Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/08081/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 August 2018 and 19 November 2018	**On 7 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

RONNY HOFER
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Mr S Kandola (Specialist Appeals Unit)
Ms A Brocklesby-Weller (Specialist Appeals Unit)

DECISION AND REASONS

1. This is the appeal of Ronny Hofer, a citizen of Germany born 20 August 1984, against the decision of the First-tier tribunal of 22 March 2018 dismissing his appeal, itself brought against the decision of the Immigration Officer of 15 September 2017 to refuse his entry to the UK for reasons of public policy.

2. The refusal notice states that the decision maker was “satisfied that your refusal of admission is justified on serious grounds of public policy [because] In your personal belongings you have items of clothing with slogans and symbols indicative of far right extremism. As such I believe that your activities whilst in the United Kingdom bear a serious threat to the fundamental interests of society and are likely to [incite] tensions between local communities in the United Kingdom.”

3. The Appellant's grounds of appeal were supported by a letter from his lawyers, Rechtsanwalt Alexander Heinig of Stuttgart, of 6 October 2017, stating that the Appellant had only sought to visit the UK for a weekend; he did not pursue any longer period of residence here. The immigration service had obviously assumed that their client wanted to go to an Ian Stuart Donaldson Memorial Concert (“ISDMC”). Even if it was true that their client had wished to do so, there was no evidence that such conduct would threaten the fundamental interests of society. The UK authorities had permitted the concert to take place and it would have taken place within a closed space with no effect on those not attending it; accordingly it was illogical to suggest it could cause inter-community tensions. Indeed such concerts had taken place without promoting racial tension since 1994.

4. The First-tier tribunal considered the appeal without a hearing, noting the Appellant had filed no evidence save for his lawyer’s letter. He had provided no sworn evidence that there was no extremist clothing in his possession. It was not accepted that the solicitor’s letter could constitute such evidence, even if they were acting on his instructions. As to the ISDMC, there was no evidence that the concert had been permitted to take place now or in the past, though the Judge noted that there was in fact no reference to this event in the refusal notice: accordingly it was treated as a factor of neutral effect.

5. Overall the Judge was not satisfied that the Appellant had discharged the burden of proof upon him to demonstrate that he was not a threat to the fundamental interests of society.

6. Grounds of appeal contended that the First-tier Tribunal had materially erred in law in overlooking the fact that the Appellant was only seeking to visit the UK rather than reside here on a longer term basis, in failing to specify the basis on which the clothing detected by the Immigration Officer on entry was said to be “racist”, in failing to take account of the fact that the true reason for exclusion (as shown by other unspecified entry clearance decisions to which it appears the Appellant’s lawyer was privy) was attendance at the ISDMC, and in failing to consider the extent to which the Appellant’s exclusion was necessary to protect a fundamental interest of society contrary to the approach set out in *Arranz* which required that a sufficiently serious threat to such an interest be expressly identified.

7. Permission to appeal was granted by the First-tier tribunal on 25 June 2018 on the basis that the Judge may have erred in treating the burden of proof as falling upon the Appellant. Before me Mr Kandola accepted that the First-tier Tribunal had materially erred in law by impermissibly placing the burden of proof in a public policy EEA exclusion case on the Appellant.

Findings and reasons – Error of law hearing

8. Regulation 11(1) of the 2016 regulations requires the admission of an EEA national to the UK upon production of a valid national identity card or passport issued by an EEA State. However, exclusion rather than admission may follow in specified circumstances. Regulation 23(1) of the 2016 Regulations provides:

> "**Exclusion and removal from the United Kingdom**
>
> (1) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if a refusal to admit that person is justified on grounds of public policy, public security or public health in accordance with regulation 27."

9. Regulation 27 of the 2016 Regulations concerns decisions taken on grounds of public policy, public security and public health. The regulation state materially:

> "(2) A relevant decision may not be taken to serve economic ends.
> …
>
> (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.

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.)."

10. Schedule 1 of the 2016 Regulations then provides, at Paragraph 7:

"For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include-"

…

(b) maintaining public order;

(c) preventing social harm;

…

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

…

(j) protecting the public;

…

(l) countering terrorism and extremism and protecting shared values."

