IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001940

First-tier Tribunal No: EA/00026/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 31 July 2024

Before

UPPER TRIBUNAL JUDGE SHERIDAN
UPPER TRIBUNAL JUDGE BULPITT

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JAROSLAW BAKULA

Respondent

(NO ANONYMITY ORDER MADE)

Representation:
For the Appellant: Mr T Melvin – Senior Home Officer Presenting Officer
For the Respondent: Ms A Kowalik – Kowalik Law

Heard at Field House on 22 July 2024

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State for the Home Department, against the decision of First-tier Tribunal Judge Robinson (the Judge) promulgated on 10 April 2024 in which she allowed Mr Bakula's appeal against the decision of the Secretary of State to make a deportation order against him following his conviction and sentence for an offence of causing death by dangerous driving. To avoid confusion, although it is the Secretary of State who brings this appeal, in this decision we will refer to the parties as they were in the First tier Tribunal where Mr Bakula was the appellant and the Secretary of State was the respondent.

2. The Judge made an anonymity order to protect the identity of the victim of the offence which led to the deportation order, and the identity of children related to the appellant. We can see no lawful basis for maintaining this order in view of the

public interest in open justice and the fact that details of the offence which gave rise to this matter, including details of the victim and the appellant, have already been reported in the media. We do not consider that open justice requires us to refer to children by name and where necessary we will refer to relevant children by initial only.

3. The hearing of this appeal was "hybrid" with Upper Tribunal Judge Sheridan sitting remotely via Cloud Video Platform (CVP) due to testing positive for Covid, while Judge Bulpitt and both parties were present in the Courtroom. No issues of communication arose as a result of proceeding in this way. Both Mr Melvin and Ms Kowalik provided us with helpful skeleton arguments for which we are grateful, and they each made oral submissions in line with those arguments. At the end of the hearing we reserved our decision which we now provide.

Factual Background

4. On 28 October 2019 the appellant was granted limited leave to remain in the United Kingdom under the European Union Settlement Scheme (EUSS) which was valid until 29 October 2024. On 13 July 2020 he committed the offence of causing death by dangerous driving. That offence occurred when he fell asleep while he was working as a delivery driver and was in control of a Sprinter van, leading to his van crossing the carriageway and colliding first with another van which had been travelling in the opposite direction, and then with a car which was being driven by 62 year old Steven West. Mr West was killed as a result of the collision and his son who was also in the car was injured. Tests revealed that at the time he was driving the appellant had amphetamine in his blood. The appellant pleaded guilty to the offence and on 27 January 2023 he was sentenced to five years imprisonment. He continues to serve the custodial element of that sentence.

5. As a result of the appellant's conviction and sentence, on 13 December 2023 the respondent took the decision to deport the appellant applying the Immigration (European Economic Area) Regulations 2016, which, although generally repealed following the United Kingdom's departure from the European Union, were preserved in respect of the appellant because he had been granted leave to remain under the EUSS and the offence occurred before the end of the implementation period following the United Kingdom's departure from the European Union. At the same time the respondent refused the appellant's human rights claim. The appellant appealed against that decision and his appeal was heard by the Judge on 11 March 2024.

The Judge's decision

6. The Judge promulgated her decision on 11 April 2024. In that decision the Judge noted at [12(c)] that the parties were in agreement that the appellant was entitled to the medium level of protection against deportation provided by Regulation 27(3) of the 2016 Regulations so that deportation could only be justified on serious grounds of public policy and public security. Having done so the Judge considered whether such grounds existed but concluded at [29] that the threshold of serious grounds of public policy and public security justifying deportation had not been met, finding that the appellant does not present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. She also went on to find in the same paragraph that it would not in these circumstances be proportionate to deport the appellant and allowed his appeal.

The respondent's appeal to the Upper Tribunal

7. The respondent sought permission to appeal on two bases: (a) that the Judge's conclusion that the appellant did not pose a sufficiently serious threat to the fundamental interests of society, involved a material misdirection of law and (b) that the Judge's conclusion that deportation would not be proportionate involved a material misdirection of law.

