



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00016/2016

THE IMMIGRATION ACTS

Heard at Field House
On 22 August 2018

Decision & Reasons Promulgated
On 31 August 2018

Before

**THE HON LORD BECKETT
UPPER TRIBUNAL JUDGE KEKIĆ**

Between

**KRZYSZTOF GONTARZ
(ANONYMITY ORDER NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Jaquiss, Counsel instructed by Duncan Lewis & Co. Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Although this is an appeal brought by the Secretary of State against the decision of First-tier Tribunal Judge Rastogi to allow this deportation appeal, for convenience, we refer to the parties as they were before the First-tier Tribunal.
2. The appellant is a Polish national born on 11 January 1977. He claims to have entered the UK in 2009. He is subject to a deportation order signed on 21 November 2015 under regulations 21 and 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 on the basis of his offending history between January 2011 and October 2015. These include offences involving non-dwelling house burglary (which led to a 12-month sentence), being drunk and disorderly, failures to surrender and, most recently, assault occasioning actual bodily harm for which he received a four-month prison sentence.

3. The appeal against deportation was heard at Hatton Cross on 7 July 2016. The appellant was unrepresented. He, nevertheless, gave evidence and made submissions and his appeal was allowed by Judge Rastogi who found that his criminality and the risk of re-offending did not amount to a sufficiently serious level to invoke the power to deport him. The determination was promulgated on 1 August 2016.
4. The respondent sought permission to appeal against the decision and the application was granted by Designated Judge Phillips on 24 August 2016. Thereafter, the matter came before Upper Tribunal Judge Perkins at the Royal Courts of Justice on 3 October 2016. Following a hearing at which the appellant, once again, appeared as a litigant in person, the respondent's challenge was successful, and the decision of the First-tier Tribunal was set aside by way of a determination promulgated on 26 October 2016.
5. The appellant then acquired legal representation and sought permission to appeal to the Court of Appeal. It was argued on his behalf that no error of law had been identified by the Upper Tribunal. The application was refused on the papers by Judge Perkins on 6 February 2017 but was granted on renewal by the Rt. Hon. Lord Justice Beatson on 14 December 2017. On 8 March 2018 the appeal was allowed to the extent that it was remitted to the Upper Tribunal for an error of law hearing by a differently constituted Tribunal. Thus, it came before this Tribunal on 22 August 2018.

The Hearing

6. The appellant was not in attendance. We heard submissions from Ms Jaquiss on his behalf and from Ms Isherwood for the respondent.
7. Ms Isherwood sought to persuade us that the judge's decision was irrational. She submitted that the judge had made several adverse findings against the appellant; that there was a risk of re-offending, that he had sought to minimise his offending behaviour, that he had not been wholly truthful, that his period of residency had been broken by prison sentences and that he was not exercising treaty rights as there was no evidence of his business producing any revenue. Ms Isherwood took us through the judge's determination pointing out the negative findings and argued that these were not all taken into account when the judge came to her proportionality assessment. She placed emphasis on the appellant's caution for possession of a bladed instrument and the assault and submitted this demonstrated that he was prepared to be violent if provoked. She submitted that whilst the judge found that the appellant's offending had decreased, she had not appreciated that the appellant had been in prison and detention for a large part of 2015 and so had been unable to commit offences. In any event, the evidence suggested that working had not stopped him from committing crimes, there was no evidence of rehabilitation and the judge had failed to address the impact of his crimes and anti-social behaviour upon the community. In those

circumstances, it was not possible for her to maintain that she had considered “*everything*” (at paragraph 44 of the determination).

8. Ms Isherwood also addressed us on rehabilitation. She submitted that the principle emanating from Dumliauskas [2015] EWCA Civ 145, referred to in the appellant’s skeleton argument, was that rehabilitation was a relevant matter for consideration along with all others. She also relied upon MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC) with respect to the issue of rehabilitation and the necessity to conduct a wide ranging holistic assessment. Ms Isherwood submitted that there was no evidence of rehabilitation before the First-tier Tribunal and there had been no inclusion of it in the proportionality assessment. She submitted that the appellant had family in Poland and had no reason to remain here beyond his desire to run a business.
9. In conclusion, Ms Isherwood submitted that the judge had failed to engage with all the evidence and had failed to explain why, given the adverse findings, she had allowed the appeal. That was a material error of law and the decision should be set aside.
10. Ms Jaquiss responded. She submitted that the respondent had mounted a rationality challenge and was required to show that the judge had been irrational to conclude that the appellant’s offending was not serious enough to justify his deportation. She pointed out that it had not been argued that the judge had failed to consider or apply the correct legal principles or test. In so far as it was argued that the judge had not made clear findings on re-offending, it was plain that she had; in fact, she had considered his offences and his behaviour. She was, however, entitled to reach the conclusion that the risk of re-offending against the person had decreased and that there would be less of a risk of acquisitive offending if he was able to work. The judge also had the impact of the offending on the community in mind and had full regard to the decision letter and the respondent’s case. It was open to her following the cases cited in the skeleton argument to place little weight on generalised and unsupported statements about crime had had no specific link to the appellant. The judge had not been overly generous; she had not over stated the possibility of rehabilitation. She had looked at the offending history and the prospects of re-offending. She had heard the evidence and applied the appropriate legal provisions. Whilst the propensity to reoffend was a relevant consideration when the risk to society was assessed, it was not definitive. A fact sensitive assessment was required. That was what the judge had carried out. Even if she had been generous, she had reached sustainable conclusions applying the wide margin of discretion available to her. The decision was not perverse and should stand.
11. Ms Isherwood did not choose to reply.
12. That completed the hearing. We reserved our determination which we now give with reasons, having taken the submissions and all the evidence into account.

