IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-003476
UI-2022-003516

First-tier Tribunal Nos:
EA/14412/2021
IA/14853/2021

EA/53532/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 02 February 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR MOHAMED ABDIAZIZ FARAH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms H Radford, Counsel, instructed by Turpin & Miller LLP
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 22 December 2022

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I have referred hereinafter to the parties as they were described before the First-tier Tribunal.

2. The Secretary of State appealed against the decision of First-tier Tribunal Judge O'Garro promulgated on 10th June 2022 allowing the appellant's appeal against a decision under the Immigration (European Economic Area) Regulations 2016

("the EEA Regulations") dated 28th September 2021 to deport him from the United Kingdom. That decision was taken following his five convictions for eight offences between 11th August 2016 and 27th July 2018. These included a conviction on 11th August 2016 for possession of cocaine with intent to supply whereupon the appellant was sentenced to two years in prison suspended for eighteen months. He was then convicted on 26th August 2016 for possession of a knife in a public place and sentenced to twelve weeks suspended for six months.

3. Finally, he was convicted on 27th July 2018 for conspiracy to supply heroin and cocaine and a breach of suspended sentence (the index offence). For that he was sentenced to eight years and six months.

The First-tier Tribunal decision

4. In the First-tier Tribunal decision the judge reasoned at [46] that

> *"The key question for me to determine is whether the links the appellant formed in the UK prior to imprisonment have been maintained and whether he is entitled to the highest level of protection against removal".*

5. The judge considered between [46] and [75] whether those integrative links had been broken, having accepted at [44] that the appellant had ten years' residence counting back from the date of the order. At [77] the judge found the appellant was entitled to "enhanced protection requiring the respondent to show 'imperative grounds of public policy'". The judge said this at [79] to [82]:

> *"79. There first must be a threat to public security. As confirmed by the ECJ in Tsakouridis, this includes internal and external security and matters such as a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations, or to peaceful coexistence of nations, or a risk to military interests may affect public security. In Tsakouridis, the ECJ held that trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or large part of it.*
>
> *80. In considering whether the appellant's offending is a threat to public security, I can take into account the appellant's most recent offending which resulted in his conviction of conspiracy to supply class A drugs. Although this represents an escalation in the appellant' offending behaviour, it cannot be said that the nature of this offence or any previous offences affect public security.*
>
> *81. The ECJ in P.I (Imperative grounds of public security) [2009] EUECJ C-348-09 held that it was open to member states to consider those crimes referred to in Article 83(1) of the Treaties of the European Union (TFEU) to constitute a particularly serious threat to the fundamental interests of society and are capable of justifying a decision on 'imperative grounds of public security' provided the manner in which such offences were committed disclose particularly serious characteristics and the individual in question poses a genuine, present and sufficiently serious threat. The areas of crime covered by Article 83(1) of the TFEU are terrorism, trafficking in human beings and sexual*

exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Although this is a non-exhaustive list, the nature of the index offence, cannot reasonably be said to fall into this category.

82. I therefore do not find that the respondent has established that the appellant's offending behaviour threatens public security in any way, let alone that 'imperative grounds of public security' exist. The appellant's appeal thus succeeds".

6. The Secretary of State appealed on the following grounds:

Ground 1: Inadequate reasoning

7. It was submitted the judge had adequately failed to reason why she concluded that the appellant's offending was insufficient to meet the required imperative grounds threshold. The case of **Land Baden-Wurttemberg v Tsakouridis (Directive 2004/38/EC Case C-145/09** found trafficking narcotics as part of an organised group could meet this threshold and the judge failed to articulate why in the appellant's case his offending fell short other than a bare and unreasoned assertion that "it cannot be said that the nature of this offence or any previous offences affect public security" at [80]. In **Tsakouridis** the ECJ reasoned between [41] and [47] the following:

"41 The concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words 'imperative reasons'.

42 It is in this context that the concept of 'public security' in Article 28(3) of Directive 2004/38 should also be interpreted.

43 As regards public security, the Court has held that this covers both a Member State's internal and its external security (see, inter alia, Case C-273/97 Sirdar [1999] ECR I-7403, paragraph 17; Case C-285/98 Kreil [2000] ECR I-69, paragraph 17; Case C-423/98 Albore [2000] ECR I-5965, paragraph 18; and Case C-186/01 Dory [2003] ECR I-2479, paragraph 32).

44 The Court has also held that a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (see, inter alia, Case 72/83 Campus Oil and Others [1984] ECR 2727, paragraphs 34 and 35; Case C-70/94 Werner [1995] ECR I-3189, paragraph 27; Albore, paragraph 22; and Case C-398/98 Commission v Greece [2001] ECR I-7915, paragraph 29).

