Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00106/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 December 2019	**On 30 December 2019**
Extempore decision	

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MARIUSZ BLOCH
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Rylatt, Counsel instructed by Turpin & Miller LLP Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Mariusz Bloch, is a citizen of Poland, born on 3 February 1975. He appeals against a decision of First-tier Tribunal Judge Andrew promulgated on 8 August 2019 dismissing his appeal against the respondent's decision to make a deportation order against him on 4 February 2019 under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

Factual background

2. The appellant claims to have arrived in the United Kingdom fifteen years ago. In 2016, he came to the attention of the authorities when he was arrested for having a bladed article in a public place. He was cautioned. Thereafter, he received a number of convictions for several offences culminating in the index offence for which the Secretary of State pursued his deportation. On 9 November 2018 in the Crown Court at Croydon the appellant was convicted of handling stolen goods and was sentenced to twelve months' imprisonment.

3. Turning to the offence, the appellant had been working in a garage. He was found in the early hours of the morning stripping a recently stolen Audi RS3 car, presumably for spare parts. He was doing so under the instruction of the person he worked for at the garage. There was no mitigation advanced on his behalf at the sentencing hearing; the sentencing judge noted that he was entitled to 25% discount on the sentence he would otherwise have received on account of pleading guilty at the plea and trial preparation hearing. Prior to his imprisonment, the appellant had been a user of amphetamines and other substances. He claimed that he had addressed his substance abuse and, in doing so, had tackled the underlying cause of his behaviour.

Permission to appeal

4. Permission to appeal was granted by First-tier Tribunal Judge E M Simpson on the basis that at paragraph 34 of the decision, the judge appeared to have reached her conclusion on the overall proportionality and lawfulness of the deportation order before considering the remaining factors in the case. There are five grounds of appeal and Judge Simpson did not restrict her grant of permission to any grounds in particular.

5. There are five grounds of appeal. First, that the judge failed to consider material evidence from the appellant on the issue of his claimed ten years' residence or alternatively failed to provide adequate reasons for placing no weight on that evidence. Secondly, the judge failed to direct herself concerning the test for "worker" status under EU law. The third ground was the primary ground upon which Judge Simpson granted permission, outlined above. The fourth ground is that the judge erred in relation to her treatment of the appellant's claimed rehabilitation, or alternatively, that she provided inadequate reasons for placing no weight on his evidence of rehabilitation. The fifth ground is that the judge erred by considering Article 8 pursuant to Part 5A of the Nationality, Immigration and Asylum Act 2002 when this was in fact an EEA appeal.

Discussion

6. I will deal first with the basis upon which the appellant was expressly granted permission to appeal. It was common ground at the hearing that the judge erroneously appeared to have concluded at paragraph 34 that

the deportation order should be maintained before having considered the remaining factors in the case. Paragraph 34 of her decision stated:

> "Accordingly, I am satisfied that there is no evidence to show that the appellant has addressed his offending behaviour. Although he has been assessed as being at low risk he remains a risk. I am satisfied the evidence and the appellant's past history shows the appellant has a propensity to reoffend and that he does not respect the laws of the United Kingdom. I am satisfied that in these circumstances the deportation order should be maintained." (Emphasis added)

7. Mr Rylatt's contention is that the judge put the cart before the horses. This was not, in his submission, a simple case of an erroneous sentence mistakenly having been inserted at the wrong point in the decision. Rather it evidenced a failure in logic.

8. There is some superficial force to Mr Rylatt's submission, but it is only superficial.

9. It is necessary to read the judge's decision as a whole. It is clear that when one does so, the judge has surveyed all relevant evidential factors and does not fail in her operative reasoning when reaching her conclusion that the deportation order was consistent with the test contained in the 2016 Regulations. At paragraph 24 of the decision, the judge recites at some length the judge's sentencing remarks from the Crown Court. She then proceeds in paragraphs 25 to 33 to analyse the offender manager's views as set out in the OASys Report provided on behalf of the appellant. She considers the circumstances in which the offence was committed, she considers the nature of the offence and she also considers the fact that the appellant's offending was fuelled by his use of amphetamines. She rejects the appellant's suggestion, which had been set out in his evidence and in his own remarks to his offender manager, that he had stopped using amphetamines and that he was no longer subject to their influence. It is against that background that the judge then considered that the appellant's circumstances of his current work, namely working for the same individual who "had employed him" in the garage where he was found during the police search to be stripping a stolen car, provided grounds to conclude that the appellant's circumstances had not changed sufficiently to merit a departure from his previous risk profile.

