Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00202/2020

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Monday 20 December 2021	**On Tuesday 25 January 2022**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

KVETA CONKOVA

Respondent

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Ms S Khan, Counsel instructed by A & M Solicitors Ltd

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State and a challenge by Ms Conkova to one of the First-tier Tribunal Judge's findings. For ease of reference, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Cockburn dated 14 June 2021 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 18 June 2020 making a deportation order against her in accordance with the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The Appellant seeks to challenge the Judge's finding that she is not entitled to

benefit from the imperative grounds criteria based on her length of residence.

2. The Appellant is a national of the Czech Republic. The date of her entry to the UK is disputed by the Respondent. It is common ground that, on 19 March 2019, the Appellant was convicted of concealing, disguising, concerting, transferring or removing criminal property and was sentenced to a term of three years and six months in prison. The offences provided material assistance to an organised crime gang, including the Appellant's husband, who were convicted of trafficking migrants into the UK. The Appellant's husband was a key member of that gang and remains in prison. The Appellant provided assistance by laundering the proceeds of the gang's criminal activities via her personal bank account.

3. Judge Cockburn accepted that the Appellant is permanently resident in the UK based on employment after 2014 ([19] of the Decision). She accepted that there was evidence of employment for the period 2008/9 to 2009/10 but, because of a gap in evidence between 2010 and 2014, the Judge did not accept that the Appellant had been resident for ten years ([20]). She found that the Appellant could not claim that the Respondent must show imperative grounds for her deportation. The Appellant has sought to challenge that latter finding. The Judge concluded that the Respondent had failed to show that the Appellant poses a genuine, present and sufficiently serious threat to the public justifying her deportation ([25]) for the reasons given thereafter.

4. The Respondent appeals on the basis that the Judge has failed to provide adequate reasons for her decision. The Respondent points to the seriousness of the offence as being adequate justification for deportation. She contends that the nature of the offence alone may in this case be sufficient justification. She also says that the Judge has failed to explain why she concluded that the Appellant is remorseful for her offending. Finally, she asserts that the Judge has failed to consider that the threat required to be shown is to the fundamental interests of society and not simply a risk to the public.

5. Permission to appeal was granted by First-tier Tribunal Judge SPJ Buchanan on 22 June 2021 in the following terms so far as relevant:

> "… 3. It is arguable that the test applied by the FTTJ at #25 and #31 and #34 conflates a 'threat to the public' with 'threat affecting one of the fundamental interests of society'. It is the former threat which has been assessed by the FTTJ; but arguably it ought to have been the latter on a proper application of regulation 27(5)(c). Protecting the public is only one of a series of fundamental interests which might be considered as a risk/threat on an application of regulation 27. That is the point made at #7 of GOA.
> 4. It is arguable by reference to the Grounds of Appeal that there may have been an error of law in the Decision as identified in the application. I grant permission to appeal. In doing so, I do not limit the scope of Grounds which might be advanced."

6. The Appellant has sought permission to appeal the finding by the Judge that she does not have the necessary length of residence to require the Respondent to show that there are imperative grounds for her deportation. In short summary, the Appellant asserts that the Judge made a mistake of fact when assessing the evidence which amounts to an error of law.

7. Permission to appeal was refused initially by First-tier Tribunal Judge Grant on 13 August 2021 in the following terms so far as relevant:

> "... 4. Contrary to the submission in the grounds the judge refers to the said documentation at paragraph 11 of his decision and finds as a matter of fact at paragraph 19 that she has acquired permanent residence on the basis of that evidence. But he was not prepared to accept she had established 10 years continuous residence before she was sentenced to a period of imprisonment and the deportation decision was made. The judge goes on to give cogent reasons for finding that the appellant had not established 10 years residence in paragraphs 21-24 and the findings reached were open to the Judge on the evidence before him.
> 5. Overall, the grounds amount to a lengthy disagreement with the findings of the Judge and an attempt to reargue the appeal from the basis of 10 years residence rather than the 5 years found by the Judge. They disclose no arguable error of law."

