. The appellant appealed that decision to the First-Tier Tribunal. Her case was initially heard by First-Tier Tribunal Judge Chohan who allowed the appeal. In a decision dated 20 November 2017 Upper Tribunal Judge Blum found an error of law in the decision of First-Tier Tribunal Judge Chohan and remitted the appeal to be re-made in the First-Tier Tribunal. Thus, the appeal came before First-Tier Tribunal Judge Parkes on 20 June 2018 and 19 November 2018. The second hearing was in order for the Tribunal to be provided with the sentencing remarks and an updated OASys report.

Decision of the First-Tier Tribunal

7. First-Tier Tribunal Judge Parkes did not accept that the appellant was entitled to the highest "imperative" level of protection from expulsion. At [15] he found:

> "The Appellant's length of residence and whether she qualifies for the highest level of protection is the appropriate place to start the consideration of the facts. The expulsion decision was made on the 2nd of March 2017. Going back 10 years from that date to the 2nd of March 2007 the Appellant's continuity of residence was broken by her being sent to prison on the 20th June 2016. Clearly that broke the 10 year period. Another issue that undermines the Appellant's claims regarding the integrative links she had established are the offences committed, the length of time over which they were committed and the degree of persistence involved."

8. In paragraphs [16]-[20] the judge placed adverse weight on a number of aspects of the appellant's criminal offences, including the period of time over which they were committed, the late guilty plea and her having continued offending even after her

employer interviewed her about the thefts. He found that she had tried to minimise her offending and was not truly remorseful.

9. At [21] the First-Tier Tribunal noted that the appellant had a "lengthy and continuous work history in the UK and has a circle of friends and relations in this country." Judge Parkes also noted at [23] that she had been asked to assist with rehabilitating other offenders and that her OASys report was positive as to how she had addressed her offending and assessed her risk of reoffending as low.

10. At [24] the judge found that the reference in paragraph 2.8 of the OASys report dated 16 November 2018 to the appellant retaining an "equivocal stance" to her offending weighed against her.

11. The First-Tier Tribunal concluded at [25]:

> "Having regard to the matters considered above I find that the Appellant has not shown that she could be regarded as being sufficiently integrated to be able to say that she benefits from the enhanced level of protection from deportation under the EEA Regulations. The Appellant clearly has 5 years lawful residence and in the circumstances the Appellant has obtained permanent residence. In those circumstances deportation can only be justified on serious grounds of public policy or security and if it is proportionate."

12. The judge went on in [26]-[29] to rehearse the adverse aspects of the criminal offences and the appellant's attitude to them and found her to be "a risk within the community of re-offending dishonestly". He concluded that the appellant met the "serious" level of threat and dismissed the appeal.

Grounds of Appeal

13. Mr Fraser's skeleton argument summarised the grounds as follows:

    (1) The FTT judge erred in his determination that the Appellant is not entitled to the highest level of protection against deportation under regulation 27(4) of the EEA Regs, namely a requirement to demonstrate "imperative grounds of public security".

    (2) The FTT judge erred in his consideration of whether, applying either the "imperative grounds" or "serious grounds" threshold, the Appellant's deportation is justified having regard to the principles and considerations in regulation 27(5)-(6) and Schedule 1 to the EEA Regs.

14. We concluded that both grounds were made out.

15. Regulation 27(4) of the EEA Regulations provides that:

> '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'

16. Regulation 3(3) qualifies that protection, stating that continuity of residence is broken if a person serves a sentence of imprisonment.

17. Regulation 3(4) qualifies the application of Regulation 3(3), providing:

> '(4) Paragraph (3)(a) applies, in principle, to an EEA national who has resided in the United Kingdom for at least ten years, but it does not apply where the Secretary of State considers that—
>
> (a) prior to serving a sentence of imprisonment, the EEA national had forged integrating links with the United Kingdom;
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> (b) the effect of the sentence of imprisonment was not such as to break those integrating links; and
>
> (c) taking into account an overall assessment of the EEA national's situation, it would not be appropriate to apply paragraph (3)(a) to the assessment of that EEA national's continuity of residence.'

