



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00596/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 26 November 2019

Decision & Reasons Promulgated  
On 14 January 2020

Before

HIS HONOUR JUDGE BIRD  
UPPER TRIBUNAL JUDGE PLIMMER

Between

DOMINIC JOSEPH MRZYGOLD

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr E Tufan, Senior Home Office Presenting Officer  
For the respondent: Ms E Fitzsimons, Counsel

DECISION AND REASONS

Background

1. The appellant is a Polish National born on 20 March 1979. He has resided in the United Kingdom since about 2007. On 27 January 2017 he was sentenced to 48 months imprisonment following conviction on 3 counts of fraudulent evasion of duty. On 29 September 2017 the Secretary of State made a deportation order exercising powers under regulation 23(6) of the Immigration (European Economic Area) Regulations 2016 (“the Regulations”).

### The FTT Decision

2. For reasons set out in his decision of 27 June 2019 First Tier Tribunal (“FTT”) Judge Devittie allowed the appellant’s appeal. Before moving to consider the grounds of appeal it is worth reflecting on the structure of the FTT Judge’s decision:
  - a. After a succinct introduction including the relevant sentencing remarks, he sets out the Respondent’s submissions (para.5) and the Appellant’s submissions(para.6)
  - b. At para.7 he sets out the legal framework reproducing regs.23 and 27 and schedule 1. At para.8 of the judgment he refers to rehabilitation and specifically to MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC)
  - c. He deals with the oral and written evidence in support of the Appellant’s case at paras.9 and 10 (in respect of the appellant) para.11 (in respect of the appellant’s partner) and para.12 (in respect of the appellant’s employment history and the supporting evidence of three friends)
  - d. He deals with the documentary evidence at para.13.
  - e. At paras.14 to 17 he deals with his assessment of the evidence and the reasons for that assessment. First (para.15) he considers if the appellant is entitled to an enhanced level of protection (under reg.27(3)). At para.16 he expresses his conclusion that reg.27(3) does not apply. Next (para.17), the FTT Judge goes on to consider whether the appellant’s conduct constitutes a “genuine, present and sufficiently serious threat” (see reg.27(5)(c)). He there concludes, after referring to the evidence which might suggest a contrary conclusion, that the appellant does not constitute such a threat.
  - f. At paras.18, 19 and 20 the FTT Judge deals with the proportionality of deportation by reference to the appellant’s ties to the United Kingdom, his family life and the risk of re-offending. The FTT Judge also refers to rehabilitation, thus dealing with the point he raised at para.8. His conclusion is that deportation would not be proportionate.

### The Law in outline

3. Reg.23(6)(b) permits the removal of an EEA national if the Secretary of State decides that that person’s removal is justified on grounds of public policy:

23. – *Exclusion and removal from the United Kingdom*

.....

(6) ..... *an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if –*

(a) ....

(b) *the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27; or*

(c) .....

4. When the Secretary of State considers if removal is justified on public policy grounds the decision must be taken in accordance with reg.27 and in particular the six principles set out at reg.27(5):

27. – *Decisions taken on grounds of public policy, public security and public health*

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

.....

(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) ....

(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.).*

5. Schedule 1 provides as follows:

*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.*

6. Reg.27(5)(c) requires the personal conduct of the person threatened with removal to represent a “genuine, present and sufficiently serious threat” affecting one of the fundamental interests of society. Those interests are listed (the list in each case is non-exclusive) at reg.7 and para.7 of schedule 1 to the Regulation.
7. Reg.27(6) requires the Secretary of State to take account of considerations such as the individual’s family situation, age and length of residence and integration into the United Kingdom (reg.27(6)).
8. Reg.27(8) requires a court or tribunal considering if the requirements of the Regulation are met to “have regard to” schedule 1. The schedule broadly provides guidance on how the Tribunal should approach the question of whether the Secretary of State’s decision has been made in accordance with reg.27. For example, paras.2 and 4 provide guidance on the subject of integration (see reg.27(6)), para.3 provides guidance on the question of whether the relevant person poses a “genuine, present and persistent threat” (see reg.27(5)(c)) and para.5 deals with proportionality (reg.27(5)(a)).
9. The principles set out at reg.27(5) represent mandatory guidance. It was accepted before us that if the personal conduct of the potential deportee does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society then there should be no removal. We are satisfied that the parties were right to take this approach: see the Court of Justice decision in *B v Land Baden-Wurttemberg* (Case C-316/16) at para.92 cited at para.28 of *Vomero v SSHD* [2019] 1 WLR 4729 referring to Art.27(2) of Directive 2004/38.

### The grounds of appeal

10. The Secretary of State advances four grounds of appeal in support of her position that the FTT Judge made one or more errors of law. The FTT Judge:
  - a. Ground 1: Was not entitled on the evidence to conclude that the appellant had accepted responsibility for his offending
  - b. Ground 2: Failed properly to apply the EEA Regulations or in the alternative, if the Regulations were properly applied failed to give adequate reasons for his conclusions

- c. Ground 3: Gave inadequate reasons for his conclusion that deportation would be disproportionate
- d. Ground 4: Gave no reasons for his finding that the appellant's rehabilitation would be more effective in the United Kingdom.

