



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000528

First-tier Tribunal No: DA/00264/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 18th of June 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARCIN PIOTR RYCHLEWSKI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Thompson, a Senior Home Office Presenting Officer.
For the Respondent: Mr Khubber instructed by Turpin & Miller LLP (Oxford)

Heard at Phoenix House (Bradford) on 7 June 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Sills ('the Judge'), promulgated on 22 December 2023, in which he allowed Mr Rychlewski's appeal against the order for his deportation from the United Kingdom dated 8 July 2019, supported by a supplementary decision of 8 April 2021.
2. The Judge sets out the factual background between [2 - 11] of the decision under challenge.
3. The Judge refers at [11] to an earlier appeal by Mr Rychlewski having been dismissed by the First-tier Tribunal on 21 January 2022 and that decision being set aside by the Upper Tribunal on 27 October 2022 with no preserved findings. The matter therefore came before the Judge to be considered *de novo*.
4. The Judge's findings are set out from [18] which properly begin with consideration of the question of whether Mr Rychlewski's personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

5. The Judge notes the nature of Mr Rychlewski's offending and criminal history which was taken to be accurately recorded in the Police National Computer (PNC) printout.
6. At [20] the Judge found the fact Mr Rychlewski had not offended for 5 years was highly significant, especially as the requirement for the test was for Mr Rychlewski's conduct to represent a 'present' threat even if that threat need not be imminent. The Judge notes during that 5-year period Mr Rychlewski has been living with his partner and three children and, even though he is not permitted to work, had not reoffended. The Judge did not discount negative factors, noting in this paragraph that two of the offences for which Mr Rychlewski was convicted were linked to his place of work, but it was found that the fact he had not reoffended despite being in difficult financial circumstances was significant. The Judge notes a last criminal offence was committed in 2018.
7. The Judge considered the OASys report, last updated in April 2021, and the statistical analysis of the likelihood of reoffending. The Judge noted Mr Rychlewski had been assessed to be a medium risk of serious harm to the public in the community but also notes he was found to be very motivated to avoid reoffending.
8. The Judge takes specific note of the supplementary decision letter of 8 April 2021 at [22] of the decision under challenge, noting that whilst what is recorded at [52] regarding propensity to reoffend was the case in April 2021, that was not the case before the Judge. The Judge notes the OASys records a 58% chance of Mr Rychlewski reoffending within two years, but that he has not reoffended.
9. The Judge consider schedule 1 para 3 of the Immigration (EEA) Regulations 2016 ('the 2016 Regulations') at [23].
10. Drawing the threads of his thinking together the Judge writes at [24]:
 24. Taking all the above into account, and in particular the fact that the Appellant has not offended for 5 years, and for the last 3 years he has been living in the UK without permission to work with his family in straightened circumstances, I find that the Appellant does not represent a genuine, present and sufficiently serious threat to the fundamental interests of society. In my view, the Appellant's own conduct shows that he does not represent a present and sufficiently serious threat. The Appellant has shown that over the last three years that he can desist from offending while living in the community. He has matched his motivation as recorded in the OASys report with his actions. His conduct during the past three years in my view is the best indication of his likely future conduct. This indicates that the Appellant will not reoffend. Further, when one considers the seriousness of the Appellant's past offending and when this took place as discussed above, alongside the fact that he has not offended since October 2018, any present threat posed by the Appellant to the fundamental interests of society is not sufficiently serious. I therefore find that the Respondent has not established that the Appellant's personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society to justify his deportation on grounds of public policy or public safety. I therefore allow the appeal on this basis.
11. The Judge went on to consider the proportionality of the decision from [25] although there was technically no need to do so in light of the primary finding that the appeal was allowed at [24].
12. The Secretary of State sought permission to appeal arguing that the Judge had made a material misdirection of law and provided inadequate reasoning in relation to the public policy considerations to which specific reference is made, inter alia, to the fact Mr Rychlewski has been residing in the UK in breach of the deportation order with no evidence that he had applied for the deportation order to be revoked, Ground 1. Ground 2 asserts inadequate reasoning in relation to family life.

