Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number:** DA/00847/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 December 2015	**On 15 January 2016**

Before

UPPER TRIBUNAL JUDGE WARR

Between

SECRETARY OF STATE

Appellant

and

DD
(Anonymity direction made)

Respondent

Representation:
For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Respondent: Mr M Cogan, of counsel, instructed by Rawal & Co, solicitors.

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Poland born on 14 September, 1988, as the appellant herein.

2. Following a hearing in December 2014 the First-tier Tribunal allowed the appeal of the appellant against a decision taken by the Secretary of State on 2 May, 2014 to deport him.

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3. The respondent considered the appellant’s case under the Immigration (European Economic Area) Regulations 2006. It was considered that the appellant had not been exercising Treaty rights for a continuous period of five years in accordance with the EEA regulations and he had not acquired the right of permanent residence in United Kingdom.

4. The respondent noted that the appellant had 12 convictions for 14 offences in the UK between 2009 and 2014. The majority of the offences were repeated offences. The convictions indicated an established pattern of repeated acquisitive offending. There was a risk of reoffending. The appellant had been convicted of 11 theft related offences and the appellant had provided no evidence to show he had addressed the issues that had led him to commit the offences in question. The appellant had a propensity to reoffend and he represented a genuine, present and sufficiently serious threat to the public so that his deportation was justified on grounds of public policy. The respondent noted in connection with her consideration of proportionality that the appellant was aged 26 and he had been granted indefinite leave to remain on 24 March, 2004 as a dependant of an asylum seeker. He had received his first conviction in 2009. He was a single man with no children and in good health and there was no evidence that he had undertaken any rehabilitative work. There was no evidence of any significant integration into the community. His deportation would not be disproportionate. In relation to Article 8 it was noted that paragraphs 396 to 400 of the immigration rules regarding Article 8 were not applicable in the applicant's case. The respondent, having considered the questions set out in Razgar v Secretary of State [2004] UKHL 27, concluded that the decision to deport the appellant complied with the principle of proportionality.

5. The Secretary of State applied for permission to appeal on the basis that there was a procedural irregularity in that the presenting officer had not been permitted to cross examine the appellant on his "non-convictions". Reliance was placed on the case of Farquharson [2013] UKUT 00146 (IAC).

6. It has also been argued that the panel had failed to give adequate reasons for its findings and had faled to have in mind the immigration rules in relation to Article 8 which represented a complete code and the appellant could not meet any of the exceptions under paragraphs 399. The appellant had failed to consider s 117B of the 2002 act inserted by the Immigration Act 2014.

7. In granting permission to appeal First-tier Judge Simpson concentrated on the point made in relation to the case of Farquharson and found the grounds identified an arguable material error of law. Judge Simpson pointed out it was not clear whether the respondent had drawn the case to the panel’s decision or whether the respondent had complied with the conditions set out in the paragraphs 1-3 of the headnote. The headnote is as follows:

> (1) Where the respondent relies on allegations of conduct in proceedings for removal, the same principles apply as to proof of conduct and the assessment of risk to the public, as in deportation cases: Bah [2012] UKUT 196 (IAC) etc applicable.
>
> (2) A criminal charge that has not resulted in a conviction is not a criminal record; but the acts that led to the charge may be established as conduct.
>
> (3) If the respondent seeks to establish the conduct by reference to the contents of police CRIS reports, the relevant documents should be produced, rather than a bare witness statement referring to them.
>
> (4) The material relied on must be supplied to the appellant in good time to prepare for the appeal.
>
> (5) The judge has a duty to ensure a fair hearing is obtained by affording the appellant sufficient time to study the documents and respond.
>
> (6) Where the appellant is in detention and faces a serious allegation of conduct, it is in the interests of justice that legal aid is made available.

8. To meet this issue Mr Kotas lodged the notes made by the presenting officer at the original hearing. She had brought the case of Farquharson to the attention of the judge.

9. It is convenient to deal with the point based on Farquharson first as Mr Kotas, having heard counsel's argument, conceded it.

10. In relation to this ground counsel pointed out that the panel referred to hearing from a police officer in paragraph 21 of its decision. The officer produced the record of the appellant's history of offending and he was not cross-examined. Farquharson was a serial rapist it was submitted and he disputed that he had ever raped anyone. The panel in the instant case had properly exercised discretion in refusing the request to cross-examine the appellant. The Police Officer had been tendered and had not been challenged or cross-examined by the Presenting Officer. As the panel observed, points could be taken in submissions.

11. Mr Kotas was acting entirely properly in conceding the point.

12. In relation to the "non-convictions" Mr Kotas also submitted that the panel had not fully taken them into account in its deliberations. In paragraph 48 of its decision the panel had stated:

> "The appellant's criminal record is not in dispute. He is a habitual offender who has committed several offences over a number of years to feed a drug habit. In addition to the convictions and cautions a number of other non-convictions were recorded. He displayed a pattern of antisocial behaviour over a period of five years and the sentencing judge described him as "self-absorbed and totally selfish with no thought for the public or

his parents or his children". We have however taken into account that he has no convictions for violent offences against the person or sex offences."