18. These provisions were introduced to the EEA Regulations following decisions of the Court of Justice of the European Union (CJEU), notably the case of **SSHD v Vomero (C-424/16) and B v Land Baden-Württemberg (C-316/16)** [2018] 3 W.L.R. 1035 (17 April 2018). The CJEU said in **Vomero** at [70]-[74]:

> "70. … In the context of that overall assessment, periods of imprisonment must be taken into consideration together with all the relevant factors in each individual case, including, as the case may be, the circumstance that the person concerned resided in the host Member State for the 10 years preceding his imprisonment (see, to that effect, judgment of 16 January 2014, G., C‑400/12, EU:C:2014:9, paragraphs 33 to 38).
>
> 71. Indeed, particularly in the case of a Union citizen who was already in a position to satisfy the condition of 10 years' continuous residence in the host Member State in the past, even before he committed a criminal act that resulted in his detention, the fact that the person concerned was placed in custody by the authorities of that State cannot be regarded as automatically breaking the integrative links that that person had previously forged with that State and the continuity of his residence in that State for the purpose of Article 28(3)(a) of Directive 2004/38 and, therefore, depriving him of the enhanced protection against expulsion provided for in that provision. Moreover, such an interpretation would deprive that provision of much of its practical effect, since an expulsion measure will most often be adopted precisely because of the conduct of the person concerned that led to his conviction and detention.
>
> 72. As part of the overall assessment, mentioned in paragraph 70 above, which, in this case, is for the referring court to carry out, it is necessary to take into account, as regards the integrative links forged by B with the host Member State during the period of residence before his detention, the fact that, the more those integrative links with that State are solid — including from a social, cultural and family perspective, to the point where, for example, the person concerned is genuinely rooted in the society of that State, as found by the referring court in the main proceedings — the lower the probability

that a period of detention could have resulted in those links being broken and, consequently, a discontinuity of the 10-year period of residence referred to in Article 28(3)(a) of Directive 2004/38.

73. Other relevant factors in that overall assessment may include, as observed by the Advocate General in points 123 to 125 of his Opinion, first, the nature of the offence that resulted in the period of imprisonment in question and the circumstances in which that offence was committed, and, secondly, all the relevant factors as regards the behaviour of the person concerned during the period of imprisonment.

74. While the nature of the offence and the circumstances in which it was committed shed light on the extent to which the person concerned has, as the case may be, become disconnected from the society of the host Member State, the attitude of the person concerned during his detention may, in turn, reinforce that disconnection or, conversely, help to maintain or restore links previously forged with the host Member State with a view to his future social reintegration in that State."

19. In order to assess whether she retained continuous residence of 10 years, the correct the First-Tier Tribunal was required to ask the questions set by Regulation 3(4):

(1) Prior to imprisonment, had the Appellant forged integrating links?

(2) Was the effect of her imprisonment such as to break those integrating links?

(3) Taking into account an overall assessment of her situation, would it be appropriate to regard imprisonment as breaking her continuity of residence?

20. We were not able to identify anywhere in the decision that the Regulation 3(4) tests were appreciated and applied. The reference in [3] to length of residence raising the question of integration is not capable of being read as a statement of the principles set out in Regulation 3 and does not purport to be any form of assessment. The bare statement in [15] that the imprisonment in 2016 "clearly" broke the 10 year period of continuous residence is inconsistent with the provisions of Regulation 3 and the guidance of the CJEU at [71] of **Vomero**. The reference to an assessment of "integration" in [15] suggests that it was viewed as a separate consideration rather than an essential part of the test of whether continuity of residence was retained and "imperative" protection available. The reference in [25] to a test of whether an individual can be regarded "as being sufficiently integrated" is again not capable of showing that the judge appreciated the provisions of Regulation 3(4).