45 It does not follow that objectives such as the fight against crime in connection with dealing in narcotics as part of an organised group are necessarily excluded from that concept.

> *46 Dealing in narcotics as part of an organised group is a diffuse form of crime with impressive economic and operational resources and frequently with transnational connections. In view of the devastating effects of crimes linked to drug trafficking, Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ 2004 L 335, p. 8) states in recital 1 that illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the Union, and to the legal economy, stability and security of the Member States.*
>
> *47 Since drug addiction represents a serious evil for the individual and is fraught with social and economic danger to mankind (see, to that effect, inter alia, Case 221/81 Wolf [1982] ECR 3681, paragraph 9, and Eur. Court H.R., Aoulmi v. France, no. 50278/99, § 86, ECHR 2006'I), trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it".*

8. It was submitted that the judge failed to engage with the substance of the appellant's index offence as set out in the sentencing remarks and failed to have regard as to how the appellant's criminal enterprise affected "the functioning of the institutions and essential public services and the survival of the population".

9. In this regard the sentencing remarks confirmed that the appellant had a leading/significant role in the county lines "Smithy Lines" gang which operated out of London supplying cocaine/crack and heroin to addicts in Aldershot and Basingstoke. The operation was run by the appellant and three others, and the proceeds were shared amongst them. The gang organised "runners" who delivered the drugs and the gang cuckooed the home of a vulnerable individual, a drug user with mental health problems, and used his bank account.

10. The Crown Court found "these sorts of drug operations do enormous damage to the communities that they target. Class A drugs bring misery and broken lives to others but easy money to you". Equally, it was self-evident from the sentencing remarks that a considerable police operation was required to bring the gang down.

11. It was submitted that none of this was substantively considered by the judge when assessing "imperative grounds" and as such it was not possible to understand upon what basis the judge found the appellant's offending behaviour was insufficient.

12. It was of note that the judge failed to go on and make any substantive findings as to whether the appellant in fact represented a genuine, present and sufficiently serious threat to a fundamental interest of society.

Ground 2: Erroneous consideration of the EUSS refusal

13. It was submitted for the reasons set out under ground 1 that the judge's findings at [84] in relation to the EUSS refusal were necessarily infected and therefore unsustainable.

The Hearing in the Upper Tribunal

14. At the hearing before me Mr Melvin referred to **Tsakouridis** and submitted that the European Court's key findings were at [45] to [49] and the judge had omitted the relevant part from her decision. The appellant was part of an organised crime network and received an eight year prison sentence which reflected that he was in charge and instrumental in the employment of the gang that used runners to transport drugs to the Home Counties. The judge had simply not engaged with the direction in **Tsakouridis**.

15. Ms Radford submitted that [80] should not be read on its own. Paragraph [66] was a discussion on integrative links and referred to the appellant having a low risk of violent reoffending, but the judge acknowledged that it was a serious offence. The judge merely said she was not going to rehearse the evidence but was clearly aware of the nature of the offending having sight of the OASys Report. The Secretary of State had not identified something about the facts that showed there was such a level of offending which threatened that aspect of public security. She also referred to the appellant's Rule 24 reply.

16. This submitted that the judge was not required to rehearse every detail of the index offence and the judge noted the offence at section 3 and 19 and again at 39. The judge had clearly engaged with the substance of the offence in order to be able to address the seriousness of the offence from [65] to [66] of the determination. The judge throughout quoted from different sections of the OASys Report and this showed the judge engaged with the details of the offending. The judge engaged with the documents uploaded to the CCD.

17. Further, any error was immaterial; there needed not simply to be a serious matter of public policy but an actual risk to public security so compelling that it justified an exceptional course of removing someone who was integrated. The severity of an offence could only be the starting point for consideration of imperative grounds but there needed to be something more, **VP (Italy) v Secretary of State for the Home Department [2010] EWCA Civ 806**. There was nothing more identified. Further the focus should be on the risk of reoffending.

18. The imperative grounds threshold was explicitly addressed in **VP (Italy)** and the Court of Appeal endorsed **LG (Italy) v Secretary of State for the Home Department [2008] EWCA Civ 190** and it was held that imperative grounds of public security required not simply a serious matter of public policy but an

> *"**actual risk** to public security so compelling that it justified an exceptional course of removing someone who had become integrated by many years' residence in the host state. The severity of the offence could be a starting point consideration but there had to be something more to justify a conclusion that the removal was imperative to the interests of public security".*

19. In response to the assertion that the judge failed to adequately reason why she concluded that the appellant's offending was insufficient to meet the required imperative grounds threshold and was other than a "bare and unreasoned assertion that '… it cannot be said that the nature of this offence or any previous offences affect public security'", it was correct that the judge did explicitly state that at [80], but it was submitted that was incorrect to suggest this was the only thing the judge took into account.