### Grounds 1 and 2

11. Properly understood it seems to us that these grounds go to the central question of whether the FTT Judge was entitled to conclude that the appellant's personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
12. At paragraph 17 of the judgment and its sub-paragraphs, the FTT Judge applies his mind to reg.27(5)(c).
13. At paragraph 17(1) reference is made to OASys (the Offender Assessment System used by the National Probation Service) which records that the appellant poses a "low risk" of re-offending. The FTT Judge records that he was satisfied on the evidence of the appellant that he had accepted responsibility for his offending. The appellant's oral evidence was that being in prison, and in particular being away from his family, had had a dramatic effect on him. In the same paragraph the FTT Judge records that the "uncontested evidence" is that whilst in prison the appellant "sought to address his offending [and sought to] make himself a better person".
14. At paragraph 17(2) and (3) the FTT Judge notes that the appellant has complied with all probation and licence requirements and finds that the effect of imprisonment on him (in particular his absence from his family and the stress that brought to him, his partner and their son) has been to deter him from crime.
15. At paragraph 17(4) the FTT Judge makes a finding that the appellant poses a low risk of re-offending. In reaching that conclusion the Judge clearly had regard to all of the evidence (see paragraphs 9, 10, 12 and 13 of the judgment - the evidence came from the appellant's friends Joanna Kordys, Marta Kaizu and Wieslaw Kowal each of whom spoke to his rehabilitation, reports from 3 probation officers Kirsten Pady, Cheryl Brown and Julie O'Boyle, the OASys report and from the appellant himself). He describes the evidence as "compelling" and deals with the length of his prison sentence. He notes that the position under the Regulations is that "the higher the sentence the greater the likelihood of re-offending". It is important to note that the FTT Judge refers to aspects of the evidence which might tend to suggest a different conclusion, that the second offence had been committed whilst the appellant was on bail and that the appellant in the past had tried to downplay his role in the criminality. The FTT Judge concludes the paragraph with a finding that

the appellant's conduct does not (paraphrasing reg.27(5)(c)) present a "genuine and serious threat".

#### Disposition of grounds 1 and 2

16. It is clear from those parts of the judgment we have referred to that the FTT Judge had in mind that the reg.27(5)(c) question was central to the appeal. It also seems to us that the Judge's reference at para.17(4) to the link between re-offending and the length of the sentence is paraphrasing what is said at para.3 of schedule 1.
17. It therefore seems to us that the FTT Judge clearly and obviously took account of relevant schedule 1 matters when considering whether the appellant represented a "threat".
18. It seems to us that there is a strong link between reg.27(5)(c) and the risk of re-offending. It is difficult to see how a person who has a low risk of re-offending is a person whose conduct represents "a genuine, present and sufficiently serious threat" to one of the fundamental interests of society.
19. We have shown at paragraphs 9 to 13 how the FTT Judge dealt with the evidence of the risk of re-offending. It is important to bear in mind that the Secretary of State (unsurprisingly) called no evidence before the FTT going to the reg.27(5)(c) issue. The issue for the FTT Judge was then largely one of credibility judged in the context of the entirety of the evidence he heard. In our view the FTT Judge was clearly entitled to make the findings he made, including that the evidence in support of his conclusion was compelling.
20. We have therefore come to the conclusion that grounds 1 and 2 must be dismissed. Given the primacy of the "threat" assessment under reg.27(5)(c) this disposes of the appeal. However, from an abundance of caution, the FTT Judge went on to consider proportionality.

#### Grounds 3 and 4 disposition

21. Having found the appellant not to pose a "threat" the FTT Judge went on to consider proportionality and rehabilitation at paragraphs 18 and 19. There is clearly a close link between rehabilitation and proportionality. Para.5 of schedule 1 sets out the only reference to "rehabilitation" in the Regulation as a factor to take into account when assessing proportionality.
22. In our view the FTT correctly approached the issue of proportionality correctly, taking account of how long the appellant had lived in the United Kingdom, his relationship with his fiancée and son, his fiancée's immigration status, her integration, the ease with which she could move to live a new life



in Poland, the impact of severing the family unit and the appellant's rehabilitation.

23. It seems to us to be implicit in the FTT Judge's findings that the appellant's fiancée "would not be able to follow him to Poland" if he was deported that she would stay in the United Kingdom with their son. The FTT Judge was clearly persuaded that the appellant's family made a great contribution to his stability and kept him away from a life of crime. The FTT Judge's finding is that he has a lesser chance of continued rehabilitation if separated from his family.

24. Grounds 3 and 4 seem to us to be immaterial given our findings in respect of grounds 1 and 2. However, in our view grounds 3 and 4 are not made out. The FTT Judge gives adequate reasons for his conclusion on proportionality and it is clear that in doing so he has carefully borne in mind not only para.5 of schedule 1 but also the matters set out at reg.27(6).

### Conclusion

25. The appeal is dismissed. None of the appeal grounds are made out.

### **Notice of decision**

The FTT's decision does not contain a material error of law and we do not set it aside.

Signed:

Date: 7 January 2020

HHJ Bird