11. The Headnote in *Arranz* [2017] UKUT 294 (IAC) sets out:

"(i) The burden of proving that a person represents a genuine, present and sufficiently [serious] threat affecting one of the fundamental interests of society under Regulation 21(5)(c) of the EEA Regulations rests on the Secretary of State.

(ii) The standard of proof is the balance of probabilities."

12. There was indeed a material error of law here. The burden of proof in establishing a public interest exception to the free movement rights that

are domestically transposed by the EEA Regulations lies upon the Secretary of State. However, here the burden of proof was reversed: that is absolutely clear from the language of the First-tier Tribunal. That is a fundamental error which affects the way in which the evidence before the First-tier Tribunal was analysed. Furthermore there was no analysis by the Judge of the precise way in which any of the fundamental interests of society specified above were threatened by the Appellant's presence in the UK. Accordingly a re-hearing was appropriate.

13. Given the serious nature of the allegations made by the Immigration Officer, I considered it was appropriate in the interests of justice for the appeal to be retained in the Upper Tribunal for a continuation hearing. The Appellant had given only a vague explanation of his reasons for his presence in the UK, and indeed had used rather equivocal language as to whether or not he sought to attend the concert which he asserts, through his representatives, underlaid the refusal of admission. He asserted that the concert took place annually with the acquiescence of the UK authorities, although there was no evidence to this effect.

14. I also noted at the error of law hearing that, notwithstanding those concerns as to the Appellant’s case, as already stated the burden of proof lies upon the Respondent. I emphasised that the Secretary of State should appreciate that the adduction of further evidence would be advisable if the Secretary of State wished to discharge the burden of proof that lies upon him.

Findings and reasons – Continuation hearing

15. At the resumed hearing Ms Brocklesby-Weller candidly admitted that the Secretary of State had not managed to improve his case since the last hearing, and acknowledged that it would accordingly be difficult to discharge the burden of proof to demonstrate exclusion was indeed conducive to the public good.

16. She was right to so acknowledge. The burden rests on the respondent to prove, on the balance of probabilities, that the appellant's 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. It is of course essential to bear in mind the diverse public interest factors identified in Schedule 1 to the 2016 Regulations, such as the need to maintain social order, protect the public and prevent social harm. Regulation 27 decisions may be taken on preventative grounds, even in the absence of a criminal conviction, provided that the grounds are case-specific.

17. I have no reason to doubt the factual propositions underlying the refusal, such as that the Appellant was searched and found to possess clothing with neo-Nazi and far right insignia amongst his personal

belongings. There is no evidence before me that he has any criminal history or that he is actively involved in any neo-Nazi or far right organisation. The political views that his possessions imply will doubtless be repugnant to the overwhelming majority of those residing in the UK, but there is no positive evidence that his attempt to gain admission to the UK was for any reason other than to attend a gathering of neo-Nazis at a concert, which it would appear is a regular event that is rigorously policed.

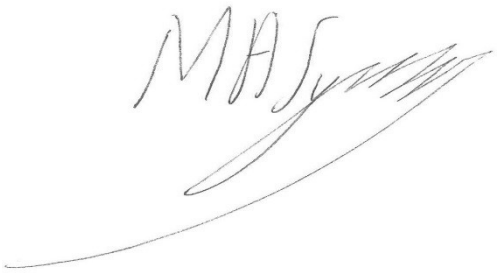
18. There is no evidence that the Appellant's presence at any such concert, whatever his garb, is likely to incite inter-community tensions in the UK, nor that he has any plans to foster international links between extremist groups. I am not satisfied that the requirements of regulation 27(5), with reference to Schedule 1 of the 2016 Regulations, have been met. I consequently find that the Respondent has not discharged the burden of proof upon him and I therefore allow the appeal.

Decision:

The decision of the First-tier Tribunal contains a material error of law.

The appeal is accordingly re-determined; and the appeal is allowed.

Signed: Date: 3 December 2018



Deputy Upper Tribunal Judge Symes