EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 28
XA90/17

Lady Paton
Lord Brodie
Lord Glennie

OPINION OF THE COURT

delivered by LADY PATON

in the appeal

by

SA

Appellant

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant: K H Forrest; Drummond Miller LLP
Respondent: Webster; Office of the Advocate General

13 March 2018

Appeal concerning the deportation of an EEA national

[1] The decision of the First-tier Tribunal ("FTT") dated 16 August 2016 demonstrates an apparent confusion in relation to two significant matters.

[2] First, the question of onus of proof. It is accepted that the burden of proof was on the Secretary of State (*SSHD* v *Straszewski* [2016] 1 WLR 1173 paragraph 12). However, at paragraph 9 of its decision, the FTT states: "In respect of the deportation appeal the burden

of proof is on the appellant". The UT observes at paragraph 9 of its decision dated 31 October 2016:

> "Reading the [FTT's] decision fairly and as a whole, the reference at paragraph 9 to a burden of proof on the appellant is only a standard recital which has been left unrevised, and is not part of the decisive passages. It is an immaterial slip."

We cannot agree. In our opinion, the FTT's proposition in paragraph 9 of its decision influenced its whole approach to the decision-making process, causing confusion.

[3] The second significant matter is that, at paragraph 14, the FTT refers to the question whether the personal conduct of the appellant represents "a genuine and sufficiently serious threat" affecting one of the fundamental interests of society. But the relevant regulation, regulation 21(5)(c) of the Immigration (European Economic Area) Regulations 2006, speaks of "a genuine, present and sufficiently serious threat." In other words, the FTT has omitted a material word, namely "present". This, combined with the previous point, results in a background of uncertainty when considering the framework within which decisions were to be made.

[4] Had these been the only issues, we would have been minded to allow the appeal and remit the case to a freshly-constituted FTT. But matters do not end there. The appellant has been in the United Kingdom since 2013. He is in employment. He pays tax. He has an ongoing relationship with a UK national and is clearly involved to a considerable extent with her extended family, although some questions about the relationships within that extended family are raised in the FTT decision. The matter which brought the appellant to the attention of the Secretary of State was a conviction at Hamilton Sheriff Court for vandalism, with what was described by the FTT as "a domestic abuse aggravator". The appellant was fined £100. In paragraph 16 of the FTT's decision there is a little more detail about the offence, based on the evidence of the appellant's partner. That detail is as follows:

> "The evidence was to the effect that there was an argument between the appellant and her sister and she was present. The appellant was outside and exchanging words with her sister and then the appellant broke the window."

[5] The FTT considered the resultant conviction for vandalism in the light of the appellant's previous convictions in Romania, listed in the Secretary of State's decision letter of 2 June 2016 at pages 1-2. Those convictions were: 2001, theft; 2003, theft; 2004, illegal possession in public places of offensive weapons. What the FTT had before it was evidence of the breaking of a window in the context of a domestic argument, attracting a fine of £100. The FTT at paragraph 16 refers to this as involving "a conviction for an offence against a person". That is not in fact borne out by the conviction itself, which was for vandalism and was based on the evidence referred to above, ie the breaking of a window in the context of a domestic argument.

[6] The relevant regulation which the FTT had to apply was regulation 21 of the 2006 regulations. Regulation 21(5) provides:

> "Where a relevant decision is taken on grounds of public policy or public security it shall in addition to complying with the preceding paragraphs of this regulation 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 concerned must represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society;
> (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."

[7] Mr Webster on behalf of the Advocate General pointed to the index offence taken with the previous Romanian convictions as demonstrating a propensity to reoffend involving violence. That was the approach and conclusion adopted by the FTT in

paragraph 16 of its decision. However, in our opinion, that approach and conclusion was irrational for four reasons. First, the offence of causing damage to property does not suggest any propensity to commit violence against a person. Secondly, the offence of causing damage to property does not suggest any likelihood of a recurrence of the type of offending which took place in Romania. In fact, the Romanian offences are wholly dissimilar. Thirdly, the index offence was, as the FTT itself recognises, "not a particularly serious offence" (paragraph 16 of its decision). Fourthly, the Romanian offences were more than 10 years old.

[8] Accordingly, having regard to the information before the FTT, we consider that it was not open to it to find that the personal conduct of the appellant represented "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" (regulation 21(5)(c)). In addition, it is our view that deportation in these circumstances would be wholly disproportionate, contrary to regulation 21(5)(a). Accordingly we are of the opinion that the UT erred in law in (i) failing to regard the confusion over onus and the omission of the word "present" as not constituting a material error of law; (ii) failing to hold the irrationality argument to have foundation.

[9] The questions in law posed in the appeal are as follows:

1. Whether the UT materially erred in law?

2. Whether the FTT materially erred in law?

For the reasons given above, we answer both questions in the affirmative. Given our decision on the ground of irrationality, it would serve no purpose to remit this case to another tribunal. We therefore allow the appeal and we quash the deportation order.