10. Having analysed those risk factors in paragraph 34, the judge proceeded at paragraph 35 to find that the decision was proportionate. She noted that although the appellant had been in this country for some years, he had spent most of his life in Poland, he still had a mother and father there as well as a sister, he spoke Polish and was familiar with the country. The judge then considers whether the best interests of the appellant's child was such that his deportation may be rendered disproportionate on that account. She concluded that it would not be rendered disproportionate. There is no merit to this ground of appeal.

11. I reject the submission that the judge did not consider the evidence adduced by the appellant purportedly demonstrating his 15 years' residence. The judge referred at paragraph 12 to that claim made by the appellant, and in the paragraphs following, until paragraph 17, analysed the evidence he provided, including his statement and oral evidence. The judge accepted at paragraph 13 that the appellant had been in the United Kingdom in around 2006, at least initially. That finding was based in part upon evidence provided by the appellant's sister. The judge then gave reasons at paragraph 14 as to why she was unable to accept the appellant's assertions that he had remained in this country ever since. One of the reasons provided by the judge was the inconsistency between his evidence and that of his sister. The appellant had said that the garage where the offending took place no longer existed. By contrast, his sister's statement said at paragraph 4 that the appellant was "working at the garage", in the present tense. Neither the sister's written evidence, nor her oral evidence at the hearing, was that the appellant had been in the United Kingdom constantly since his initial arrival in 2006. At paragraph 16, the judge explained why her overall findings were that she was not satisfied that the appellant had been in the United Kingdom for as long claimed. She had no employment records covering the time, nor records from HMRC. Although in his statement at paragraphs 9 and 11 the appellant had stated that he had enjoyed various employment during his time here, there were no dates, and no wider supporting documentary evidence. Nor was there anything to demonstrate that the appellant had registered as a jobseeker during any interim periods.

12. The judge reached findings of fact which were open to her on the evidence she heard. She had the benefit of seeing the appellant give evidence and considering the entirety of the evidence in the case. As an appeal lies only to this tribunal on a point of law, rather than a finding of fact, it is necessary for an appellant to demonstrate that findings of fact were irrational, perverse, or otherwise legally flawed. Mr Rylatt's clear and helpful submissions on this point have not demonstrated that the judge fell into such error when analysing this aspect of the appellant's case.

13. At paragraph 42 the judge addressed the appellant's claimed rehabilitation, which is a factor to which I will return, before concluding in her global conclusion at paragraph 43 that the appellant meets the test of deportation contained in the 2016 Regulations. At paragraph 43 she said:

> "Accordingly, and for all these reasons, I find that the appellant does continue to pose a genuine, present and sufficiently serious threat to one of the fundamental interests of the United Kingdom society and I am satisfied that his deportation is both justified and proportionate."

14. The question for my consideration is whether the erroneous insertion of a sentence indicating that the judge had reached a conclusion by the time she had got to paragraph 34 in her reasoning is such that the entire decision is infected by the error of law which Mr Rylatt submits that it is.

15. It is trite law that decisions of this Tribunal and indeed of any court are not to be construed in the same way as one would construe black letter legislation. They are documents which set out a series of reasons drawn together in an overall global conclusion. This is precisely what the judge did on this occasion.

16. There is no indication from the judge's operative reasoning as it continues throughout the decision that the judge was influenced by having, as Mr Rylatt submits, put the coach before the horses. The judge considered all relevant factors; her remarks in paragraph 34 must be viewed in that context. In paragraph 34 she was addressing the appellant's propensity to reoffend. She provided unquestionably sound reasons as to why she rejected the appellant's assertions that he had stopped using amphetamines, a factor which had led to his offending, and that he had addressed the overall circumstances of his offending behaviour. The remarks the judge made at the end of paragraph 34 were in my judgment in relation to the issue of propensity to reoffend. The judge was saying in paragraph 34 that she was satisfied that his deportation should be maintained insofar as it turned on his propensity to reoffend. She was not closing off the possibility that other reasons could mitigate against that, as her later analysis demonstrates. There is no merit to this ground of appeal.

17. Turning to the fourth ground of appeal Mr Rylatt submits that the judge made irrational findings concerning the appellant's claimed rehabilitation. At paragraph 42, she said that the appellant had "adduced no evidence to show that he has done any rehabilitative work in custody save or (sic) his attendance at DART [Drug and Alcohol Recovery Team]". Mr Rylatt submits that the appellant's own remarks to the offender manager and his description in his statement of being free from alcohol and drugs problems was such that there was evidence going to his claimed rehabilitation, and it was simply the case that the judge had failed to take that into account. I reject this submission. As outlined a moment ago, the judge considered all the factors relating to the appellant's claimed rehabilitation in the course of her reasoning between paragraphs 25 and 34. She records that the appellant's own remarks to the offender manager were that he had not used amphetamines. She made the entirely valid finding that she had no evidence that he has "in fact" stopped taking amphetamines. What I take this to mean is the judge is referring to the absence of independent evidence of the sort that is available to those who used to be substance abusers but are no longer. So much is clear from the following extract of the decision:

> "He gives no evidence as to the support he has required or whether he has been prescribed medication to assist with any withdrawal symptoms. No negative drug tests have been placed into evidence. I cannot know whether the appellant's claims are credible or not and I am unable to make any findings in this regard as I do not have the evidence before me."