8. Following a renewed application to this Tribunal, Upper Tribunal Judge Stephen Smith refused the application on 6 October 2021 on the basis that the Appellant was seeking to appeal against a discreet factual finding and not against the Decision per se. He pointed out that this was not an avenue open to the Appellant as she was the successful party. He drew the Appellant's attention to the guidance given by the Court of Appeal in Secretary of State for the Home Department v Devani [2020] EWCA Civ 612 and suggested that any challenge to the Judge's finding in this regard should be incorporated in a Rule 24 response. That was done in Ms Khan's skeleton argument which incorporated the Appellant's Rule 24 response and sought an extension of time to raise the challenge were one needed (given that an application for permission to appeal was made in time).

9. The appeal came before me to consider whether there was an error of law in the Decision and if I so concluded either to re-make the decision or remit the appeal to the First-tier Tribunal in order for it to do so. I had before me the Appellant's bundle before the First-tier Tribunal, the Appellant's skeleton argument incorporating her Rule 24 response and the Respondent's bundle (hereafter referred to as [RB/xx]). I heard oral submissions from Ms Isherwood and Ms Khan. Following those submissions, I reserved my decision and indicated that I would issue that in writing which I now turn to do.

DISCUSSION AND CONCLUSIONS

The Respondent's Appeal

10. I begin by noting that the Respondent does not challenge the Judge's finding that the Appellant is permanently resident in the UK. Although Ms Isherwood at one point in her submissions appeared to suggest that this was disputed, she was constrained to accept that there is no pleaded challenge to that finding. Nor, I find, is it implied in any of the grounds. Accordingly, the issue for the Judge was whether the Respondent had shown that the Appellant poses a genuine, present and sufficiently serious threat to the public justifying her deportation on serious grounds of public policy ([25] of the Decision).

11. The Respondent relies on the case of R v Bouchereau [1978] ECR 732 ("Bouchereau") and the upholding of the CJEU's judgment by the Court of Appeal in Secretary of State for the Home Department v Robinson (Jamaica) [2018] EWCA Civ 85 ("Robinson") as authority for the proposition that the nature of the Appellant's offence was sufficient to reach a conclusion that she represents the necessary threat to societal interests. The Respondent relies in particular on [84] of the judgment in Robinson. However, the principle on which the Respondent relies emerges most clearly from [71] to [73] of the judgment as follows:

> "71. It is important to recognise that what the ECJ was there talking about was not a threat to 'the public' but a threat to 'the requirements of public policy'. The latter is a broader concept. At para. 28 the ECJ said that past conduct can only be taken into account in so far as it provides evidence of personal conduct constituting a 'present threat to the requirements of public policy.' As the ECJ said at para. 29, 'in general' that will imply that the person concerned has a 'propensity to act in the same way in the future' but that need not be so in every case. It is possible that the past conduct 'alone' may constitute a threat to the requirements of public policy. In order to understand in what circumstances that might be so, I consider that it is helpful and appropriate to have regard to the opinion of the Advocate-General in *Bouchereau*, when he referred to 'deep public revulsion'. That is the kind of extreme case in which past conduct alone may suffice as constituting a present threat to the requirements of public policy.
>
> *72.* *Bouchereau* was considered by this Court in *R v Secretary of State for the Home Department, ex p. Marchon* [1993] Imm AR 384 and was applied in that case by this Court.
>
> 73. However, in the more recent case of Straszewski v Secretary of State for the Home Department [2015] EWCA Civ 1245; [2016] 1 WLR 1173, at para. 19, Moore-Bick LJ said that he could see 'some force in Mr Drabble's submission that the decision in ex p. Marchon can no longer be regarded as representing Community law. He continued, at para. 20:
> '… The authorities to which I have referred support the general proposition that great importance is to be attached to the right of free movement which can be interfered with only in cases where the offender represents a serious threat to some aspect of public policy or public security. *Save in exceptional cases*, that is to be determined solely by reference to the conduct of the offender (no doubt viewed in the context of any previous offending) and the likelihood of re-offending. General considerations of deterrence and public revulsion *normally* have no part to play in the matter. In these respects the principles governing the deportation of foreign criminals in general differ

> significantly from those which govern the deportation of EEA nationals who have acquired a permanent right of residence. …'

Having considered the argument as referred to at [73] that Bouchereau no longer represented good law, the Court concluded at [80] of its judgment that Bouchereau continued to bind domestic courts.

