Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00438/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10th September 2014	**On 6th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LEOS JONES
(No Anonymity Direction)

Respondent

Representation:

For the Appellant: Mr Hopkin, Home Office Presenting Officer
For the Respondent: None

DETERMINATION AND REASONS

1. The application for permission to appeal was made by the Secretary of State for the Home Department but nonetheless I shall refer to the parties as they were termed before the First-tier Tribunal that is the appellant Mr

Leos Jones and the respondent the Secretary of State for the Home Department.

2. The appellant appeals under the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations) and the Nationality, Immigration and Asylum Act 2002 against the decision to refuse entry to the UK under Regulation 19 of the EEA Regulations. The decision was made on 4th December 2013 in the following terms:

> "You have sought admission to the United Kingdom under EC law in accordance with Regulation 11 of the Immigration (European Economic Area) Regulations 2006 on the ground that you are a Czech national. However I am satisfied that your exclusion is justified on grounds of public policy because sixteen clandestine entrants were found in the trailer of the vehicle of which you were the driver and it is believed that, to a high degree of probability, it is unlikely that you were unaware of their presence.
>
> I therefore …[sic] you admission to the United Kingdom in accordance with Regulation 19(2)."

3. An appeal was heard on the papers by First-tier Tribunal Judge Cresswell and a determination was promulgated on 30th June 2014 allowing the appeal.

4. An application for permission to appeal was made by the Secretary of State in the following terms; the judge found that the respondent supplied no evidence but the Immigration Officer's account had been accepted by the appellant in that he did not deny sixteen clandestine entrants were found in his trailer and no further evidence was necessary.

5. Although there were defects in the refusal notice this was not fatal "to the appeal" as all parties were aware of the basis of the refusal.

6. It was submitted that the appellant 'created a risk' by failing to carry out adequate checks to his trailer which allowed sixteen individuals to board unnoticed. Even if the appellant was unaware they had boarded he knew of the associated risks of not carrying out the security checks and thus facilitated entry whether known or not.

7. At paragraph 15 the judge accepted that the appellant made proper checks of his trailer which contradicts the appellant's own account at 14 "he checked again after refuelling but did not check the truck tarp".

8. The judge had not considered the public interest in allowing the appeal and the judge had failed to deal with all points adequately and such failure amounted to a material misdirection of law. Permission to appeal was granted by First-tier Tribunal Judge Ransley who stated that the judge's findings were brief and that his finding at 15(iv) was inconsistent with the appellant's admission that after refuelling in Calais he "did not check the

truck tarp". The judge in allowing the appeal did not have regard to public security considerations under Regulation 19 of the EEA Regulations.

9. At the hearing it was submitted by Mr Hopkin that the judge had failed to give reasoned findings and in particular at paragraph 15(iv) there was an inadequacy of reasoning as the appellant himself stated he did not check the truck tarp. The assessment of the evidence was an error.

10. Mr Hopkin accepted that there was a weakness in the Secretary of State's case in that no further evidence was provided to support a contention that the appellant was explicitly complicit in the action or reckless and there was no evidence on this. The assessment of the Entry Clearance Officer in Calais should be given some weight and it was his opinion that "to a high degree of probability" that the appellant was unlikely to be unaware of the presence of the sixteen clandestine entrants.

Conclusions

11. As the judge set out at paragraph 12, Regulation 11(1) of the EEA Regulations states that "an EEA national must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA State" and further to Regulation 11(8) but this Regulation is subject to Regulation 19(1)(1AB) and (2).

12. Regulation 19(1) states that a person is not entitled to be admitted to the United Kingdom by virtue of Regulation 11 if his exclusion is justified on grounds of public policy, public security or public health in accordance with Regulation 21.

13. Regulation 21 refers to decisions taken on public policy, public security and public health grounds and further to Regulation 21(5)

> "where a relevant decision is taken on grounds of public policy or public security it shall, in a condition to comply with the preceding paragraphs of this Regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."

14. The judge set these out in full and directed himself appropriately.

15. The decision in question and as recorded by the judge at paragraph 13 refers to the respondent's contention that it was 'believed to a high

degree of probability' that the appellant was 'unlikely' to be 'unaware' of the presence of the clandestine entrants.

16. As Mr Hopkin conceded this would require some evidence of intention or at least of the reckless nature of the appellant's actions and I find that in this instance the burden of proof would be on the EEA appellant to establish a right of admission or residence but on the Secretary of State to prove the fact that he is alleging. It is also the contention that the appellant was engaged in complicit dishonesty in effect in people smuggling. This onus is on the respondent to show this on the balance of probabilities.

17. The evidence was set out by the judge, in part, at [14]. He noted that the evidence produced by the appellant was that he had undertaken security checks on his truck after refuelling at Calais but he did not check the truck tarp. The judge noted that the appellant claimed people must have entered when he went to the toilet. The judge also noted the statement of his witness Mr Bretislav Trnecka and he stated (although not set out by the judge) "I was with him a whole time so I believe they had to entry the trailer during the refuelling. That was the only time he had to leave the truck for a while and the truck was checked a few minutes before." Thus it was not the case that the judge did not take into account material evidence.

18. As, however, the judge states at paragraph 15(1) the respondent had supplied 'no evidence whatsoever'. The judge had already recorded that a poorly drafted refusal notice was the total of the evidence produced by the respondent. The judge correctly stated that barring an EEA citizen is a serious issue requiring that it be strictly justified and proportionate to the objective pursued.

19. In the circumstances I find that the judge did not necessarily accept that the appellant made proper checks of his trailer but merely that he noted the appellant's account that he did not know and was not complicit or reckless in the entry of the clandestine entrants into his truck. It was the ECO's case that the appellant was actively complicit, not as implied, in the application for permission to appeal that he was merely negligent. The judge as he stated had to 'guess' at the grounds of public policy.

20. The ECJ has repeatedly emphasised that exclusion on the grounds of public policy should not occur unless the person's presence or conduct constitutes a genuine and sufficiently serious threat to public policy. The threat must be sufficiently serious. The decision, also, as the judge pointed out to exclude must be both strictly justified and proportionate to the objective pursued. As he stated at [15 (iii)] 'without any evidence to contradict the appellant's account of proper checking (supported by his colleague's account), or at all, I can do nothing other than allow the appeal'.

21. Without clear and explicit evidence that the appellant was reckless or was complicit in transporting illegal entrants, and I do not accept that that is the case from his statement, or that of his friend Mr Trnecka, I do not find that the judge's first finding at 15(1) that the respondent supplied no evidence or that there was no evidence to contradict the appellant's account [15(iv)] can be challenged. The judge refers to the appellant's *account* of proper checking rather than the fact that he did check properly but there was no evidence as to complicity save for surmise. This would be axiomatic and fundamental and effectively a condition precedent to a decision considering proportionality or the degree of threat. There was no further evidence supplied by the respondent for the judge to consider.

22. As such I find that there is no error of law and the determination shall stand.

Signed Date 3rd October 2014

Deputy Upper Tribunal Judge Rimington