IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000808
First-tier Tribunal No:
HU/52393/2022
IA/03776/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 01 November 2023

Before

UPPER TRIBUNAL JUDGE LESLEY SMITH
UPPER TRIBUNAL KAMARA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SALVATORE SCARPA
[ANONYMITY DIRECTION NOT MADE]

Respondent

Representation:
For the Appellant: Mr C Thomann, Counsel instructed by Government Legal Department
For the Respondent: Mr R K Rai, Counsel instructed by Kilby Solicitors

Heard at Field House on Monday 23 October 2023

DECISION AND REASONS

BACKGROUND

1. This is an appeal brought by the Secretary of State. To avoid confusion, we refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Seelhoff promulgated on 20 December 2022 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 3 March 2022 refusing the Appellant's human rights claim relying on his family and private life (Article 8 ECHR). The Respondent's decision was made in the context of a decision to deport the Appellant to Italy. It is common

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ground that, although the Respondent made a second decision on 3 March 2022 refusing the Appellant's application for status under the EU Settlement Scheme ("EUSS"), he did not appeal against that refusal (see [15] of the Decision).

2. The Appellant is a national of Italy. He came to the UK in September 2013. Prior to coming to the UK, his Italian lawyer was served with an Italian arrest warrant. This related to an offence dating back to 2005. The nature of the offence is the subject of the Respondent's first ground and we therefore do not deal with this in detail at this stage. Suffice it to say that the warrant culminated in a successful prosecution of the Appellant following which he was sentenced to a term of eight years and eight months in prison. The Appellant appealed the conviction first to the Court of Appeal in Naples and second to the Supreme Court. Following a return of his case to the Court of Appeal, the Appellant's sentence was reduced to five years and two months and twelve days.

3. The Appellant was extradited to Italy to serve his sentence in 2018. On 24 March 2020, the Italian authorities made a request to the UK Ministry of Justice to permit the Appellant to serve the remainder of his sentence in the UK. The Ministry of Justice issued a warrant on 23 September 2021 authorising the Appellant's transfer to the UK. By the time that the Appellant returned to the UK, he only had some two months of his sentence outstanding. Again, the facts of the transfer lie at the heart of the Respondent's second ground and we will therefore deal with the detail thereof below when considering that ground.

4. Following the expiry of his criminal sentence, the Appellant was detained under immigration powers until 17 December 2021. The Appellant made an application for pre-settled status under the EUSS on 24 November 2021. He made his human rights claim on 3 December 2021 which was considered by the Respondent and rejected for the reasons given in the decision under appeal.

5. The Appellant relies on his private and family life in the UK. He relies on his residence here from 2013/4 to 2018 when he was extradited. He also relies on his family connections in the UK consisting of his brother, Alfonso, and sister-in-law, Tulah. However, the main element of his claim is his relationship with his Lithuanian partner, Viktorija, and their child [E]. The relationships on which the Appellant relies are not in dispute. What is in dispute is whether those outweigh the public interest in deportation.

6. The Appellant is not a Foreign Criminal as defined in section 117D Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). As such, section 117C of the 2002 Act ("Section 117C") does not apply directly (although the principles may inform the proportionality assessment – see Gosturani v Secretary of State for the Home Department [2022] EWCA Civ 779 – "Gosturani"). The deportation order is made under section 5(1) Immigration Act 1971 relying on section 3(5)(a) of that Act. In other words, the Respondent has determined that the Appellant's presence in

the UK is not conducive to the public good. Although Section 117C does not apply directly to the Appellant, the Respondent relies on Sections 117A to 117D of the 2002 Act as reflecting Parliament's intention as to what the public interest requires.

7. The Judge accepted the Appellant's case that his deportation would be disproportionate. We deal with the reasoning in the Decision so far as necessary below. It is here relevant to note that the Judge found that he did not have much information about the offence on which the Respondent relied beyond what was said in the decision under appeal (that the European Arrest Warrant – "EAW" - for the Appellant's extradition stated that it was for "export fraudulent evasion of prohibition (drugs class other)", the length and reduced sentence given and what the Appellant said about the offence in his witness statement (to which we refer below).

8. We also note that, prior to the hearing before him, Judge Seelhoff had issued directions to both parties to provide him with more information about the offence. We return to this below when dealing with the Respondent's first ground.

9. The Respondent appeals the Decision on two grounds which can be broadly summarised as follows:
Ground one: the Judge failed to give appropriate weight to the public interest in deportation. This has now been expanded upon as a submission that the Appellant breached his "Kerrouche" duty by misleading the Tribunal about his offence.
Ground two: the Judge has wrongly treated the transfer of the Appellant to the UK to serve the remainder of his sentence as a determinative factor in the proportionality assessment – in essence, the argument is that this was not a relevant consideration.

