Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02524/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Promulgated**	**Decision and Reasons**
on 24 November 2015		**on 8 December 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

O L P

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Winter, Advocate, instructed by Bruce Short, Solicitors
For the Respondent: Mrs S Saddiq, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Poland, born on 10 April 1982. By determination promulgated on 27 March 2015 Designated Judge Murray dismissed his appeal against deportation to Poland, by reference to the Immigration (European Economic Area) Regulations 2006 and to Article 8 of the ECHR.

2. The appellant sought permission to appeal to the Upper Tribunal on the following grounds:

1 At paragraph 51 when assessing the best interests of the child:

(i) In assessing the best interests of the child the FTT has erred in law by failing to exercise anxious scrutiny. In particular there was a report from Dr McCormack commenting on the best interests of the child and the effect on the child were the appellant to be deported. Dr McCormack's view was that it would not be in the best interests of the child for the appellant to be deported. The FTT has erred in law as the FTT has failed to assess this report when assessing the best interests of the child and has not paid careful consideration to all relevant factors (*see FZ v Secretary of State for the Home Department [2014] SC (UKSC) 75 at paragraph 10 per lord Hodge):*

(ii) By falling into the same error as identified in *Peart v Secretary of State for the Home Department [2012] EWCA Civ 568* at paragraph 15. Namely, the case called for a careful appraisal of the child's circumstances and the extent to which her welfare would be better served by allowing the appellant to remain in this country, thereby making it possible for the child to develop a proper relationship with her father of whom she will otherwise have no recollection. It also called for the child's welfare to be given primary (through not overwhelming) importance. Paragraph 51 of the decision gives the clear impression that the FTT was far from persuaded that the appellant had as close an attachment to the child as he professed, but, in order to do justice to the child's position, the FTT ought to have made careful findings about that and should have considered how the relationship might develop in the future if the appellant were allowed to remain in this country. That would have enabled the FTT to decide what was in the child's best interests. In the light of the FTT's decision on that question it could then decide whether the nature of the appellant's offending nonetheless required his removal. The FTT did not give sufficient consideration to what was in the child's best interests or give her welfare the degree of importance it ought to have received.

(iii) By failing to recognise that family life cannot be continued by the occasional visit, email or Skype (*see Mansoor v Secretary of State for the Home Department [2011] EWHC 832 (Admin)* at paragraph 16 per Blake J);

(iv) In assessing the best interests of the child, the FTT appears to have relied on the appellant's criminal offending. The FTT has erred in law as the child cannot be blamed for the actions of the memorialist (*see FZ, supra);*

(v) In reaching contradictory findings. At paragraph 51 the FTT carries out an assessment on the best interests of the child. However, at paragraph 56 the FTT appears to find that there is no genuine relationship between the appellant and his daughter. It is thus unclear why the FTT has carried out a best interests assessment. The FTT has erred in law by failing to resolve this contradiction (*see R (Iran) and others v Secretary of State for the Home Department [2005] Imm AR 535* at paragraph 9 per LJ Brooke). In any event the findings at paragraph 56 of the FTT are not clear as to whether it accepts there is a genuine relationship between the appellant and his child.

2 The FTT has erred in law at paragraph 59. The FTT finds at paragraph 59:

"Although Dr McCormack states that the appellant is a low risk of re-offending when his history is considered I am more inclined to accept the social work reports dated 2013 which consider him a medium risk. One of the reasons for this is his criminality has been increasing."

(i) The FTT erred in law by failing to apply anxious scrutiny when referring to the social work reports assessing the appellant as a medium risk. No such assessment was contained within the social work reports. In fact the social work reports stated the appellant was not an immediate or serious risk of harm to the public;

(ii) The FTT erred in law by failing to exercise anxious scrutiny in relation to the report by Dr McCormack. The factors relied on by Dr McCormack were the same factors relied on by the social work reports and Dr McCormack's conclusions assessed the appellant as a low risk which coincided with the statement in the social work reports that the appellant was not an immediate or serious risk of harm to the public. The FTT has thus erred in law by failing to apply anxious scrutiny in relation to the reports before it. In light of those reports there is no insufficient evidence to show the appellant is a medium risk and on a proper reading, notwithstanding his criminality had increased, the reports assessed the appellant as a low risk and not an immediate or serious risk to the public.

(iii) The FTT erred in law by failing to exercise anxious scrutiny in relation to the reports referred to above. Although the FTT referred to the appellant's increased criminality, the reports took account of that, and assessed the appellant as a low risk and not an immediate or serious risk to the public. The reason given by the FTT for finding that the appellant is a present, genuine and sufficiently serious threat is not supported by the evidence and thus the FTT has erred in law.

3 Having regard to the foregoing the FTT has erred in law at paragraph 60 as there is no or insufficient evidence to show that the appellant is a present, genuine and sufficiently serious threat and/or that it would be proportionate to deport the appellant.

