Upper Tribunal
(Immigration and Asylum Chamber) Appeal No: UI-2022-002681 & UI-2022-002688

(FtT ref's DA/00269/2021 & EA/16182/2021)

THE IMMIGRATION ACTS

Heard at George House, Edinburgh
on 2 November 2022

Decision & Reasons Promulgated
on 10 December 2022

Before

UPPER TRIBUNAL JUDGE MACLEMAN
& DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

KAROL WYRZYKOWSKI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr D Byrne, Advocate, instructed by Drummond Miller, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. By a decision promulgated on 27 April 2022, FtT Judge Agnew dismissed the appellant's appeal against decisions in terms of the Immigration (European Economic Area) Regulations 2016 ("the regulations") and of the EU Settlement Scheme ("the EUSS").

2. The appellant sought permission to appeal to the UT. The grounds are overlapping, lengthy, and rather confused. They are set out under these

headings (numbering added): (i) Error of fact; (ii) Procedural unfairness; (iii) Concession; (iv) No regard to documentary evidence; (v) Lost right to permanent residence; (vi) Burden of proof; (viii) Unfairness; (viii) Inconsistent finding of fact; (ix) Imperative ground of public security; (x) Serious threat – risk of offending; and (xi) Principle of proportionality.

3. On 30 May 2022 FtT Judge Aziz granted permission:

> There is merit to the appellant's second ground if proven (paragraph 5). It is argued that the Judge; "proceeded to cross-examine the Appellant, persistently and repeatedly over the same issue such that the appellant's solicitor had to object. FTJ Agnew continued. The judge's questioning and persistence raises the question of apparent bias". No evidence has been submitted to substantiate the assertion. However, if the allegations contained at paragraph 5 are substantiated, then it is arguable that there has been a material error of law. This will need to be determined at the appeal hearing and the appellant's representative will need to adduce evidence to substantiate their allegation.

4. On 22 June 2022 the SSHD responded to the grant of permission: …

> [3]. The appellant did not dispute the previous convictions cited for offences committed in Poland. At [22] the appellant is recorded as having acknowledged this and served at least half of the 2 ½ year sentences issued to him in 2011.
>
> [4]. Any assertion as to procedural unfairness or a misunderstanding of any concession made/or not made would have to be supported with evidence. No such evidence has been provided such [as] a record of proceedings or a statement.
>
> [5]. The FTTJ was entitled to take into account the vague evidence of the appellant. It is not in dispute that the evidence given was that he returned to Poland in either 2013 or 2014. He was not released from detention until August 2016. It was for the appellant to indicate evidence that showed his continuity of residence had not been broken. Evidence of employment within a tax year does not necessarily demonstrate residence for the entirety of that tax period.
>
> [6]. The FTTJ has conducted a thorough and detailed assessment taking into account the prolific offending history of the appellant, and noting the limited evidence of integration in the UK and provided cogent reasons for attributing little weight to that issue. It is submitted that the grounds amount to no more than mere disagreement with the outcome and in the absence of persuasive evidence of unfairness reveal, fail to identify a material error.

5. On 31 October 2022 the appellant' solicitors sent an e-mail to the UT:

> We enclose transcript of the appeal proceedings at the First Tier Tribunal and supplementary statement of the appellant, which the appellant will seek to rely on in respect of the hearing. We do apologise for the late lodging of these and request that the Tribunal admit these in evidence in regards to the appeal.

6. On 1 November 2022 the appellant's solicitors sent a similar email with an "inventory of productions". This item consists of case law, not productions.

7. Mr Byrne firstly raised the question of the scope of the grant of permission, which might be read as limited to one issue. He referred us to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014:

> 34.— (1) On receiving an application for permission to appeal the Tribunal must first consider whether to review the decision in accordance with rule 35.
>
> (2) If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision, or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.
>
> (3) The Tribunal must send a record of its decision to the parties as soon as practicable.
>
> (4) If the Tribunal refuses permission to appeal it must send with the record of its decision—
>
> (a) a statement of its reasons for such refusal; and
>
> (b) notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the manner in which, such application must be made.
>
> (5) The Tribunal may give permission to appeal on limited grounds, but must comply with paragraph (4) in relation to any grounds on which it has refused permission.

8. He submitted that in absence of any reasons for refusing permission on any of the grounds, and of notification of the right to apply to the UT on those grounds, the grant was to be read as applying to all grounds.

