



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

Appeal Number: DA/00314/2020

**THE IMMIGRATION ACTS**

**Heard at Birmingham Justice Centre**

**Decision & Reasons  
Promulgated**

**On 25<sup>th</sup> January 2022**

**On 20<sup>th</sup> May 2022**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR TOMASZ RAJKOWSKI  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr C Bates, Senior Home Office Presenting Officer

For the Respondent: Mr Rea, Rea Law

**DECISION AND REASONS**

1. The appellant in the appeal before me is the Secretary of State for the Home Department (“SSHD”) and the respondent to this appeal is Mr Tomasz Rajkowski. However, for ease of reference, in the course of this

decision I adopt the parties' status as it was before the FtT. I refer to Mr Rajkowski as the appellant, and the Secretary of State as the respondent.

2. The respondent appeals the decision of First-tier Tribunal Judge Farrelly promulgated on 20<sup>th</sup> April 2021 allowing the appellant's appeal under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") against the respondent's decision of 25<sup>th</sup> June 2020 to make a deportation order.
3. The respondent's appeal was listed for hearing before me, and the hearing took the form of a remote hearing using Microsoft Teams. Neither party objected to a remote hearing. The appellant did not join the hearing remotely, but at the outset, Mr Rea confirmed the appellant is aware of the hearing and he was content to proceed in the appellant's absence. At the end of the hearing I reserved my decision and informed the parties that my decision and reasons will be set out in writing. This I now do.

## **Background**

4. The appellant is a national of Poland. The appellant claims that he travelled from Poland to Northern Ireland in September 2010.
5. On 25<sup>th</sup> February 2019, the appellant came to the attention of the respondent when he was remanded at HMP Maghaberry facing a charge of attempted robbery. He was convicted on 8<sup>th</sup> October 2019 at Newry Crown Court of attempted robbery and given a three-year sentence, made up of 18 months imprisonment and an 18-month licence period. As a result of that conviction and the sentence imposed, the appellant was issued with a notice of liability to deportation giving him an opportunity to make representations to the respondent, but he failed to respond. The respondent therefore made a deportation order upon the basis of the information available to her.

6. The respondent considered the offence for which the appellant had been convicted and his conduct. She was satisfied that the appellant would pose a genuine, present and sufficiently serious threat to the interests of public policy if he were to be allowed to remain in the United Kingdom. She concluded that the appellant's deportation is justified under Regulation 27 of the Immigration (European Economic Area) Regulations 2016.
7. The appellant's appeal against that decision was allowed by FtT Judge Farrelly for reasons set out in a decision promulgated on 20 April 2021. It was common ground before the First-tier Tribunal that the appellant had acquired a permanent right of residence in the United Kingdom and as such, he is entitled to a higher level of protection from removal, namely, a decision could not be taken in respect of the appellant except on serious grounds of public policy and public security. Judge Farrelly noted the appellant could not benefit from the highest level of protection (*imperative grounds of public security*) because he has not resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision.
8. The respondent claims that in reaching his decision, Judge Farrelly failed to have adequate regard to the seriousness of the offence committed by the appellant or the impact on the victim. The respondent claims that the conclusion, at paragraph [33] of the decision that the respondent has failed to establish on balance, that the appellant represents a present and serious risk fails to have adequate regard to the fact that the appellant has been assessed as posing a medium risk of reoffending. The respondent claims the judge failed to have any regard to the considerations referred to in Schedule 1 of the EEA Regulations 2016. The fundamental interests of society in the United Kingdom include, *inter alia*, maintaining public order, preventing social harm, excluding or removing an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to

take such action and protecting the public. The respondent claims Judge Farrelly noted, at [20], that the likelihood of the appellant re-offending was assessed to be 'medium' within the next 2 years. There were concerns about his unsettled lifestyle, the history of alcohol misuse and a lack of insight, limited victim awareness and limited skills for coping with stress management. The respondent claims that in considering proportionality, the fundamental interests of society outweigh the appellant's rights in view of the seriousness of the offending, and the absence of any factors that indicated he would be unable to integrate into life in Poland.

9. Permission to appeal was granted by First-tier Tribunal Judge Adio on 30<sup>th</sup> April 2021. Judge Adio noted there is no indication within the consideration of the appellant's case that the judge applied Regulation 27(8) of the 2016 Regulations, which requires that a court or tribunal considering whether the requirements of Regulation 27 are met, must (in particular), have regard to the considerations contained in Schedule 1. He noted that, arguably, the issue of the fundamental interests of society have not been adequately dealt with by the First-tier Tribunal Judge.
10. Before me, Mr Bates submits that Judge Farrelly failed to have regard to the considerations contained in Schedule 1 and failed to adequately engage with the fundamental interests of society. He submits Judge Farrelly referred to the evidence of the appellant that he had felt bad about the incident and ultimately approached the police and confessed. That however was a factor that was known to the probation officer who had noted that the appellant accepts responsibility for his offending behaviour when completing the assessment of the likelihood of reoffending. Mr Bates submits the appellant has little by way of links to the UK and the probation officer identified a number of risk factors including an unsettled lifestyle, financially motivated offending, chronic alcohol misuse, poor stress management techniques and limited victim awareness. The probation officer had regard to factors that weigh in favour of the appellant including his limited criminal record, the fact that