12. Leaving aside for the moment the issue about wider public policy which is also raised in that extract, I accept that there may well be cases where the nature of the offence is such that the offence alone is sufficient to justify expulsion irrespective of the current conduct of the offender. Robinson itself was concerned with supply of Class A drugs for which the appellant had been sentenced to two years and six months in prison. However, having made the observations it did about the continued relevance of Bouchereau, the Court of Appeal concluded at [85] that "the sort of case the ECJ had in mind in *Bouchereau*, when it referred to past conduct alone as potentially being sufficient, was not the present sort of case but one whose facts are very extreme". Although the Court did not consider it "necessary or helpful to attempt an exhaustive definition" it observed that the "sort of case that the court was thinking of was where, for example, a person has committed grave offences of sexual abuse or violence against young children". It therefore rejected the application of that principle to the Robinson case ([86]).

13. I was not particularly impressed by Ms Khan's submission that the Appellant's offence can be distinguished from the underlying trafficking offence. As Ms Isherwood pointed out, the Appellant was found to have known of the gang's operation and knowingly laundered the proceeds. Such subsidiary assistance is essential to the sort of operation of which the Appellant's husband and the other gang members were convicted.

14. Ultimately, however, I have concluded that the Respondent cannot show that the Decision was wrong for failing to consider this issue since, as Ms Khan pointed out, it was never raised previously. The Respondent does not raise the issue in her decision letter under appeal. There is no reference to any submission based on this principle in the Decision and the Respondent has not produced any evidence to show that it was raised. Interesting though this might be in the context of the offence of which the Appellant was convicted, I am therefore unpersuaded that the Judge can be faulted for not considering an issue not raised with her.

15. I move on then to the central issue raised in the grounds and which led to the granting of permission to appeal namely whether the Judge has focussed only on risk and has failed to consider the threat posed by the Appellant more generally to the fundamental interests of society.

16. Ms Isherwood drew my attention to the sentencing Judge's remarks regarding the offence. Those appear at [RB/C]. They are lengthy and I do not therefore set them out in full. Much of the sentencing remarks also refer to the Appellant's co-defendants. They show though that the Appellant was

no innocent participant. The Judge notes that "[t]he system would not have operated so successfully had it not been for what [the Appellant] personally did". The Appellant is married to "the main conspirator". The sentencing Judge found that the Appellant "knew precisely what he did". The Judge found that the Appellant was "highly" culpable. That undermines Ms Khan's submission that the Appellant's offending was at the lower end of the scale. The sentence was, as is shown by the remarks, fixed by reference to the monetary value of the proceeds converted and that value was reduced to some extent because some might not have been linked to people trafficking. The offending was elevated by reason of the harm caused. There was though a lack of previous convictions and the Appellant has a child whose welfare was also taken into consideration. The starting point for the sentence was said to be five years being at the top of the lower category or the bottom of the higher category which was reduced to three years and six months by the mitigating factors.

17. The Respondent also relies in her grounds on the ECJ's judgment in Land Baden-Württemberg v Tsakouridis (Case C-145/09) ("Tsakouridis"). The Court accepted in that case that the fight against organised narcotics crimes was "capable of being covered by the concept of 'imperative grounds of public security'". If it is capable of justifying expulsion in an imperative grounds case, the Respondent says, then it must be capable of justifying it in a serious grounds case.

