Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00360/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 May 2019	**On 14 May 2019**

Before

THE HONOURABLE MR JUSTICE SOOLE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JOHN ROSS BLE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Respondent: Mr K Smyth, Counsel instructed by Kesar & Co Solicitors

DECISION AND REASONS

1. We shall refer to the Respondent as "the Appellant" as he was before the First-tier Tribunal ("the FTT"). He is a citizen of France. His date of birth is 23 December 1996. The Appellant appealed against the decision of the Respondent to make a deportation order on 12 June 2017 under Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). His appeal was allowed by FTT Judge Kaler, following a hearing on 30 November 2018 in a

decision that was promulgated on 7 December 2018. The Secretary of State was granted permission by First-tier Tribunal Judge Saffer on 4 January 2019.

The background

2. The Appellant has an appalling criminal history as recorded by the judge at paragraphs 3 to 7 of the decision. In short, between 2 May 2012 and 23 August 2016 he amassed ten convictions for sixteen offences, two of which are offences against the person and two involve weapons, including firearms. On 31 January 2014 he was convicted of aggravated burglary of a dwelling with intent to commit an assault occasioning actual bodily harm (ABH). These offences were the trigger which led to the Secretary of State making a deportation order ("the trigger offences"). The Appellant was sentenced to five years imprisonment for aggravated burglary and two years for ABH, to run concurrently. He was aged 17 at the date of sentence and aged 16 when the offences were committed.

The decision of the FTT

3. It was agreed by the parties that the 2016 Regulations apply to the Appellant and that because of the time that he has been in the UK, he benefits from the highest level of protection with reference to Regulation 27 (4). Thus, a decision to remove him cannot be made unless justified on imperative grounds and public security. It was accepted by the Secretary of State that the Appellant has been here since the age of 2.

4. The judge summarised the details of the trigger offences, having regard to the sentencing judge's remarks. The FTT described the offences as "appalling", noting from the judge's sentencing remarks that the Appellant and others entered the home of the victim wearing balaclavas and armed with weapons, the Appellant with a gun and one of his accomplices with a Stanley knife. The Appellant kicked a middle-aged woman in the face and she was knocked unconscious. This was committed in the presence of the victim's 17- year old daughter. The sentencing judge described "dreadful damage" to the victim's face and eye and psychological injuries to both the victim and daughter. The offence was described by the sentencing judge as extremely serious. The sentencing judge considered two previous offences of robbery committed by the Appellant. He had been given what the sentencing judge described as a chance with the imposition of a youth rehabilitation order and latterly a detention and training order. The sentencing judge said that the offence was a category 1 offence because of greater harm and the higher culpability of the Appellant. He recorded the only mitigation as "a degree of remorse." He observed that had the Appellant been an adult the starting point would have been a ten-year sentence.

5. The Appellant was released on license on 2 August 2016. On 23 August 2016 he committed two offences of assaulting police officers. He was convicted of a third assault on a PC on 5 January 2017. He was recalled to prison on 23 August 2016 because he failed to comply with the rules of approved premises. The Respondent before the FTT relied on a report prepared by an offending supervisor and his conclusion; namely that the Appellant had not rehabilitated, continued to exhibit

offending behaviour and was likely to reoffend. The offending supervisor expressed concerns that the Appellant was involved in serious organised crime. He could not provide a risk management plan but would be able to manage the risk presented by the Appellant whilst in the community.

6. Whilst the Appellant was in prison in 2018 there were three adjudications against him. On 4 January he was found to have assaulted a prisoner. On 5 May he was found to have obstructed officers from performing their duties. It is recorded that on this occasion he was extremely aggressive and refused staff instructions. On 30 June he was found to have damaged property when using a chair to fight another prisoner. In addition to which he was found with an improvised weapon. There were many other incidents involving violence recorded against the Appellant. These were noted by the judge in her decision.

7. The judge heard evidence from the Appellant and his mother. She found that the Appellant's behaviour since the trigger offence had been appalling, that the evidence did not show that he had learned his lesson or that he is determined to mend his ways and that there was little prospect of rehabilitation. She expressed fear that he would continue to offend. She found that the Secretary of State had not established that the Appellant is a member of a gang or that he had been involved in serious crime.

