



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00451/2019

THE IMMIGRATION ACTS

Heard at George House, Edinburgh
On 27 October 2021

Decision & Reasons Promulgated
On 16 November 2021

Before

UT JUDGE MACLEMAN

Between

W B

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr M Way, Advocate, instructed by Katani & Co, Solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Poland, aged 45. He has lived in the UK since on or around 23 August 2006. He was convicted after trial in 2017 at the High Court in Edinburgh of attempted rape and sentenced to 5 years imprisonment.
2. The sentencing judge said:

I take a serious view of the circumstances of this crime: whilst a woman [the sister of the appellant's partner] who was a guest in your house was sleeping, you commenced a sexual assault on her ... in the presence of her 8 years old child ...

You persisted in sexually assaulting the complainer while she was crying and telling you not to. You attempted to rape her. You have shown no remorse. You seek to blame the complainer and you see yourself as the victim ... Whilst the crime fell short of rape, this was a determined attempt carried out in the presence of a child of 8 with all the implications that has for the child and her mother ... It is a seriously aggravating feature ... Your crime has had a significant impact on the complainer and her family.

3. On 16 August 2019 the SSHD decided to make a deportation order against the appellant under the Immigration (EEA) Regulations 2016, regulation 23(6)(b) on serious grounds of public policy and public security. At page 6, having considered the appellant's personal circumstances, including his relationship with his son, deportation was considered proportionate and in accordance with regulations 27(5) and (6).
4. Although not directly applicable to an EEA national, the decision also considered the deportation scheme in terms of article 8 of the ECHR, the immigration rules paragraphs A362 and A398 - 399D, and part 5A of the 2002 Act. It was accepted that the appellant has a genuine and subsisting relationship with his son, but not that it would be unduly harsh either for the child to live in Poland or to remain in the UK without the appellant. At page 10, it was concluded that no exception to deportation was made out and there were no very compelling circumstances to outweigh the public interest in deportation.
5. The appellant was advised of rights to appeal under regulation 36 and on human rights grounds under section 82 of the 2002 Act.
6. The appellant filed notice of appeal to the FtT on 4 September 2019. By a decision promulgated on 17 January 2020, FtT Judge McLaren dismissed his appeal under the regulations but allowed it on human rights grounds.
7. Both parties were granted permission to appeal to the UT.
8. The decision of UT Judge Keith promulgated on 2 June 2020, setting aside the decision of the FtT, should be read as if incorporated herein. At [18] errors of law were found in assessment of proportionality in terms of the regulations and in terms of private and family life. At [19] no error was found in the (unchallenged) findings that the appellant was entitled to protection in terms of "serious grounds of public policy and public security" and that his conduct represented "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". Findings made by the FtT in its decision at [24, 25, 30-35] were preserved.
9. The case has been retained in the UT for remaking of the decision. A transfer order has been made for that to be completed by another judge.
10. The appellant tendered updating statements from him and his partner, materials on sex offender management in Scotland, and evidence that he was released from custody on 23 August 2021, subject to licence conditions, including weekly contact with his supervising officer, until 1

March 2022. These items were all admitted into evidence, unopposed by Mr Diwnycz, who did not seek to cross-examine. There is no ongoing dispute on the primary facts.

11. I am obliged to Mr Way and to Diwnycz for their clear and concise submissions, having heard which, I indicated that the appeal would be allowed under the regulations, but dismissed on human rights grounds, for the following reasons.
12. The most adverse matters against the appellant are the serious and sordid nature of his crime, its effect on the victim and her child, who are close relatives of his partner, and his ongoing failure to take any responsibility for his actions.
13. The seriousness of the crime is not a feature, on its own, by which deportation may be justified.
14. The respondent accepted that the only threat to the fundamental interests of society by which deportation could be justified is the risk of re-offending.
15. There might well be grounds for scepticism over the appellant's assertion that he will never re-offend, in context of his repudiation of any guilt. However, his offending was a unique event, at a relatively advanced age, not part of a lifetime pattern of offending; professional assessments are of a low risk of re-offending; and the FtT, whose findings have been preserved, proceeded on the basis of low risk.
16. Deportation therefore does not score very highly on the objective of prevention of re-offending; and, as Mr Way observed, that is "a relatively modest objective" in this context.
17. There was also force in the submission that licence conditions, offender management arrangements, and presence on the sex offenders' register represent less onerous methods of achieving the objective of protection from re-offending.
18. This is not one of those cases where the offender and his immediate family would have no great difficulty in moving back to his country of origin. There is no reason why he might not be expected to do so, if he were not a family man; but his partner, although also of Polish origin, has intimate connections with her parents here. There are preserved findings by the FtT at [35] of family life "of exceptional quality" particularly between father and son; and at [36] of inability of the family as a unit to relocate to Poland.
19. As suggested by Mr Way in his submissions, the FtT essentially "got it the wrong way round". It failed to factor in matters in the appellant's favour in terms of the regulations, where they did count, and it reached an outcome on article 8 which the same matters could not sustain in that context.

20. On the FtT's view of the primary facts, which has not been overturned, the logical conclusion is that the proportionality balance, in terms of the regulations, tips in favour of the appellant; while at the same time, there is nothing which could sensibly be found to constitute very compelling circumstances reaching beyond the exceptions to deportation.
21. The decision of the First-tier Tribunal has been set aside. The decision substituted is that the appeal, as brought to the FtT, is **allowed** under the Immigration (EEA) Regulations 2016, and is dismissed on human rights grounds.
22. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.



28 October 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.