Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01512/2018

THE IMMIGRATION ACTS

Heard at Field House
On 3 December 2018

Decision & Reasons Promulgated
On 9 January 2019

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MICHAL MARIAN CHAWAWKO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms F Allen, Counsel
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Poland born in 1982. A decision was made on 19 January 2018 to refuse him admission to the UK pursuant to regulation 11 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The EEA Regulations were amended in July 2018, but not materially for the purposes of this appeal, the amendments in any event post-dating the decision in this case.

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2. He appealed and his appeal came before First-tier Tribunal Judge Meah ("the FtJ") on 7 August 2018 resulting in the appeal being dismissed. The FtJ considered the appeal 'on the papers' as requested by the appellant.

3. The grounds of appeal in relation to the FtJ's decision contend, in summary, that the FtJ failed to have regard to documents that were before him which were relevant to issues such as whether the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (reg 27(5)(c) of the EEA Regulations).

4. The further background to the appeal is that in March 2015 the appellant was extradited from the UK to Poland to serve a four year sentence relating to three counts of supplying drugs, for which he was convicted on 28 May 2008. The offences appear to have been committed between 2003 and 2006. The appellant is on probation in Poland until 8 December 2019.

The FtJ's Decision

5. The FtJ quoted the respondent's decision verbatim and identified relevant aspects of the EEA Regulations that applied to the appeal. In his 'findings' section he referred at [11] to the appellant's case that he wished to come to the UK to have contact with his son who was born on 17 February 2012. However, the FtJ concluded that there was no evidence to show that the appellant was genuinely seeing his child in the UK and that even if he was the appellant's criminal background was sufficiently serious to outweigh any claim the appellant may have in relation to wanting to see and maintain contact with the child.

6. At [12] in relation to the appellant having a fiancée in the UK, he referred to the appellant's grounds of appeal in terms of his fiancée working in the UK but also being a single mother of two children, and his stating in the grounds that it would be very difficult to maintain their relationship because of financial constraints. However, he concluded that there was no evidence before him of any ongoing relationship with anyone in the UK. He said that even if he were to accept the appellant's assertions at face value, such a relationship was not sufficient to outweigh the public policy grounds relied on by the respondent justifying refusal of admission.

7. He concluded that on the evidence before him that the appellant had not acquired a permanent right of residence and therefore was not entitled to the enhanced protection under reg 27(3).

8. In [16] he said as follows:

> "In all, I have duly noted that which is stated in the appellant's grounds of appeal and considered that which he has attached with these, however, there is nothing before me to show that the respondent's decision is not justified and proportionate in all the circumstances."

9. I should also mention that at [4] he referred to the appellant's grounds of appeal having "some attachments" and referred to them being listed at Section B of the appeal form.

The Grounds of Appeal and Submissions

10. In the grounds of appeal it is argued that the FtJ failed to have regard to material evidence. In particular, relevant documents were an Application for Release on Licence with a translation, dated 21 November 2017, a Release on Licence Decision, dated 8 December 2017 and a Certificate of Release and Translation. The grounds refer to the application for release document being one prepared and approved by the Deputy Director of the Correctional Institute where the appellant was then imprisoned. Amongst other things, the Deputy Director states that the appellant's behaviour whilst serving his sentence should be assessed positively, and that he had no problems with observing internal Rules and regulations. That document goes on to state that he caused no behavioural problems and is polite to his superiors and is agreeable and peaceful towards his inmates. Since his Application for Release on Licence was last rejected he had been granted privileges six times, including the fourth highest types of privileges, mostly for performing his duties at work conscientiously. No disciplinary penalties had been imposed. The document also refers to work that the appellant had been doing and courses he had been attending. He had participated in "The Alternative" addiction prevention programme in relation to risks of alcohol abuse, drug abuse and psychoactive and psychiatric substance abuse. He is said not to belong to any delinquent subculture.

11. The report goes on to state that the social and criminal prognosis for the appellant was positive given his exemplary and consistent behaviour, precise future plans after being released, an expected change of attitude and a highly critical attitude to the offences that he had committed. That, it is said, meant a deep involvement in his own "re-socialisation process".

12. The Release on Licence Decision refers to his behaviour as having been exemplary and that the social and criminal prognosis was positive. The prosecutor did not object to his release on licence.