Findings and Conclusions

13. It is common ground that the appellant has not completed five years or more of continuous residence in accordance with the Regulations and so he is not entitled to the higher level of protection against expulsion.
14. It is also accepted that the judge properly identified the issue for determination as whether the appellant's deportation as an EEA national could be justified on the 'public policy' criterion (and that it was the future risk to society which was central to that issue) and whether the decision was proportionate.
15. The appellant's history of offending is also accepted. He has accumulated eight convictions for twelve offences committed between January 2011 and October 2015 and had received various punishments from prison sentences, to fines and conditional discharges. He also has two cautions. He was imprisoned in 2013 and in 2015. The judge observed in her determination that the respondent had failed to comply with the Tribunal's directions and had not provided any details of the convictions other than the bare bones of the offences and the outcomes; we note that this is still the position.
16. The respondent's challenge is essentially one on rationality grounds. It is maintained that the judge's decision to allow the appeal was perverse / irrational because of the adverse findings made as to the appellant's past offending and propensity to re-offend.
17. Ms Jaquiss was correct to observe that the judge is not criticized for failing to consider the correct legal principles or applying the wrong test. The criticism is that she did not place sufficient weight on the appellant's offending history and the risk to the community of his future re-offending. We have considered the judge's findings at paragraphs 21-46. These commenced after she set out the respondent's case (at 3a-e), the law (at 4-7), the hearing, evidence and submissions (at 8-10 and 14-20) and the appellant's offending history (at 11-12). She found there was supporting evidence for his claim to have entered the UK in 2009, to have set up a building business, which had not been actively trading or yielding revenue, and to have obtained an English qualification in prison. She had regard to both the judgments Ms Isherwood referred us to (see paragraph 27) and to the principles that the criminal convictions in themselves are not enough to deport and that the propensity to re-offend had to be taken into account.
18. The judge took the appellant's explanations into account but found that these did not excuse his crimes. She also considered that he had a propensity to re-offend. However, she also noted that "*the rate of offending was reducing*" and that prior to the assault in July 2015 he had managed to remain offence free for 19 months (apart from a drunk and disorderly conviction in November 2013 for which he was fined), having fully qualified to work in the building trade. Ms Isherwood submitted that this did not take account of the fact that he spent much of 2013

and 2015 in custody but his incarceration in 2015 postdates the period the judge had in mind and that of 2013 predates it. The judge was entitled to find that the appellant's acquisitive offending coincided with the period when his business was not yielding an income and that his offending ceased whilst he was able to work.

19. The judge took account of the conviction for assault in October 2015 which the appellant maintained was a fight he got into with a friend who had stolen from him. She found that although he had not provided evidence of rehabilitation and did not show remorse, he did reveal some self-reflection as to how he would deal with such a situation in the future and this amounted to a form of rehabilitation and a lessening of the risk of crimes against the person in the future. The judge also took account with the extremely low level at which all but one offence were dealt with and indeed the respondent himself accepts in his grounds that the offences "*are not particularly serious*" (at p. 7). She plainly had regard to the protection of members of the public from violent crime (at 35) and considered *Bulale* [2008] EWCA Civ 806 which gave a member state "*a certain amount of judgment in deciding what its law-abiding citizens must put up with*". The judge was entitled to reject the respondent's generalized arguments about the impact of offending upon the public and to find that reg. 21(2) prevented her from putting weight on the respondent's justification of his decision on economic grounds where he refers to "*the undermining of the foundation of our economy during this difficult economic crisis*".
20. Essentially what the judge concluded was that although the appellant had committed mainly low level offences, and may continue to do so if he does not work, his record "*did not reveal a pattern of offending against the person or crime causing serious harm*". There was, thus, a lessened risk of such behaviour in the future. The judge concluded that even though he presents a real risk of further offending the nature of any such offending is at such a low level that it is insufficient to meet the criteria of reg. 21(5)(c): that he represents "*a genuine, present and sufficiently serious threat*" to a fundamental interest of society. She found that the decision disproportionately curtailed his right to free movement, notwithstanding his limited private life in the UK and the presence of family in Poland, and accordingly allowed the appeal.
21. We have found that the judge properly considered all the factors put forward for both sides, applied the correct legal principles and test and fully reasoned her findings. Whilst it is entirely possible that another judge would have reached another decision, that does not make this decision irrational. It cannot be said that no other judge could have reached the same conclusions. In the circumstances, whilst we agree with Ms Jaquiss that the judge may have been generous in her decision making, we cannot interfere with her decision which we find was rationally made.

Decision

22. The First-tier Tribunal did not make any errors of law and the decision to allow the appeal against deportation is upheld.

Anonymity

23. We were not asked to make an anonymity order and there is no reason to make one.

Signed

A handwritten signature in black ink, appearing to read "R. Keir". The signature is written in a cursive style with a small dot at the end.

Upper Tribunal Judge

Date: 22 August 2018