8. In respect of ground (a) the respondent argued that the Judge erred in law when conducting her assessment of the risk posed by the appellant to the fundamental interests of society, by failing to have regard to the fact the appellant was assessed by a Probation Officer in an OASys assessment as being a medium risk of serious harm to the public, failing to have regard to the fact that the threat does not need to be imminent, failing to have regard to the fact the appellant's conduct has not been tested since his conviction as he remains incarcerated, and failing to have regard to the fact the OASys report's percentile risk of offending analysis indicates he is a threat. In respect of ground (b) it was argued that the Judge failed to have regard to the public interest in the appellant's deportation and focused exclusively on matters which favour the appellant.

9. Permission to appeal was granted by First-tier Tribunal Judge Brannan on 24 April 2024 in respect of ground (a) only with Judge Brannan stating that ground (b) was arguable but was in his view not material because of Judge Robinson's conclusion that the appellant did not represent a sufficiently serious threat to the fundamental interests of society.

10. The respondent sought permission to amend the grounds of appeal to allow her to argue both grounds (a) and (b). Mr Kowalik opposed this application pointing out that the application to amend grounds had been made late. We reserved a decision on whether to allow the amendment so that it could be determined having heard from the parties all their submissions concerning both grounds.

11. Mr Melvin further argued that the Judge's decision that serious grounds of public policy and public safety were not made out did not adequately deal with the fundamental interests of society as identified in the decision letter and Schedule 1 to the 2016 Regulations and also that her assessment of the risk posed by the appellant involved "double counting."

The appellant's reply

12. In reply Ms Kowalik argued that the respondent's arguments did not identify an arguable error of law but were all mere disagreements with the Judge's decision. Ms Kowalik argued that the Judge had demonstrated that she had due regard to the OASys report but that she considered it holistically with all the other evidence, and that the assessment of risk in the light of that evidence was for the Judge to make. She pointed out that the only reason the appellant's conduct on release from prison had not been tested was the decision of the respondent to pursue deportation while the appellant was still serving his custodial sentence and so no criticism of the Judge's assessment of risk can properly be made on that basis.

Legal Framework

13. By virtue of Regulation 23(6)(b) of the 2016 Regulations an EEA national living in the United Kingdom in accordance with the 2016 Regulations can be removed if the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27.

14. Regulation 27(3) of the 2016 Regulations provides that a decision taken on the grounds of public policy, public security or public health may not be taken in respect of a person with a right of permanent residence except on serious grounds of public policy and public security. As already noted, it was agreed by the parties that this subsection applied to the appellant and that this was the threshold that the respondent had to establish in order to justify an order to remove the appellant.

15. Regulation 27(5) of the 2016 Regulations states that "*The public policy and public security requirements of the United Kingdom include restricting the rights otherwise conferred by these regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles-*

    a) *the decision must comply with the principle of proportionality;*
    b) *the decision must be based exclusively on the personal conduct of the person concerned;*
    c) *the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;*
    d) *matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;*
    e) *a person's previous criminal convictions do not in themselves justify the decision;*
    f) *the decision may be taken on preventative grounds even in the absence of a previous criminal conviction, provided the grounds are specific to the person"*

16. Sections 11 and 12 of the Tribunals, Courts and Enforcement Act 2007 restrict the Upper Tribunals jurisdiction on appeal to errors of law. At [26] of Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 the Court of Appeal gave a useful summary of the settled law in respect of that jurisdiction including the fact that (i) the First-tier Tribunal is a specialist fact-finding tribunal and the Upper Tribunal should not rush to find an error of law simply because it may have reached a different conclusion on the facts or expressed themselves differently; (ii) where a relevant point was not expressly mentioned by the First-tier Tribunal, the Upper Tribunal should be slow to infer it had not been taken into account; (iii) judicial restraint should be exercised by the Upper Tribunal when it comes to the reasons given by the First tier Tribunal and it should not be assumed the First-tier misdirected itself just because not every step in its reasoning was fully set out; (iv) the issues for decision and the basis upon which the First-tier Tribunal reaches its decision on those issues may be set out directly or by inference; (v) judges sitting in the First-tier Tribunal are to be taken to be aware of the relevant authorities and to be seeking to apply them; and (vi) it is the nature of assessment that different tribunals without illegality or irrationality may reach different conclusions on the same case.

Analysis and Decision

17. We agree with Ms Kowalik's submission that the respondent's complaints about the Judge's finding that serious grounds of public policy and public security had not been established are in reality no more than disagreements with the Judge's conclusion which do not identify an error of law. There is certainly no suggestion that the Judge has applied the wrong test or mis-stated the legal principles she had to apply.

