Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00148/2019

THE IMMIGRATION ACTS

Heard at Field House Face to Face
On 16th December 2021

Decision & Reasons Promulgated
On 3rd February 2022

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PAWEL HORNIAK
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr P Georget

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but I shall refer to the parties as they were described before the First-tier Tribunal, that is Mr Horniak as the appellant and the Secretary of State as the respondent.

2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Higgins promulgated on 24th June 2021 allowing the appellant's appeal under the Immigration (European Economic Area) Regulations 2016 against the decision of the Secretary of State dated 28th March 2019 which supplemented a decision of 21st February 2019.

3. The appellant is a Polish national born on 15th May 1997 and is 24 years old. He entered the UK when he was 5 in July 2002 and lived with his grandmother until her unfortunate death in 2012. He then lived with his aunt for four years until she left London when he was 20 years old. On 3rd March 2012 the appellant was cautioned by the British Transport Police for travelling on a railway without paying a fare.

4. On 13th March 2018 at Snaresbrook Crown Court he was convicted of burglary and being carried in a motor vehicle taken without consent and two counts of breach of a Bail Act Order for which he was sentenced to a total of 21 months' imprisonment.

5. On 26th July 2018 at Chelmsford Crown Court, whilst on bail, he was convicted of attempted burglary (with intent to steal – in a dwelling), burglary and attempted theft of a motor vehicle for which he was sentenced to 32 months' imprisonment to be served concurrently.

6. The Secretary of State decided to make a deportation order on the grounds of public policy in accordance with Regulation 23(6)(b) and Regulation 27 of the Immigration (European Economic Area) Regulations 2016. The Secretary of State received no representations to the notice of liability to deportation and a deportation order was signed on 21st February 2019.

7. The appellant was removed to Poland on 4th June 2019.

<u>The grounds for permission to appeal</u>

8. First-tier Tribunal Judge Higgins heard the appeal on 7th June 2021 (over two years after the appellant was removed) and found that

   (a) the appellant did not have permanent rights of residence (paragraph 43);

   (b) the appellant represented a genuine, present and sufficiently serious threat to any of the fundamental interests of society, (paragraph 49);

   (c) it would not be proportionate to maintain exclusion, so the appellant's appeal succeeded, (paragraph 52).

9. It was submitted that the judge had given inadequate reasoning for finding that the respondent's decision was disproportionate. The respondent had taken into account in the deportation letter the appellant arrived in the UK at a young age and was schooled here, but the appellant had no particularly strong family ties to the UK and the impact of exclusion on him and his family members had not been demonstrated.

10. The grounds set out that the appellant was considered a threat to society and had not demonstrated rehabilitation to a level that eliminated that threat. He had been in Poland for two years prior to the hearing. Overall it was contended that the decision was inadequately reasoned.

11. Permission to appeal was granted by Upper Tribunal Judge Grubb who noted that the judge found that the appellant's offences (domestic burglary with a sentence of 32 months' imprisonment) amounted to "very serious offences" and the appellant continued to be at risk of reoffending, and it was arguable that the judge's reasoning primarily in paragraph 52 was inadequate to sustain the proposition that the appellant's exclusion from the UK (he had already been deported and lived in Poland for two years) would not be proportionate. The finding rested on an arguably inappropriate "analogy" or "near miss" in establishing a permanent right of residence and that, if so, only "serious grounds" would have sufficed.

12. At the hearing before me, Mr Whitwell submitted that until paragraph 50 of the determination the findings were in the favour of the Secretary of State. The reasons for allowing the appeal were not only brief but inadequate.

13. Mr Georget relied on his 'Rule 24' response and submitted that the appellant's length of time in the Untied Kingdom was material to the question of proportionality. This level of residence still went to integration. It was submitted that it raised the issue that the appellant may not have accrued the level of protection technically, but this was not his fault as being a child it was difficult to state that he was not here lawfully and could not achieve permanent residence. Mr Georget accepted, however, that this was not an argument put to the First-tier Tribunal. He did submit that I should not, if I found an error, preserve the finding in relation to the threat posed by the appellant.