10. Permission to appeal was refused by First-tier Tribunal Judge J M Dixon on 28 February 2023 in the following terms (so far as relevant):

> "…The respondent challenges the decision on a number of grounds which in reality amount to a veiled attempt to reargue the merits. The Judge had well in mind the seriousness of the offence (as indicated by the sentence of over 5 years) as well as the public interest in deportation but was entitled to conclude that such interest was attenuated by the peculiar circumstances, not least because the respondent was unable to assist as to why the appellant had been allowed back into the UK, noting paragraph 42 of the decision."

11. The grounds of appeal to this Tribunal were drafted by Counsel (Mr Thomann) and have developed into the case as argued by him before us. We therefore refer to the detail of those grounds below. Permission to appeal was granted by Upper Tribunal Judge C N Lane on 3 June 2023 as follows:

> "The renewed grounds raise matters (in particular, as regards the appellant's duty to disclose and arising from the appellant's return to the

United Kingdom from Italy to complete his prison sentence) which are arguable. It is not clear from the documents before me whether the respondent has filed full details of the appellant's offending in Italy (the renewed grounds suggest that this evidence would be available by the end of March 2023). In any event, the respondent should file and serve any relevant documents prior to the error of law hearing."

12. The documents to which Judge Lane referred emanate from the Italian Courts and were obtained via the Foreign, Commonwealth and Development Office and the British Embassy in Italy (although as we understood Mr Thomann to submit at one point, the Supreme Court's judgment should be in the public domain). Those documents are the subject of an application by the Respondent under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("Rule 15(2A)"). When this matter first came before me (in July 2023), the Rule 15(2A) application had not been made in proper form. That defect has since been remedied. In any event, I was obliged to adjourn the hearing at that time as the Appellant had insufficient notice of the hearing in order to prepare his reply.

13. Since that hearing, the Appellant has provided a response to the Respondent's Rule 15(2A) application. He says in essence that the documents should not be admitted. As part of that response, he too has made an application under Rule 15(2A) to admit a supplementary bundle. We will need to deal with the documents in that bundle when considering ground one. The Appellant has also provided a Rule 24 response seeking to uphold the Decision.

14. We have been provided with a multiplicity of documents in various bundles, many provided late in the day, and which caused some confusion at the outset of the hearing. Having heard submissions from both Counsel, we consider that all the salient points can be dealt with by reference to the bundle provided by the Respondent for the hearing before us (which we refer to as [RB/xx]), the Appellant's bundle and supplementary bundle before the First-tier Tribunal ([AB/xx] and [ABS/xx] respectively) and the Appellant's bundle submitted with the Rule 15(2A) response and application ([AB2/xx]). We had Mr Rai's skeleton argument before the First-tier Tribunal. We also had a skeleton argument filed by Mr Thomann for the hearing before us. The latest version is dated 16 October 2023, but Mr Thomann confirmed that this was simply an update providing cross-references to the Respondent's bundle. Mr Rai relied on the Rule 24 response filed by the Appellant. We also had an agreed bundle of authorities.

15. Having heard submissions from both Counsel, we indicated that we intended to reserve our decision and provide that in writing which we now turn to do. We take the two grounds in order.

DISCUSSION

Rule 15(2A) applications

16. As we come to below, there are faults on both sides in relation to the conduct of the hearing before the First-tier Tribunal, in particular concerning the disclosure of documents relevant to the nature and circumstances of the Appellant's offence in Italy.

17. On 5 December 2022, Judge Seelhoff gave directions in the following terms:

> "The respondent has provided no evidence of the alleged facts of the offence. Similarly, the Appellant has served no evidence in support of his assertion that the length of sentence was reduced on appeal. Both parties are asked to use their best endeavours to rectify the deficiencies in advance of the hearing listed before me on the 7th of December."

18. On 6 December 2022, the Respondent wrote to the First-tier Tribunal in response as follows (so far as relevant) ([RB/198]):

> "...Contact was made with the Foreign Convictions Team who have advised that they do not hold any further documentation relating to the 'alleged facts of the offence'."

19. As a result of the lack of documentation concerning the nature and circumstances of the offence, the Judge set out what he knew of that offence at [1] and [22] of the Decision. However, at [28] of the Decision he went on to say that "[i]n terms of the facts of the offence there is nothing [he could] say about the seriousness of the sense [sic] beyond noting the length of sentence". As a result, as he there said, "[t]he ultimate sentence of a little over five years in prison is a serious one, but on the face of it this is the only factor in favour of deportation". He was critical of the Respondent's failure to obtain "further and better information about the facts of the offence".

20. Before we turn to consider the Rule 15(2A) applications which are made by both parties, we refer to the test which we have to apply. Rule 15(2A) itself requires a party to indicate the nature of the further evidence and why it was not produced before. The Tribunal when deciding whether to admit that evidence must consider inter alia whether there has been "unreasonable delay" in producing that evidence.

21. Both Counsel accepted that the decision whether to admit the new evidence is discretionary and took us to authorities concerning the factors to be considered in the exercise of that discretion. Those were Kabir v Secretary of State for the Home Department [2019] EWCA Civ 1162 ("Kabir") and E v Secretary of State for the Home Department [2004] EWCA Civ 49 ("E") (applying Ladd v Marshall [1954] EWCA Civ 1)) .