9. Mr Mullen accepted that the grant was not limited.

10. The UTIAC & FtT IAC's Joint Presidential Guidance, 2019 No 1, "Permission to appeal to UTIAC", includes this:

> 38. A bald allegation of bias or other procedural unfairness will not normally suffice to grant permission to appeal. As with all procedural issues, the proper place to raise an allegation of bias or unfairness is with the judge in question during the hearing. Any representative who concludes during a hearing that a judge is behaving in an inappropriate manner or that there has been procedural unfairness has a duty to raise this with the judge.
>
> 39. An allegation of bias against a judge is a serious matter. Any grounds alleging bias should address in detail the principles set out in *Alubankudi* (Appearance of bias) [2015] UKUT 542 and *PA* (protection claim: respondent's enquiries; bias) Bangladesh [2018] UKUT 337 (IAC).

> 40. Where further evidence is relied on to prove the procedural irregularity, the Judge will have to consider whether the nature of that evidence combined with any supporting material is sufficient or whether a further inquiry should be made.
>
> 41. If granted, the permission application should be referred to the Principal Resident Judge of the UTIAC, who may invite the FtJ concerned to comment, making clear that any response may be disclosed to both parties. Where no or insufficient evidence has been provided with the grounds it may – although it is thought rarely - be appropriate to adjourn consideration of permission for such further evidence to be provided.

11. The grant of permission in this case was generous, in light of those requirements, which perhaps is why the granting Judge pointed out the need for evidence.

12. Allegations in grounds do not prove themselves. The appellant has been very tardy in tendering any evidence. However, that has turned out not to require any further enquiry or adjournment.

13. We also note in passing that the grant of permission fails to observe the guidance at [43 – 49] on limiting grounds.

14. The Tribunal Procedure (Upper Tribunal) Rules 2008 state at paragraph 15:

> … (2A) In an asylum case or an immigration case—
>
> (a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party—
>
> (i) indicating the nature of the evidence; and
>
> (ii) explaining why it was not submitted to the First-tier Tribunal; and
>
> (b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.

15. Practice Directions require such notice to be given as soon as practicable after permission has been granted.

16. The appellant has provided no notice.

17. It may be self-explanatory why the evidence now tendered was not before the FtT, but there has been delay up to the last moment, for no good reason.

18. Mr Byrne advised us that the appellant's additional statement was not relied upon to make out the allegation of apparent bias and would be relevant only if the case were to proceed to rehearing.

19. There was no objection to introduction of the record of proceedings, which we would have admitted as a matter of public fact and as key to the principal ground of appeal.

20. Mr Mullen needed no further time to consider the record. By chance, he was also the SSHD's representative in the FtT (although there is a slip in the FtT's decision at the beginning, which states another name). We insert the relevant part of the record:

Transcript of proceedings as recorded by Humphrey Ndubuisi solicitor for Appellant

Question	Answers by Appellant (KW)
Examination in Chief by Humphrey Ndubuisi (HN)	
HN - can you confirm the name and date of birth	**KW** - Karol Wyrzykowski
HN - do you adopt the statement?	**KW** - yes
HN - no further questions	
Cross examination by Andrew Mullen Presenting Officer (AM)	
AM - the sentences imposed in 2011 in Poland, were they sentences imposed in absentia?	**KW** - that wasn't in absentia as I was personally present at every hearing
Judge - do you understand what absentia is?	**KW** - yes
AM - did you actually go to prison in Poland at that time?	**KW** - yes
AM - roughly when? Do you know the date you were serving your sentence?	**KW** - yes - so I was in prison in 2016 and also I was in prison when I was young. I think it was 2004 or 2005
AM - when you were in prison in 2016 was this for sentence handed down in 2011?	**KW** - yes
AM - in Poland what percentage of sentence did you spend in prison?	**KW** - well I gave in the timescale…..
AM - I will give you an example. In Scotland if sentenced to two years you spend one year and then supervision outside prison does that apply in Poland?	**KW** - yes the same in my case after a half of my sentence I was released on licence
AM - did the licence release in 2016 allow you to go the UK?	**KW** - yes obviously you require the permission of the Polish Criminal Court to do so. I wrote the motion to court and gave a permanent address and got permission.