There the judge was referring to the sort of evidence which would be entirely reasonable to expect to support a claim of this nature, and she found that there was no such evidence. That was not a finding which was irrational or otherwise outside the range of reasonable findings that were open to this judge to make.

18. I return now to the final two grounds of appeal as they can be dealt with rather briefly. The second ground of appeal is that the judge erroneously stated that the 2016 Regulations do not contain a definition of "worker" status. There is some superficial force in that criticism of the judge's reasoning at paragraph 20: see regulation 4(1)(a) of the 2016 Regulations which defines the term "worker" by reference to Article 45 of the Treaty on the Functioning of the European Union. However there is no materiality to this error. The judge correctly noted that employment under the Regulations must be genuine and effective and not marginal or supplementary. That is a term which the judge attributes to the respondent's own guidance concerning the assessment of worker status. It is a concept which finds support both in the European and domestic authorities. In the case of Begum v Secretary of State for the Home Department [2012] 2 CMLR 13 this Tribunal summarised the jurisprudence on what amounts to a worker. At paragraph 16 Mr Justice McCarthy said:

> "A worker is a person who pursues effective and genuine activities, to the exclusion of activities on such a small scale to be regarded as purely marginal and ancillary …"

19. As such, the judge correctly directed herself as to the substantive test for the assessment of worker status and correctly recited that in her decision even if she did incorrectly attribute it solely to the respondent's guidance rather than to the authority to which I had just referred. It no doubt features in the respondent's guidance concerning "worker" status, although, being an autonomous EU law concept, its provenance is EU law. Nothing turns on this. Mr Rylatt was unable to submit before me any reasons why the judge should rationally have found that the appellant was a person who was employed in the sense of being a "worker" for the 2016 Regulations for a period which would place him in a higher category of protection from removal and the basic and lowest level that the judge applied. This is not a material error.

20. The final ground of appeal relates to the judge's application of the public interest factors set out in Part 5A of the Nationality, Immigration and Asylum Act. I consider nothing to turn on this criticism. First the judge addressed this issue having made conclusive findings that the 2016 Regulations did not operate so as to render the appellant's deportation unlawful. She correctly addressed the position of Article 8 having already considered the position under the 2016 Regulations. This is entirely consistent with the approach of this Tribunal in Badewa (Sections 117A–D and EEA Regulations) [2015] UKUT 00329 (IAC). The headnote states:

> "The correct approach to be applied by Tribunal judges in relation to ss.117A–D of the Nationality, Immigration and Asylum Act 2002 (as amended) in the context of EEA removal decisions is:
>
> (i) first to decide if a person satisfies the requirements of the Immigration (European Economic Area) Regulations 2006. In this context ss.117A–D has no application;
>
> (ii) second where a person has raised Article 8 as a ground of appeal, ss.117A–D applies."

The judge plainly adopted the approach required by Badewa.

21. The second reason as to why this is not a material error is because the protection from removal conferred by the 2016 Regulations is greater than that enjoyed by those subject to immigration control under Article 8. That means that the appellant suffered no prejudice in having his case additionally considered under Article 8 of the ECHR once the judge had dismissed his appeal under the 2016 Regulations. This ground is therefore dismissed.

Conclusion

22. Drawing the above analysis together therefore I find that the judge reached findings which were open to her on the facts concerning the appellant's claimed length of residence. She did not misdirect herself in relation to the appellant's putative worker status. In relation to her analysis at paragraph 34 it is necessary to consider the decision as a whole and not attempt to construe it as a black letter statute. In relation to rehabilitation the judge reached the findings which were open to her on the facts and finally for the reasons I have just set out the judge adopted the correct approach in relation to Article 8 in the context of deportation appeals. For these reasons this appeal is dismissed.

NOTICE OF DECISION

The decision of Judge Andrew did not involve the making of an error of law.

This appeal is dismissed.

No anonymity direction is made.

Signed *Stephen H Smith* Date 20 December 2019

Upper Tribunal Judge Stephen Smith