22. At [33] of Kabir, the Court of Appeal made the following observations about the scope of the Tribunal's discretion as follows:

> "When it came to the application to admit the fresh evidence, the UT also had a wide discretion. This was not a case in which the new material inevitably resolved the factual issue in the Appellant's favour; it presented similar factual questions to the initial evidence: it was not a case of clear misapprehension of established and relevant fact: see paragraph 91 of the judgment in *E and R* quoted above. Nor was it a case of the character of *ML (Nigeria)*. The UT was, in my view, entitled to refuse the application in view of the failure to follow the correct procedure and to take into account the *Ladd v Marshall* principle that this new evidence could, with reasonable diligence, have been made available to the FTT on the initial appeal. I discern no error of law, therefore, on the UT's part in the decision that the judge made in declining to admit the fresh evidence."

23. As the Court of Appeal made clear, in Kabir and in E, the principles in Ladd v Marshall remain the starting point. We accept as Mr Rai pointed out, that in Kabir the Tribunal refused the Rule 15(2A) application. Nonetheless, we accept Mr Thomann's submission based on what was said in Kabir and E (relying on Ladd v Marshall) that the factors to be considered are as follows:
    (1) The credibility of the new material.
    (2) The extent to which the new material bears on the case (and therefore what the interests of justice require).
    (3) Whether the new material could reasonably have been available to the parties earlier.

24. We have applied those tests when considering the respective Rule 15(2A) applications in what follows.

The Respondent's Rule 15(2A) application

25. As we have already noted, the Respondent appears to have had sight of the EAW when making her decision under appeal as the offence is referred to in that decision letter. It may be also that the Supreme Court's judgment in the Appellant's case was in the public domain prior to the hearing before Judge Seelhoff (although neither party has taken us to any published record of it). The Court of Appeal's and Supreme Court's judgments form the basis of the Respondent's Rule 15(2A) application and are at [RB/37-127] (Supreme Court including an incomplete translation) and [RB/128-170] (Court of Appeal documents including incomplete translation).

26. The latter documents from the Court of Appeal of Naples were sent to the Ministry of Justice on 24 March 2020 (as the covering letter at [RB/128-129] makes clear) as part of the request for the Appellant to be transferred to the UK to serve the remainder of his sentence. As we understood the Respondent to accept therefore, the Court of Appeal documents at least were within the possession of the UK Government albeit not the Home Office.

27. Pursuant to directions which I gave at the previous hearing before me, the Respondent filed submissions in support of her application under Rule 15(2A) dated 14 July 2023. As is there accepted and as Mr Rai pointed

out, it was not until the application for permission to appeal was made to this Tribunal that the Respondent indicated that she was taking steps to obtain documents from the Italian authorities regarding the Appellant's conviction. It is also accepted in those submissions that the judgment of the Court of Appeal was in the possession of the UK Government, prior to the hearing before Judge Seelhoff, albeit that it was in the possession of a different Government department.

28. The Respondent does not suggest that she could not have obtained those with reasonable diligence. The EAW and the request for the Appellant's transfer to the UK to serve the remainder of his sentence could and should have alerted the Respondent to the fact that the Ministry of Justice might have documents which were relevant to the nature of the offence.

29. In relation to this factor, therefore, we conclude that the Respondent could with reasonable diligence have obtained the documents which she now seeks to rely upon earlier. The Respondent makes the point that the Appellant could have obtained these documents but that is no answer to the Respondent's failure to seek them out.

30. On the other hand, however, there can be no issue in relation to credibility of the new material. The documents emanate from the authorities of an EU Member State and speak for themselves.

31. We also accept that these documents could have a material bearing on the outcome of the proceedings. The fact that the Judge asked for further documents about the "alleged facts" of the offence and the comments he made about the lack of evidence in this regard indicate that he considered that such documents could have a bearing.

32. Since the relevance and important of the new material has a crossover with the Respondent's first ground, we do not at this stage set out the detail of the importance of these documents. However, for reasons we will come to, we consider that the combination of the credibility and importance of these documents outweighs the concerns we have about the Respondent's failure to produce them earlier.

33. Taking the wording of Rule 15(2A) itself and bearing in mind our wide discretion to admit this evidence, we have concluded that it is appropriate to accede to the Rule 15(2A) request made by the Respondent.

The Appellant's Rule 15(2A) Application

34. As Mr Thomann pointed out in his submissions on Rule 15(2A), the Appellant and those acting for him can also be criticised for failing to provide documents in their possession to the Tribunal. In some respects, these failures are even more concerning.

35. At [AB/21-26] the Appellant provided extracts from an OASys report dated 8 January 2022. At [ABS/67-72] are extracts from an earlier OASys report dated 15 December 2021. Those are selective extracts from those reports which we described in the course of the hearing before us with good reason as being "edited highlights". The reports as contained in the bundles before Judge Seelhoff excluded the pages which detailed the nature and circumstances of the Appellant's offence. Mr Thomann agreed when we asked him that the nature and circumstances of the Appellant's offence are fairly summarised in the December 2021 report. That section of the report is at [AB2/17] (full report at [AB2/17-29]). The full report is one of the documents which is included in the Rule 15(2A) application.