18. Contrary to the assertion in the grounds of appeal it is abundantly clear that the Judge did have regard to the contents of the OASys report, indeed the Judge states this explicitly at [24] and [25] of her decision. In those paragraphs the Judge gives a clear and cogent analysis of that report and the bearing it had on her overall assessment of the risk the appellant poses to the fundamental interests of society. Relevant factors from the OASys report identified by the Judge include the low risk of reconviction (the report identifies a 15% risk of general offending within two years of discharge and a 0.27% risk of serious offending in the same time period), the circumstances of the offence and the appellants lack of a criminal history (it is noted that there is no evidence of other risky behaviours or attitudes that are supportive of offending in general), the fact the appellant is very motivated to address his offending behaviour and his completion of relevant courses while in prison.

19. Although he acknowledged that the Judge referred to it in her decision, Mr Melvin complained about the Judge's treatment of another part of the OASys report namely the assessment that the appellant poses a medium risk of serious harm in the community. This seems to be the issue that concerned Judge Brannan when granting permission to appeal. It must be noted however that, as recognised by the Court of Appeal at [57] of Secretary of State for the Home Department v AA (Poland)[2024] EWCA Civ 18, a case to which Mr Melvin drew out attention, an OASys report is not carried out for the purposes of the 2016 Regulations and while it may be used as a benchmark for considering the public policy and public security question posed in the 2016 Regulations the assessment serves a different purpose. Here, the Judge evidently had regard to this assessment within the OASys report (see [25] in particular) but she did so in the context of the evidence as a whole.

20. Mr Melvin suggested that the Judge's assessment of risk involved "double counting" of the sort identified by the Court of Appeal in AA (Poland). This argument however has no merit. This is not a situation like the one in AA (Poland) where the Judge reduced the assessment of risk as a result of preventive measures which had been put in place by the probation service precisely because of the risk posed by the appellant. Instead the Judge has simply viewed the OASys assessment of risk in the context of the evidence as a whole in order to reach her conclusion on the separate issue of whether the serious grounds of public policy and public security threshold had been reached. The Judge was perfectly entitled to do so and provided coherent reasons for the conclusion she reached. Those reasons did not include any element of double counting.

21. The other complaints made about the Judge's assessment of the risk posed by the appellant similarly have no merit. There is no reasonable basis for the suggestion that the Judge has not taken into account the fact the risk does not need to be imminent. The use of the word "imminent" in the Judge's reasons was a direct quote from the OASys report and does not in any way indicate that the Judge had been ignorant of the statement in Regulation 27(3)(c) (a provision the

Judge makes repeated reference to in her decision) that the threat does not have to be imminent. Neither is there any reasonable basis for finding that the Judge has not had regard to the fundamental interests of society as identified in Schedule 1 of the 2016 Regulations, especially in the light of the Judge's explicit reference to doing so at [29] of her decision. Finally the Judge was plainly aware that the appellant was still serving the custodial element of his sentence and his conduct in the community since his conviction had not therefore been tested.

22. The reality is that though the respondent may disagree with the decision reached by the Judge it was clearly one that was open to the Judge and one which the Judge has adequately explained. The Judge had regard to the relevant legal principles, applied those principles and reached a decision she was entitled to reach on the evidence. In these circumstances there is no lawful basis for this Tribunal interfering with her decision.

Application to amend the grounds of appeal

23. In view of our finding that the Judge was entitled to find that there are no serious grounds of public policy or public security which justify the appellant's removal and that her decision on that issue did not involve an error of law, there would be no purpose in permitting the respondent to argue ground (b) which concerns the proportionality of the appellant's removal. As the Court of Appeal make clear at [71] – [73] of AA (Poland) and as Mr Melvin accepted, if the grounds for removal under the 2016 Regulations are found not to be made out then it cannot be proportionate to remove the appellant and the assessment of proportionality in those circumstances cannot be properly challenged. We would however comment that we saw no merit in the suggestion that the Judge had focused exclusively on factors which favour the appellant particularly in the light of the Judge's explicit reference to the seriousness of the offending at [29] and identification of the aggravating features of that offending at [21].

24. We therefore decline to permit an amendment to the respondent's grounds of appeal as it is not necessary to do so following our analysis of ground (a).

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law and therefore stands.

Luke Bulpitt

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 July 2024