the appellant accepted responsibility for his behaviour, and that he has a good work ethic. The appellant had been sentenced to a three-year sentence, made up of 18 months imprisonment and an 18-month licence period. In reaching his decision, Judge Farrelly noted, at [31], that the appellant is abstinent, but how long he will remain so is unknown. Mr Bates submits the appellant is on licence, and the threat of deportation is an incentive to comply, but that is a short-term incentive. Mr Bates submits that Regulation 27(5) sets out the principles that apply where a relevant decision is taken on grounds of public policy or public security. They include, *inter alia*, whether the personal conduct of the person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and importantly he submits, the threat does not need to be imminent. Mr Bates submits that here, Judge Farrelly appears to proceed upon the premise there is no risk because the appellant is abstinent. Judge Farrelly said, at [33], that although the future cannot be predicted he did not see evidence that would suggest relapse and reoffending as a likelihood. Mr Bates submits the evidence all points to someone who does pose a risk, albeit not imminent.

11. In reply, Mr Rea quite properly accepted that Judge Farrelly does not make any express reference to Regulation 27(8) or Schedule 1 in the decision. He submits that at paragraphs [18], [19] and [20] of the decision, Judge Farrelly referred to the appellant's evidence regarding his upbringing, the release plan that was before the First-tier Tribunal and the probation officer's assessment of the risk of reoffending. As Judge Farrelly noted at paragraph [12], the respondent had failed to provide a copy of the trial judge's sentencing remarks. The appellant had explained the circumstances surrounding the offence. Judge Farrelly had found the appellant's oral evidence to be credible. Mr Rea submits Judge Farrelly was plainly aware of the probation officer's report and had regard to what was set out. In reaching his decision, at paragraph [19], Judge Farrelly refers to the positive steps taken by the appellant and matters that weigh in his favour. At paragraph [20], Judge Farrelly referred to the

assessment of the likelihood of the appellant reoffending and properly noted that there was a medium risk. Again, it is clear the judge had regard to the factors that weigh in favour of, and against the appellant. Mr Rea submits the extent to which the appellant had been rehabilitated was relevant and properly considered by the Judge. Mr Rea submits Judge Farrelly accepted the appellant's evidence and although the judge does not expressly say that the threat does not need to be imminent, the judge had careful regard to the appellant's past and present behaviour. The judge carefully noted the evidence before the Tribunal, and we can properly assume that the Judge accepted the evidence that he recorded. The judge referred to the lack of any previous offending either in Poland or the UK, and noted the appellant enjoys good health. The judge noted, at [30], that the appellant will now have an appreciation of the consequences of offending and the link between offending and deportation. He noted, at [31], the risk that arises if the appellant faces economic hardship if out of work. He noted the appellant's links to the UK and the absence of ties to Poland. Judge Farrelly also found that it would seem likely that if returned to Poland the appellant could obtain employment and attempt to re-establish his life there. In reaching the decision, Judge Farrelly considered matters that weigh in favour of, and against the appellant. Mr Rea submits that on the evidence, and considering matters in the round, it was open to the judge to conclude that the appellant does not represent a present and serious risk.

### **This Discussion**

12. It is useful to begin with the EEA Regulations 2016. Regulation 23(6)(b) provides that an EEA national who has entered the United Kingdom may be removed if the respondent has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with Regulation 27. Regulation 27 insofar as it is material to this appeal provides:

27.—(1) In this regulation, a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.

...

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

...

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
- (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;
- (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

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

...

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

13. It is also convenient to set out Schedule 1 of the 2016 Regulations insofar as it is relevant to this appeal.

### **The fundamental interests of society**

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

...

(b) maintaining public order;

(c) preventing social harm;

...

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

...

(j) protecting the public;

..."

14. To justify interfering with the appellant's rights to free movement and residence in the UK, the respondent must establish the appellant's removal is justified on grounds of public policy and public security. As set out in Regulation 27(5)(c), the appellant cannot be removed unless his personal conduct represents "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct and that the threat does not need to be imminent. Paragraph 1 of Schedule 1 confirms that the EU Treaties do not impose a uniform scale of public policy or public security values and member States enjoy considerable discretion, acting within the parameters set by the EU Treaties to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time. The application of paragraph 1 to the United Kingdom is informed by what follows at paragraphs 2 to 6 of Schedule 1.
15. The failure to refer to Schedule 1 of the 2016 Regulations 2016 is not in itself fatal to the decision of the First-tier Tribunal provided that it is clear that Judge Farrelly applied the correct test. A party appearing before a Tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the Tribunal is addressing its mind and the basis of fact on which the conclusion has been reached.
16. A finding as to whether the conduct of the appellant represents a genuine, present and sufficiently serious threat is a prerequisite for the