36. In relation to the reasons why that full report was not produced earlier, we have a witness statement from the Appellant dated 17 October 2023 ([AB2/1-4]) which is a response to the Respondent's Rule 15(2A) application but which we also understand to be relied upon in support of the Appellant's application to adduce the further evidence in the supplementary bundle produced for the hearing before us.

37. At [15] and [16] of the statement the Appellant says this:

> "15. The Home Office states that I did not provide a full picture of the offence and my history. However, I would like to state that I did not have in possession Italian Supreme Court document in full concerning my sentencing. This was always with my lawyer. I only have in my possession the court of appeals document rectifying my sentence. I neither had the full application to transfer my sentencing from Italy to the UK. I only have the receipt chasing the application dated 23.01.2020 and second 24.07.2020 and 03.10.2020. I have now provided evidence of this to my solicitor.
> 16. The SSHD is trying to paint picture that I withheld information or documents; however I was under the assumption that the SSHD had access to all these documents. At my hearing in December 2022, I was questioned about facts of my criminal case by the First Tier Tribunal Judge which I felt would only have been known to them if they had seen these documents. As such I truly believed that they had full knowledge of my offence, and yet still allowed my appeal."

38. That explanation raises more questions than it answers. Mr Rai pointed out that "my lawyer" in that statement refers to the Appellant's Italian lawyer. That is how we understood the reference. However, ordinarily, a document in the possession of a legal representative instructed by a party would be taken to be in that party's possession. We accept that the Appellant was not asked by Judge Seelhoff's direction of 5 December 2022 to produce documents about the nature of his offence; that direction was addressed to the Respondent. Nonetheless, the Appellant and his UK representatives could have been in no doubt following the Respondent's response that the Respondent did not have access (or at least did not realise she might have) to the documents from the Italian authorities save for those which were before Judge Seelhoff. In particular she did not have the court judgments. The Appellant and his

UK representatives must have known that following the Respondent's letter dated 6 December 2022 to which we refer above.

39. More worryingly, it is abundantly clear that the Appellant's legal representatives had access to the full OASys reports. They provided extracts in the bundles before Judge Seelhoff. There is no explanation for their failure to include the full reports which they have now done.

40. We accept of course that the Respondent could have obtained and produced those OASys reports (although may have assumed that she did not need to do so given that the Appellant had included at least part of them in his bundles). It is not clear to us why neither the Judge nor the parties' representatives queried why only part of those reports were in the bundles. It is however clear that the full reports were in the possession of the Appellant's representatives, and we have no explanation for why they were not produced in full.

41. We accept that the Civil Procedure Rules do not apply to proceedings before the Tribunal. Were it otherwise the Appellant's representatives would have been under a duty to provide the full reports as those were relevant and could assist the Respondent's case or undermine the Appellant's case. Mr Rai suggested that there would still be no obligation to disclose as the Appellant did not deny his offence. However, as we will come to, that depends on what the Appellant says is his offence. It is also no answer to say that the burden of establishing the extent of the public interest lies with the Respondent.

42. As we say, we accept that the CPR does not apply. However, the Appellant's legal representatives are officers of the court and owe a duty not to mislead the Tribunal irrespective of the disclosure test which applies. Since there is a crossover with the Respondent's first ground, we consider whether there has been any misleading of the Tribunal below.

43. For the time being, we repeat what we said about the Respondent's application. The December 2021 OASys report is a credible document which emanates from the UK Probation Service and speaks for itself. For reasons we come to below, we consider it to be a document which could have an influence on the outcome of the appeal and for those reasons, we admit that document (and the others included in the Appellant's supplementary bundle before us) in the exercise of our discretion.

Ground One

44. The thrust of the Respondent's first ground is that, in relation to the nature of the Appellant's offence, the Appellant misled the Tribunal and therefore is in breach of his "Kerrouche" duty.

45. We consider first the nature of this duty. It comes from what was said by the Court of Appeal in R v Secretary of State for the Home Department ex parte Kerrouche No 1 [1997] Imm AR 610 as follows:

> "…The obligation of the Secretary of State cannot be put higher than that he must not knowingly mislead. Before the Secretary of State could be said to be in that position, he must know or ought to have known that the material which it is said he should have disclosed materially detracts from that on which he has relied."
> [Mr Thomann's emphasis]

46. That principle is restated in CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC) ("CM") at [1] of the headnote. The Tribunal has also restated it more recently in BH (policies/information: SoS's duties) [2020] UKUT 189 ("BH") at [52] as follows:

> "Although, as we have seen, it has been prayed in aid in case law concerning policies, the true significance of the 'Kerrouche' duty not to mislead lies in its relationship with the law of disclosure. 'Kerrouche' and the House of Lords case of Abdi and Gawe, upon which it drew, concerned the unsuccessful attempt to import into asylum proceedings the principles of disclosure in civil litigation whereby a party can, in particular, be required to disclose to another party documents in the former's possession upon which he relies or which adversely affect his case. From this, 'Kerrouche' has fashioned the narrow but nevertheless important duty not to mislead. Its origins in the law of disclosure mean that the duty involves informing the other party about documents etc that the respondent knows (or ought to know) she has in her possession or control, which the other party does not have; or to which the other party does not otherwise have access. It does not extend to documents that are in the public domain. So much is, in our view, plain from the judgment of Laws LJ in CM."
> [Mr Thomann's emphasis]

47. Mr Thomann very fairly accepted that the authorities refer only to the Respondent's duty (although BH comes close to suggesting that the obligation is on both parties). We have already pointed out that there is an obligation on legal representatives as officers of the court not to mislead in their presentation of a party's case. In any event, we do not understand the Appellant in his Rule 24 response to dispute that the duty applies equally to him. His case is that he has not misled the Tribunal. We therefore go on to consider the Respondent's case in this regard and the evidence both before Judge Seelhoff and as it is now in relation to the nature of the offence.

48. The most convenient evidence about the nature and circumstances of the Appellant's offence is to be found in what the Respondent accepts is a fair summary of this in the December 2021 OASys report at [AB2/17] as follows:

> "Mr Scarpa has been convicted, together with other co-defendants, for the offences of the unlawful trafficking of large quantities of drugs across Europe.
> In June 2005 Law Enforcement agencies intercepted phone communications between two brothers, Pasquale and Vincenzo Scarpa and their nephew, Natale Cherillo which related to the exchange of 30,000 Euros for a quantity of illegal drugs. Further communications linked between the brothers and

two Romanian women indicated that a group were imminently travelling to Amsterdam together with calls which related to the purchase of drugs and transportation to Italy.

On 26/06/2005 intercepted phone calls between Mr Scarpa and his uncle, Pasquale Scarpa, indicated that there had been complaints about the quality of the drugs recently distributed and to refer the complaints back to the original supplier. Pasquale suggested that Mr Scarpa should come to Holland and assess the quality of them himself.

On 23/07/2005 intercepted phone calls between Mr Scarpa and Pasquale Scarpa suggested that he was travelling to Amsterdam and that he had a large amount of money which was to be used to purchase illegal drugs.

On 29/07/2005 intercepted phone calls indicated that drugs collected by Mr Scarpa would be handed over by him to the courier and transported back to Italy. Later that day it was confirmed that an exchange had taken place and that two individuals, Fioravente Balzone and his wife, Lucia Sautaniello would transport the drugs through Germany and into Italy in their Motorhome.

It was indicated that Mr Scarpa would return to Italy where he would organise the refinery of the drugs, whilst the other members of the group would wait for it to be passed to them.

On 01/08/2005 Pasquale Scarpa returned to Italy and was collected at the airport by Mr Scarpa who took him to a safe address in Locality Giuliano, Campania which Mr Scarpa had arranged for him. Whilst at the address Pasquale contacted Mr Balzone and his wife and indicated that they would be met at a certain junction of the motorway, just outside Naples, where they would be escorted to a safe address. Fioravente Balzone and his wife, Lucia Sautaniello were stopped by Italian Police between Rome and Naples close to the meeting place and following a search of their motorhome a large quantity of illegal drugs were recovered:

- 250.70kg of herbal Cannabis
- 577.39g of Cocaine
- 1598.04kg of MDMA crystals (0.02mg is used in the production of 1 Ecstacy Tablet)

Also seized were two mobile phones that indicated links to those also involved in the offences.

Police then carried out a search of the surrounding area and located Mr Scarpa at the motorway junction in his vehicle, a BMW X3 index CW804HM. Mr Scarpa was found in possession of two mobile phones which were identified to have been in contact with the phones found with Mr Balzone and his wife."

49. We also consider the following extracts from the OASys report (as now disclosed) to be of importance:

(1) [AB2/18] at [2.11] when considering whether the Appellant has accepted responsibility for the offence:

> "Mr Scarpa stated that he was not heavily involved in the offences of trafficking large quantities of illegal drugs across Europe from Holland to Italy. He stated that he was directed by his uncle to meet with people and direct them to meet in certain places and also acted as a driver for his uncle, Pasquale Scarpa and others linked with the group. The evidence obtained by Law Enforcement agencies indicates that he was an active member of the group at the time and that he would have been fully aware of his actions."

(2) [AB2/18] at [2.14]: Whilst recognising that the Appellant has no other convictions and represents a low risk, the report records that "Mr Scarpa accepts some responsibility for his actions, but plays down the full extent of his involvement in the wholesale trafficking of illegal drugs".

(3) [AB2/19] at [3.6]: the report records the linking of the Appellant's previous time in Amsterdam with the offence.

(4) [AB2/22] at [6.11]: the report notes the association of the Appellant's uncle with the Gallo Camorra Mafia gangs (although appears to accept that the Appellant's own family had no direct links with them).