Analysis

14. The judge made the following relevant findings:

    the appellant had not returned to Poland during the seventeen years that elapsed before he returned there on 4th June 2019 and that he had attended various schools and colleges whilst in the United Kingdom and lived with his aunt between 2013 and 2017 (paragraph 26).

    he had produced "some certificates" in relation to his courses undertaken whilst in custody and further, and it would be "difficult for him to put down any firm roots (in Poland) as long as his appeal against his expulsion remained outstanding" (paragraph 32)

    the appellant had adduced no evidence in support of his claim not to have offended since returning to Poland, but it was difficult to see what evidence he could have adduced and "there was a substantial incentive for him not to reoffend" and therefore the judge at paragraph 34 considered "it unlikely he has done so".

15. At paragraphs 36 to 43, the judge turned to the level of protection the appellant could secure and found that the appellant had not acquired the right of permanent residence for reasons which Mr Georget in his submissions to me confirmed that were not challenged.

16. From paragraph 44 onwards the judge found that the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of society, noting that the burden rested with the respondent to demonstrate that the appellant's exclusion was justified.

17. The judge at paragraph 46 described the 2018 offences as "very serious offences" which warranted an immediate term of imprisonment and that the second of his burglaries was committed whilst the appellant was on bail and that notwithstanding his youth, he was sentenced to 32 months in prison.

18. At this point in the determination, and from paragraph 48 onwards the judge strays into considering the case through the lens of the respondent justifying the appellant's exclusion on "serious grounds of public policy or public security". The judge opines that he would not have been satisfied that the risk to the public the appellant posed was sufficiently serious to justify it on that basis, but reminds himself that that was not the context in which it should be considered and notes that were he to return to the UK the appellant would no longer be constrained by the fear that offending would jeopardise his appeal and found "I am not satisfied his rehabilitation has so far been such that the risk of him reoffending has been eliminated".

19. The judge then turns to the proportionality of the appellant's exclusion and at paragraph 50 rehearsing the relevant issues to be taken into account, states at paragraph 51 the following

    51. He was 5 when he was brought here by his grandmother and he never visited Poland during the seventeen years he lived in the UK. He spent his formative years in this country. He was educated here and he had acquired some limited experience of work by the time he began offending in 2018. He would have been fully integrated in the UK at the age of 20, and although he has been in Poland for the past two years, he has yet to put down any firm roots there because his immediate family is in the UK and he has been awaiting the outcome of his appeal.

    And at 52

    52. Had the Appellant acquired the right of permanent residence, and had it therefore been necessary for the Respondent to justify the Appellant's exclusion on serious grounds of public policy or public security, she would not have satisfied me, I have already concluded, that the risk to the public the Appellant currently poses is sufficiently serious to justify his continued exclusion. It is through no fault of the Appellant's that he never acquired the right of residence. He failed to acquire it because of his father's poor record. But he was until May 2015 a child and his father's poor work record was a circumstance over which the Appellant had no control. The level of protection from exclusion an EEA national enjoys increases as the extent of their integration is deemed to have increased. An EEA national who has

acquired the right of permanent residence may only be excluded on serious policy grounds. An EEA national who has acquired the right of permanent residence and has been continuously resident for ten years may only be excluded on imperative grounds. The Appellant resided in the UK for more than seventeen years, for thirteen of which he was a child and lacked autonomy. He was at least as integrated as someone who had resided in the UK in accordance with the 2006 or 2016 Regs for a continuous period of five years, and probably considerably more so. Bearing in mind my assessment of the threat he currently poses to the public, the Respondent has not satisfied me the Appellant's continued exclusion is proportionate. The decision against which he has appealed breaches his rights under the EU Treaties in respect of entry to and residence in the UK for that reason and I allow his appeal.

20. I acknowledge as Mr Georget set out in the skeleton argument to the First-tier Tribunal, that it was an established principle of EU law that the state must employ "the least restrictive measure", **Lumsdon and the Legal Services Board [2016] AC 697**, but the judgment of **The Secretary of State and Robinson [2018] EWCA Civ 85** identified, having summarised the most recent CJEU case law, that *all* the current and relevant circumstances of the case should be considered in the light of the principle of proportionality and at paragraph 61 noted the following factors as likely to be relevant:

"*61. That assessment must therefore take account in particular of:*

(1) the personal conduct of the individual concerned;

(2) the length and legality of his residence on the territory of the member state concerned;

(3) the nature and gravity of the offence committed;

(4) the extent to which the person concerned is currently a danger to society;

(5) the age of the child at issue and his state of health;

(6) his economic and family situation.

21. What was apparently omitted from the proportionality assessment was a full consideration of the factors as listed above in favour of a focus on an irrelevant matter as to whether the appellant might have had permanent residence or not.

