Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00361/2016**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 5th June 2017	**On 6th June 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MALGORZATA ROZYCKA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Nnamani, Counsel, instructed by ILAS LLP
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Juss (FtJ), promulgated on 14 February 2017, dismissing the appellant's appeal against the respondent's decision of 07 July 2016 to deport the appellant pursuant to regulation 19(3)(b) and regulation 21 of the Immigration (European Economic Area) Regulations 2006.

Factual Background

2. The appellant is a national of Poland, date of birth 17 August 1991. According to her statements she first entered the United Kingdom sometime around June

2015 and remained in Scotland for around a month before returning to Poland around July 2015. She next entered the United Kingdom on 8 June 2016. Her father is resident in the UK as a qualified person and her brother is also present in the United Kingdom, although no details were provided as to his circumstances. On 9 June 2016 she was taken to Croydon University Hospital because she was vomiting following the ingestion of balloons full of amphetamine. A CT scan revealed 2 balloons in her gastric area. The appellant was subsequently arrested and charged in respect of an offence relating to the Importation of a Controlled Class B drug.

3. On 4 July 2016 the appellant was convicted at a Magistrates Court of the drugs importation offence and received a sentence of 9 weeks imprisonment. In her decision to make a deportation order the respondent considered that the appellant posed a genuine, present and sufficiently serious threat to the interests of public policy if she were allowed to remain in the United Kingdom. As she committed a serious criminal offence the respondent took the view that there was a real risk that she may reoffend in the future.

The decision of the First-tier Tribunal

4. The appellant was previously represented by Duncan Lewis solicitors. She was however unable, "because of costs", to continue instructing the firm. Duncan Lewis did however provide to the First-tier Tribunal and the respondent a bundle of documents for the purposes of her appeal including two statements from the appellant (one dated either 18 October 2016 or 18 August 2016; the other dated 22 September 2016), photocopies of her brother's death certificate dated 25 October 2011 with certified translations, photocopies of a Change of Name Deed dated 26 February 2016 accompanied with a certified translation, a medical certificate from the Mental Health Centre dated 23 December 2015 and accompanying certified translation, medical records from Yarls's Wood Immigration Removal Centre, a Rule 35 report dated 5 August 2016, disclosure from the Subject Access Request made to the National Police Chief's Council, details of the appellant's criminal conviction, and photocopied ID documents and correspondence relating to the appellant's father.

5. At the hearing the appellant made an application to adjourn to enable her to obtain alternative legal representation. This application was refused by the FtJ as there was no reasonable prospect that the appellant would be in receipt of funds to instruct legal representatives in the future. The appellant confirmed the contents of her witness statement (the judge notes only one statement that dated 18 October 2016). She initially claimed that she had been wrongly convicted of importing drugs but then accepted under cross examination that she had swallowed drugs, that she did so because she was depressed on account of a very difficult relationship with her boyfriend in Poland, and that she had brought drugs into the United Kingdom. The FtJ summarised the respondent's closing submissions and the appellant's submissions that she had not committed any other offences. The FtJ was not satisfied that the appellant had discharged

the burden of proof upon her. At [10] the FtJ records that the appellant initially said she was not guilty but then immediately accepted under cross examination that she was guilty of bringing drugs into the country. At [11] the FtJ records the respondent's "clear view" that there was a real risk that the appellant would reoffend again in the future. Nothing that the appellant said at the hearing distracted from that view. At [12] the FtJ notes that the appellant failed to raise any grounds against deportation and, given the threat of serious harm that she posed to the public, and her personal circumstances, there was nothing that precluded her deportation to Poland. This is because although her father and brother were in the UK they did not attend the hearing to support her. Given that her mother and aunt remained in Poland deportation could properly be pursued as it was in accordance with the principles of regulation 21(5). The appeal was dismissed.

The grounds of appeal

6. The grounds of appeal, settled by the appellant's current legal representatives, were discursive and focused on arguments that the FtJ failed to adequately consider the seriousness of the appellant's offending when assessing the relevant public policy considerations. The grounds concentrated on whether the appellant posed a risk of serious harm to the public, as disclosed in a National Probation Service Circular, although this has no relevance to the test for exclusion under the EEA regulations.

7. Permission was however granted by Judge of the First-tier Tribunal Gillespie in the following terms:

> The grounds of appeal are somewhat incoherent and consist in large part of an attack upon the decision to make a deportation order rather than upon identifying errors in the decision of the learner judge. What is identifiable in the proposed grounds, however, is the averment the learned to judge did not engage with the provisions of regulation 21 of the Immigration (European Economic Area) Regulations 2006, in any meaningful way, or at all.
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> The decision by the judge is extremely scant. It is badly affected by apparent errors of typography and expression. This unfortunately gives an impression of inadequate consideration. More importantly, the decision makes no reference whatever to regulation 21, consideration of which is an essential part of any determination of an appeal against a decision to deport an EEA national. It does not engage with the principle upon which an EEA national may be removed and makes no finding concerning necessary considerations relating to the principal.
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> Permission to appeal is granted.

