IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001977

First-tier Tribunal No:
DA/00131/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 8th March 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Secretary of State for the Home Department

Appellant

and

FR
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms K McCarthy, counsel instructed by Turpin & Miller
For the Respondent: Ms R Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 7 September 2023

An anonymity direction was made by the First-tier Tribunal ("FtT"). Although this decision concerns the deportation of FR, the identification of FR is likely to lead to the identification of three children, whose psychological well-being and behaviour form part of the appeal. It is therefore appropriate that an anonymity direction is made. Unless and until a Tribunal or Court directs otherwise, FR is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. The appellant in this appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is FR. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to FR as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of the Netherlands. On 11 June 2017 the appellant arrived in the UK on a flight from Ethiopia. He was found to be in possession of Class A drugs and arrested. The appellant was convicted on 10 October 2017 at Isleworth Crown Court for the importation of Class A drugs. He received a sentence of 7 years and 3 months in prison.

3. The respondent subsequently notified the appellant of her intention to deport him from the UK and signed a deportation order against him on 22 October 2020. That deportation order was subsequently revoked and a new deportation order was signed on 11 June 2021. The appellant's appeal against the respondent's decision dated 23 October 2020 and a supplementary decision dated 11 June 2021, to make a deportation order against him on public policy grounds was allowed by First-tier Tribunal Judge Young-Harry for reasons set out in a decision promulgated on 6 April 2022. Judge Young-Harry was not satisfied the respondent has established that the appellant represents a genuine, present and sufficiently serious threat to a fundamental interest of society, such that the appellant's deportation is justified on the grounds of public policy.

The Grounds of Appeal

4. The respondent claims the decision of Judge Young-Harry is vitiated by material errors of law. The Judge accepted, at paragraph [8], that the appellant does not have permanent residence in the UK, and neither has he resided continuously in the UK for 10 years. Therefore, the appellant is entitled only to the bottom tier of protection, as set out in Regulation 27(1). The respondent must therefore establish the appellant's deportation is justified on the grounds of public policy. The respondent claims Judge Young-Harry found, at [24], that the respondent has not shown the appellant represents a genuine, present and sufficiently serious threat, but in reaching her decision, failed to have regard to relevant factors such as the evidence in the OASys report that the appellant continues to deny knowledge of the offence, suggesting he is not motivated to address his offending behaviour. The respondent claims Judge Young-Harry failed to give adequate reasons for finding that the appellant does not pose a present threat to the fundamental interests of society.

5. The respondent claims Judge Young-Harry failed to have regard to the fundamental interests of society as set out in Schedule 1(7) of the EEA Regulations 2016. In *Land Baden-Württemberg v Tsakouridis (Directive 2004/38/EC)* Case C-145/09, the European Court of Justice referred to the fight against crime in connection with dealing in narcotics as part of an organised group as a factor covered by the concept of 'serious grounds of public policy or public security'. Furthermore, in *K. () and allegations de crimes de guerre) (Citizenship of the European Union - Right to move and reside freely within the territory of the Member States - Restrictions - Judgment)* [2018] EUECJ C-331/16 (02 May 2018), the court confirmed, at

[56], that it is also possible that past conduct alone may constitute such a threat to the requirements of public policy. The respondent claims Judge Young-Harry failed to consider the seriousness of the consequences of re-offending in line with *Kamki* [2017] EWCA Civ 1715. It is said Judge Young-Harry failed to have proper regard to other information contained in the OASys report including the suggestion that the children are also considered to be at risk due to the appellant's drug use and the fact the appellant is assessed as presenting a medium risk to children.

6. Permission to appeal was granted by Upper Tribunal Judge Macleman on 23 September 2022. He said:

> "The grounds found upon the appellant's denial of any offending; unnoticed contradictions between an OASys report and the evidence at the hearing on matters tending against family being a significant protective factor; a risk assessed at 25%; and other matters said to have been overlooked, and tending against rehabilitation.
>
> Perhaps the case might have gone either way, but the grounds qualify for debate on whether they disclose inadequacy of reasoning, rather than just a difference of opinion."