	After I got permission I travelled to the UK
AM - no further questions	
HN no re-examination	
Cross examination by Judge Agnew (JA)	
JA - I want you to clarify a couple of things for me. Can I be clear what happened between 2011 and 2016. On 13 June 2011 you were convicted in Poland and sentenced to two years six months?	**KW** - yes
JA - do you remember when you went to prison?	**KW** - I know the sentence was around this time but I didn't start the sentence straight away because there were some deferrals in sentences.
JA - what was the last part?	**KW** - deferral of sentences.
JA - it looks as though also that in 2011, December, you were sentenced to two years imprisonment	**KW** - yes
JA - so when did you come out of prison?	**KW** - I am really confused now with all the dates and years. I think it was 2016. I know I went through half of my sentence. I think it was 2016. After I went there the half of my sentence I was released
JA - so were you in Poland between 2011 - 2016?	**KW** – no
JA - when did you come to the UK?	**KW** - 2007
JA - sorry I meant you were sentenced in Poland on 14 December 2011. Did you go to prison in Poland then?	
HN objected	
HN - objection ma'am. I thought he had already answered that he was in prison in 2016	
JA - yes I know he said he was in prison in 2016. I am not sure. I am not clear what happened before that	
HN - the answer to the Home Office and to yourself was that was when he actually went to prison	
JA - it doesn't make sense that he went to prison from 2011 to 2016	
HN - but he said he wasn't in Poland in this period	

JA - yes if you want to do another statement to make it clear that's fine but if not I need to clarify it now. I will ask questions that will help me understand. I will read what is in the reasons for refusal to understand your history	
JA - on 13 06 2011 you were convicted to two years six months	**KW** - yes
JA - sentence is two and a half years. I imagine there was an appeal	**KW** - started to respond but FTJ interjected
JA - can you let me finish (Immigration judge interjected). Right in December 2011 the original sentence was revoked and you were sentenced to two years	**KW** - yes
JA - I am assuming that you served at least one year in prison from the end of 2011. Is that correct?	**KW** - yes that would be correct
JA - then you came to the UK after your release	**KW** - yes
JA - and you remember when that was?	**KW** - I can't remember
JA - the next thing I can see that you were again released from prison in Poland in 2016 August. I don't understand what happened in the meantime	**KW** - that was my separate conviction. After 2011 sentencing I went after I did half of that I went to the UK and after my relationship suffered some difficulties I split up with my woman and I came back to Poland and I again committed a crime and I was sentenced to prison in 2016
JA - so when did you return to Poland?	**KW** - I don't understand
JA - I just want to know when you returned to the UK after you split up	**KW** - I can't remember. I think it was 2014 or 2013. I was in Poland for about a year
JA - when you were in Poland was that before you were in prison?	**KW** - yes
JA - how long were you in prison for?	**KW** - one year
JA - and when did you return to the UK?	**KW** - as soon as I was released in 2016
JA nothing further	

21. Although headed as recorded by the appellant's solicitor, it was agreed that this is an accurate transcript from the proceedings recorded by the FtT.

22. Mr Byrne firstly referred us to the "*Surendran* guidelines", set out in an annex to *MNM* [2000] UKIAT 00005. Arising from a case where the SSHD

was not represented in the original hearing, those are fundamental guidelines on the function of a judge, which do not include a duty to expand upon the Home Office's basis of refusal, or to raise matters as a Presenting Officer might do in cross-examination.

23. We accept the submission of Mr Byrne that this description of a Judge's functions applies equally, or more so, where the SSHD is represented.

24. Mr Byrne took us next to *XS* (Kosovo- Adjudicator's conduct - psychiatric report) [2005] UKIAT 00093. He sought to extract 3 principles applicable to the present case.

25. The first point was based on *XS* at [33]:

> The questions should not be too long. There is no precise permissible ratio, but asking significantly more questions than the Home Office Presenting Officer is again an indication of apparently excessive intervention with the attendant risk of apparent bias.

26. The second principle, based on [35], was that a Judge should be cautious about adopting his or her own theory of the case, particularly if that was -

> … a hostile theory, in addition to the Secretary of State's different opposition.

27. The third principle went to the character of questions by the Judge. "Warning bells" sounded if the Judge were to express scepticism about credibility in advance, [29]; raise issues not pursued by the SSHD, [31]; or express hostility or disbelief, [34]. Such features risked giving the impression of bias even where objectively there was none.