Submissions at the error of law hearing

8. Ms Nnamani drew my attention to the bundle of documents provided by Duncan Lewis solicitors which was before the FtJ. It was submitted that the decision lacked any satisfactory consideration of regulation 21(5). There were

said to be no consideration of the fact that this was a "one off" offence, no assessment of the material provided on the appellant's behalf. Nor was there any consideration of the rule 35 report which referred to a harrowing history of sexual abuse and supporting evidence relating to the appellant psychological state, including her reliance on antidepressant medication since 2012. In assessing whether the appellant posed a genuine, present and sufficiently serious threat to the fundamental interests of society the judge should have considered all of her personal circumstances, the absence of any previous criminal convictions, the relatively short sentence and her medical history. It was further submitted that the judge misdirected himself at [10] by stating that the burden of proof rested on the appellant.

9. Mr Melvin provided an expanded rule 24 reply which also acted as written submissions. Mr Melvin accepted that the decision was scant on factual findings but that there was little evidence before the FtJ upon which he could make lengthy findings on proportionality or propensity to reoffend. Given the appellant's lack of apparent ties with the UK, and given that her offence was on entry to the UK, the decision was sustainable. The FtJ found that the appellant was prepared to be untruthful in her evidence and admitted that she had actually been guilty of smuggling drugs into the UK. The FtJ properly adopted the respondent's position, as disclosed in the deportation decision, that there was a real risk that the appellant would reoffend. Given that the appellant had no ties with the UK no Tribunal properly directing itself would be entitled to find in the appellant's favour when considering proportionality.

10. I reserved my decision.

Discussion

11. The grant of permission to appeal referred to the FtJ decision being "extremely scant" and being "badly affected by apparent errors of typography and expression." The decision itself is extremely short consisting of just 4 pages. There are a large number of typographical errors and some of the FtJ's sentences lack clarity, with a few bordering on the incoherent. It is likely that the FtJ dictated his decision and either failed to proof read it or dispatched a draft copy for promulgation. Either way the typographical errors and the errors of expression give the impression that inadequate consideration has been given by the FtJ to the appeal. These mistakes however are not of such a serious degree as to render the decision incoherent or to amount to a material legal error.

12. More concerning is the failure by the FtJ to structure his decision in such a way as to clearly engage with the principles established in regulation 21(5) of the EEA Regulations. This reads,

> (5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(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.

13. Although the FtJ does refer to regulation 21(5) at [1] and [13] he does not engage in any meaningful way with each of the 5 principles and does not consider the appellant's offending or her personal circumstances within the framework of those principles. At [11] the FtJ refers to the "clear view" taken by the respondent that the appellant poses a real risk of reoffending in the future and that she failed to mention anything at the hearing detecting from that view. It is of course for a judge to determine for himself or herself, in a statutory appeal, whether an appellant does pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The FtJ makes no reference whatsoever to the medical notes or the rule 35 report, and no reference is made to the appellant's account of events that caused her to leave Poland, as disclosed in her 2 statements (only one of which was considered by the FtJ) and the supporting evidence placed before the First-tier Tribunal. It was incumbent on the FtJ to engage with this evidence and to provide a reasoned explanation for concluding that the appellant, given her circumstances and her asserted vulnerability, was likely to reoffend. I am additionally satisfied that the FtJ has misdirected himself by approaching the appeal on the basis that it is for the appellant to discharge the burden of proof in respect of the deportation/exclusion decision.

14. I do not accept Mr Melvin's submission that the appeal would inevitably have been dismissed and that no judge, properly directing him or herself, would be entitled to allow the appeal. Whilst the appellant has very tenuous associations with the United Kingdom her claim, considered in the context of her asserted vulnerability and the relatively short sentence received (albeit for an offence of a serious nature) is not one that would necessarily be bound to fail.

15. In the circumstances it is appropriate to remit the matter to the First-tier Tribunal for a full de novo hearing before a judge other than Judge of the First-tier Tribunal Juss.

Notice of Decision

The First-tier Tribunal's decision is vitiated by a material error of law

The matter is remitted to the First-tier Tribunal for a fresh hearing before a judge other than Judge of the First-tier Tribunal Juss

I make no anonymity direction.

05 June 2017

Signed Date

Upper Tribunal Judge Blum