adoption of an expulsion measure and it is only upon such a threat being established, that the issue of proportionality arises. Here, the respondent had failed to provide the Tribunal with the Judge's sentencing remarks, but Judge Farrelly found the appellant to be a credible witness, and at paragraphs [15] and [16] of the decision, recorded the appellant's account of events. He noted the appellant has only one conviction in the UK and no previous convictions in Poland. Judge Farrelly referred, at [18], to the appellant's account of his childhood, and at paragraph [19], he referred to the evidence before the Tribunal regarding the appellant's conduct in prison. Judge Farrelly noted, at [20], the evidence of the probation officer and the assessment that the likelihood of reoffending is assessed as being medium, within the next two years. The probation officer identified the various risk factors that the assessment was based upon and the protective factors pertaining to that assessment. Judge Farrelly referred to the appellant's conduct in prison and at paragraphs [28] and [31] noted the history of alcohol abuse but accepted the appellant is now abstinent. The judge appears to have been persuaded that the appellant has a capacity for change, but that entirely disregards the fact that the appellant has been assessed as posing a medium risk of reoffending within two years and that the risk does not need to be imminent in circumstances where the risk for the appellant is when he would face economic hardship if out of work and abusing alcohol. That was the background to his previous offending. Judge Farrelly noted the absence of any close support from friends and noted the absence of visitors when the appellant was in prison. It appears that the judge had particular regard to the fact that the appellant is abstinent and noted that "how long he will remain so is unknown". At paragraph [33], Judge Farrelly properly noted that the future cannot be predicted but he did not see there to be evidence that would suggest relapse and reoffending as a likelihood.

17. Although brevity is often to be commended, in my judgment the findings and conclusions reached by Judge Farrelly are without any adequate explanation and fail to demonstrate that the judge had in mind the

correct legal framework. Judge Farrelly was required to have regard to the principles set out in Regulation 27(5)(c) of the 2016 Regulations. That is, 'the personal conduct of the appellant must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent'. In my judgement, in reaching his decision Judge Farrelly was entitled to have regard to factors that weigh in favour of the appellant and indeed to conclude that he did not see evidence that would suggest relapse and reoffending, provided it is also clear that he was mindful of the 'fundamental interests of society' as expressed in Schedule 1 of the 2016 Regulations and the principle that the threat does not need to be imminent. Judge Farrelly concludes at [33] that the respondent has failed to establish that the appellant represents a present and serious risk. The question is not simply whether the appellant represents a present and serious risk, but whether he represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct and that the threat does not need to be imminent. In considering that question, the Tribunal was required to have regard to the fundamental interests of society set out in Schedule 1.

18. In reaching his decision, Judge Farrelly failed to have any regard to the observations made by the respondent in her decision that the inherently violent nature of robbery and attempted robbery differentiates it from other acquisitive offences. The respondent noted that despite the fact physical force may not have been used, it is classified as a violent crime because the threat of force being used can have significant psychological impact. The respondent noted that for victims who have been threatened with, or subjected to physical force, either with or without a weapon, robbery and attempted robbery can be a terrifying experience. In addition to physical injury, in cases where the victim is particularly vulnerable, the effect of the offence can be life changing.

19. True it is that the appellant may have been abstinent, and that the future cannot be predicted, but in my judgment, Judge Farrelly focused upon entirely the present and failed to consider what might happen in the absence of the threat of deportation and after completion of the licence period, in light of the appellant's limited ties to the United Kingdom and the lack of support. Although the appellant might well have been abstinent and sought assistance when he was serving a term of imprisonment, this is not a case where there had been a prolonged period of industrious good behaviour following the term of imprisonment, showing that the appellant's offending can be considered in isolation when considering the fundamental interests of society, one of which is to protect the public. There is no reference at all by Judge to the 'fundamental interests of society' expressed in Schedule 1 of the 2016 Regulations. In the end, I cannot be satisfied that Judge Farrelly would have reached the same conclusion, if he had directed himself to the the fundamental interests of society.
20. It is only upon such a threat being established that the issue of proportionality arises. As Judge Farrelly found the appellant does not represent a present and serious risk, he did not consider whether the decision to restrict the rights otherwise conferred by the 2016 Regulations complied with the principle of proportionality as required by Regulation 27(5)(a) of the 2016 Regulations.
21. It follows that in my judgement, the decision of Judge Farrelly is infected by a material error of law and the appropriate course is for the decision of First-tier Tribunal Judge Farrelly to be set aside with no findings preserved.
22. As to disposal, as Mr Rea submits, in my judgment the appropriate course is for the matter to be remitted to the FtT for hearing *de novo*. I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statement of 25<sup>th</sup> September 2012. In my view, in determining

the appeal, the nature and extent of any judicial fact-finding necessary will be extensive.

**Notice of Decision**

23. The appeal is allowed. The decision of FtT Judge Farrelly promulgated on 20<sup>th</sup> April 2021 is set aside, and I remit the matter for re-hearing in the First-tier Tribunal with no findings preserved.

Signed **V. Mandalia**  
2022

Date 29<sup>th</sup> April

**Upper Tribunal Judge Mandalia**