22. As stated in the grounds for permission to appeal the judge makes continual reference to the appellant's length of residence in excess of seventeen years and to the fact that but for his father's actions, he would have satisfied the permanent requirements of the EEA Regulations and it was not his fault that he missed out on that protection. The findings

beyond that however and in relation to proportionality were limited and inadequate, essentially resting on the length of the appellant's residence in the UK.

23. Although the judge asserts that "he would have been fully integrated in the UK by the age of 20", the judge does not appear to factor in that his integration would have been compromised by his offending, particularly bearing in mind that the judge found that he was not satisfied that his offending would not continue and that he represented a genuine, present and sufficiently serious threat.

24. The fact is the appellant had not acquired the right of permanent residence and the observations in paragraph 52 ostensibly, are largely otiose and do suggest the application of a higher level of protection by applying a 'near miss' principle'. Paragraph 52 proceeded on the basis that the appellant *should* have acquired the right of permanent residence, but he did not; the reasoning was essentially confined to the length of residence. Although it was submitted by Mr Georget that it was clear *why* the judge found exclusion would be disproportionate, the judge did not engage with the respondent's position that the appellant's criminal offending had an impact on his integration within the balancing exercise.

25. In terms of family ties, the judge noted that his aunt had offered him accommodation should he return to the UK until he was able to rent somewhere of his own but as the Secretary of State asserted, he did not claim to have any particularly strong family ties to the UK and nothing in terms of family ties had been shown. There was no information as to how the appellant had fared in Poland where he had been residing since his removal to the date of the hearing before the First-tier Tribunal.

26. It was also the Secretary of State's case, in terms of the strength of his ties to Poland, that the judge had failed to engage with the reasoning in the supplementary reasons for refusal letter, particularly at paragraphs 46 to 68. As the judge had recorded at paragraph 15, the Secretary of State in her decision letter had pointed out the appellant had been brought up in this country but in a Polish household and it was likely he would have familiarity with the Polish language and Polish culture albeit the judge at paragraph 51 stated "he had never visited Poland". By the time of his appeal he had lived in Poland for two years. That aspect of the appeal was not considered and was a failure to consider relevant factors.

27. I am aware of the authority **UT Sri Lanka and the Secretary of State for the Home Department [2019] EWCA Civ 1095**, such that the UT is not entitled to remake a decision of the First-tier Tribunal simply because it does not agree with it and that giving weight to a factor is essentially for a fact-finding Tribunal, but in the face of the findings overall on offending and the continuing threat of reoffending, it was incumbent on the judge to give adequate reasoning as to why the Secretary of State had not justified her decision on proportionality grounds, and particularly in the face of the previous findings by the judge on the threat posed by the appellant.

Overall there was an inadequacy of reasoning which was a material error of law.

28. It is not the weight that the judge attached to the length of the appellant's residence, which is a matter for the judge as submitted by Mr Georget, but that it was not reasoned particularly when the judge failed to address relevant factors.

29. Contrary to Mr Georget's submission in his skeleton argument, the challenge is not a rationality challenge; that is not how it was framed in the application for permission to appeal.

30. I set aside the decision but preserve the findings in relation to the acquisition of the right to permanent residence. Mr Georget agreed that those findings were not challenged. The Rule 24 response submitted that regardless of the level of protection to which the appellant was entitled the respondent still had to show the appellant represented a threat. The level of threat is part of the question of whether the decision is proportionate and bearing in mind this is a matter which will be remitted to the First-tier Tribunal, it would be wrong to preserve a finding in that regard; it may be several months before this matter is reheard and the matter was heard some six months ago.

31. The findings preserved are from paragraphs 25 to 32 which relate to background facts, and 37 to 44 which relate to the level of protection. The appellant is no longer in the United Kingdom and had been removed prior to the hearing. Thus the assessment of the level of protection is not affected by the fact that the findings are from June 2021. Paragraphs 33 to 35, however, relate to the circumstances in Poland and any further offending, and the offer of accommodation in the United Kingdom, which will clearly be subject to updated evidence.

32. The decision is otherwise set aside and the matter is remitted to the First-tier Tribunal for re-determination.

33. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and subject to the paragraphs identified as preserved. Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

No anonymity direction is made.

Signed Helen Rimington Date 25th January 2022

Upper Tribunal Judge Rimington