



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00410/2016

THE IMMIGRATION ACTS

Heard at Glasgow
on 3 August 2017

Decision & Reasons Promulgated
On 15 August 2017

Before

Mr C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M M

Respondent

Representation

For the Appellant: Mr M Diwynycz, Senior Home Office Presenting Officer
For the Respondent: Mr C Jones, Advocate, instructed by Chung & Rea, Solicitors

DECISION AND REMITTAL

1. The parties are as described above, but the rest of this decision refers to them as they were, and will be again, in the FtT.
2. The SSHD appeals against a decision by First-tier Tribunal Judge David C Clapham SSC, promulgated on 18 November 2016, allowing the appellant's appeal against deportation.
3. On 10 March 2011, the Sheriff at Edinburgh ordered the extradition of the appellant to Poland. On 1 March 2012, the Appeal Court, High Court of Justiciary, quashed that order: [2012] HCJAC 33. The Lord Justice General said (by reference to section 27(4)(b) the Extradition Act 2003) at ¶28, "The ultimate question for this court is whether the appellant's mental condition is such that it would be oppressive to

extradite him”, and at ¶32 answered that question, “I find this to be a very narrow case but have come ultimately to the view that this appeal should be allowed”.

4. At ¶52 the FtT Judge said, “If the High Court of Justiciary concluded that it would be oppressive to extradite the appellant it appears that it must follow that it would be disproportionate to deport him”.
5. Mr Jones sought valiantly to persuade us that the decision could be read to show that the Judge did not conflate deportation with extradition, did not base his decision only on following the decision of the Court, gave it no more than appropriate weight, implicitly weighed all other relevant factors, and reached a view of the appellant’s mental condition and risks current at the date of the hearing which was justified in absence of up to date medical evidence. However, we were not persuaded that such a reading could be extracted.
6. The Judge made it plain at ¶47, 48 and 52 that but for the decision of the High Court he would have come to the opposite view.
7. We have some concern over whether it is right to express a proportionality assessment based on all factors bar one, and then to see if that makes any difference, rather than giving all factors their due weight; but that is not the error which leads us to set the decision aside.
8. The decision of the High Court was an important point of departure, but the considerations in extradition and in deportation case are very different, and the decision was almost 5 years previously.
9. The Judge thought at ¶48 that in the absence of up-to-date reports the only inference he could draw was that the medical situation was unchanged from the time of the High Court judgement. There was evidence which might have suggested to the Judge that the situation had changed, e.g. an intervening period of several years of admitted heavy use of cocaine; the absence of the proposal of deportation to serve a prison sentence in Poland; not being in detention; and the absence of any information about ongoing risk of self-harm, or any further attempt at such. This was not a case where only one inference could be drawn; and the onus to lead evidence of the up-to-date situation was on the appellant, not on the respondent.
10. The Judge appears at ¶45 and 49 to have accepted the submissions of counsel in the FtT (who was not Mr Jones) that deportation and extradition were to be equated and that the situation was similar to *Devaseelan*. Both of those submissions were ill-founded and misleading. Their acceptance by the Judge goes further against the interpretation of the decision sought by Mr Jones.
11. The appellant put his case to the Judge on the basis, which the Judge appears also to have accepted, that deportation, like extradition, requires him to go to Poland. It does not. It requires him to leave the UK. As a citizen of the EU, he is free to live not only in Poland but in any member state other than the UK. To make his case, he had to exclude the proportionality of his alternative choices, as to which he was silent.

12. We recognise, as Mr Jones submitted, that part of the argument on proportionality was the effect on the appellant's wife of the choice whether to leave the life she has established in the UK. That, however, is a factor in any fresh decision. It cannot save the present decision.
13. We might have proceeded to substitute a decision based on the evidence previously led, as there has been no application for any further evidence to be considered. However, we took the view that even in absence of notice of any further evidence, we should give the appellant the opportunity to update his case.
14. The decision of the FtT is **set aside**. None of its findings are to stand, other than as a record of what was said at the hearing.
15. The nature of the case is such that it is appropriate in terms of section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 to **remit the case to the FtT** for an entirely fresh hearing.
16. The member(s) of the FtT chosen to consider the case are not to include Judge Clapham.
17. An anonymity direction was made in the FtT. The matter was not addressed before us. We have maintained anonymity herein.

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

3 August 2017
Upper Tribunal Judge Macleman