IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000263

First-tier Tribunal No: DA/00282/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 4 October 2023

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPPER TRIBUNAL JUDGE JARVIS

Between

The Secretary of State for the Home Department

Appellant

and

Shefqet Vata
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr S Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr Z Malik KC, instructed by Vanguard Solicitors

Heard at Field House on 7th September 2023

DECISION AND REASONS

1. These written reasons reflect the oral decision which we gave to the parties at the end of the hearing.

2. We refer to the appellant as the Secretary of State, and to the respondent as the claimant, for the remainder of these reasons.

3. The Secretary of State appeals against the decision of First-tier Tribunal Judge Brewer, promulgated on 19th January 2023, in which she allowed the claimant's appeal against the Secretary of State's decision to deport him pursuant to Regulation 23(6)(b) of the Immigration (EEA) Regulations 2016 (the 'Regulations').

Background to the appeal

4. As recorded by the Judge in her decision, the claimant is an Albanian national, born on 10th March 1983. He entered the UK on 21st July 2006, with entry clearance to join his EEA national spouse. On 11th April 2007, he was issued with a residence card as an EEA spouse and was granted permanent residence on 9th September 2012, having retained rights of residence. He currently resides in the UK with his wife and three British citizen children. On 23rd April 2018, he was convicted at Cardiff Crown Court of conspiracy to supply Class A drugs and was sentenced to five years and seven months' imprisonment. On 14th August 2020, the respondent issued the decision to deport him from the UK.

5. The Judge identified the issues in the appeal before her, at §4, as follows:

> "(1) Whether the Appellant's deportation is justified on serious grounds of public policy or public security in accordance with Regulation 23(6)(b) of the 2016 Regulation?
>
> (2) Alternatively, whether under section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), (i) the effect of the Appellant's deportation from the United Kingdom would be unduly harsh on his children, or, (ii) there are very compelling circumstances in this case?"

6. The Judge went on to consider the context of the claimant's index offence. He had been described by the sentencing Judge as playing a significant role in the supply of one kilo of cocaine. It was accepted that he had no previous offending and had acted as a middleman (§13). The Judge also recorded that the claimant's wife confirmed that if the claimant were deported, she and their children would return to Albania with him. She indicated that the impact of that would be detrimental, in particular because of her poor mental health and on the impact to their children, one of whom had what were described as "difficulties" and the fact that the couple's children could not speak, read or write Albanian.

7. The Judge went on to consider, at §§18 to 27, a psychiatrist's report as well as an independent social worker report. The former included a discussion of the risk of the family facing eviction and the deterioration in the children's behaviour. The claimant's wife was diagnosed as suffering from a major depressive disorder requiring psychiatric treatment, without which her prognosis was poor. Moreover, the oldest child was described as having autistic traits with delayed social interaction, understanding and use of language skills. During his father's imprisonment, he had received counselling from CAMHS (mental health services). The independent social worker report recorded a close relationship between the claimant and his two eldest children before his imprisonment and their subsequent behavioural difficulties during his imprisonment.

8. The Judge analysed, at §§28 to 31, an OASys Report of 2018, which recorded the claimant as denying that he supplied drugs, but, as the Judge also recorded, the Probation Officer reaching an assessment of risk despite that denial. The Judge also considered a privately funded psychological risk assessment report dated November 2022, which the Secretary of State challenged as lacking details of the index offence and objectivity.

9. The Judge recited the law at §§36 to 40, on the basis that the claimant had a mid-level of protection against deportation based on what is sometimes referred to as “serious grounds of public policy and public security” under the Regulations.

10. The Judge concluded at §§41 to 53 that the Secretary of State had not established that the claimant represented a genuine, present and sufficiently serious threat. We do no more than summarise the gist, but in detailed reasons, these included the catastrophic effect of the claimant’s offending on his wife and two young children, which would mitigate the risk of his reoffending; the OASys Report which assessed him as a low risk; and the assessment of the privately commissioned report, albeit the Judge had concerns about that report and had attached less weight to it accordingly (§50).

11. The Judge carried out in a proportionality assessment of §§54 to 55 and concluded that to deport the claimant would be disproportionate. She therefore allowed the appeal, although it is unclear whether this was both in respect of the Regulations and any human rights claim.

The Secretary of State’s appeal

12. The Secretary of State appealed against the Judge’s decision on 13th February 2023, which again we summarise briefly. First, the Secretary of State said that the Judge had made a material misdirection of law or failed to give adequate reasons about whether the claimant represented a genuine, present and sufficiently serious threat, bearing in mind that he was said to have played a significant role in the sourcing and distribution of drugs within an organised crime group, in the context of the well-known authority of Land Baden-Württemberg v Tsakouridis (Directive 2004/38/EC) Case C-145/09). The Judge had relied upon the OASys Report whilst failing to evaluate the impact of his offending on the public and the Judge had erred in concluding that there was a low risk of causing harm and general offending, bearing in mind that he remained on licence until June 2023, so that his propensity to reoffend had not been tested.