(5) [AB2/23] at [7.5] under the heading "Recklessness and risk-taking behaviour":

> "Mr Scarpa stated that his index offences occurred in 2005 and that since that time he has not engaged in any other criminal activities. Mr Scarpa stated that prior to his offending and afterwards he has lived a pro-social lifestyle and that he was not linked with anyone involved in criminal behaviours. Mr Scarpa has no other recorded offences which is evidence to support his pro-social lifestyle. Mr Scarpa stated that during the short period of his life, whist he was living with his Uncle in Amsterdam, he allowed himself to become easily influenced to engage in criminal behaviour. His lifestyle at the time encouraged risk-taking behaviour, which is evidenced by being involved in the trafficking of large quantities of drugs from one country to another. Mr Scarpa stated that he was not physically involved in the couriering of either the drugs or the money, but that he was involved in the arranging of those involved. Mr Scarpa stated that he was aware that the group he was involved with had links to the criminal Mafia groups in Italy. He stated that he is fully aware of the history of these groups, the criminal activities involved and the risks of being associated with them, but that he was prepared to continue his offending…."

None of those parts of the OASys report were included in the Appellant's bundles before Judge Seelhoff.

50. The account of the offence in the OASys report (as also confirmed by the Italian court documents) falls to be compared with the Appellant's evidence about it. At [10] of his witness statement dated 26 August 2022 ([AB/1-8]) he says this:

> "I was first encountered by the Italian police on 2nd August 2005. I was randomly stopped and checked. I was then taken to the police station and was released shortly after. I was not questioned or informed of my offence. I now know that the investigation of the offence I was convicted of started in 2005, I had no knowledge of the investigation until the end of the 2013, when my representative received the Italian warrant arrest. My last electronic passport has been renewed from the Central Police Station, the same of the investigations above, in September 2012."

51. He goes on to summarise his offence at [18] of his statement as follows:

> "I was convicted to export fraudulent evasion of prohibition money to deliver to my uncle, to buy drugs, I must state that I have never been detected with drugs or prohibition money."

52. The Appellant's skeleton argument before Judge Seelhoff focusses on the brevity of the offending, the time passed since the offence and the Appellant's rehabilitation. There is no reference to the nature of the offence.

53. In terms of the Judge's understanding of the offence, we accept that he was aware that it was drugs related. He says as much at [1] of the Decision (taken it appears from the Respondent's decision under appeal, itself taken from the EAW). However, the only record of the evidence given by the Appellant in this regard is at [22] of the Decision where the Judge says this:

> "When asked if he accepted that he was guilty of the offence he said that he had made a mistake in being present with his uncle and that the court had thought he had brought money out of Italy but accepted that ultimately he was found guilty".

54. Even in his more recent witness statement (not before Judge Seelhoff) at [AB2/1-4], the Appellant says only this about his offence:

> "14. I made wrong choices when I was younger and was only 28 years old in 2005. I made the mistake to go against Italian law at that time. I regret my choices deeply. I never tried to hide this from the Home Office during the entire appeal process. I have always felt guilty. I served my time willingly and I only complained about the non-proportionality about my sentence which was initially 8 years and then brought down to 5 years. To my knowledge I gave truthful answers at my appeal hearing in December 2022. I never tried to hide the fact that there is a criminal offence in my past, as the Home Office has suggested."

55. The Appellant could not of course deny that he had been convicted of a criminal offence in Italy. He was extradited from the UK to Italy on an EAW. He was transferred from Italy to the UK to serve the latter part of his sentence. The issue is not whether he has admitted to an offence but whether he has admitted to the offence of which he was convicted or has misrepresented that offence. The latter is the Respondent's case.

56. The Respondent says that the Appellant has downplayed his offending (and therefore misled the Tribunal) in the following ways:

(1) The offence was one of the unlawful trafficking of a very large quantity of drugs (including Class A drugs) across countries. The Appellant says that his offence was only bringing money out of Italy for his uncle (although Judge Seelhoff did know that the offence was one of "export

fraudulent evasion of prohibition (drugs class other)"). The offence of which Judge Seelhoff was aware, however, did not encompass any understanding of the quantities involved or the level of the drugs.

(2) An aggravating feature of the offence was the link with Mafia gangs of which the Appellant admitted (to the Probation Service) that he was aware. That is not mentioned in the Appellant's evidence (save by oblique reference to "prohibition money").

(3) The Appellant did not admit to the level of his involvement in the offending. Indeed, the OASys report records that the Appellant had downplayed his involvement. He sought to suggest that he had only "brought money out of Italy". Whilst technically it may be correct to say that he "had never been detected with drugs or prohibition money" in the sense that he was never caught red-handed with either, according to the OASys report as taken from the Italian court documents, the Appellant was involved at some point in taking possession of the drugs in Amsterdam, passing them to a courier there and had intended to receive them in Italy in order to organise their refinery. Mr Rai suggested that the Appellant had admitted his involvement in the offence. There is however a significant difference between an offence of taking money with Mafia origins out of Italy which was then used to buy drugs and being involved in the organisation of the couriering of those drugs from Holland to Italy. It is worthy of note that the Appellant omits from his statement entirely that he lived in Amsterdam for a time with his uncle, a factor which the OASys report said had a bearing on his offending.