The Hearing of the Appeal before me

7. Ms Arif adopted the grounds of appeal. She submits the appellant did not have an enhanced level of protection and in reaching her decision the judge failed to have regard to the fundamental interests of society as set out in Schedule 1(7) of the EEA Regulations 2016. She refers to the OASys Assessment which records *(section 2.1)* the background to the offence and sentence that was imposed. The report records:

> "…He denies having had knowledge of the drugs in his suitcases and maintains his innocence in the matter. He was unable to explain where the drugs may have come from and how they found their way into the suitcases. Due to the circumstances of the case, I would assess the motivation behind the offence to be financial gain or gain of certain luxuries like travel. Had he in fact not been aware of the presence of drugs in the suitcases he brought to the UK, it would at the very least show poor thinking skills and a lack of awareness of consequences, bringing a suitcase to the UK for another person…"

8. Ms Arif submits the judge failed to take into account what is said in the OASys report when considering whether the appellant would re-offend. Ms Arif submits the judge considered the family to be a protective factor. However, the OASys report assesses the appellant to present as a 'medium' risk to children in the community *(section R10.6)*. The assessment identified *(section R10.2)* a particular risk to his own children. She submits the judge failed to failed to have regard to the appellant's ongoing denial and failure to recognise the effect of his crimes on victims. That, she submits, is indicative that he continues to pose a risk. Ms Arif submits the judge failed to consider all relevant matters when reaching her decision, having regard to the particular background and the risks identified.

9. In reply, Ms McCarthy adopts the rule 24 response settled by her and dated 6 September 2023. The appellant accepts that he has acquired only

the basic tier protection and the focus is therefore on whether the respondent has established the appellant presents a "genuine, present and sufficiently serious threat to one or more of the fundamental interests of society".

10. She submits that in reaching her decision, the judge noted the observation made in the OASys assessment that the appellant continues to deny knowledge of the contents of the suitcases that he was carrying, despite having pleaded guilty to the offence. She submits the judge weighed in the balance that this suggests a lack of motivation to address his offending behaviour. Ms McCarthy submits the judge had regard to factors set out within the OASys report that reduce the threat the appellant poses of committing further offences. The judge also had regard to the more recent evidence of the Probation Officer, the appellant and his partner.

11. Ms McCarthy submits the judge was not required to make express reference to Schedule 1(7) and it is clear that the judge had proper regard to the fundamental interests of society, including the public interest in tackling harm caused through drugs or crime.

12. Ms McCarthy refers to the email dated 29 September 2021 from Richard Grant, a Probation Officer that was at page 36 of the appellant's bundle. The Probation Officer confirms the appellant has engaged well since being placed on Probation. It is said that he has attended every appointment as instructed, and has been open and honest about the offence and why he was involved. The Probation Officer states:

> "His current risk of harm is medium and there are no indicators which would give me concerns regarding any escalation. He remains supported by his partner and their relationship has grown stronger since his release. His children have also benefitted from him being there and are pleased that he is home. [The appellant] has found it difficult finding employment due to his immigration status and lack of identification paperwork.
>
> From our discussions in supervision, he presents as remorseful and is unlikely to engage in such criminal behaviour again."

13. Ms McCarthy acknowledges the Probation Officer states the current risk of harm is 'medium, but she submits, it is not clear what risk the probation officer is referring to. Ms McCarthy submits the email provides an update. It was provided three months after the appellant's release from custody on 25 June 2021 and post-dates the OASys assessment that is dated 22 March 2021. The OASyS assessment confirms *(Section R11.2)* that as part of the 'victim safety planning', the appellant's drug use should be monitored to protect his children from physical and/or emotional harm from coming in contact with potent drugs or potentially harmful paraphernalia.

14. Ms McCarthy submits the judge noted at paragraphs [13] and [14] that the appellant's family life was interrupted whilst he was in prison, but found that is now a protective factor. She submits the 'medium' risk to children identified in the OASyS related to the appellant's use of 'spice' in prison and the possibility of cannabis use in the family home rather than a risk of the appellant being involved again in organised drug smuggling.