13. Second, the Secretary of State argued that the Judge erred in misdirecting herself on the law, or failed to give adequate reasons for placing particular weight on the best interests of the claimant's wife and family, in circumstances where they were supported by social services and medical professionals and no evidence had been advanced that they would not have that support in the event of the claimant’s deportation.

14. Whilst the Secretary of State's application for permission was initially refused, Upper Tribunal Judge Rimington granted permission following a renewed application, in her decision dated 23rd February 2023. The grant of permission was not limited in its scope.

The hearing before us

15. In brief but focused and helpful submissions, both representatives identified the key issues in this case, namely first, the risk presented by the claimant and the Judge’s analysis of that, and second, the question of proportionality. In relation to the risk, Mr Tufan reiterated the point about Tsakouridis and the risk of harm because of involvement in the supply of drugs. He emphasised the importance of the various factors in Schedule 1 of the Regulations, and he pointed out that the consideration of Schedule 1 was mandatory, (see Regulation 27(8)). There was

no clear indication from the Judge's reasons that she had considered Schedule 1. For example, in §3 of Schedule 1, the length of sentence was relevant to the threat represented by an offender and other relevant subparagraphs were §§7(c), (g) (wider societal harm, such as offences relating to the misuse of drugs) and (j) (protecting the public). Mr Tufan did accept that if the Judge's reasons on whether the claimant represented a genuine, present and sufficiently serious threat were sufficient, then the Secretary of State's challenge to the proportionality assessment fell away. For the claimant's part, we refer to a substantial Rule 24 reply prepared by Mr Malik. As we indicated to him, it was unnecessary for him to repeat these detailed submissions and we are grateful for the detail of them.

16. We do not recite the detail of the settled law except to touch upon one particular case, particularly in the context of the challenge by reference to Schedule 1, that a Judge of the First-tier Tribunal can be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically unless it is clear from the language that they have failed to consider them, see AA (Nigeria) v SSHD [2020] EWCA Civ 1296. It was common ground as to the level of protection and as Mr Malik confirmed, he had referred in his skeleton argument before the Judge and in oral submissions to Schedule 1 and). He had argued that notwithstanding the nature of the claimant's offence this was clearly not a case where the claimant's offending was comparable to the threshold set out in SSHD v Straszewski [2015] EWCA Civ 1245 and SSHD v Robinson (Jamaica) [2018] EWCA Civ 85. The Judge had been entitled to conclude that the deportation could not be justified on serious grounds of public policy and her findings that the claimant did not constitute a genuine, present and sufficiently serious threat contained no error of law. Mr Malik also made submissions on the issue of proportionality, particularly where Mr Vata was a 'Zambrano' carer for his children (see Ruiz Zambrano v Office National de l'Emploi, case no. C34/09, [2012] QB 265).

Discussion and conclusions

17. We bear in mind that we will not have had the opportunity to consider the evidence in the way that the Judge had. We focus first on the question of the genuine, present and sufficiently serious threat. We accept first that the Judge's analysis was consistent with Schedule 1 and that she can be taken to have had Schedule 1 in mind. The Judge, in our view, provided a detailed explanation for why, notwithstanding the seriousness of the offence and the length of the sentence, the claimant no longer posed a relevant threat. She explained why, at §44, she had attached weight to the 2018 OASys Report. She was conscious of the substantial seriousness of the offence, for example 1 kilo of cocaine supplied; the sentence of five years and seven months; and also, the fact that the Probation Officer made an assessment of the risk, notwithstanding the claimant's denial of his responsibility. In our view, the Judge was plainly entitled to consider the 2018 Report as having a material part in the jigsaw of assessing that risk. Moreover, she considered additional factors, including, in particular, the consequences of drug supply upon not only the claimant's own family and his conviction but also on wider society. She considered the Probation Officer's assessment of a low risk of harm 3% and of reoffending at 6% (§47). She was concerned about the independent report of Ms Davies and attached less weight to it, but also had the benefit of considering the evidence from the claimant and his wife about the catastrophic consequences of the claimant's imprisonment. The Judge had placed weight on the hurt and pain caused to the claimant's

family, as a protective factor, weighing against the claimant's propensity to reoffend. In our view, there was no error in the Judge's failure to refer specifically to Schedule 1, which she can be taken to have considered, or in her assessment of the risk which the claimant represented.

18. Mr Tufan accepts that the Judge's assessment of risk is dispositive of this appeal, because if the Judge were entitled to reach the conclusion she did, then the challenge to the proportionality assessment falls away. However, for completeness, we do not accept that there was any error in relation to the proportionality assessment.

19. As the Judge noted, and as Mr Malik invited us to consider, at §55 of her reasons, the Judge assessed a number of additional factors, in concluding that the claimant's deportation would be disproportionate. The Judge found that it would not be in the best interests of the children to live in Albania and the Judge also considered the effects on them of the claimant's absence during his imprisonment, because of the children's vulnerability, which the Judge described at §55(ii), as including being parented by a mother who herself was suffering from poor mental health.

20. In conclusion, we are satisfied that the Judge did not err in law, such that her decision is unsafe. Her decision accordingly stands.

Notice of Decision

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

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27th September 2023