(4) The Appellant suggested that the stop by the police in Italy was random and that he knew nothing of the investigation until 2013. That may have been correct at that time. However, it is evident that, by the time of his statement, he was well aware of the details of the investigation which had led to the stop; they are set out in the OASys report which was in his possession and which his UK legal representatives also had.

(5) The Appellant was also responsible for finding a safe house for another of the gang members.

57. The misleading of the Tribunal can take place just as much by omission as by a positive assertion which is contrary to the truth. So much is clear from the reference in <u>CM</u> to the duty "not to mislead by <u>omission</u> of material..." (our emphasis). We accept the Respondent's argument that the Appellant has misled the Tribunal by omission of relevant facts about the nature and circumstances of his offence and the part he played in it. He failed to mention salient facts about the extent of the offence and even the nature of it and misrepresented his role in it.

58. The Appellant also submits that any omission makes no difference to the Decision and outcome. This is because, he says, the Judge was well aware of the seriousness of the offence and weighed that in the balance.

59. We have already noted that the Judge was aware that the Appellant's offence had a link to drugs. However, nowhere in the Decision is there any reference to the nature or quantity of drugs or that the offence involved the couriering of large quantities of drugs (including Class A) between countries (because the Judge did not have that evidence). Nor is there any reference to the Appellant's involvement in the couriering of drugs between Holland and Italy (because the Appellant admitted only that he had taken "money" out of Italy). The reference to "prohibition money" in the Appellant's witness statement may have indicated the involvement with Mafia gangs but it is not clear that the Judge understood that as there is no use of the word "prohibition" in the Judge's recording of the evidence at [22] of the Decision.

60. We accept that the Judge has taken account of the seriousness of the offence by reference to the length of sentence. However, as the Judge himself says at [28] of the Decision, the "only factor in favour of deportation" was the length of sentence. He had no evidence about the nature and circumstances of the offence beyond what the Appellant said. He was unaware that the offence involved the couriering of drugs between countries and, most importantly, of the Appellant's involvement in that couriering.

61. As the Respondent also points out by reference to the Court of Appeal's judgment in Gosturani (at [36]) "the seriousness of an offence cannot necessarily be measured by the sentence imposed by the foreign courts". As Mr Thomann submitted and we accept, the proportionality assessment in the case of a criminal convicted abroad is an intensely fact sensitive one.

62. Whilst the Judge cannot be criticised for his reliance on the length of sentence due to the failures of both parties to provide him with relevant documents, the further evidence produced on both sides (which we have admitted in our discretion) goes to the heart of the proportionality assessment.

63. The Judge was also not aware because he was not provided with the full OASys reports that the Probation Service, whilst concluding that the Appellant was a low risk and taking in his favour the matters on which the Appellant relies as to his offending, had also found that the Appellant had downplayed his involvement in the offence. That may well be relevant to a judicial consideration of any continuing risk.

64. Mr Thomann very fairly conceded that the new material would not necessarily change the outcome of the appeal. We accept however his submission that there is a "strong prospect" that the new material (produced by both sides) might make a difference. Ground one is therefore made out.

Ground Two

65. Strictly, given our conclusions on the first ground, we do not need to deal with the second. However, we do so for completeness. This ground rests on the Judge's conclusions in relation to the public interest, and in particular the importance of the Appellant's transfer back to the UK to serve the remainder of his sentence in 2021.

66. The circumstances of the Appellant's transfer back to the UK are evidenced by the following documents:

(1) Request by the Italian authorities for transfer of the Appellant to the UK (documents submitted by the Appellant on 20 December 2022 after the hearing but before the Decision).

(2) Warrant issued by the UK Ministry of Justice dated 2 November 2021 ([ABS/65-66]) ("the Warrant"). That is said to supersede a previous warrant, but the changes made appear to relate to the length of the remaining sentence and not to any other substantive amendments.

67. The Respondent's second ground centres on what was said by the Judge at [36] and [42] of the Decision as follows:

> "36. In terms of the Appellant's residence since his return in September 2021 I do consider that he had some degree of legitimate expectation that he would be allowed to remain in the UK given that the UK government facilitated his return to the country. Whilst there may be a mistake on the face of the papers in terms of his nationality, I am satisfied that he did not misrepresent his nationality when applying for repatriation. It is hard for the Respondent to argue that there is public interest in his removal when the UK government actively facilitated his return to the UK under what appear to be discretionary powers in the 1984 Act. Indeed if the Appellant is said to present a risk to the public in the UK something went very wrong when a decision was taken to bring him back to the UK.
>
> ....
>
> 42. In my assessment the determining factor in this case is the positive decision on the part of the UK government to bring the Appellant back to the UK to complete a sentence here based on what must have been his family life. I note that I expressly invited Ms Kugendran to make submissions on this issue and she said she had nothing to add to the reasons for refusal letter which does not address the point at all. Ms Kugendran was unable to tell me whether it was a mistake that the Appellant was brought back and so I have to proceed on the basis that it was a conscious and considered choice to bring the Appellant back under the discretionary provisions and having made that decision the UK government must stand by it as to do otherwise would not be proportionate. There is no public interest in the UK government acting capriciously and inconsistently as it undermines the integrity of the systems of immigration control."