20. After considering the seriousness of the offence at [65] to [66] the judge considered the appellant's remorse, his behaviour in prison and rehabilitation and the risk of reoffending and risk of harm. The findings were set out from [68] to [72].

21. The judge explicitly stated at [81] the following:

> *"The ECJ in P.I (Imperative grounds of public security) [2009] EUECJ C-348-09 held that it was open to member states to consider those crimes referred to in Article 83(1) of the Treaties of the European Union (TFEU) to constitute a particularly serious threat to the fundamental interests of society and are capable of justifying a decision on 'imperative grounds of public security' provided the manner in which such offences were committed disclose particularly serious characteristics and the individual in question poses a genuine, present and sufficiently serious threat. The areas of crime covered by Article 83(1) of the TFEU are terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Although this is a non-exhaustive list, the nature of the index offence, cannot reasonably be said to fall into this category".*

22. The judge did not find the appellant to be a present or serious threat. It was said that the determination needs to be read as a whole.

23. The respondent quoted from **Land Baden-Wurttemberg v Tsakouridis** and concluded that the judge failed to have regard to how the appellant's criminal enterprises affected the "functioning of the institutions and essential public services and the survival of the population". However, the case of **Tsakouridis** did not state the criminal offending similar to the appellant's "necessarily effected" functions of institutions and essential public services and the survival of the population. It simply said that the fight against crime in connection with dealing in narcotics as a part of an organised group were "necessarily excluded". This required the judge not to automatically exclude the offence, but she did not. She considered the seriousness of the case. Tests for imperative grounds involves demonstrating there was

> *"something more, in scale or kind, to justify the conclusion that the individual poses 'a particularly serious risk to the safety of the public or a section of the public ... there needs to be some threat to the public or a definable section of the public sufficiently serious to make expulsion 'imperative' and not merely desirable as a matter of policy in order to ensure the necessary differentiation from the second level".*

The evidence and the judge's finding demonstrated that any threat was not so serious owing to rehabilitation considerations as to demonstrate that expulsion was imperative and not merely desirable.

Analysis

24. One of the key considerations in the grounds to the First-tier Tribunal was whether the appellant had the highest level of protection, that is, there should be "imperative grounds" for his expulsion in accordance with the EEA Regulations.

The respondent did not accept that the appellant automatically qualified for protection on imperative grounds of public security.

25. The judge set out the issues at [28] being:

(1) Has the appellant resided in the UK for ten years and does he qualify for the enhanced protection of Regulation 27(4) relating to imperative grounds of public security?

(2) Can the Secretary of State show there are imperative grounds which justify the deportation?

(3) If not, could the respondent show the personal conduct of the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society?

(4) Would it be a breach of Article 8?

26. The judge then set out the relevant law from [37] onwards and commenced her findings at [38]. She identified at [39] that the appellant was convicted of conspiring to supply controlled drugs class A heroin and crack cocaine for which he was sentenced to a total of eight and a half years' imprisonment. She identified at [44] that the respondent did not accept he qualified for the enhanced ground of protection, and then stated at [46]: "The key question for me to determine is whether the links the appellant formed in the UK prior to imprisonment have been maintained and whether he is entitled to the highest level of protection against removal". The judge then directed herself in accordance with the relevant case law from [47] to [61]. As the judge stated at [61] she went on to consider the appellant's integrative links.

27. The consideration at [73] of the rehabilitation courses, the motivation at [74] and the OASys Report at [75] were all focused on whether the appellant had broken the

> *"strong integrative links to the UK acquired through his length of residence were significantly weakened during his offending period but taking into account the circumstances that led to the appellant's offending, his acceptance of responsibility for his behaviour demonstrated by his motivation to rehabilitate himself, in doing courses".*

28. The judge stated that she "found that his links to the UK were not so severed as a result of his detention". Thus, the majority of the reasoning of the judge is focussed on the assessment of what level of protection the appellant is entitled.

29. It is only at [78] to [82] that the judge addressed the reason why she concluded that the appellant's offending was insufficient to meet the required imperative grounds threshold. At [78] she states that the case law 'makes clear that there must be exceptional circumstances' but thereafter the judge departs from and does not apply **Tsakouridis**. At [79] she did not set out the relevant and, for this purpose material, paragraphs of **Tsakouridis** or indeed anywhere else in the decision and which are as follows:

> *"46 Dealing in narcotics as part of an organised group is a diffuse form of crime with impressive economic and operational resources and*

frequently with transnational connections. In view of the devastating effects of crimes linked to drug trafficking, Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ 2004 L 335, p. 8) states in recital 1 that illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the Union, and to the legal economy, stability and security of the Member States.

