



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/46012/2014

THE IMMIGRATION ACTS

Heard at Field House
On 9 October 2015

Decision & Reasons Promulgated
On 28 January 2016

Before

UPPER TRIBUNAL JUDGE CRAIG
UPPER TRIBUNAL JUDGE S H STOREY

Between:

RADOSLAW ANDRZEJ KONWERSKI
(ANONYMITY NOT GRANTED)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Counsel Ms M Sirikanda, on the instructions of Imran Khan & Partners

For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

Background

1. The appellant (A) is a Polish national, now aged 33. He seeks to challenge the decision of the First-tier Tribunal (FtT), promulgated on 29 June 2015, dismissing his appeal against the decision of the respondent dated 17 November 2014 (and served on 18 November 2014), to deport him under regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). That decision was made in the light of his conviction in June 2014 for offences of possession of an imitation firearm with intent to cause fear or violence and theft. He was sentenced in August 2014 for a total of

24 months for these offences. His appeal was made out of country following his removal to Poland on 16 April 2015. Although he did not attend the hearing in person (a matter we shall return to later) he was represented, and his father and stepmother attended and gave evidence.

2. A claims that he entered the United Kingdom (UK) in June 2007 and had been in employment for much of the time thereafter, including as a security guard. However, the respondent considered that he had only provided evidence of working for periods in 2011, 2012, 2013 and 2014 and so had not provided evidence of continuous residence or of exercising Treaty rights in the UK for a continuous period of 5 years.

3. The grounds of appeal upon which A relies are set out in the Skeleton Argument, and attached to his application for permission to appeal dated 26 November 2014. Additional grounds dated 24 July 2015 and 8 October 2015 were also before us. It is submitted that the FtT materially erred in law by failing to:

- (i) Provide adequate reasons to establish that A had a propensity to reoffend, or posed an unacceptably high risk of reoffending, or to identify what level of risk of reoffending he posed;
- (ii) Correctly identify the categories of risk available in an OASys assessment;
- (iii) Pay demonstrable regard to material evidence of rehabilitation;
- (iv) Conduct an assessment of proportionality in accordance with regulations 21(5)(a), 21(5)(e) and regulation 21(6) or to give consideration to the prospects of A's future rehabilitation in the United Kingdom and Poland in accordance with *Essa* [2012] EWCA Civ 1718.

4. The application for permission to appeal was considered by a FtT Judge on 6 August 2015, who granted permission on the grounds that, the first instance judge had arguably materially erred in law by:

- a) Failing to give adequate reasons for a finding that A represented a present threat by reason of a propensity to reoffend or an unacceptably high risk of reoffending;
- b) Generally failing to have proper regard to the factors set out at regulation 21; and
- c) Failing to consider A's prospects of rehabilitation in Poland.

Proceedings before the Upper Tribunal

5. At the hearing, we had before us an application from A to adjourn the proceedings to enable him to attend and give oral evidence. We did not consider that an adjournment was necessary in the interests of justice, for the purposes of the hearing before us.

6. Ms. Sirikanda, submitted that regulation 21 of the 2006 Regulations required the FtT to make a finding on the level of risk A posed to society. In doing so, the FtT Judge should have had regard to the evidence before him of a Senior Probation Officer. In relation to A's residence in the UK, she argued that the FtT Judge had failed to demonstrate that he had had regard to the documentary evidence before him of A's employment and training, and to make a finding of fact on the number of years A had resided in the UK. There was also,

in her view, a failure to address A's dependency on his father and the extent of his integration in the UK.

7. Mr. Kandola, submitted that the FtT had made a legally sustainable finding that A presents a present, genuine and sufficiently serious threat to the public based on the findings of the Probation Officer in the Pre-Sentence report. He argued that A had provided insufficient evidence of integration and could not benefit from rehabilitation until he can demonstrate integration. He argued that A could not be integrated in two countries and pointed to evidence that suggested A had relatives and accommodation in the UK and Poland.

The Legislative Framework

8. Regulations 21 of the 2006 Regulations provides as follows:

'Decisions taken on public policy, public security and public health grounds

21. (1) – (4) ...

(5) 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.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.'

Was there an error of law?

