Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/50514/2020
IA/01474/2020

THE IMMIGRATION ACTS

Heard in George House, Edinburgh
On 6 May 2022
Typed 17 May 2022

Decision & Reasons Promulgated
On 21 October 2022

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR EDISON BALA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Winter, instructed by RH & Co Solicitors
For the Respondent: Mr Mullen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Komorowski promulgated on 7 May 2021 dismissing his appeal against a decision made by the Secretary of State on 14 October 2020 to refuse him a residence card under the Immigration (European Economic Area) Regulations 2016. Although those Regulations have been repealed, they are retained still for the purposes of this appeal and no point falls to be taken on that.

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2. The decision taken by the Secretary of State in this case was not to issue the appellant with a residence card following his conviction on a summary trial before a sheriff when on 14 January 2020 he was convicted after trial under the Sexual Offences (Scotland) Act 2009, Section 3 for which he was sentenced to twelve months' imprisonment.

3. The appellant is a citizen of Albania. He is married to a Greek national who is exercising her Treaty rights in the United Kingdom. No points are taken on that. The decision in this case is purely to refuse to issue him with a residence card, which the judge understood effectively to have the effect of requiring his removal although it is of note that the Secretary of State has not taken a decision to remove the appellant nor, although there are indicators in the refusal letter that the matter may be referred to the Criminal Casework Directorate, is there any material before me suggesting that that has been done or a decision has been taken to deport the appellant.

4. The judge noted that the appellant has no prior convictions in the United Kingdom nor is there any evidence of offending after the index offence. He also noted [2] that it was for the Secretary of State to satisfy him that the appellant's grounds of appeal were unfounded and that unless satisfied that he does pose such a threat, that is, that he presents a genuine, present and sufficiently serious threat, that his removal is proportionate.

5. The judge considered the conviction and sentence, the fundamental interests of society, the degree of risk and made findings of fact [14] to [20], noting in particular the Criminal Justice Social Work Report, noting that the appellant was prosecuted on summary complaint rather than indictment and there was thus no record of the reasons for imposing sentence and noting that since the release the appellant had been assessed by Social Work as providing a low risk.

6. The judge came to the conclusion, having made his own assessment of risk, that the appellant poses a genuine, present and sufficiently serious threat, noting that the denial of guilt inhibits his ability to point to countervailing considerations; the fact of the commission of the serious crime was an indication he might do so in future; and, that, [26], the conviction, in the absence of sufficient countervailing evidence, was sufficient to show that he provided the aforementioned threat. The judge the considered proportionality, noting in particular [32] the appellant's contention that he faces exclusion from Greece on account of what has occurred, therefore dismissed the appeal.

7. Permission to appeal in this case was granted by Upper Tribunal Judge Keith, on 18 November 2021 on limited grounds. The grounds on which permission was granted are in effect two:

   (i) that the judge had not proceeded on the basis that the burden of proof was on the Secretary of State and failed adequately to explain his conclusion [23] that the fact that the appellant has

offended on a single occasion was a serious indication that he will re-offend; and,

(ii) that the judge erred [32] in apparently reversing the burden of proof on the appellant, in this case, the issue whether he would be excluded from Greece.

8. I heard submissions from both Mr Winter and Mr Mullen. Mr Winter submitted that it was important to note in this case that the offending was not at the most serious end of sexual offences, drawing my attention to the decision of the Inner House of the Court of Session in Goralczyk [2018] CSIH 60 where criticism was made of the judge referring to very serious offending when it was not so. He submitted that the error in this case was material although he did accept that on the facts of this case the appellant had received the maximum sentence possible on summary trial. He submitted that the judge had erred in concluding that all three limbs of the test were met in concluding that the appellant presented a genuine, present and sufficiently serious threat had been met. He submitted further that this was a reasons challenge rather than a perversity challenge and that it was not clear to the informed reader why the appellant had decided what he did.

9. Turning to the second ground, Mr Winter submitted that the case law would indicate that if the Secretary of State had said that somebody can go to a specific country the burden lies upon them to do so. However, he accepted that in the refusal letter it was not stated that the appellant could go to Greece and he accepted that that is perhaps inevitable, given that this is not a decision to remove an applicant.

10. Mr Mullen in response submitted that the judge had given a reasoned and balanced assessment of all the factors and had sufficiently explained his decision as to why the appellant presents a genuine, present and sufficiently serious threat.

11. I address the grounds in order.

Ground 1

12. Having had regard to the decision as a whole, and as I have already mentioned, it is clear from paragraph 2 that the judge properly identified that the burden of showing that the appellant presents a genuine, present and sufficiently serious threat was on the Secretary of State. It is also implicit in what the judge says at paragraph [12], that the burden was on the Secretary of State, and in his assessment of the facts at [21] to [26], it is sufficiently clear that the judge did realise that the burden was on the Secretary of State, even if not expressly said at that point. I find nothing which demonstrates that the judge took another view of this and indeed, the phrasing of paragraph 26 where the judge said “the appellant’s conviction, in the absence of sufficient countervailing evidence, is a sufficient indication to satisfy me that the threat that the appellant poses is genuine, present and sufficiently serious” is a strong indicator that he was aware of where the burden lay.

13. It is, I consider, sufficiently clear from the decision that the judge concluded that although this was a single offence on a single occasion, that there was sufficient material for him to consider that the appellant presented a genuine, present and sufficiently serious threat. This was not based solely on the conviction, it is based also on the conduct of the appellant, that is, the lack of remorse and the denial of guilt which he was clearly entitled to find relevant. The judge gave sufficient reasons as to why he considered that those were indicators of risk and I consider that his reasoning is sufficient, adequate and it is clear to the informed reader as to why he reached that decision.

14. I do not consider that he impermissibly considered that this was a particularly serious offence and fell within the terms deprecated by the Inner House in Goralczyk and I conclude that the decision that the judge reached was one open to him and for which he gave sufficient reasons. Accordingly, I am not satisfied that ground 1 as set out in paragraphs 7 and 8 of the grounds is made out. The judge reached a conclusion which was open to him on the law and the facts and for which he gave adequate reasons.

Ground 2

15. I consider that in this case the burden was on the appellant to establish that he would not be admitted to Greece. This is a submission that the appellant made; the general rule is that he who asserts a proposition has to prove it. That it particularly so where, as here, the Secretary of State had not suggested that he could go and live in Greece. Indeed, the Secretary of State had not ordered the appellant to leave the country at all, and accordingly, it cannot be said that the judge erred in his consideration that it was the burden on the appellant to show that he would be excluded from Greece, given that he had put forward that proposition himself. Whilst what the judge says at paragraph 32 might have been more clearly worded, there is no indication that any error here was material in that I am satisfied that as a matter of law and on the facts of this case the appellant would have to have shown that he could not go to live in Greece. Accordingly, for that reason I find that the second ground is not made out.

16. In conclusion therefore, I find that the appellant has failed to satisfy me that on the limited grounds on which permission was granted the decision of the First-tier Tribunal involved the making of an error of law which affected the outcome of the decision. Accordingly, I dismiss the appeal and I uphold the decision of the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

No anonymity direction is made.

Signed Date 21 May 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul