IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001178

First-tier Tribunal No: EA/05158/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 23 June 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALI LIKA

Respondent

(ANONYMITY ORDER NOT MADE)

Representation:
For the Appellant: Ms S. Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr D. Bazini, instructed by Warren Grant Immigration

Heard at Field House on 12 June 2023

DECISION AND REASONS

1. For the sake of continuity, I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The original appellant (Mr Lika) appealed the respondent's (SSHD) decision dated 01 March 2021 to refuse to issue a residence card recognising a right of residence as the 'family member' of an EEA national on public policy grounds. The appeal was brought under The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016'). The ground of appeal was whether the decision breached the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom.

3. First-tier Tribunal Judge Mill ('the judge') allowed the appeal in a decision sent on 22 February 2023. The judge noted that the burden of proof was on the respondent to show that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society [5]. The judge

went on to summarise relevant aspects of the EEA Regulations 2016, including quoting regulation 27(5) and paragraph 7 of Schedule 1 [11]-[12].

4. The judge heard evidence from the appellant and his wife, who is a Greek citizen. He found them to be credible witnesses [14]. The judge summarised the course of events since the appellant left Albania in 2013. He noted that the appellant entered France illegally, where it is known that he committed serious criminal offences assisting a smuggling/trafficking gang. The appellant entered the UK illegally in 2015. He was arrested in February 2016 on an Interpol arrest warrant. The judge recorded that the appellant resisted extradition to France and remained in prison for around a year. He was extradited to France in March 2017. The appellant was convicted of facilitation of unauthorised entry and residence, laundering the proceeds of crime, and knowingly taking part in non-criminal activities of a criminal gang on 20 July 2017. He was sentenced to five years' imprisonment. The evidence showed that the appellant's sentence was reduced. He was released early on parole on 15 February 2019 and removed to Albania [16]-[18].

5. The appellant continued to commit breaches of immigration law. He said that he entered the UK illegally for a second time in May or June 2019 [19]. On 17 August 2019 he was convicted of using a vehicle while uninsured and driving otherwise that in accordance with a licence. His licence was endorsed and he was ordered to pay various penalties [20]. The appellant said that he met his wife online. She moved to the UK in October 2019 only a few months later. The couple married in December 2019, only a couple of months after they first met in person. It was accepted that the appellant's wife was exercising rights of free movement in the UK [21]-[22].

6. The judge summarised the main reasons given by the respondent for refusing the application [23]. It is clear he considered the content of the decision letter. The judge went on to conduct a detailed analysis of evidence that was produced by the appellant from an advocate in France, which went to the issue of rehabilitation [24]-[29]. He found that the process in France was designed to assess whether the appellant was sufficiently rehabilitated such that he no longer represented a threat to public order. He considered that the fact that the appellant was released on parole early was a matter that he could take into account when assessment whether the appellant continued to pose a genuine, present and sufficiently serious threat for the purpose of the EEA Regulations 2016 [29].

7. The judge gave due weight to the appellant's further unlawful behaviour in entering the UK illegally for a second time. He concluded that this behaviour conflicted with his claimed rehabilitation before his release from prison. However, the judge took into account a range of evidence before him, including the appellant's behaviour since the relatively minor conviction in the UK in 2019 and evidence that showed that he had made efforts to integrate in the UK. He noted that there was no evidence to show that the appellant had returned to the type of criminal activity he was convicted of in 2017. He also found that the appellant's family life with his wife was likely to be a significant protective factor weighing heavily against the commission of further offences. Having considered the evidence in the round, the judge concluded that the respondent had failed to discharge the burden of showing that the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and concluded that the decision was disproportionate [32]-[38].

8. The Secretary of State applied for permission to appeal to the Upper Tribunal. The grounds make a series of submissions on the facts and are not clearly particularised. Ms Cunha drew out the following points in her submissions at the hearing:

   (i) The First-tier Tribunal failed to give adequate weight to the wider public interest considerations contained in paragraph 7 Schedule 1 of the EEA Regulations 2016.

   (ii) The First-tier Tribunal failed to give adequate reasons for concluding that the appellant did not represent a threat given the serious criminal conviction for facilitating breaches of immigration control with an organised crime group and his own repeated breaches of immigration control by way of illegal entry.

9. I have considered the First-tier Tribunal decision, the evidence that was before the First-tier Tribunal, the grounds of appeal, and the submissions made at the hearing, before coming to a decision in this appeal. It is not necessary to summarise the oral submissions because they are a matter of record, but I will refer to any relevant arguments in my findings.

Decision and reasons

10. When analysed, I find that the respondent's case outlines disagreements with the outcome of the appeal. The grounds do not disclose material errors of law. It is likely that other judge might not have made the same decision, given the severity of the offence committed in France, and the appellant's repeated disregard for immigration law. However, Judge Mill's findings were made with proper self-directions to the law and were within a range of reasonable responses to the evidence.

11. The first ground asserts that factors contained in paragraph 7 of Schedule 1 to the EEA Regulations 2016 were not considered properly. Clearly this is not the case when the judge quoted paragraph 7 in full in his decision. That part of the regulations merely identifies factors considered to be 'fundamental interests of society' for the purpose of the test contained in Article 27 of the Citizens' Directive (2004/38/EC) and Regulation 27 of the EEA Regulations 2016. The Directive does not identify what the 'fundamental interest of society' are. It is open to the respondent to define what she considers them to be so long as the provisions contained in the EEA Regulations 2016 conform with EU law.

12. All that Article 27 of the Directive requires is that the person represents a threat 'affecting' one of the fundamental interests of society. Article 27(2) makes clear that measures taken on public policy grounds must be based exclusively on the personal conduct of the individual concerned and that previous criminal convictions shall not in themselves constitute grounds for taking measures on grounds of public policy. It goes on to state that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

13. All that regulation 27(8) of the EEA Regulations 2016 requires a court or tribunal to do is to 'have regard' to the considerations contained in Schedule 1. Neither that regulation nor Schedule 1 itself states that a particular weight must be given

to those factors. The only requirement of EU law is that the threat represented by a person affects one of the fundamental interests of society. Contrary to what seems to have been argued by the respondent, the factors contained in Schedule 1 do not form part of a balancing exercise between the individual's circumstances and weight to be given to public interest considerations of the kind that is conducted under Article 8 of the European Convention. EU law makes clear that wider considerations are not relevant to the assessment.

14. Many of the same factors might be considered within the assessments undertaken under Articles 27-28 and Regulation 27 as would be considered in an Article 8 assessment. However, the assessment of proportionality under EU law depends on the context and is not the same as a balancing exercise under Article 8 where weight might be attributed to wider public interest considerations: see *R (on the application of Lumsdon and others) v Legal Services Board* [2015] UKSC 41; [2016] AC 697.

15. It is clear from the decision that the judge was fully aware of the fact that the criminal offence and other repeated breaches of immigration law were matters that affected fundamental interests of society. Not only did he quote paragraph 7, but it is self-evident that such behaviour affects fundamental interests such as preventing unlawful immigration, abuse of immigration law, and maintaining public order. The judge made clear at [30] and [32] that the appellant's past behaviour was serious and he took these negative factors into account.

16. The key test that the judge was required to consider was whether the appellant represented a genuine, present and sufficiently serious threat at the date of the hearing. In relation to this assessment, it was open to the judge to consider detailed evidence about the process of the appellant's early release in France, which was based on deemed rehabilitation. It is clear that the judge was aware of the subsequent breach of immigration law when the appellant returned to the UK illegally in 2019. Nevertheless, it was open to the judge to take into account the fact that there was no evidence to suggest that the appellant had committed offences of a similar kind since 2019. It was also open to the judge to explain why the appellant's marriage was a positive and protective factor and to highlight other evidence that was suggestive of rehabilitation in the UK.

17. The reasons why the judge concluded that the respondent had failed to show that the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society were adequately explained with reference to the correct legal framework.

18. For the reasons given above, I find that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

Notice of Decision

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

The decision shall stand

M.Canavan
Judge of the Upper Tribunal

Immigration and Asylum Chamber

14 June 2023