13. Permission to appeal was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:

2. The grounds assert that the judge erred by failing to take into account that the appellant was in breach of a deportation order, and that there has been inadequate reasoning for allowing the appeal.
3. In an otherwise well-written decision, it is to be noted that the judge makes no reference, in the findings, to the breach of the deportation order. The appellant had committed serious offences and the overall assessment has not been placed in context by failing to take into account that the appellant had entered the UK in breach of a deportation order. This must be explored further.

14. In a Rule 24 response filed on 22 May 2024 Mr Rychlewski opposes the Secretary of State's appeal for the following reasons:

R's Response to SSHD's grounds of appeal.

11. In summary R submits that: i. There was no legal error by the FTT requiring its decision allowing R's appeal to be set aside. ii. Alternatively, even if there were any legal errors by the FTT, such were not material requiring the FTT's decision to be set aside.

12. In relation to the SSHD's challenge to the FTT's consideration of the public policy etc issue R makes the following submissions in order to understand why this challenge lacks merit. [4]

13. (1). R accepts that the FTT decision does not make explicit reference to R's previous breaches of the deportation order by returning to the UK in the body of the decision in his reasoning on threat. However, there can be no doubt that the FTT was well aware of it and was instead understandably focussing on the more recent reasoning given by the SSHD for its decision i.e. see para 23: "While I note [R]'s adverse immigration history, it is [R]'s criminal conduct that the [A] relies upon in the supplementary decision of 8 April 2021 concerning the threat the [R] poses. Pertinently, the FTT] continues: "In any event, [R] has also complied with immigration restrictions placed upon him since he was released on immigration bail in August 2020."

See also para 8 FTT decision referring to the breaches of the deportation order.

14. (2). The above passage shows that the FTT] was sufficiently aware of R's adverse immigration history and evaluated its relevance to the issues before him. He was entitled to that make that evaluation. His downgrading of its relevance resulted from the SSHD's own focus on his offending and the relevant fact that R had now been compliant with immigration conditions for over 3 years at the time of the hearing. That evaluation was permissible and does not amount to an error of law requiring his decision to be set aside.

15. (3). Alternatively, if it could be said that the FTT]'s failure to explicitly address R's adverse immigration conduct regarding breaches of the deportation order, it is difficult to see how that would have materially impacted on the conclusion on threat under EU law that he reached in this case: i.e. the breaches were now historical, the focus was on his future offending conduct, R had now shown compliance with both criminal and immigration law for a number of years whilst in the UK. Any further consideration of the immigration history could not realistically have changed the evaluation reached by the FTT] on threat or proportionality under EU law.

16. (4). The SSHD's reliance on Bouchereau is misconceived. That guidance was referring to particularly heinous past conduct which alone, could in extreme circumstances, satisfy the public policy/public security threshold e.g. see more recently per Singh LJ in *Robinson v SSHD* [2018] EWCA Civ 85; [2018] 1 WLR [5] 81. The SSHD has not specified why and how he is seeking to rely on R's past conduct to meet this

exception. Neither decision letters relied on by the SSHD sought to rely on the Bouchereau exception.

17. This ground is not made out and should be rejected.

18. The SSHD's second ground regarding misdirection on family life is also not made out for the following reasons.

19. (1). Generally, the SSHD's submissions here clearly amount to a disagreement with the evaluation properly reached by the FTTJ on the evidence before him. That evaluation cannot be impugned as unlawful or irrational as the SSHD appears to do.

20. (2). The criticism that the only evidence about detriment was that of the social worker is plainly wrong and misconceived: the social worker's report was based on evidence from the family, the FTTJ received evidence (witness statements, documentation etc) and heard evidence from R and his partner regarding the implications for them of his deportation (FTT para 14, 25-29).

20. (3) FTTJ's reasoning for deciding that R's deportation would be disproportionate because of the adverse impact on his family life was set out with care and detail at paras 25-29.

21. (4). The suggestion that the FTTJ has failed to follow the guidance in HA (Iraq) has a fundamental flaw: it fails to appreciate that when considering family life under EU law the FTT was not constrained to follow Part 5A NIAA 2002 which deals with consideration of a pure Article 8 ECHR claim i.e. R did not have to meet the unduly harsh test but rather a proportionality analysis through the lens of EU law (see R's skeleton at para 63). [6]

Conclusion.

22. For the reasons identified above R submits that the SSHD's appeal is not made, his appeal should be dismissed and the FTT's decision should stand.

Discussion and analysis

15. The Judge was clearly aware of Mr Rychlewski's criminal history including his conviction for burglary at the Sheffield Crown Court on 6 February 2019 and subsequent period of imprisonment. The Judge was also aware of Mr Rychlewski's history of persistent offending from 2009 to 2019.

16. Ground 1 challenges to Judge's findings alleging the Judge failed to have regard to the fact Mr Rychlewski has been residing in the UK in breach of the deportation order with no evidence he has applied to revoke it.

17. Whether a person presents a real risk of serious harm is a question of fact. Answering that question is an important aspect of an appeal under the 2016 Regulations which differs from domestic law. Under domestic law a person can be deported solely as a result of the offence they have committed for which they have been convicted and imprisoned. Whilst a person who has committed a serious offence can be deported on a similar basis under the 2016 Regulations, such cases are intently fact specific. This case is not one of those.

18. The Judge makes reference to schedule 1 of the 2016 Regulations, and specifically to schedule 1 (3) which reads:

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

19. The Judge took into account the specific matters for which Mr Rychlewski had been convicted, but they do not include any action being taken for the breach of the deportation order. As noted in the Rule 24 reply, and as discussed at the error of law hearing, Mr Rychlewski has complied with immigration restrictions placed on him since he was released from immigration detention on bail in August 2020. There was therefore nothing before the Judge suggesting any further action had been taken by the prosecution for entry in breach of the deportation order, and that rather than remove Mr Rychlewski the Secretary of State allowed him to remain in the United Kingdom on bail, the terms of which he honoured.
20. Regulation 27 sets out issues to be considered when a decision is taken on grounds of public policy, public security or public health. Regulation 27 (5) reads:
- (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.
21. The focus by the Judge on whether Mr Rychlewski will reoffend was therefore directly relevant to his personal conduct and whether that conduct represented 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. The need to focus on what may happen in the future is reinforced by Regulation 27 (5) (e), that the individual's personal criminal convictions did not in themselves justify the decision. Although looking back at past offences, the Judge was required to look to the future to assess risk, which he did.
22. The Ground asserting the Judge makes no specific mention of the fact Mr Rychlewski is in the UK in breach of the deportation order may be so, but that does not establish the Judge's finding that he is a reformed character who is motivated not to reoffend, and that his conduct did not represent a genuine

- present and sufficiently serious threat, is outside the range of findings reasonably available to the Judge on the evidence.
23. Although the primary challenge fails, as the Judge was aware of Mr Rychlewski's immigration history, the Grounds also fail to identify how, even if this factor had specifically been mentioned, it would have made a material difference to the Judge's overall conclusions. As the basis on which the Judge's findings are made relate to much wider issues identified by the Judge, and are supported by adequate reasons, it is not made out if it would have made any material impact.
 24. I find the Judge considered all the evidence with the required degree of anxious scrutiny which included that relating to Mr Rychlewski's immigration history. I advised the advocates I will be considering the merits of the challenge taking into account the guidance provided by the Court of Appeal to appellate judges in Volpi v Volpi [2022] EWCA Civ 462 @ [2] and Ullah v Secretary State for the Home Department [2024] EWCA Civ 201 @ [26].
 25. There is specific reference in Ullah to the fact that where a relevant point was not expressly mentioned by the First-tier Tribunal, the Upper Tribunal should be slow to infer that it had not been taken into account; by reference to MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49 @ [45].
 26. Although Mr Thompson submitted the fact there was no specific reference to Mr Rychlewski being in the UK in breach of deportation order in the determination, which I accept, meant the Judge had not factored this into the assessment of risk, I do not accept this argument.
 27. No material error of law is made out even if the Secretary of State disagrees with the decision. It is not made out the Judge's findings, which are adequately reasoned, are outside the range of those reasonably open to the Judge on the evidence.
 28. It is not made out that had the Judge put in another paragraph referring to what was written about Mr Rychlewski overstaying, it would have made any difference to the overall decision. Mr Thompson was unable to persuade me otherwise.

Notice of Decision

29. No legal error material to the decision to allow the appeal has been made out. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 June 2024