9. In our judgment, there was no material error of law in the judge's treatment of the issue of rehabilitation. Given that A had failed to produce evidence to establish that he had acquired a right of permanent residence (by virtue of a continuous period of 5 years exercising Treaty rights), it would have been wrong in law had the FtT judge sought to attach substantial weight to prospects of rehabilitation: see *Secretary of State for the Home Department v Dumliauskas & Ors* [2015] EWCA Civ 145 and *MC (Essa principles recast)* [2015] UKUT 520 (IAC).

10. That is not to say that the judge's treatment of the issue of integration was free of error. The FtT Judge found as fact that A was "integrated in Poland" because he had spent his formative years there with "relatives" and that his father and stepmother could visit him in Poland. Even if his prospects of rehabilitation could not be one that had substantial weight in the balance, it was still necessary for the judge to assess A's degree of integration in the UK against the background that even if he had not been working continuously he had been in the UK at least since 2006. The judge does not appear to have made any clear finding on the extent to which A had integrated into the UK, simply saying at paragraph 13 that his father and stepmother can visit him in Poland "if they so wish". The FtT judge failed to engage with the evidence that A's mother, with whom he had lived in Poland (prior to joining his father and stepmother in the UK), was now deceased and that he had no immediate family in Poland, save for cousins. His finding [at paragraph 13] that A was integrated in Poland was not adequately reasoned and supported by evidence.

11. Considered on its own, the above deficiencies were not sufficient to amount to a material error of law. However, we do consider the FtT made a material error of law by failing to give adequate reasons for its finding [at paragraph 14] that A "poses a threat of serious harm to the public and should not be able to return to the UK whilst the deportation order remains in force". Despite noting the contents of the Pre-Sentence Report of Probation Officer, Ms Souza, dated 13 August 2014 [at paragraph 8], the judge's treatment of it in paragraph 10 dwelt solely on its finding that A "poses a medium risk of harm to the public" and appears to have wholly disregarded its final conclusion, that "he does not pose a significant risk to members of the public of serious harm by the commission of further specified offences". At the end of paragraph 10, the judge notes that he was told that the Home Office Offenders Re-Conviction Scale had given A, a score on probability of proven re-offending as 6% within 12 months and 11% within 24 months, "placing him in the lower risk category based on static factors alone, i.e. age at first conviction, conditional or absolute discharge". This was evidence in support of the appellant's case, yet not only did the judge conduct no analysis of it, but he thereafter made no reference to it and simply proceeded [at paragraph 11] to state his own view that, "[t]he appellant has failed to recognise the implications of his offence and would act in the same way again in the same circumstances, which he did ...".

12. It is worth noting at this point, that A was not present at the hearing to give evidence and the judge does not record any witnesses as saying anything to suggest that A would act in the same way again. Furthermore, although not mentioned at all by him in his determination, the judge had before him a report dated 27 March 2015 from Sasha Howard, Probation Service Officer. In it, she referred to A's feelings of remorse, his engagement with prison services and his high level of motivation to change his identified risk factors. This evidence was not before the respondent at the date of her decision. In the light of this evidence, Sasha Howard concluded that A posed a medium risk to the public, but was unlikely to cause harm unless there was a change in circumstances, such as misuse of alcohol, deficit in thinking and poor emotional management. In her opinion, A was at low risk of re-offending. There was also an OASys report dated 23 March 2015, indicating that A had taken decisive steps to address his alcohol abuse. The failure of the judge to consider these further reports was a plain error of law.

13. The FtT judge was right to conclude that A had committed serious offences, as reflected in the 24-month custodial sentence. However, we take the view that the judge

was still required to conduct a balancing exercise, which he failed to do, in order to assess on all the available evidence whether A represented a present threat of serious harm to the public because of a propensity to reoffend or an unacceptably high risk of reoffending. The finding of the FtT judge that A poses a threat of serious harm to the public, was not demonstrably based on an assessment of the entirety of the evidence before him.

Decision

14. For the above reasons, we find that the FtT did make material errors of law and we remit the appeal to be heard before a different FtT judge.

Signed:

Dated:

S.H. Storey

27 January 2016

**Sehba H Storey
Judge of the Upper Tribunal**