13. Mr Kotas submitted that the panel had erred in downplaying the seriousness of the appellant's offences in this paragraph. Reference was made to sub-paragraphs 29 (i) and (j) of the case of MC [2015] UKUT 520 (IAC):

> "i. Matters that are relevant when examining the prospects of the rehabilitation of offenders include family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like (Essa (2013) at [34]). However, lack of access to a Probation Officer or equivalent in the other Member State should not, in general, preclude deportation (Dumliauskas [55])
>
> ...
>
> j. In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (Dumliauskas [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide-ranging holistic assessment. Both recognises that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (Dumliauskas at [46] and [54])."

14. It was submitted that re-integration was not an important factor, the panel had not considered the appellant's non-convictions. Reference was made to Badewa (ss 117A-D and EEA Regulations) [2015] UKUT 00329 (IAC). The panel should have directed itself by reference to s 117C in the light of what was said in that case.

15. Mr Cogan, having addressed the principal ground which as I have mentioned above was conceded submitted that the panel had given ample reasons for its decision. It was clear that it had taken into account the appellant's non-convictions. It had accepted that the appellant was an habitual offender as appeared from paragraph 48. It had heard from three sources. It had heard evidence from the appellant and his parents and a letter from the mother of the children. The points made in the grounds were not made out. The evidence of the appellant's parents had been accepted. It was not right to say that it was merely self-serving evidence. The panel had been entitled to rely on the oral testimony. The grounds referred to paragraph 117B which the panel had taken into account. The appellant had been in the United Kingdom for 18 years and he had had his education here. He had had two children in this country and was integrated. The convictions did not demonstrate that he was not integrated.

16. In reply, although conceding the point in relation to the procedural irregularity Mr Kotas relied on section 117C. The panel had not considered whether the impact on the children was unduly harsh.

17. Counsel submitted that the point based on section 117C was a new point and had not featured in the grounds of appeal.

18. At the conclusion of the submissions I reserved my decision. I can only interfere with the decision of the panel if it was materially flawed in law.

19. I am grateful to both advocates for their submissions and to Mr Kotas for lodging the notes made by the presenting officer although in some respects they do not help his case and for his prompt and fair concession regarding the procedural irregularity point.

20. It does appear that the judge granted permission to appeal on the basis of this point although he did not specifically refuse permission on the other grounds.

21. The grounds referred to the immigration rules in relation to Article 8 but this point was not pressed by Mr Kotas and indeed in paragraph 34 of the decision the respondent specifically stated that they were not applicable to the applicant's case.

22. It was submitted that the panel erred in failing to consider s 117C. As counsel argued this point had not featured before. Mr Kotas submitted that the point was “Robinson” obvious: R v Secretary of State ex parte Robinson [1997] Imm. A.R. 568. One might ask if the point was so obvious why it did not feature in the grounds and why no application to amend the grounds had been made before the hearing to give counsel the opportunity to address it. It does not appear to have been raised at the initial hearing according to the Presenting Officer’s notes. The Tribunal in Badewa accepted at paragraph 15 of its decision that the matter was not straightforward. Even if the point were obvious it is doubtful that the Secretary of State could rely on it: see GH (Afghanistan) v Secretary of State [2005] EWCA Civ 1603; [2006] Imm AR 235 at para 17 per Brooke LJ:

> “It remains undecided how much further, if at all, that approach [ie the Robinson approach] can be relied on by the Secretary of State to complain of a failure by the court to take points that the Secretary of State had not taken. For our part, we would wish to come to that question with considerable caution, not least because the inequality of resources between the government and the average asylum-seeker makes it unattractive for the Secretary of State to appeal to a forensic indulgence originally formulated in favour of the asylum-seeker. It is not necessary to pursue that enquiry in the present case, because no extension of the Robinson jurisprudence in favour of the Secretary of State can apply here. That is because the present case concerns not the refugee Convention, but the European Convention on Human Rights. In contrast to the provisions of Article 1F of the refugee Convention, the signatory state to the ECHR has no positive obligation to refuse relief in any case. If, therefore, as is alleged to have occurred in this case, the state purports to grant relief under an article of the ECHR when properly understood such relief is not available, the state, in contrast to the position in A (Iraq), commits no breach of the international instrument that it purports

> to be applying. Accordingly, the overriding obligation to prevent such breaches that was identified in A (Iraq) does not exist."

23. The Presenting Officer's notes were fairly disclosed in their entirety by Mr Kotas. I consider that the Presenting Officer acted with commendable frankness and neutrality in her remarks about the procedural issue – now conceded. Although only of peripheral relevance, she also correctly forecast the panel's decision and commented that the oral evidence was consistent with the view that the panel was likely to take.

24. The panel gave proper reasons for its decision. It approached the appellant's evidence with an understandable degree of caution as it says in paragraph 49. It accepted matters were finely balanced. The grounds largely consist of expressions of disagreement with the conclusions of the panel. Its decision was satisfactorily reasoned on all salient issues. I have carefully considered the points advanced on both sides but I accept the submissions made by Mr Cogan as outlined above on the matters that were not conceded.

25. The determination was not materially flawed in law and I direct that it shall stand.

26. The Secretary of State's appeal is dismissed.

Signed

Upper Tribunal Judge Warr

18 December 2015

ANONYMITY ORDER

The anonymity order made by the panel continues.