21. It was also our view that it was not possible to conclude that the decision would have been the same had the correct legal matrix been applied. The first stage of the test set out in Regulation 3 (4) is an assessment of integration prior to imprisonment. This puts the evidence of the appellant's 9 years of lawful residence prior to the offending behaviour, her work history and social involvement with family and friends at the forefront of the assessment. There is only a one sentence summary of the appellant's history prior to offending in [21] of the decision. The remainder of [16]-[24] which

underpin the conclusion that the appellant is not "sufficiently integrated", are concerned only with the criminal offences and the appellant's attitude to them. That approach is not in line with the provisions of Regulation 3 or the guidance of **Vomero** at [72].

22. If more is needed, we also agreed with the submission that the First-Tier Tribunal took an incorrect approach to the appellant's evidence on her view of her offences and the OASys report. The appellant's evidence was that she accepted her culpability entirely. She set this out in some detail in a letter to the respondent dated 2 August 2016 which is at page 69 of the appellant's bundle of evidence. In her witness statement dated 11 August 2017 at paragraph 21, contrary to the comments in [18] and [19] of the decision, she states that "I did something wrong and … there is no excuse for it" and "I am truly sorry and regretful for what I did". Nothing indicates that her evidence at the hearing in any way resiled from those statements. We were not taken to any evidence supporting the comments at [20] that the appellant sought to deny or minimise her conduct. We were not taken to any evidence supporting the comment at [20] that since conviction the appellant claimed that she did not gain from the offences.

23. The OASys report dated 16 November 2018 before the First-Tier Tribunal was an update of an earlier report. The updated information was identified in the report by the wording "ISP Review – 13/11/2018", for example at 12.8 which states:

> "Ms [B] has demonstrated a very positive and reassuring level of motivation throughout her order and has displayed an encouraging commitment to addressing her offending behaviour. She has recently returned to HMP Peterborough to deliver a talk to current inmates about her progress and achievements post release. She has remained in consistent employment post release and has secured stable accommodation for herself. She has demonstrated a brilliant attitude towards her licence and has remained in regular contact with her OM. "

24. The First-tier Tribunal did not refer to any of the updated information in the OASys report but drew an adverse conclusion from a comment at paragraph 2.8 which was not updated and referred to the appellant being "equivocal" towards her offences. The fact of this reference not being current was explained to the First-tier Tribunal but weight was placed on it nevertheless. In any event, even if it was legitimate for the judge to consider the entry at 2.8 as relevant to his assessment, that had to be in light of the appellant's explanation that it was not the current view of the Probation Service, the other highly positive comments in the OASys report and the appellant's consistent evidence as to genuine remorse and appreciation of her wrongdoing. Further, even if it her position remained "equivocal", this was not determinative of whether integration had been established and whether continuous residence was retained, Regulation 3(4) requiring a more holistic assessment.

25. It is therefore our conclusion that the decision of the First-tier Tribunal disclosed errors of law in failing to apply the correct legal tests as to whether the appellant

should qualify for the "imperative" level of protection and that the assessment that was conducted was flawed.

26. It was also our view that the "serious grounds" assessment set out at [26]-[29] discloses an error of law. We have identified above that the First-tier Tribunal did not take a correct approach to the evidence on the appellant's "equivocal" view of the offences. The "serious grounds" assessment repeatedly features her perceived lack of remorse as showing her to be a higher risk of offending than stated in the OASys report. This undermines any conclusion that the "serious" level of threat was present.

27. Further, even if the appellant had correctly been found to represent a serious threat to public policy and security then an assessment of the proportionality of expulsion had to be conducted, including consideration of the factors identified in Regulation 27(5) and (6) and Schedule 1 to the EEA Regulations. There is no reference at all to these provisions in the decision other than a bare statement that deportation was "proportionate" in the final sentence of the decision. The discussion at [26]-[29] does not show that the statutory factors were applied in substance. The obvious factors capable of weighing in the appellant's favour, her long residence, work record, conduct in prison and notable rehabilitation after her sentence, immediately obtaining work and assisting the authorities with other offenders are not addressed at all.

28. It is therefore also our conclusion that the First-tier Tribunal discloses errors of law such that it must be set aside to be re-made.

