



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-004162

First-tier Tribunal No:
DA/00021/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 18th of June 2024

Before

UPPER TRIBUNAL JUDGE S SMITH
and
UPPER TRIBUNAL JUDGE MANDALIA

Between

MR. EDGARAS ZVILAUSKAS
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

REPRESENTATION

For the Appellant: No appearance by or on behalf of the appellant
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

Heard at Royal Courts of Justice (Belfast) on 17 May 2024

DECISION AND REASONS

INTRODUCTION

1. The appellant is a national of Lithuania. On 2 October 2019 he was convicted of 'Conspiring to Fraudulently Import Class A Controlled Drugs', at Laganside Crown Court. He was sentenced to a licence period of eight months, a custodial sentence of eight months, and an Offender Levy of

£25. On 4 October 2019 the Department of Justice revoked his licence, and he was recalled to prison to serve his licence period of eight months. The respondent considered the offence of which the appellant had been convicted and his conduct in accordance with Regulation 27 of the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations 2016”). The respondent was satisfied that the appellant poses 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, and that his deportation is justified under Regulation 27.

2. On 30 January 2020, the respondent decided to make a Deportation Order pursuant to the EEA Regulations 2016. The appellant’s appeal against that decision was dismissed by First-tier Tribunal Judge Fox for reasons set out in a decision promulgated on 29 June 2022.

THE GROUNDS OF APPEAL

3. The appellant claims, in summary, that Judge Fox; (i) failed to have regard to or apply the relevant legal test such as to amount to a material misdirection of law on a material matter, and (ii) made perverse or irrational findings.
4. The appellant claims that despite displaying a clear awareness of the principles in Regulation 27(5) and Schedule 1 of the EEA Regulations 2016, the Judge has failed to apply the test appropriately, if at all, and failed to have regard to the relevant case law. It is said the judge has not identified the threat posed by the appellant on relapsing or re-offending, outlined how his conduct represents a genuine, present and sufficiently serious threat, nor defined the fundamental interests of society at play or how they would be affected. The judge found the appellant is a drug addict and the appellant claims, without further consideration of the legal principles, the judge considers that finding justifies the appellant’s deportation without considering the other factors relevant to the legal test in Regulation 27(5).
5. The appellant claims Judge Fox irrationally or perversely made a number of findings that on their own, or taken together, amount to a material error of law. The criticisms made are set out at paragraphs [7] to [14] of the Grounds of Appeal. Furthermore, the appellant claims the judge failed to consider the appellant’s social circumstances, both at the time of his offending, and now.
6. Permission to appeal was granted by Upper Tribunal Judge Kebede on 5 November 2022. She said:

“There is arguable merit in the assertion in the grounds that the judge erred in his application of the relevant legal test and in his consideration of regulation 27(5) of the EEA Regulations 2016 in the terms set out in the first ground, in particular in regard to the proportionality issue. With regard to the second ground, whilst it may be difficult for the challenge to meet the high threshold of perversity, it is nevertheless arguable that there was a lack of adequate reasoning in the judge’s findings.”

THE HEARING BEFORE US

7. On 13 May 2024, the Tribunal received a written request from the appellant's representatives, Oracle Solicitors, seeking an adjournment. They indicated that they are without instructions and had last heard from the appellant in February 2023. They have provided the appellant with regular updates, but he had not responded to emails or telephone calls. The application was refused.
8. The appellant did not attend the hearing. At the outset of the hearing before us, Mr Beech of counsel, who had settled the grounds of appeal, and a skeleton argument dated 13 May 2024, appeared before us and informed us that the appellant's representatives had managed to establish contact with him, and had expected the appellant to attend the hearing. In the absence of the appellant, and no explanation for his failure to attend, Mr Beech withdrew representation since there is no funding in place for further representation before us.
9. We have had regard to Rule 38 of The Tribunal Procedure (Upper Tribunal) Rules 2008. We are satisfied the appellant has had notice of and is aware of the hearing. We have the benefit of the comprehensive grounds of appeal that have been settled by Mr Beech together with the skeleton argument that he had prepared in readiness for the hearing before us. The appellant has failed to maintain regular contact with his representatives and has demonstrated little commitment to this appeal. There is nothing to assure us that if the hearing is adjourned, the appellant would attend on the next occasion. We consider it in the interests of justice to proceed with the hearing in the absence of the appellant.
10. On behalf of the respondent Mr Mullen adopted the comprehensive rule 24 response dated 10 November 2022 filed on behalf of the respondent. He submits that on any view, there is a strong public interest in the deportation of the appellant. He is only entitled to the lowest level of protection and there is little that can be said by the appellant to demonstrate that his deportation is disproportionate. He submits the judge reached a decision that was open to him and he invites us to dismiss the appeal.

