Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00448/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 July 2019	**On 1 August 2019**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PRZEMYSLAW [Z]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant/Secretary of State for the Home Department: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Ms V Easty, Counsel, instructed by Thompson & Co

DECISION AND REASONS

1. The Respondent is a citizen of Poland. His date of birth is 24 January 1979. I shall refer to him as the Appellant as he was before the FtT.

2. The Appellant came here in or around September 2016. The Secretary of State made a deportation order on 5 June 2018 pursuant to Regulation 23(6) of the 2016 EEA Regulations. The Appellant appealed against this decision. His appeal was allowed by Judge of the First-tier Tribunal Groom. Permission was granted to the Secretary of State by Judge Adio on 18 April 2019. Thus, the matter came before me on 23 July 2019.

3. The Appellant's criminality is comprehensively set out at paragraph 4 to paragraph 10 of the Secretary of State's decision letter. On 3 July 1998 at a court in Gorzow Wielkopolski the Appellant was convicted of offences described as robbery and causing minor bodily injury. He was sentenced to two years and six months imprisonment. On 6 February 2001 at a court in Gorzow Wielkopolski the Appellant was convicted of an offence described as brawl and battery. He was sentenced to two years imprisonment which was suspended for a period of five years: however, this was subsequently revoked. On 13 May 2005 at a court in Gorzow Wielkopolski the Appellant was convicted of an offence described as theft. He received a sentence of imprisonment of one year. On 16 September 2005 at a court in Gorzow Wielkopolski the Appellant was convicted of an offence described as brawl and battery. He was sentenced to ten months' imprisonment. On 10 February 2011 the Appellant was convicted at a court in Gorzow Wielkopolski of an offence described as unintentional killing and driving under the influence of alcohol or narcotic drugs. He was sentenced to four years' imprisonment. On 23 April 2015 at a court in Gorzow Wielkopolski the Appellant was convicted of an offence described as making threats and violating physical integrity. He was sentenced to five months' imprisonment. On 12 February 2016 at a court in Gorzow Wielkopolski the Appellant was convicted of an offence of robbery and sentenced to four months' imprisonment.

The hearing before the FtT

4. There was no dispute that the Appellant had been convicted of the above offences. In addition, the Secretary of State relied on a supplementary letter of 22 August 2018. It was stated that the Appellant had come to the attention of the authorities for assaulting his ex-partner on 2 September 2017. It was alleged that he had breached bail and committed criminal damage on 4 September 2017. These allegations were discontinued.

5. The judge in his decision directed himself on the law at [5]-[9]. There is no suggestion that the judge misdirected himself. The judge identified the evidence at [10] of the decision. He heard evidence from the Appellant and made findings of fact at [16] – [18]. The judge expressed concern that the exact circumstances of the offences committed in Poland and/or the sentencing comments of the judge/s were not available to him.

6. The Secretary of State relied on evidence that whilst the Appellant was in detention (he had been in detention since 10 May 2018) he had been reproached by IRC staff on eleven separate occasions for "infractions" that had related to incidents of verbal abuse towards staff and non-compliance and disputes with other detainees. The judge at [15] stated that the details of these infractions were not provided to him by the Secretary of State.

7. The judge considered whether the Appellant presents a genuine, present and serious threat affecting one of the fundamental interests of society having regard to Schedule 1 of the EEA Regulations and the principles set

out in Arranz (EEA Regulations – deportation – test) [2017] UKUT 00294. The judge took into account the Appellant was allowed to enter the UK. The Secretary of State did not seek at that time to exercise a power under Regulation 23 of the 2016 Regulations.

8. The judge took into account that the Appellant's offending was confined to when he was in Poland and he had not offended since he arrived in September 2016. The judge found:-

> "Given that the precise details of the Appellant's previous convictions are not known, it is difficult to ascertain how the Respondent concluded that threat posed by the Appellant is sufficiently serious".

9. In respect of the Appellant's criminality, the judge said that "Previous criminal convictions do not in themselves justify the decision" and:-

> "A decision made on public policy or public security grounds cannot be made on criminal convictions alone. All the principles of Regulation 27(5) must be taken into account. The nature of previous offending including the number and seriousness of previous convictions should form part of the assessment of the person's present conduct when considering the overall conduct of the person concerned" (see [17]).

10. The judge at [18] accepted the Appellant's representative's submission that in the absence of definitive evidence as to the precise nature of the offences, the decision of the Respondent insofar as it relates to the offences of which the Appellant has been convicted is no more than generalisations and speculation.

11. At [22] the judge returned to this point stating that the Secretary of State had made his decision on the basis of the Appellant's previous convictions, …:-

> "As there was no evidence obtained as to the nature of the offences involved, or any aggravating or mitigating features which may have reveal (sic) the triggers for offending for example, the Respondent did not obtain a sufficiently accurate picture which enabled the Secretary of State to conduct a proper assessment of risk or a propensity to reoffend".