8. At [20] the judge turned her attention to whether the Secretary of State had established imperative grounds of public security. She found that the risk of reoffending was high. She found that the Appellant had a propensity to reoffend and that he presents a genuine, present and sufficiently serious threat to the public (see Regulation 27(5)(c)). She found that had the Appellant been entitled to a lower level of protection, namely that under Regulation 27(3) (a relevant decision may not be taken in respect of a person with a right of permanent residence under Regulation 15 except on serious grounds of public policy and public security) she would have no doubt that the test would have been satisfied.

9. At [23] the judge observed that there is no guidance in the Regulations as to what is meant by "imperative grounds of public security." She directed herself on a number of authorities between [23] and [31]. Those authorities are PI v Oberbürgermeisterin der Stadt Remscheid (Case C-348/09), Land Baden-Württemberg v Tsakouridis (Case C-145/09), the Opinion of Advocate-General Bot: PI v Oberbürgermeisterin der Stadt Remscheid (Case C-348/09), KA and Others v Belgische Staat (Case C-82/16), LG and CC (EEA Regs: residence; imprisonment; removal) Italy [2009] UKAIT 00024, MG and VC (EEA Regulations 2006; "conducive" deportation) Ireland [2006] UKAIT 00053, VP (Italy) v SSHD [2010] EWCA Civ 806; and Jarusevicius (EEA Reg 21 – effect of imprisonment) [2012] UKUT 00120(IAC).

10. The judge went on to conclude as follows: -

> "32. In all the cases where imperative grounds have been found to exist relate to offences that disclosed particularly serious characteristics. The (sic) include offences concerning issues of national security, importing and supplying

high quantities of drugs, serious incidents of violence and systematic abuse of children.

33. My assessment establishes that serious grounds of public policy and public security have been established. However, having taken guidance from the established caselaw (sic), I am not satisfied that the higher test of imperative grounds of public security have (sic) been made out. Invading a person's home, which is what this Appellant did, is always a serious matter and is particularly repugnant to public order and assaulting a woman in such premises is deplorable. His behaviour towards this victim and the other members of the public and public servants has been disgusting, but it does not establish *imperative grounds*. The Appellant is not a terrorist and although he has used a firearm to threaten people, he has not seriously injured or killed anyone. Although I fear that the Appellant may be capable of committing more series (sic) offences if he does not change his ways and behaviour, I do not find that the test of *imperative grounds* has been met."

The grounds of appeal

11. The grounds are diffuse and insufficiently particularised. Mr Kotas' oral submissions were more focussed. He asserted that the judge misdirected herself and artificially reduced the scope of the analysis of whether there were imperative grounds. Mr Kotas stated that the judge effectively boxed herself in when assessing whether there were imperative grounds. In support of this he drew our attention to [19] and [32] of the decision. He submitted that Judge Kaler in her analysis was looking for the type of offences that could satisfy the test rather than looking at matters in the round. He drew our attention to [33] where the judge said that the Appellant is not a terrorist.

12. Mr Kotas submitted the offence committed by the Appellant was a serious, violent offence. The judge was wrong in her assessment of imperative grounds. The assessment does not do justice to the very serious threat posed by the Appellant. Mr Kotas drew our attention to parts of the OASys Report to support his assertion that the judge vastly understated the risk when she concluded, at [33], that the Appellant "may be capable of committing more serious offences …". He drew our attention to page 7 of the assessment where there is a risk assessment expressed as a percentage. He has been assessed at 74% risk of reoffending within one year and 85% within two years. He drew our attention to other aspects of the report including page 11 which states that the Appellant has been moved to fourteen prison institutions during his sentence based on his behaviour towards others or safety concerns. It is recorded that he stated that he always makes the first move with regards to assaulting others.

13. The author of the OASys assessment concluded that the Appellant holds underlying beliefs and attitudes that contribute to his offending behaviour and that he was unable to show any regret or compassion for the victim of the index offence. It also refers to physical altercations with prison staff. At page 33 it is noted that there are concerns about the Appellant's control and disruptive behaviour. At page 34 (R10.3) our attention was drawn to the author's consideration of when the risk is likely to be greatest and it is recorded that when released into the community the Appellant may

seek reprisals against rival gang members. Mr Kotas drew our attention to the assessment of risk (at page 35) which indicates whilst in custody he presents a very high risk to staff.