Since that assessment, the appellant had been bailed to his home address to live with his partner and children indicating there were no serious child protection concerns. There was no evidence that he has engaged in drug use since his release from prison or that he is in any other way a risk to his children. Ms McCarthy submits that the grounds failed to disclose a material error of law in the decision of the FtT.

Decision

15. It is useful to begin with the EEA Regulations 2016 that applied. As the judge noted at paragraph [8] of her decision, Regulation 23(6)(b) provides that an EEA national who has entered the United Kingdom may be removed if the respondent has decided that the person's removal is justified on grounds of public policy. Regulation 27 as far as it is material to this appeal provides:

> "27.—(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
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> …
>
> (5) The public policy and public security requirements of the United Kingdom include restricting 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 —
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> (a) the decision must comply with the principle of proportionality;
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> (b) the decision must be based exclusively on the personal conduct of the person concerned;
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> (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;
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> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
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> (e) a person's previous criminal convictions do not in themselves justify the decision;
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> (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.
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> (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.
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> …

> (8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).”

16. It is also convenient to set out Schedule 1 of the 2016 Regulations as far as it is relevant to this appeal.

> “The fundamental interests of society
>
> 7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—
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> …
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> (b) maintaining public order;
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> (c) preventing social harm;
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> …
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> (g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);…
>
> (j) protecting the public
>
> …”

17. To justify interfering with the appellant’s rights to free movement and residence in the UK, the respondent must establish the appellant’s removal is justified on grounds of public policy and public security. As set out in Regulation 27(5)(c), the appellant cannot be removed unless his personal conduct represents "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct and that the threat does not need to be imminent. Paragraph 1 of Schedule 1 confirms that the EU Treaties do not impose a uniform scale of public policy or public security values and member States enjoy considerable discretion, acting within the parameters set by the EU Treaties to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time. The application of paragraph 1 to the United Kingdom is informed by what follows at paragraphs 2 to 6 of Schedule 1.

18. I accept, as Ms McCarthy submits, the failure to refer to Schedule 1 of the 2016 Regulations is not in itself fatal to the decision of the FtT provided that it is clear that the judge applied the correct test. A finding as to whether the conduct of the appellant represents a genuine, present and sufficiently serious threat is a prerequisite for the adoption of an expulsion measure and it is only upon such a threat being established, that the issue of proportionality arises.

19. At paragraph [7] of her decision the judge identified the evidence before the Tribunal and confirms that she has carefully read and considered all the documents which were before her. Her findings and conclusions are set out at paragraphs [8] to [26] of the decision. At paragraph [10] of her decision the judge records the appellant joined his family in the UK in

2013, but did not live with them in the family home until 2014. At paragraph [11] of her decision the judge said:

> "Despite claiming that he began living with his family in 2014, the respondent notes that the appellant made a number of applications one in 2016 and two in 2017, as the unmarried partner of an EEA national; sponsored by someone other than his wife. The appellant initially claimed during the hearing, that he did not have any knowledge of these applications. He later admitted, that someone asked to use his documents for the purpose of making applications."

20. Although not set out as a finding, it can be inferred that the judge accepted the appellant began living with his family in the family home in 2014. At paragraph [12] of the decision the judge noted the appellant received a caution for the possession of a Class B drug on 7th September 2015. She noted the evidence of the appellant's wife that in 2017 their relationship again broke down, and they stopped living together. It was in June 2017 that the appellant was caught attempting to enter the UK with a quantity of Class A drugs from Ethiopia leading to his conviction on 10 October 2017, for the importation of a Class A drug, for which he received a sentence of 87 months.

21. At paragraph [13] of her decision, the judge said:

> "According to the OASys report provided, the appellant continues to deny knowledge of the offence, which suggests he is not motivated to address his offending behaviour; the report states he committed the offence for financial gain. The likelihood of serious reoffending however is recorded as low; I find this reduces the likelihood that the appellant represents a present threat. The report writer observes, that the appellant's family is a strong motivator in striving towards better decision making. While incarcerated the appellant completed a number of courses, including painting, construction and English, all of which aid his rehabilitation."