13. The grounds contend that the contents of those documents should have been fundamental to the determination of the appellant's appeal. It is argued in the grounds that the FtJ seemed only to rely upon the appellant's previous convictions. It was also pointed out that he was convicted for crimes which occurred at least 12 years ago and there was no evidence before the FtJ which established that the appellant posed a genuine, present or serious threat.

14. Further, the FtJ had failed to acknowledge the period of time during which the appellant had been 'crime free', between 2006 and the present date. This was relevant to the issue of rehabilitation it is argued.

15. Lastly, it is argued that the FtJ's decision applied the wrong burden of proof, whereas the burden of proof for expulsion or removal of an EEA national lies with the Secretary of State.

16. In her submissions Ms Allen relied on those grounds and referred specifically to the documents identified in them. It was submitted that the respondent's 'rule 24' response about the appellant having to inform the Probation Service (in Poland) of a change of residence, does not alter the fact that the FtJ erred in law by failing to take into account material evidence. In addition, the appellant's statement referred to his wanting to seek employment in Poland which suggests that he was not looking to change his permanent residence and thus would not be in breach of any probation conditions.

17. Mr Melvin, for his part, relied on the rule 24 response. The respondent's decision clearly explained why the appellant was refused entry. Effectively, he was still in prison under licence and the Polish authorities therefore plainly still considered him to be a risk. Mr Melvin said that his understanding was that licence requirements are such that a person needed to remain in the country of origin.

18. It was submitted that the FfJ set out the respondent's reasons for the decision and adopted them in his own decision. Since the appellant would not be admitted to the UK given the requirements of his licence, there was no need for the FtJ to make an assessment of the appellant's character. Therefore, any error of law on the part of the FtJ was not material. There was nothing before the FtJ to suggest that he had the right to leave Poland whilst under licence.

Assessment and Conclusions

19. Reg 11 of the EEA Regulations provides that an EEA national must be admitted to the United Kingdom on arrival if he produces a valid national identity card or passport issued by an EEA State. However, that regulation is subject to regs 23(1), (2), (3) and (4) and 31.

20. Reg 23(1), dealing with exclusion and removal from the UK, states that a person is not entitled to be admitted the UK by virtue of reg 11 if a refusal to admit that person is justified on grounds of public policy, public security or public health in accordance with reg 27.

21. Reg 27 (as it was at the date of the decision under appeal, and as material to the appeal) provides as follows:

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.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(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.)

22. It is evident therefore, that one of the matters that needs to be considered is whether the personal conduct of the person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Therefore, amongst other things, there must be an assessment of the risk of reoffending. It is

also the case that a person's previous criminal convictions do not in themselves justify the decision.

23. Although the FtJ referred in indirect terms to having documents before him, he did not identify those documents, i.e. those identified in the grounds of appeal. They were plainly germane to the issues to be resolved under reg 27.

24. In advance of the hearing a witness statement from the Immigration Officer who made the decision in this appeal was provided. It was not a document that Mr Melvin was aware of and nor had it been provided to the appellant's representatives. It justifies the appealed decision in various different respects, for example referring to the EEA Regulations, the appellant's background and circumstances, and the Council Framework Decision 2008/947/JHA (on the mutual recognition of judgments and probation decisions).

25. However, nothing of the Council Framework Decision is evident in the FtJ's decision and the decision suffers from the defects to which I have referred in terms of the proportionality assessment and in relation to the issue of the risk of reoffending.

26. In the circumstances, I am satisfied that the FtJ erred in law in failing to take into account material documentary evidence (as summarised at [10]-[12] above) which was relevant to the outcome of the proceedings. I do not accept that any error of law in this respect was immaterial. In so far as the Council Framework Decision is relied on by the respondent, I am not persuaded that it unequivocally points to the conclusion that the appellant would in any event be prevented from entering the UK or that it could have that effect, at least not on the basis of the limited argument put before me.

27. Accordingly, I set aside the decision of the FtJ. Given that there needs to be a full appraisal of the appellant's appeal in the light of all the evidence, which so far has not been undertaken, the appropriate course is for the appeal to be remitted to the First-tier Tribunal to be heard by a judge other than First-tier Tribunal Judge Meah, with no findings of fact preserved. In deciding to remit the appeal to the First-tier Tribunal I have had regard to paragraph 7.2 of the Practice Statement of the Senior President of Tribunals and taken into account the extent of the fact-finding required in the re-making of the decision

Decision

28. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge Meah, with no findings of fact preserved.

Upper Tribunal Judge Kopieczek 19/12/18