4 In addition, the FTT finds at paragraph 48 that the fact that the appellant has not attended unpaid work goes against his credibility. The FTT has erred in law by failing to give adequate reasons as to why this factor goes against his credibility. The appellant admitted he had not attended unpaid work due to his employment. That does not detract from whether or not the appellant is to be believed. The FTT has thus erred in law by failing to give adequate reasons for this finding at paragraph 48 or has erred in law by reaching an irrational finding.

5 Further the FTT finds at paragraph 47 that the appellant's offending was for monetary gain. The FTT has erred in law as the FTT has failed to assess whether the appellant's answers had been wrongly recorded in the social work report as there was no interpreter.

3. On 28 July 2015 Upper Tribunal Judge Southern granted permission to appeal, observing as follows:

> The judge was plainly and unarguably entitled to consider that in seeking to reconcile the tension between the social workers' reports and that of Dr McCormack the latter should yield to the former and she gave legally sufficient reasons …
>
> However, it is arguable that the finding at paragraph 56 that despite her appearance at the hearing … the appellant know longer enjoyed a subsisting relationship with Ms M, whilst sustainable so far as that person was concerned should not have extended without more to a finding that there was also no family life between the appellant and

> his child, which seemed to flow from it. Although the respondent did not accept the parental relationship there appears to be no finding to that effect by the judge.
>
> On that basis alone, the question of whether the determination … discloses legal error in respect of the assessment of the best interests the child, I am persuaded, if only just, that the grounds merit further attention …

4. By letter from his solicitors dated 23 November the appellant sought permission to argue all previous grounds, on the basis that the judge granting permission did not appear to have taken into consideration that there were 2 reports by Dr McCormack, one on the best interests of the child and one on the risk of re-offending.

5. Mr Winter submitted that the grant of permission was unclear as to its extent.

6. I allowed all the grounds to be addressed.

7. Mr Winter's submissions were along the lines of grounds 1 and 2. He acknowledged that at paragraph 51 the judge did consider the relationship between the appellant and his daughter. However, at paragraph 56 the finding appeared to be that there might be no relationship with Ms M and no relationship with her daughter either. It was to be questioned, in the light of those conclusions, why paragraph 51 appeared. As to the reports by Dr McCormack, it was clear that the judge referred only to the one on re-offending (A), and not to the one concerning the child (B). The appellant's supplementary bundle in the First-tier Tribunal listed item A, "Risk assessment by Dr McCormack" and item B, "Report on NL [the child] by Dr McCormack". There was some overlap but these were distinct matters. Report B dealt with the child's view of the relationship, cited research on the importance of relationship between child and father, and so on. From the judge's record of the submission for the appellant at paragraph 21 and from her assessment at paragraph 50, it could be seen that she thought there was only one report by Dr McCormack.

8. I observed at this stage that although the supplementary bundle lists reports A and B, it contains only report B. Report A is to be found among the voluminous papers on the Tribunal file, but as a separate item. Ms Beats, who represented the appellant in the First-tier Tribunal and was present to instruct Mr Winter in the Upper Tribunal, confirmed that was the form in which the materials were put forward.

9. Mr Winter accepted that report B went beyond proper limits in its concluding proposition that the needs of the child "be held as paramount" and its recommendation that the appellant's "appeal against deportation … be upheld". He said that the report should be read without reference to those recommendations which went beyond its scope, and that it obtained information relevant to the question whether the best interests of the child required the appellant to remain in the UK.

10. I inquired what the evidence had been about the likely future residence of mother and child, who are both Polish citizens who have moved between Poland and the UK. Mr Winter said that the judge appeared to have

accepted that the gist of the evidence was that they were now likely to remain in the UK.

11. Mr Winter said that the social work reports did not contain an assessment of medium risk of re-offending. The judge appeared to have misapprehended that point.

12. Mr Winter submitted that either or both of those grounds required remittal of the case to the First-tier Tribunal for a fresh decision, although he accepted that the underlying situation has not changed in any significant respect and that there has been no application to introduce any further evidence.

13. Mrs Saddiq accepted that the judge may not have made it clear that there were two reports before her by Dr McCormack. She argued that nevertheless she had fully explained her conclusions, both in relation to the best interests of the child and as to the risk of re-offending. Report B at page 8 disclosed that there had been very little contact between father and child. Through his own fault, he has spent almost all of her life in prison. There was little to suggest that he had in the past had or would in the future have any beneficial impact on her. The report contained nothing about the possibly adverse impact of his criminality on the child, as it blandly assumed that there would be no further offending. The report was very limited. Any further consideration of it would have made no difference to the outcome. The child has never had a day-to-day relationship with her father. As to risk of re-offending, even if the social work reports were not explicit, the appellant's criminal history and attitudes are such as to disclose at least a medium level of risk. That is what the reports implied. The judge was entitled not to believe the appellant's explanation that his crimes were all due to pressure from criminal associates. Any slips made by the judge were immaterial to a determination which overall was well reasoned. If the decision did need to be remade, that should be carried out on the evidence which the appellant had supplied, and should lead to the same conclusion.