18. The Appellant relies on the fact that Mr Tsakouridis was himself a member of a drugs gang. He had been sentenced to about double the sentence to which the Appellant here was sentenced. Whilst, as I have already pointed out, the assistance given to trafficking of this nature by money laundering is significant, I accept that the Appellant herself was not convicted of the trafficking operation itself. However, again, and although the Respondent makes the point that such assistance is "critical to the effective operation" of organised crime, she does not suggest in her decision under appeal that the Appellant's involvement is to be equated with membership of the trafficking operation itself. Reference is made in the decision letter to Tsakouridis as being one of the cases considered by the decision maker but it is not referred to in support of the proposition put forward in the grounds. Nor is reference made to any submission on this basis in the Decision. In any event, the issue for the Judge remains whether this appellant poses a genuine, present and sufficiently serious threat. Once one removes from the equation the Bouchereau point, a finding of such a threat has to be justified by an appellant's personal conduct and is a fact sensitive issue. It is therefore inappropriate to draw on the outcome of other cases however similar they may be.

19. I would not in any event have found there to be an error in this regard. The Judge sets out at [8] of the decision the substance of the Respondent's case regarding the threat posed by the Appellant. When considering that threat, the Judge provided the following reasons for rejecting that case:

> "25. On the basis of the evidence before me, I am not satisfied that the respondent has discharged her initial burden to show, on balance, that the appellant poses a genuine, present, and sufficiently serious threat to the public which justifies her deportation on grounds of public policy. In reaching this decision I have had regard to all of the factors in Regulation 27.
> 26. I have carefully considered the factors relied upon by the respondent in reaching this aspect of her decision and I place significant weight upon the nature of the offence committed by the appellant and the clear culpability founded by the conviction and the Judge's sentencing remarks. I have also taken into account the evidence of the appellant's conduct in the course of the criminal proceedings. She initially denied her guilt and failed to acknowledge the impact of her offending. The offence and the circumstances surrounding it clearly engage those fundamental societal interests referred to by the respondent in the deportation decision. The appellant was an actor in laundering the proceeds of crime from the smuggling of migrants into the UK. There can be no doubt that this form of crime has a detrimental impact upon the social and economic interests of society as a whole and the interests of those who are more directly affected including vulnerable migrants. The appellant's former conduct, including her refusal to accept responsibility for her actions is clearly a factor which is relevant to the assessment of whether she poses a threat to the public now, and I have taken it into account."
> [my emphasis]

20. The Judge there takes into account not only the nature of the offence and sentencing remarks but also that the issue is the threat to the fundamental interests of society and not simply the risk which the Appellant poses presently. That then forms the background to what follows.

21. The Judge next turns to consider whether the Appellant poses a risk. She takes into account the Appellant's own evidence and other evidence of remorse and rehabilitation. She accepts that the Appellant is genuinely remorseful ([30] of the Decision). As the Appellant points out in response to the criticisms made by the Respondent regarding the Judge's finding in this regard, the Appellant was not cross-examined in relation to her evidence. The Judge notes that at [30]. The Judge was therefore entitled to rely on that evidence as she has done when accepting at [31] of the Decision that the Appellant "does not pose a present risk to the public". It may be overstating the position to say in that paragraph that this is "one offence" given the continuing nature of it. Nonetheless, the Appellant had no previous criminal convictions (as is taken into account by the sentencing Judge) and has not committed any offences since. There is no merit to the submission at [6] of the grounds that the Judge has failed to provide reasons for her finding regarding the Appellant's remorse. Those reasons are given at [30] and [31] of the Decision relying upon the evidence recorded at [28] and [29] of the Decision.

22. The Judge goes on to consider the risk as set out in the OASys report and whether the Appellant's continued relationship with her husband (still in prison at the present time) is sufficient to lead to a finding that the Appellant poses a continuing risk. The Judge was entitled to reach the conclusion she did that the Appellant does not pose a continuing risk.