14. Mr Kotas submitted that the judge did not attach sufficient weight to [33] of the decision letter which indicates that the Appellant has been assessed and subject to the highest level of multi-agency public protection arrangements (MAPPA level 3), the purpose of which is the protection of the public. A level 3 assessment indicates that he is considered one of the "critical few" and poses an immediate danger to the public. There was evidence that the judge did not make a global assessment of the risk presented by the Appellant in the context of the evidence as a whole.

15. Mr Smyth made submissions in the context of the Rule 24 response. He argued that the Respondent was attempting to reargue the case. The judge was aware of the risk of reoffending and the future risk posed by the Appellant. She had all material factors in mind. She did not "box herself in" as suggested by Mr Kotas. She applied a global assessment in the absence of strict guidance from the higher courts. Her conclusion was open to her in the absence of irrationality.

Conclusions

16. At Regulation 27 thehierarchy of levels of protection based on criteria of increasing stringency is set out.[1] There is a general criterion that removal may be justified "on

[1] 27.- (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 right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

(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; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(17).

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(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;

grounds of public policy, public security or public health". A more specific criterion is applicable to those with permanent rights of residence. They may not be removed "except on serious grounds of public policy or public security". The most stringent criterion, applicable to a person "who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision", who may not be removed except on imperative grounds of public security". This reflects paragraph 24[2] of the preamble and Article 28 of Chapter V1 of the Directive 2004/38/EC.[3] Neither party referred to the Directive. The decision of the judge must

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(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010(18); or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

[2] (24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.

[3] *Article 28*

Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

be considered in the context of the rights laid down in the Directive and the protection against deportation afforded to EEA nationals. "Imperative grounds" is not defined in the EEA Regulations 2016 or the directive. It may be interpreted more widely than threats to the state or its institutions, and can, for example, include serious criminality, such as drug dealing as part of an organised group. See: Tsakouridis (European citizenship) [2010] EUECJ C-145/09. In LG (Italy) v Secretary of State for the Home Department [2008] EWCA Civ 190, the court did not attempt to lay down definitive guidance recognising that European Law recognises "an area of discretion" for Member States (Van Duyn v Home Office [1974] ECR 1337 para 18); and that the Directive allows for "imperative grounds" test to be subject to definition by Member States. The Respondent did not draw our attention to a definition. The grounds rely on the case of SSHD v Straszewski [2015] EWCA Civ 1245. It is not clear whether this case was brought to the attention of the judge. The relevant paragraphs relied on by the Secretary of State are the following:-

> "22. Our attention was not drawn to any case in which the CJEU has considered the kind of conduct that is likely to be sufficiently serious to justify deportation of an EEA national who enjoys a permanent right of residence but has not lived in the member state concerned for a period of at least ten years. Ms Chan did, however, draw our attention to the decision in *I v Oberbürgermeisterin der Stadt Remscheid*, in which the claimant had been convicted of multiple offences of sexual abuse, sexual coercion and rape of a 14 year old girl in respect of which he had been sentenced to 7½ years' imprisonment. The CJEU was asked to decide whether the expression 'imperative grounds of public security' referred only to conduct which threatened the security of the state itself, its population and the survival of its institutions or was broader in scope.
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> 23. In giving its judgment the court emphasised that member states retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, but that the requirements of the Directive must still be interpreted strictly. Criminal offences which constitute a particularly serious threat to one of the fundamental interests of society or which pose a direct threat to the calm and physical security of the population may fall within the concept of 'imperative grounds of public security', as long as the manner in which such offences were committed discloses particularly serious characteristics. However, the court also emphasised that even then deportation will not be justified unless the conduct of the person concerned represents a genuine, present threat affecting one of the fundamental interests of society, which normally implies that he has a propensity to act in the same way in the future (see paragraphs 17-30).
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> 24. … it is clear, as the court confirmed, that the expression 'imperative grounds of public security' creates a considerably stricter test than merely 'serious' grounds, but since the application of the test is primarily for the member state concerned, which must take into account social conditions as well as the various factors to which the Directive itself refers, the question is likely to turn to a large extent on the particular facts of the case. It would therefore be unwise, in my view, to attempt to lay down guidelines. In the end, the Secretary of State must give effect to the Regulations, which

> themselves must be interpreted against the background of the right of free movement and the need to ensure that derogations from it are construed strictly. In that context it is worth noting that even in a case where it is considered that removal is prima facie justified on imperative grounds of public security, the decision-maker must consider, among other things, whether the offender has a propensity to re-offend in a similar way (judgment, paragraph 30)."