28. Mr Byrne was clear in advancing the grounds as based on an *impression* of bias, not on actual bias. He accepted that the questions set out above are open and not hostile. However, he argued that the Judge transgressed principles (i) and (ii) through the ratio of questioning and the development of her own theory.

29. At this point the allegation of apparent bias intersects with the rest of the grounds.

30. It was accepted for the appellant that his evidence was confused and self-contradictory about the time he has spent respectively in the UK and in Poland and about when and for how long he was in custody. The Judge was said to have involved herself in those matters not simply to clarify the facts but with a view to finding the appellant not entitled to have his case considered on imperative grounds of public security (the highest level of protection in terms of the regulations) but only on serious grounds of public policy or public security (the intermediate level). This argument eventually came to turn on [59] of the SSHD's decision. A longer passage needs to be quoted:

> 58. As you have acquired a permanent right of residence under the EEA Regulations 2016, as saved, consideration has been given to whether your deportation is justified on serious grounds of public policy or public security.
>
> 59. Having assessed all these factors, the Home Office considers that you meet the integration criteria, as set out in *Tsakouridis*. Consequently, consideration has been given to whether your deportation is justified on imperative grounds of public security.
>
> 60. Having assessed all these factors, the Home Office considers that you do not qualify for the enhanced protection of regulation 27(4) of the EEA Regulations 2016, as saved, because:
>
> • the amount of time you have spent in prison in the United Kingdom which in total exceeds 7 months;
>
> • you have been unable to demonstrate the overall length of residence in the United Kingdom,
>
> • your lack of family ties in the United Kingdom;
>
> 61. The evidence indicates that you have maintained significant ties to Poland and are not sufficiently integrated into the community of the United Kingdom. Therefore, you do not therefore qualify for the highest level of protection that of imperative grounds.
>
> 62. Consequently, consideration has been given to whether your deportation is justified on serious grounds of public policy or public security

31. We accept the submission that [59], read alone, would stand as acceptance that the appellant qualified for consideration on imperative grounds. The overall wording is not ideal. However, the whole passage means, plainly enough, that the SSHD has considered whether the highest level applies and has decided that it does not. The substance of the detailed decision which follows is obviously based on applying the intermediate level.

32. This was the principal dispute engaged in between representatives in the FtT and resolved by the Judge.

33. We are unable to accept that the SSHD made a concession at any stage that the highest level applied or that the Judge went off on an expedition of her own on this topic.

34. The sub-heading in the transcript, “cross-examination by Judge Agnew”, is incorrect, as Mr Byrne accepted. That should read simply, “questions by the Judge”. Whether their nature amounted to cross-examination is a matter for decision in course of an appeal.

35. The Judge asked more questions than the Presenting Officer, but there is no rule against that. We are unable to detect that she did any more than try to make more sense of the appellant’s evidence than he, with the assistance of his solicitor, had succeeded in doing. The allegation that this

conveyed bias, even apparent, goes much too far. We have no hesitation on rejecting it.

36. The objection taken in course of the hearing is indecipherable. It does not go to undue persistence or unfairness in the Judge's questions.

37. Representatives of course should not shrink from allegations of bias, or apparent bias, where justified; but such serious allegations should not be made lightly, or without paying attention to what is required to substantiate them. If such attention had been paid, this case might never have arrived at this stage. Once scrutinised, the allegation is little more than frivolous.

38. The final submission by Mr Byrne, perhaps rather hopefully, was that a rehearing was needed to arrive at a clear chronology of the appellant's places of residence and periods of imprisonment. However, the grounds do not show that lack of clarity on those matters arises from error of law or unfairness by the FtT, rather than from shortcomings in his case.

39. The rest of the grounds are only disagreement with the Judge's finding that deportation is justified in terms of protection at the intermediate level. No error is shown on any point of law.

40. The FtT did not state distinct reasons regarding the EUSS decision, but no issue has been raised. That outcome is also preserved.

41. We are obliged to both representatives for their assistance in unravelling this case. Mr Byrne was instructed only late in the proceedings. His submissions made the most that could be made of the grounds. Deficiencies in the evidence before the FtT and in the written pleadings before the UT were not his responsibility.

42. The decision of the FtT shall stand.

43. No anonymity direction has been requested or made.

H Macleman

3 November 2022
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.