47 Since drug addiction represents a serious evil for the individual and is fraught with social and economic danger to mankind (see, to that effect, inter alia, Case 221/81 Wolf [1982] ECR 3681, paragraph 9, and Eur. Court H.R., Aoulmi v. France, no. 50278/99, § 86, ECHR 2006'I), trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it.

48 It should be added that Article 27(2) of Directive 2004/38 emphasises that the conduct of the person concerned must represent a genuine and present threat to a fundamental interest of society or of the Member State concerned, that previous criminal convictions cannot in themselves constitute grounds for taking public policy or public security measures, and that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention cannot be accepted.

49 Consequently, an expulsion measure must be based on an individual examination of the specific case (see, inter alia, Metock and Others, paragraph 74), and can be justified on imperative grounds of public security within the meaning of Article 28(3) of Directive 2004/38 only if, having regard to the exceptional seriousness of the threat, such a measure is necessary for the protection of the interests it aims to secure, provided that that objective cannot be attained by less strict means, having regard to the length of residence of the Union citizen in the host Member State and in particular to the serious negative consequences such a measure may have for Union citizens who have become genuinely integrated into the host Member State".

30. Curiously the judge stated at [79] that in **Tsakouridis** the ECJ held that trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm of physical security of the population as a whole or a large part of it but she ignores this principle in **Tsakouridis**. The judge's analysis of the appellant's offending is confined to [80] where she states:

"Although this represents an escalation of the appellant's offending behaviour, it cannot be said that the nature of the offence or any previous offences affect public security".

31. This goes no way towards engaging with the relevant propositions in **Tsakouridis** and seemingly contradicts **Tsakouridis**. The decision fails to analyse properly the offending of the appellant in this regard or indeed whether there was anything "more" as submitted in the Rule 24 report. The Rule 24

attempts to set out the reasoning as to why the appellant had not reached this threshold but that is not apparent from a reading of the First-tier Tribunal decision.

32. Indeed at [81] the judge recorded that **PI (Imperative grounds of public security) [2009] EUECJ C-348-09** held it was

> '*open to member states to consider those crimes referred to in Article 83(1) of the Treaties of the European Union (TFEU) to constitute a particularly serious threat to the fundamental interests of society and are capable of justifying a decision on 'imperative grounds of public security' provided the manner in which the offences were committed disclose particular serious characteristics and the individual in question poses a genuine, present and sufficiently serious threat*'.

33. Curiously, however, as the judge herself recorded at [81] the areas of crime specifically covered by Article 83(1) include "illicit drug trafficking" and "organised crime". The judge then proceeded to conclude that "the nature of the index offence cannot reasonably be said to fall into this category". Not only did the judge not explain why that is the case, bearing in mind the nature of the offences recorded, but appeared to forget that the index offence was indeed illicit drug trafficking and also apparently organised crime.

34. As pointed out in the grounds the Crown Court found that the appellant had a leading/significant role in a county lines group which operated out of London supplying crack cocaine and heroin to addicts in Aldershot and Basingstoke. The operation was an organisation run by the appellant and three others and the proceeds were shared, and indeed the gang used runners who had also "cuckooed the home of the vulnerable individual and used his bank account". None of this was engaged with. There was no proper engagement with the sentencing remarks.

35. I find that the judge simply failed to make a proper analysis of the relevant elements required when assessing imperative grounds and it was not possible to understand on what basis the judge found the appellant's offending behaviour insufficient. Notwithstanding there was an analysis of offending, including from the OASys report for the purposes of integrative links, there was no adequate analysis in line with **Tsakouridis**, **LG (Italy)** or **VP (Italy)** bearing in mind the appellant was found, in December 2020, to pose a medium risk of reoffending. It was violent reoffending for which he posed a low risk. Indeed, the judge herself stated there had been 'an escalation in the appellant's offending behaviour'.

36. Overall, the judge failed to give adequate reasoning for her conclusions.

37. As such, the second ground is also made out because that clearly, as Mr Melvin stated, was dependent on the first ground.

38. The grounds of appeal by the Secretary of State did not challenge the finding by the judge that the appellant had secured the highest level of protection ie 'imperative grounds' and that conclusion, that is paragraph 77 only, will be preserved, for the purposes of the remittal hearing. Both representatives requested that the matter be remitted to the First-tier Tribunal for redetermination.

39. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Helen Rimington

Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber

1st February 2023