68. In relation to what is said at [36] of the Decision, the Respondent submits that for a substantive legitimate expectation to arise there needs to be a "clear and unambiguous undertaking". If such an undertaking is given, "the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so". Those principles are derived from the Supreme Court's judgment in Re Finucane's application for judicial review [2019] UKSC 7 at [62]. We accept that they apply. In this case, there is no evidence of any undertaking having been given to

the Appellant that he would be entitled to remain in the UK after serving the remainder of his sentence. The Appellant does not say that any such undertaking has been given.

69. The Judge's findings in this regard are further undermined by the following factors:

(1) The decision to allow the Appellant to serve the remainder of his sentence in the UK was made by the Ministry of Justice and not by the Secretary of State for the Home Department. The Ministry of Justice is not responsible for immigration control and the decision was not made under the Immigration Acts.

(2) There was therefore no acceptance by the Respondent, express or implied, that the Appellant would be able to remain in the UK once he had served his sentence.

70. We would add to those reasons which are relied upon by the Respondent, that, on the face of the Warrant, there is no evidence of any undertaking being given, whether express or implied. Importantly also in our view there is no evidence of any discretion being exercised by the decision maker.

71. As Judge Seelhoff recorded at [12] of the Decision, there is a power to accept the transfer of prisoners under the Repatriation of Prisoners Act 1984 if they are (section 6) (a) British or (b) "the transfer appears to the relevant Minister to be appropriate having regard to any close ties which that person has with the United Kingdom". It is clear on the face of the documents that the Italian authorities were seeking a transfer under section 6 (b). We accept that one of the documents from the Italian authorities does refer to having transmitted "information relating to [the Appellant's] family ties with British territory".

72. However, the Warrant itself refers to the Appellant as a British citizen. The best explanation which Mr Thomann was able to offer on instructions was that the Ministry of Justice may have thought that, as an EU national, the Appellant was entitled by reason of his length of residence to permanent residence (an argument which was not pursued before Judge Seelhoff – see [16] of the Decision). We also accept as the Judge found that the Appellant "did not misrepresent his nationality".

73. As Mr Rai submitted and we accept, whether to accept the Appellant under section 6(b) was a matter of the exercise of a discretion by the UK authorities. However, on the face of the Warrant there is no indication of any exercise of a discretion. The evidence such as it is does not show that the decision-maker at the Ministry of Justice decided in his discretion to accept the Appellant's transfer rather than making a mistake. Far from showing that the Ministry of Justice "actively facilitated [the Appellant's] return to the UK under what appear to be discretionary powers in the 1984 Act", the evidence shows that the decision-maker made an error of fact or law in permitting the transfer.

74. In any event, as the Respondent points out, this was not a decision made by or on behalf of the Respondent in the exercise of her immigration powers. The Appellant was not invited to make representations as to his Article 8 rights to remain in the UK until after his sentence was completed. Put another way, there is no evidence that the person who decided to issue the Warrant was considering any balance between the long-term residence of the Appellant and his family in the UK against the public interest in deportation.

75. For those reasons, we are satisfied that the Judge took into account an irrelevant consideration by placing reliance on the Warrant as indicative of some form of undertaking given to the Appellant that he would be permitted to remain in the UK following the completion of his sentence. Certainly, it could not be determinative of the proportionality balance as the Judge suggests. Neither does it suggest any inconsistent decision making. The Warrant was issued by a different Secretary of State exercising different powers under different legislative provisions. The Respondent’s second ground is also made out.

76. Mr Thomann also pointed out that, when attributing weight to the interests of the Appellant’s child, the Judge has wrongly assumed that she is “almost certainly British” ([41]). Mr Thomann informed us that an application has been made for her registration as a British citizen, but she was not in fact one at the time of the hearing before Judge Seelhoff. The evidence indicates that the Appellant’s child is in fact a national of Lithuania (as her mother) ([AB/19]) albeit both mother and child now have settled status under the EUSS.

CONCLUSION

77. The Respondent has made out her case on both grounds. The Decision contains errors of law as set out above.

78. We invited both parties to indicate whether they considered that the appeal should be retained in the Tribunal for re-making or remitted to the First-tier Tribunal. Both parties submitted that the appropriate course would be remittal. Having carefully considered the relevant Practice Direction we agree. No findings of fact can be preserved in light of the new evidence. Accordingly, the appeal will require to be redetermined entirely de novo. It is more appropriate that this is done by the First-tier Tribunal.

NOTICE OF DECISION

The decision of Judge Seelhoff promulgated on 20 December 2022 contains errors of law which are material. We set that decision aside and remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Seelhoff.

L K Smith

Upper Tribunal Judge Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 October 2023