Upper Tribunal
(Immigration and Asylum Chamber) DA/00110/2020 (V)

THE IMMIGRATION ACTS

Heard by "*Microsoft Teams*" on 28 July 2021

Decisions and Reason Promulgated on 16 August 2021

Before

UT JUDGE MACLEMAN

Between

KAROL FILIP ZEMLIK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr B Criggie, of Latta & Co, Solicitors
For the Respondent: Ms H Aboni, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Poland, born on 29 June 1992.

2. The respondent decided on 16 March 2020 to make a deportation order against the appellant under the Immigration (EEA) Regulations 2016.

3. FtT Judge Agnew heard the appellant's appeal on 8 February 2021, having declined to grant his application for adjournment, and dismissed the appeal by a decision promulgated on 12 February 2021.

4. The appellant sought permission to appeal to the UT. His grounds allege error in refusing the adjournment request; error in not finding the appellant to be in a genuine and subsisting relationship with a Ms Reid, by applying too high a standard of proof; consequent flaw in the article 8 assessment; and error in taking the appellant's 6 month sentence to be the maximum available for his offence, when the maximum was 12 months.

5. FtT Judge Nightingale granted permission by a decision issued on 8 March 2021, observing that the judge might have erred by overlooking the possibility of taking evidence from the appellant and Ms Reid by telephone, and that it would be for the appellant to show the sentencing range available for his offence.

6. Mrs Aboni was prepared to accept that the maximum sentence available had been 12 months, not 6. She submitted that this did not play such a substantial part in the decision as to require it to be set aside.

7. At [19] the judge attached some significance to the sentence being, as she understood it, the maximum available. However, the decision gives several strong reasons for finding against the appellant and, on its own, I consider the decision must have been the same upon excision of this error.

8. Mr Criggie acknowledged that neither representative, nor the judge, had mentioned the possibility of taking evidence from the appellant and the sponsor by telephone only, without video. He had spoken to them before the hearing, when they were using someone else's phone, and they said they could not access any device which would let them link into the hearing - as recorded in the decision at [10].

9. Mr Criggie also, correctly, acknowledged that no unfairness could be detected in the judge's reasons for declining to adjourn on the eve of the hearing, as set out in the appendix attached to her decision.

10. The judge was at pains to give the appellant and his witness the chance to take part, and it is difficult to detect unfairness in her proceeding, as matters were set out before her. However, even although the suggestion was never made by anyone, the position of the appellant might have been tested further by offering to take evidence over the telephone (perhaps by a "conference call").

11. The judge went on to find at [37] that the appellant had not established that he had any relationship with Ms Reid.

12. There were written statements from both to that effect, and documentary confirmation of a shared address, in the form of a council tax bill, which was also the address of the appellant on file with the tribunal.

13. The judge might well have found that the relationship was not such as to outweigh other considerations. However, even if she thought the

appellant and the witness had made little effort to participate, the conclusion that the relationship did not exist went rather far, without hearing from them and without any further testing of their evidence.

14. I find that the (i) the slip over the maximum sentence, (ii) the oversight of the possibility of telephone evidence (even although never suggested), and (iii) the finding of non-existence of the relationship, taken together, are such that the decision cannot safely stand.

15. Ms Aboni advised that the respondent's information is that since 25 May 2021 the appellant has been on remand on several criminal charges and that the address on the tribunal file, being the address of his partner (or former partner) is no longer available to him.

16. Those matters are irrelevant to whether the FtT erred, and pending charges are not convictions. However, it appears that the appellant has not observed his duty to keep the tribunal advised of his address, and has not let his representative know his change of circumstances. Any further relevance will require to be addressed in the FtT.

17. The decision of the FtT is set aside, and the case is remitted for a fresh hearing, not before Judge Agnew.

18. No anonymity direction has been requested or made.

Hugh Macleman

29 July 2021
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email.