DECISION

11. The relevant EEA Regulations 2016 are cited in paragraphs [5] and [6] of the decision. 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. As set out in Regulation 27(5), the public policy requirements of the United Kingdom include restricting rights otherwise conferred by the Regulations in order to protect the fundamental interests of society and where a decision is taken on grounds of public policy it must also be taken in accordance with the principles set out in Regulation 27. Regulation 27(5) (c), operates so that 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.

Ground 1

12. We reject the claim that the judge failed to consider or apply the appropriate legal test. At paragraph [34] of the decision, the judge said:

“...I am satisfied that the Respondent has discharged the burden of proof and has satisfied me on the balance of probabilities that the Appellant represents a genuine, present, and sufficiently serious threat to the public by the high risk of relapsing and re-offending.”

13. Paragraph [34] cannot be read in isolation. At paragraph [7] of the decision, the judge referred to the respondent’s ‘Drug Strategy 2010’, which records the respondent’s view that trade in illicit drugs has a severe negative impact on society. The test, as the appellant’s skeleton argument acknowledges, is whether the conduct of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account the past conduct of the appellant and that the threat does not need to be imminent. The judge concluded the appellant is at high risk of relapsing and reoffending. That is the ‘genuine, present and sufficiently serious threat, taking into account the past conduct of the appellant, and noting the threat does not need to be imminent. Furthermore, paragraph [34] must be read alongside what was said in paragraphs [18] to [33] of the decision, in which the judge considered the conduct of the appellant referring to matters that weigh in favour of and against the appellant.

14. We also reject the claim that the judge failed to engage in any determination of whether the respondent’s decision complies with the principle of proportionality and other relevant factors identified in Regulation 27(5). At paragraph [35] of his decision, the judge noted the appellant has acknowledged that he has drug problems and an addiction but weighed that against the other evidence before the Tribunal regarding short term attempts by the appellant to engage with certain services. The judge said the appellant’s lack of commitment and self-control is such that the risk remains prevalent. The judge was satisfied that there is every chance that the appellant would continue to reoffend with the possibility that the offences will become more serious. The lack of due regard to the consequences of his own behaviour and the consequences his behaviour has on the public, combined to persuade the judge that the decision to deport the appellant is proportionate in all the circumstances. At paragraph [36] of his decision the judge also referred to the appellant’s connections to Lithuania, and the assistance, accommodation and support that will be available to him.

15. The decision must be read as a whole. Having done so, we are satisfied that the judge had regard to the factors set out in Regulation 27 of the EEA Regulations 2016 and reached a decision that was rooted in the evidence and open to the judge.

Ground 2

16. We also reject the appellant's claim that the decision contains several perverse, incorrect or irrational findings as set out in paragraphs [7] to [15] of the Grounds of Appeal. The findings and conclusions reached by the judge are set out at paragraphs [15] to [37] of the decision. The judge found there was no evidence before the Tribunal that the appellant had at any time exercised Treaty rights while in the UK.
17. The appellant claims that at paragraph [18], the judge does not explain why he rejected the appellant's claim that he did not understand the significance of the caution he had received, or why he concluded the caution had no impact on the appellant. He also claims there is no 'evidential or reasoned basis' for reaching the conclusion at [19], that it is likely that the appellant was accompanied on more than one occasion. Reading paragraphs [17] to [22] of the decision, there is no merit to either criticism.
18. The judge referred, at [18], to the appellant's own evidence that he had fallen into the wrong company and that he had travelled regularly to Dublin, to purchase heroin. He noted the appellant had come to the attention of the police authorities and received a caution in connection with his drug use and purchase. The judge noted, at [21] that the appellant was cautioned on 11 January 2019, and that shortly thereafter, on 20 January 2019, the appellant was arrested on the more serious charge upon a return trip with another person from Dublin. At paragraph [22], the judge said:

"The salient point from this observation is that, whether the Appellant fully understood the Caution or not, it had little impact upon him and his behaviour, even though the Caution came from the Police Service of Northern Ireland ("PSNI"). Eight (8) days later he set off on a further purchasing expedition to Dublin to obtain more heroin. The Caution had clearly no impact upon him at all, so as to modify his behaviour."
19. The judge engaged with the appellant's claim and reached a decision, giving adequate reasons for doing so.
20. We also reject the claim made that in reaching his decision, the judge elevated the severity of the appellant's offending and sentence. Although we accept that at paragraph [20] of the decision, the judge refers to a charge and conviction for "fraudulently importing a Class A drug", the judge noted in the same paragraph that the charge and conviction had been set out in paragraph [4] of the decision. In paragraph [4] of the decision, the judge records the appellant was given a Restorative Caution for 'Possession of a Class A Drug with intent to supply' and 'Supplying Class A Controlled Drugs'. The judge also recorded in that paragraph that the appellant was convicted of 'Conspiring to Fraudulently Import Class A Controlled Drugs', at Laganside Crown Court on 2 October 2019. Any

erroneous reference of the index offence in paragraph [20] is immaterial when on any view, as the judge said, "*the conviction is serious*" and the appellant acknowledged the respondent's position on drugs and the impact they have on society generally.

21. We also reject the appellant's claim that the judge failed to have regard both to the appellant's "grossly inadequate social circumstances prior to his arrest" and the fact that he was on remand as opposed to a sentenced prisoner, so that he had less access to offender focussed support. We reject too, the appellant's claim that the judge misunderstood the submissions made on behalf of the appellant regarding the pre-sentence report and the lack of a finding regarding the reasons for the missed probation meeting. At paragraphs [23] to [30] of his decision, the judge carefully considered all the evidence before the Tribunal regarding the appellant's circumstances and his lack of engagement with services generally. The judge said at paragraph [23] that the appellant had not been honest with his partner. The judge had regard to the evidence of the appellant's partner and found her to be intelligent, erudite, competent, committed and loyal. Yet her control over the appellant did not extend to being able to keep him on the straight and narrow in spite of her considerable commitment. The judge noted the language barrier and the impact of restrictions imposed during the Covid pandemic. The judge referred to the appellant's conduct following his release on licence and the appellant's own evidence that the claim made in his statements to having successfully ceased using drugs were untrue as demonstrated by the lapses that he acknowledged.
22. Finally, we reject the claim that the judge erred in his analysis of the appellant's evidence because the admissions the 'lapses that had occurred' were only drawn out in cross examination. The judge noted, at [26], that the lapses had in fact occurred prior to the appellant having signed his witness statements. The evidence of the appellant in those statements that he successfully ceased using drugs was therefore plainly incorrect. The appellant was represented at the hearing of his appeal, and as the judge noted at [26], the appellant had every opportunity to correct his evidence but he did not do so. The judge was plainly entitled to have regard to the reliability of the appellant's evidence in reaching his decision.
23. We accept, as the respondent submits, that the grounds of appeal amount to no more than a disagreement with a decision of the Tribunal that was open to the judge. It is now well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. An appeal before the Upper Tribunal is not an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, even surprising, on their merits. The analysis of the issues that arise in such an appeal and of the evidence is always a highly fact sensitive task. Standing back and reading the decision as a whole, the findings and conclusions reached by the judge were in our judgment, neither irrational nor unreasonable in the Wednesbury sense, or findings and conclusions that were wholly unsupported by the evidence.

They were based on the particular facts and circumstances of this appeal and the evidence before the Tribunal.

24. It follows that in our judgment the decision of First-tier Tribunal Judge Fox is not vitiated by any material error of law and his decision to dismiss the appeal stands.

NOTICE OF DECISION

25. The appeal to the Upper Tribunal is dismissed
26. The decision of First-tier Tribunal Judge Fox promulgated on 29 June 2022 stands.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 May 2024