Re-Making

29. The Secretary of State does not dispute that the appellant has acquired permanent residence and so cannot be deported unless, as provided by Regulation 27(3), it is found that there are "serious grounds of public policy and public security". Our first task, therefore is to assess whether the appellant represents "a genuine, present and sufficiently serious" threat at the "serious" level affecting one of the fundamental interests of society, taking into account her past conduct.

30. This assessment was relatively straightforward in light of the further OASys report dated 26 March 2019. The following extracts accurately reflect the overall tenor of the report:

> '2.11
>
> Ms [B] accepts her guilt, regrets her actions and is ashamed of her crime and the impact her offence (and period in custody) has had upon her family and her parents especially. However, Ms [B] does minimise her crime as she says monies were not spent and rewarded (sic) back to her employer. When pressed, Valentina acknowledges her actions were wholly wrong and critically, illegal.
>
> 2.14
>
> Ms [B] did not display any risk of serious harm behaviours in the prison setting and gained a position as a peer mentor to others in custody on her release. She

continues to not present any risk of serious harm in the community; indeed she has received glowing reports from her employers, and has consistently positively engaged with probation staff as well.

11.10

Records (court papers) show that Ms [B] unequivocally denied her offence and "balmed (sic) others – namely her co-worker, for her offence. Today, Ms [B] has made positive developments in her thinking and accpets (sic) full responsibility for her offence and does not apportion balme (sic) elsewhere. I am confident that Ms [B] no longer blames others, and attributes her behaviour to others, and that she wholly accepts responsibility for her offence.

12.8

Ms [B] has demonstrated a very positive and reassuring level of motivation throughout her order and displayed an ongoing commitment to address her offending behaviour, engaging well in appointments and responding well to any tasks set. She had also acted as a peer mentor and delivered talks to inmates, post release. She has remained in consistent employment post release and has secured stable accommodation for herself. I assess that her attitudes do not have any contribution to risk of serious harm or offending behaviour in the present day.

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Ms [B] has maintained a brilliant attitude towards her licence; she has complied throughout and has attended every appointment. She has remained in constant contact with her OM and undertaking (sic) all tasks as required. She has secured stable accommodation and employment for herself and is progressing very positively. She is assessed as a low risk of serious harm and a low risk of offending.

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Ms [B] is currently doing extremely well in the community. She has confronted her guilt and faced the shame she feels linked her to her offence. She has complied with her licence and has remained in constant contact with her OM. She also returned to HMP Peterborough to deliver a talk to current inmates on her progress and achievements. She is in full time employment and is progressing well at work.'

31. Section 10.6 of the report assesses the appellant as posing a low risk of harm. The OASys report also identifies her desire to retain employment, successful career change with the assistance of qualifications obtained in custody, declarations of income and outgoings to probation, being debt free, her family and a longstanding friendship group who stood by her though her imprisonment, as factors protecting her from reoffending.

32. We found the OASys report provided strong evidence that the appellant does not represent "a genuine, present and sufficiently serious" threat at the "serious" level.

Her conduct during and after imprisonment showed significant and meaningful remorse and acceptance of her responsibility for her offences. Her rehabilitation is significant and precludes any other conclusion than that she does not pose a current risk at the "serious" level. The threshold for deportation of someone with permanent residence is therefore not met here. The appeal must be allowed on this basis.

33. If more were needed, and we were required to go on to assess whether the appellant qualified for the "imperative" level of protection, we would have found in her favour. Her residence prior to her offending behaviour comprised 9 years of work and social involvement clearly amounting to integration. Her conduct in prison was highly positive, the appellant following a significant number and variety of rehabilitation programmes and managing to obtain employment prior to being released. Her friends and family remained highly supportive. It would not have been our conclusion, taking her overall situation into account, that her sentence of imprisonment did not break her continuity of residence and integrative links. It will be obvious that her offending behaviour and positive rehabilitation show that she does not meet the "imperative" level of threat required for someone who has resided here for 10 years and remained integrated.

Notice of Decision

34. The decision of the First-tier Tribunal discloses an error of law and is set aside.

35. The appeal is re-made as allowed under the Immigration (European Economic Area) Regulations 2016.

Signed Date 27 March 2019

Upper Tribunal Judge Pitt