14. In reply, Mr Winter submitted that a high standard had to be reached before it could be said that but for an error the outcome must have been the same. The errors should be found material, particularly in a case which involved a proportionality assessment. If the determination did need to be remade, the appellant would seek the opportunity at least to make further written submissions on the outcome on the merits.

15. I reserved my determination.

16. The grounds and submissions have probed hard for error, and have identified two slips: there were two expert reports not one, and the social work reports did not contain an express assessment of the risk of re-offending. Are those errors significant enough to justify setting the determination aside?

17. Report B, to which the judge did not explicitly refer, cites literature on the important role of the father in the development of the child. It has little to

say, apart from theory, on the actual and potential value to this child of her relationship with the appellant as an individual. It states at page 9 that it was "the threat of danger and violence towards her" (the child) which led him to commit his current offence. That extraordinary conclusion is derived from the separate meeting which the author held for purposes of report A, to which the judge did refer.

18. The author of the reports is a chartered psychologist, well qualified and of long experience. However, report A is based on taking everything the appellant told the author at face value, without any critical analysis. At page 8 the report accepts that the appellant is determined not to engage in any criminal activity; that he has adopted a strategy whereby he will in the future immediately contact the police and tell them everything he knows about the "criminal activities in many areas" of his associates; that he is "abject with remorse"; and that he "desires nothing but to remain in the UK to amend for his crimes, find employment and look after and support [his partner, his former partner and his child]".

19. The appellant plainly found it very easy to say that his entire criminal offending, both in Poland and in the UK, was forced upon him by the bad company he kept; but he is as free to choose his company and his actions as anyone else. The suggestion that he was forced into crime in the UK because of threats to his partner and child came as a surprise to his partner (paragraph 47 of the determination). The alleged element of coercion is not reflected in any defence or mitigation put forward in the criminal courts. There has been nothing to stop him from co-operating with the police by sharing his information with them, if he wishes to live the life of a good citizen.

20. The propositions that the needs of the child be held as paramount and that the appeal against deportation be upheld go beyond the province of the author as a chartered psychologist and as an expert witness. The further conclusion in report B of a "high risk estrangement from her father could prejudice and even damage [the child's] social and emotional and cognitive development" is not supported by reference to the facts. It lies in the realm of theory alone.

21. The judge did not accept what the author said about re-offending. As stated below, I do not think that on that point (ground 2) there was any error of law. The grounds are inter-related. With all due respect to the learned author, I do not find that application of any greater scrutiny to her reports might have advanced the appellant's case based on the best interests of the child. Both reports share the same defects. Anything which may have been overlooked makes the appellant's case no better.

22. I do not consider that ground 1 at (i) and (ii) discloses any material error. The judge based her decision on there having been no meaningful relationship between daughter and child to date, a situation which would not change on his release and deportation, although he could still contact her by telephone and in writing or by visits in Poland. Any ambiguity about whether this amounted to a relationship at all is insignificant. As to

(iii), it is trite that ordinary family life cannot be replicated by occasional visits, email or Skype but that does not mean that every decision which refers to the possibility of ongoing contact by these methods is bad in law. As to (iv), the Judge does not blame the child for the actions of the appellant. As to (v), the findings at paragraph 51 should be treated as reached in the alternative and as sufficient.

23. The first social work report which was before the Tribunal is dated 8 May 2013. Under the heading Risk Assessment, this states, "Serious Harm/Imminence: there are no indications that Mr P presents as an immediate or serious risk of harm." The second report is dated 3 June 2013. It contains the same passage. Oddly, neither report appears to contain any other express statement of the level of risk of re-offending.

24. The judge may have misapprehended whether there was any express statement in the social work reports of the level of risk of re-offending. She was aware of Dr McCormack's assessment that the risk of re-offending was low. The judge noted that criminality was tending to escalate. The reasons given by Dr McCormack for stating a low risk assessment are based on accepting what the appellant says and on nothing else. I do not think that any misapprehension was material. In my opinion, it would be unrealistic for any judge to draw from the reports, from the appellant's history and from all the other evidence a conclusion of anything less than a medium risk of similar re-offending in the future. No material error arises from ground 2.

25. Grounds 3, 4 and 5 were not addressed in submissions and do not add anything of significance.

26. Reading the determination fairly and as a whole, I am not persuaded that the grounds disclose any errors of such materiality as to require the judge's conclusions to be revisited.

27. No anonymity order has been requested or made, but as the case involves a young child, I have referred to the individuals concerned by their initials only.

28. The determination of the First-tier Tribunal shall stand.

30 November 2015
Upper Tribunal Judge Macleman