IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07548/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 September 2014	**On 20 January 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS
UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ANDRZEJ AUGUSCIAK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Gilbert, instructed by Birnberg Peirce & Partners, Solicitors
For the Respondent: Ms Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Andrzej Augusciak was born on 31 January 1983 and is a male citizen of Poland. He had appealed to the First-tier Tribunal (Judge R A Jones; Mr B Bompas) against a decision of the respondent dated 21 March 2012 to make a deportation order against him on the ground that his removal from the United Kingdom was conducive to the public good. The First-tier Tribunal, in a determination promulgated on 20 June 2014,

dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Designated Judge Zucker gave permission to appeal on 9 July 2014 in the following terms:

> The grounds submit that the appellant has spent time in a United Kingdom prison during extradition proceedings which were found by the High Court to be flawed. The appellant contends that his deportation would violate his human rights because, if deported, rather than being extradited, he would not receive credit in Poland, to where he would be returned, in respect of the time spent in prison in the United Kingdom against the sentence imposed by the Polish courts.

3. In its response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent submitted:

> The respondent will submit the grounds raise no material arguable errors of law and were merely an attempt to re-argue the claim in mere disagreement with the negative outcome of the appeal. The question of double punishment has been raised before the Panel and was addressed in findings which were properly open to the Panel and supported by sound and sustainable reasons at paragraph 23 of the determination.

4. The appellant has been living in the United Kingdom since 2004. In that year, he had been sentenced *in absentia* in Poland to a total of 25 months' imprisonment for burglary offences which had been committed before he left that country to enter the United Kingdom. A European Arrest Warrant (EAW) was issued against him in 2007. The appellant was arrested and spent 22 months in prison under the terms of the warrant. On 10 September 2012, the judge discharged the EAW on the basis there were substantial grounds to show that if, expelled, the appellant would face a real risk of being subject to treatment contrary to Article 3 of the ECHR on his return to Poland. That decision was, in turn, appealed under Section 28 of the Extradition Act and the appeal was allowed and remitted for hearing (see the decision of the Administrative Court in *Poland v Augusciak* [2012] EWHC 4043 (Admin)). District Judge Coleman, sitting at Westminster Magistrates' Court, ordered the appellant's extradition on 16 September 2013 and the appellant appealed to the Administrative Court (Collins J) who allowed his appeal on the ground that the proceedings had not been formerly commenced within the required time period. The appellant had been arrested under the EAW whilst still serving his term of imprisonment for offences committed in the United Kingdom in 2009; the appellant had pleaded guilty to an offence of possessing prohibited ammunition and possession of a prohibited weapon and for which he had been sentenced to five years' imprisonment in February 2010 at a Crown Court. He had been recommended for deportation by the Crown Court Judge, notwithstanding his status as an EEA national. The extradition hearing should have commenced within 21 days of the appellant's England and Wales criminal sentence coming to an end (23 March 2012) whereas it had not commenced until 24 July 2012. Collins J found that this area

vitiated the legality of the entire proceedings; because proceedings had been commenced out of time, everything that had happened in the extradition following that error had been a nullity.

5. The grounds of appeal note that no attempt had been made to re-arrest the appellant or to re-commence extradition proceedings. Before us, Ms Isherwood, for the respondent, made enquiries whilst at court but there was nothing to suggest that these proceedings would be forthcoming in the near future.

6. The difficulty in the appellant's case is whether he will or will not be given credit for the time that he has spent in the United Kingdom when he returns to face re-arrest in Poland in respect of his conviction in absentia. The appellant submits that, if he is returned to Poland by way of extradition, then all the time he had spent in prison under the EAW (22 months) will be deducted from his outstanding sentence in Poland. Whereas, if he is deported rather than extradited, he will not receive any credit. This, in turn, raises issues of "double punishment" (see *WC (no risk of double punishment) China* [2004] UKIAT 00253). The appellant challenges the First-tier Tribunal's determination on a number of bases. First, the Tribunal found that the appellant could have agreed to his own extradition to Poland whereupon he would be given credit for time spent in the United Kingdom and the EAW. Secondly, the Tribunal suggested that the appellant himself, by challenging extradition, had led to his is remaining in detention in the United Kingdom for a period that was longer than necessary. Thirdly, the Tribunal took into account that the extradition proceedings "may" be restarted.

7. In its determination, the Tribunal at [23] noted that the appellant is "a young man in good health who was found by Dr Blackwood not to be suffering from mental illness." The Tribunal in the same paragraph addressed the relevant circumstances and concluded that the appellant's removal, under the Immigration (European Economic Area) Regulations 2006 would be proportionate. An Article 3 ECHR claim that the appellant might be at risk of ill-treatment in Poland from his family and members of the Roma community was dismissed by the Tribunal which noted that the appellant's Counsel before it had acknowledged that "this claim was difficult to maintain though he had not abandoned it" [24]. This latter matter is not referred to at all in the grounds of seeking permission to appeal to the Upper Tribunal.

8. We raised with Mr Gilbert a matter which we found to give rise to a significant difficulty in his client's case. The grounds of appeal, which we have summarised above, are predicated on the assumption (and it is no more than that) that, if the appellant is deported (as opposed to extradited) to Poland the Polish authorities will not give him credit for any time spent in detention in the United Kingdom. The difficulty is that there has been no evidence at all put before either the First-tier Tribunal or ourselves which would establish that the Polish authorities were likely to respond to the appellant's return in that way. Mr Gilbert submitted that it

was likely that they would respond by depriving the appellant of any credit but he could give us no persuasive reason why they would do so. He argued that the appellant should not need to rely upon the discretion of the Polish authorities to give him credit but the fact remains that he should not be in the position of giving the appellant the benefit of the doubt on an issue which is amenable to being settled by reference to expert country evidence. Put simply, it is the appellant's case that he is at jeopardy of double punishment; consequently, he was required before the First-tier Tribunal to prove to the appropriate standard that he is likely to be punished twice. He has failed to do so. Indeed, whilst the Polish authorities may wish to punish the appellant for offences committed in Poland and for which he has not served a term of imprisonment there, but they might,, faced with problems of prison overcrowding common throughout Western Europe, consider that the appellant has served his time. The fact is, we simply do not know. We are not prepared to assume that the authorities in a modern EU state would behave unjustly, particularly concerning a person's personal liberty, without clear credible evidence on the point.

9. We acknowledge that there are possibly problems with the First-tier Tribunal's view that the appellant (if he wished to be sure of receiving credit for his detention spent in the United Kingdom) should have acquiesced in the expedition proceedings. As it turned out, he had been right to fight those proceedings as the Administrative Court ultimately concluded they had been a nullity. However, any error of law which the First-tier Tribunal may have perpetrated is not so serious as to require us to set aside its determination given the failure of the appellant to establish, by reference to evidence, that he is likely to receive no credit in Poland for periods of imprisonment served in the United Kingdom. In the circumstances, the appeal is dismissed.

Decision

10. This appeal is dismissed.

Signed Date 19 January 2015

Upper Tribunal Judge Clive Lane