12. In respect of the incidents in 2017 the judge attached weight to there being no criminal proceedings brought against the Appellant. There was no evidence from the Secretary of State about the infractions relied on and the judge stated at [20] … "the precise nature of those infractions was not available for me to assess during the hearing".

13. At [21] the judge said that he had taken into account the Appellant's personal conduct, age, state of health, family and economic situation, length of residence and social and cultural integration. The Appellant was aged 40 and the judge said that …:-

> "It was apparent from his oral evidence that he does not dispute the convictions against him which were all obtained in Poland and he was

> candid on more than once (sic) occasion by stating '*I know I am not an angel.*'"

The judge attached weight to the evidence that the Appellant has not been convicted of an offence since 2016 and that this "gives weight to his personal conduct whilst in the UK and the level of risk that he poses and propensity of re-offending" (see [21]). The judge found that the Appellant is positive about his extended family network, now in the UK, and stated … "the inference being that it is this family network who offer him stability".

14. The judge found that the Appellant has ties to his local community taking into account the evidence from a neighbour, Mr Steadman. The judge found that the Appellant does not have family ties in Poland. The judge attached weight to the Appellant having previously lived and worked here in 2009 noting that there were no convictions during that time. The judge attached weight to a recent certificate obtained by the Appellant in decorative design concluding that it supported his assertion that he would wish to take advantage of the opportunities here in the UK.

15. At [22] the judge concluded that the Secretary of State has not discharged the burden of demonstrating that the Appellant presents a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

The legal background

16. "27.- (1) In this regulation, a 'relevant decision' means an EEA decision taken on the grounds of public policy, public security or public health.

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

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(1).

(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.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ('P') who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010(2); or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

(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.).

…

Regulation 27

SCHEDULE 1

CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

Considerations of public policy and public security

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

Application of paragraph 1 to the United Kingdom

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

   (a) the commission of a criminal offence;

   (b) an act otherwise affecting the fundamental interests of society;

   (c) the EEA national or family member of an EEA national was in custody.

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including—

(a) entering, attempting to enter or assisting another person to enter or to attempt to enter, a marriage, civil partnership or durable partnership of convenience; or

(b) fraudulently obtaining or attempting to obtain, or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

The fundamental interests of society

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(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;

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;

(j) protecting the public;

(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);

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

The grounds of appeal

17. The Secretary of State's grounds of appeal read as follows:-

> "1. The respondent considers the appellant's past conduct is sufficient to bring him within Regulation 27(5)(c) in order to justify deportation, as it allows the respondent to take account of past conduct when assessing threat. The appellant has a prolific offending history in Poland: between 1998 – 2006 he spent only limited time out of prison as convictions followed soon after each release.
>
> 2. A 2.5 year gap in offending in the UK does not evidence he is a reformed character given his very long offending history.
>
> 3. The Judge has allowed the appeal for a lack of detail of the offending, but where in this case the appellant has a very long string of offences for violence, theft, robbery and unintentional killing under the influence of drugs and alcohol, totalling custodial sentences of around 11 years. Even if there were mitigating circumstances to one or more offence, he still represents a present threat to the UK. The appellant does not dispute the offending.
>
> 4. It is respectfully submitted that for the above reasons, the judge has erred in allowing the appeal."

The grant of permission

18. The First-tier Tribunal granted permission to the Secretary of State. The decision of 18 April 2019 reads as follows:-

> "1. The Respondent seeks to permission to appeal in time against a decision of the First-tier Tribunal (Judge J P Groom) who in a decision promulgated on 22nd March 2019 allowed the Appellant's appeal against the Respondent's decision to deport him under EEA Regulations. To be granted permission to appeal the appealing party must show that there is an arguable case that the judge made an error of law or conducted the appeal with procedural unfairness. In the grounds for permission to appeal the Respondent argues that the Appellant's conduct is sufficient to bring him within Regulation 27(5) in order to justify deportation as it allows the Respondent to take into account past conduct when assessing threat. It was noted the Appellant has a prolific offending history in Poland between 1998 and 2006 (should read 2016). The Respondent noted that the Appellant only spent a limited time out of prison as convictions followed soon after each release. It was argued that a 2.5-year gap in offending in the UK does not evidence a reformed a character given his long offending history. *I find that based on the long offending history of the Appellant and the short period he has stayed in the UK it is arguable that even if there are mitigating circumstances to one or more offences the Appellant still represents a present threat to the UK particularly as there is no dispute with the offending. I find that the judge's decision did not give enough weight to the points made by the Secretary of State in the grounds for*

> *permission to appeal.*(my emphasis).There is an arguable error of law raised by the Respondent."

Submissions

19. Mr Melvin relied on his skeleton argument of 3 June 2019. He made oral submissions. It was submitted that "the judge should have given careful consideration to the previous offending, the convictions themselves, and not look for evidence of aggravating or mitigating circumstances, and by doing so has materially erred". Details of the infractions were set out in the supplementary letter and the arrests in 2017 were matters going to the overall assessment. The judge failed to assess rehabilitation and integration. I pressed Mr Melvin to make it clear to me where the error lay in the decision of the judge. He said that there was a failure to make findings on material matters. He submitted that the judge ignored that the Appellant was eligible for the lowest level of protection only. It was incumbent on the judge to consider the period of time that the Appellant had been here and he failed to do so. Moreover, the judge erred in looking for mitigating circumstances. He said that the grounds do not concern weight, but a failure to consider material matters. Ms Easty made oral submissions, relying on the Rule 24 response and her skeleton argument, the thrust of which is that the grounds are a disagreement with the findings.

Conclusions

20. The grounds of appeal do not properly identify an arguable error of law. In *R (Iran)* [2015] EWCA Civ 982 the Court of Appeal considered the Tribunal's jurisdiction to correct errors of law and gave at [9] a brief summary of the points of law that will most frequently be encountered in practice:-

> "i) Making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters');
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;
>
> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> iv) Giving weight to immaterial matters;
>
> v) Making a material misdirection of law on any material matter;
>
> vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
>
> vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the Appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

21. The grounds comprise four paragraphs. Paragraphs 1-3 do not identify an arguable error, rather they are a restatement of the Secretary of State's case and a disagreement with the findings of the First-tier Tribunal. Paragraph 4 is a bare assertion that the judge erred.

22. I have emphasised the part of the decision granting permission which contain the reasons for the grant. The judge said as follows:-

> *"... I find that based on the long offending history of the Appellant and the short period he has stayed in the UK it is arguable that even if there are mitigating circumstances to one or more offences the Appellant still represents a present threat to the UK particularly as there is no dispute with the offending ...".*

23. This sentence does not identify an arguable error of law. It is the opinion of the judge granting permission.

24. The grant of permission goes on:-

> *"... the judge's decision did not give enough weight to the points made by the Secretary of State in the grounds for permission to appeal. There is an arguable error of law raised by the Respondent."*

25. Not giving enough weight to points raised in the grounds by the Secretary of State is not an arguable error of law, unless of course as a consequence it can properly be said that the judge made an irrational decision (more recently the Upper Tribunal gave guidance in Durueke (PTA: AZ applied, proper approach) [2019] UKUT 00197. Irrationality is not pleaded by the Secretary of State.

26. The grounds are in truth no more than a disagreement about weight to be given to the different factors, namely; the Appellant's offending history in Poland, the 2.5- year gap in offending and the lack of detail about the offences committed in Poland. They fail to identify an arguable error of law. Mr Melvin's skeleton argument expanded on the grounds, but it does not identify an error of law in the decision of the judge.

27. In oral submissions Mr Melvin identified, for the first time, matters which are capable of amounting to errors of law; namely, a failure to make findings on material matters and a failure to take into account material evidence. Neither are raised in the grounds. Permission was not granted to argue the points. In any event, there is no substance in them. The judge was aware that the Appellant was entitled to the lowest level of protection (having identified at [3] that he had not acquired permanent residence and referring to what he called the "bottom tier of protection" at [8] and [9]). It is unarguable that he ignored that the Appellant was entitled to the lowest form of protection (a point that was not raised in the grounds or in Mr Melvin's skeleton argument, but for the first time in oral submissions). The judge unarguably took into account the "infractions" and 2017

matters on which the Secretary of State relied and made findings that were open to him on the evidence.

28. The judge did not seek to go behind the Appellant's criminal offending. The judge was aware of the extent of the Appellant's criminality in Poland and that this was a factor which weighed heavily against him. He was unarguably aware of the timeline. He did not look for mitigation in the absence of evidence from the Appellant, as asserted by Mr Melvin. The judge was entitled to expect further details about the offences committed in Poland, including the sentencing comments to help him to identify causes or triggers to help him assess risk. Whilst the same could possibly have been obtained by the Appellant as suggested by Mr Melvin, the burden of proof (properly applied by the judge) was on the Secretary of State.

29. The judge had the benefit of hearing oral evidence from the Appellant. It is clear that he accepted the Appellant's evidence and found him to be credible. His evidence is that he is not a threat to the UK (see the Appellant's witness statement). He asserts that he has not done anything wrong whilst here and he will not commit offences whilst here. He did not know what the "infractions" related to but stated that he feels frustrated whilst in custody.

30. There was adequate consideration of matters relating to integration, in so far as they relate to reg 27 (5) (c).

31. The judge took into account all material evidence and made adequate findings of fact on material matters. He was entitled to attach weight to the Appellant having not committed offences whilst in the UK. The findings were open to the judge and consistent with Schedule 1 considerations. What weight to attach to the factors identified in the Respondent's grounds was a matter for the judge. His findings are grounded in the evidence and adequately reasoned. The conclusions are rational (irrationality is not a ground of appeal, in any event). The grounds amount to a disagreement with the findings.

Notice of Decision

32. The Secretary of State's application is dismissed. The decision of the First-tier Tribunal to allow the Appellant's appeal under the 2016 Regulations is maintained.

33. No anonymity direction is made.

Signed Joanna McWilliam Date 24 July 2019

Upper Tribunal Judge McWilliam