22. At paragraph [14], the judge referred to the OASys assessment and noted that the appellant had a number of adjudications recorded against him, amounting to an additional 33 days. The judge noted the appellant's evidence that on his release in June 2021, he and his wife had reconciled, so he returned to the family home. At paragraph [15], the judge referred to the letter from the Probation Officer that is referred to by Ms McCarthy. She noted the reference in that letter to the risk of harm being assessed as 'medium'.

23. At paragraphs [16], [17], [18], [19] and [20] of the decision, the judge refers to the evidence before the Tribunal in the form of a report prepared by Freya Knowles, dated 24 May, and a report prepared by Gary Crisp, an independent social worker dated 23 August 2021, regarding the detrimental impact that the appellant's separation from his children has had upon them in the past, and will have upon them in the future if the appellant is deported. They are, as the judge said at paragraph [20], factors relevant when considering 'proportionality'.

24. At paragraph [19] of her decision the judge referred to the evidence before the Tribunal regarding the mobility of the appellant's wife and at paragraph [22], the judge referred to the evidence of the appellant's wife

regarding the changes in the appellant's attitude and approach to the family since his release.

25. At paragraph [22], the judge found the respondent has not established that the appellant's personal conduct presents a genuine, present and sufficiently serious threat to a fundamental interest of society. At paragraphs [23] and [24] of her decision the judge said:

> "23. I therefore consider whether there is a serious threat of further conduct, taking into account the appellant's past conduct and the fact that the threat does not need to be imminent. I find the appellant has taken some steps towards rehabilitation, such that he does not represent a present threat, and the likelihood of him reoffending is low, based on the findings in the OASys report and the letter from Richard Grant. This suggests there were limited identifiable factors, which may lead him to reoffend.
>
> 24. I find the conclusion reached in the more recent probation letter, namely that he is engaging well and has shown remorse for his offence, supports the appellant's case. Additionally, I find the appellant's family is a strong and powerful self motivator for the appellant, helping to ensure he does not repeat the conduct. Accordingly, I am not satisfied the respondent has shown, the appellant represents a genuine, present and sufficiently serious threat."

26. Contrary to what is said by the respondent, it is clear from what is said at paragraph [13] of the decision that the judge did consider what is said in the OASys report and she noted the appellant continues to deny knowledge of the offence. The judge referred to the risk of the appellant reoffending, and set out her reasons for concluding that the respondent has not established that the appellant represents a genuine, present and sufficiently serious threat at paragraphs [22] to [24] of her decision. At paragraph [22], the judge said it is undeniable that the appellant committed a serious offence, which is reflected in the length of sentence he received. The judge correctly noted at [23] that the question is not simply whether the appellant represents a present and serious risk, but whether he represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct and that the threat does not need to be imminent.

27. In my judgement, in reaching her decision, the judge was entitled to have regard to factors that weigh in favour of the appellant and indeed to conclude that the appellant is engaging well with Probation and that his family is a strong and powerful self motivator for the appellant, helping to ensure he does not repeat his past conduct.

28. It is now well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. An appeal before the Upper Tribunal is not an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, even surprising, on their merits. Standing back, the analysis of the issues that arise in such an appeal and of the evidence is always a highly fact sensitive task. The findings and conclusions reached by Judge Young-Harry were in my judgment, neither irrational nor unreasonable in the Wednesbury sense, or findings and conclusions that were wholly unsupported by the evidence. They were based on the particular facts

and circumstances of this appeal and the evidence before the Tribunal. Where a judge applies the correct test, and that results in an arguably generous conclusion, it does not mean that it was erroneous in law.

29. It follows that in my judgment the decision of First-tier Tribunal Judge Young-Harry is not vitiated by a material error of law and his decision to allow the appeal stands.

Notice of Decision

30. The SSHD's appeal is dismissed.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 February 2024