23. Turning back then to whether the Judge has confined her consideration only to risk rather than wider societal interests, I have already referred to the self-direction which the Judge gave herself at the outset. As the Appellant points out, in that extract the Judge refers specifically to regulation 27 of the EEA Regulations to which she has had regard. Moreover, at [7] of the Decision, the Judge says the following when setting out the Respondent's case:

> "The appellant poses a threat to the following fundamental interests of society in the UK:
> (a) Preventing unlawful immigration and abuse of the immigration laws and maintaining the integrity and the effectiveness of the immigration control system (including under these Regulations) and of the Common Travel area.
> (b) Preventing the evasion of tax and duties.
> (c) Protecting the rights and freedoms of others, particularly from exploitation and trafficking.
> (d) Protecting the public."

24. It cannot sensibly be suggested that, when reaching her conclusion at [34] that the Respondent has failed to show that the Appellant poses a "genuine, present, and sufficiently serious threat to the public" the Judge had overlooked her earlier self-directions. That conclusion and the reasoning which led to it must be read in the context of the self-directions and what is said at [25] and [26] of the Decision as set out above.

25. I have already rejected the Respondent's submission that the Judge should have considered that the nature of the offence itself met the requisite test. That is not the way in which the case was argued.

26. As I am reminded by the Appellant, the issue for me is whether the Decision discloses an error of law and whether the conclusion was open to the Judge on the evidence. The outcome might not be that which all Judges would have reached. However, the Judge was entitled to reach the conclusion she did for the reasons she gave which are adequate. The conclusion is not irrational. The Judge properly self-directed herself as to the relevant test and applied it, taking into account the submissions which were made to her.

27. Although the Respondent challenges also the Judge's conclusion on the proportionality of the deportation decision, given the finding regarding the present threat posed by the Appellant, I do not need to consider what is there said. I would in any event have found the reasons given at [35] of the Decision to be sufficient in the context of what precedes that paragraph.

The Appellant's Challenge

28. I turn finally to the Appellant's challenge to the finding that the Respondent does not have to show imperative grounds for her deportation. I can deal with this quite shortly in light of the above.

29. Ms Khan accepted that if I rejected the Respondent's appeal, there was no need for me to deal with whether imperative grounds are required since the Appellant succeeds in any event.

30. Moreover, whatever the position in relation to the Appellant's length of residence and evidence about her exercise of Treaty rights in the period 2010 to 2014, the relevant test in relation to imperative grounds counts back from the deportation decision and not forward from the start of the period of residence (see regulation 27(4) of the EEA Regulations). That is the point being made at [4] of the decision of First-tier Tribunal Judge Grant when refusing the Appellant permission to appeal.

31. Imprisonment during that period in principle breaks the continuity of residency (Secretary of State for the Home Department v MG [2014] EUECJ C-400/12). Whether it does so depends whether the term of imprisonment breaks integrative ties forged to that point. As Ms Khan recognised this case-law was not taken into account by the Appellant in the presentation of her appeal. Nor does it find any mention in the Appellant's challenge as pleaded in the Rule 24 Reply. Although the Appellant's skeleton argument before Judge Cockburn correctly recognises that the period of residence dates back from the deportation decision, it appears to proceed on the basis that the exercise of Treaty rights in a ten-year period excluding imprisonment is sufficient to meet the imperative grounds threshold. There is no attempt to argue that imprisonment did not break the integrative ties formed up to that point in time.

32. Having had her attention drawn to the legal test, Ms Khan did not press this challenge. As I say, strictly, I do not need to deal with it in any event since I have preserved Judge Cockburn's conclusion that the Appellant's appeal succeeds.

CONCLUSION

33. For the foregoing reasons, I am satisfied that neither party has shown that the Decision contains any legal error. I therefore uphold the Decision.

DECISION

The Decision of First-tier Tribunal Judge Cockburn dated 14 June 2021 does not involve
the making of an error on a point of law. I therefore uphold the Decision.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 12 January 2022