17. We note that the initial decision of the Respondent was based on the Appellant being entitled to the lowest level of protection. The Secretary of State conceded in a supplementary letter of 21 November 2018 that the Appellant was entitled to the highest level of protection. The decision does not assist with the interrelation of imperative other than by reference to Tsakouridis where it was decided by the ECJ that the definition should not be restricted to attacks on the state but also include serious criminality.

18. The judge accepted that the Appellant presented a high risk of reoffending. She was unarguably wholly aware of the details of the trigger offences, the extent of the Appellant's criminality and the contents of the OASys Report. These factors led to the Appellant presenting a high risk of the commission of further offences of the same order as the trigger offence. Whilst the judge did not explicitly refer to the MAPPA level 3 assessment, we do not consider that it was necessary for her to do so because she accepted the Respondent's case that there was a high risk of reoffending and she understood the seriousness of the Appellant's offences and the risk that he presented. The judge's finding, at [19], that the Appellant is not part of a gang or involved in serious organised crime was one that was open her. In addition, it was a factor she was entitled to attach weight to when deciding the extent and nature of the threat. Whilst there is reference within the OASys Report to the Appellant being in a gang or involved in serious organised crime, the evidence amounted to unsupported assertions. There is no substance in the Respondent's ground that the judge did not consider material evidence.

19. The judge set out relevant case law. We do not accept that she artificially and erroneously limited the scope of her assessment of what is capable of establishing imperative grounds which would justify deportation for the purposes of the 2016 Regulations. Her conclusions at [32] do not establish that she wrongly limited the scope of what can constitute imperative grounds. She understood that whilst it includes terrorism it also includes serious criminality falling short of terrorism. What the judge did was to take what limited guidance there is from the case law available. She recognised at [23] that there was no guidance in the Regulations about what is meant by "imperative grounds". Ultimately, in our view she made an assessment based on the circumstances of the Appellant which is what is required in cases of this nature.

20. The Respondent's position is that the judge did not properly take into account SSHD v Staszewski. Whilst it is not apparent that her attention was drawn to it, there is nothing in the judgement that would establish that the judge erred in her approach. The observation made by the Court of Appeal at [24] was that it will be unwise to

attempt to lay down guidelines and that the relevant question (in this case whether there are imperative grounds of public security to justify the Appellant's deportation, whilst in the case of Straszewski the issue was whether there were serious grounds) is likely to turn to a large extent on the particular facts of the case. In the absence of specific guidelines and/ or a definition of what constitutes imperative grounds, the judge's approach to the assessment was correct and her ultimate decision was open to her.

21. Insofar as the grounds rely on the case of Bulale v Secretary of State for the Home Department [2008] EWCA Civ 806 they conflate the test of imperative grounds with the test under 27(5)(c) of the Regulations which the judge found had been satisfied in this case, in any event. The judge was satisfied that the Appellant's conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Indeed, it would be difficult to reach a different conclusion on the evidence before her; however, unless the deportation can be justified on imperative grounds, it is not lawful.

22. The challenge to the decision regarding imperative grounds does not properly identify an error of law. The judge was entitled to conclude that the Appellant's conduct did not reach the very, very high threshold. In the absence of irrationality (which was not, in any event, pleaded in the grounds of appeal), the decision was open to the judge on the evidence before her.

Notice of Decision

23. The decision of the FTT to allow the Appellant's appeal under the 2016 Regulations is lawful and sustainable. The Secretary of State's application is dismissed.

24. No anonymity direction is made.

Signed *Joanna McWilliam* Date 10 May 2019

Upper Tribunal Judge McWilliam