IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002659
First-tier Tribunal No:
DA/00170/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 April 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

KAMIL DZIOBEK
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Adam Pipe, instructed by BHB Law
For the Respondent: Carlton Williams, Senior Presenting Officer

Heard at Birmingham Civil Justice Centre on 2 February 2023

DECISION AND REASONS

1. In a decision which was issued to the parties on 22 April 2022, First-tier Tribunal Judge Hobson ("the judge") dismissed the appellant's appeal against the respondent's decision to remove him from the United Kingdom on public policy grounds. The appellant now appeals against the judge's decision with the permission of First-tier Tribunal Judge O'Garro.

Background

2. The appellant is a Polish national who was born on 16 December 1987. His precise date of arrival in the United Kingdom is unclear. He states that he entered in 2007 but that he subsequently moved to Cyprus until January 2010, at which point he returned to the UK.

3. The appellant was sentenced to fourteen years' imprisonment by HHJ Lockhart, sitting in the Crown Court in Warwick, on 14 June 2019. He had been convicted, on guilty pleas, of offences connected with running a drug-dealing operation in

Coventry. He was arrested at a house in Exhall on 19 November 2018 and was found to be in possession of substantial quantities of drugs of Class A and B, weapons (a handgun together with ammunition and a taser), and several thousands of pounds in cash. His sentence comprised nine years for the counts relating to drugs and a further five years, to be served consecutively, for the weapons.

4. The appellant was duly notified that the respondent was considering his deportation. He made representations against that course on 14 August 2019 but on 1 March 2021, the respondent decided to make a deportation order against the appellant. It was against that decision that the appellant appealed to the First-tier Tribunal.

The Decision of the First-tier Tribunal

5. The judge set out the appellant's immigration history and a detailed summary of his offending at [1]-[9]. At [10]-11], she summarised the basis on which the respondent had reached her decision. The salient provisions of the Immigration (EEA) Regulations 2016 were set out at [14]-[15]. At [16]-[17], the judge recorded that she had heard evidence from the appellant and submissions from the advocates before reserving her decision. The judge set out the appellant's oral evidence at [19]-[29]. There is then a summary of the OASys report at [30]-[32] and, at [33]-[35], a distillation of the other evidence relied upon by the appellant.

6. The judges' analysis appears at [36]-[64]. It is structured under three sub-headings. At [37]-[47], the judge explained why she had concluded that the appellant had not acquired permanent residence in the United Kingdom. At [48]-[55], she set out her reasons for concluding that the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom. At [56]-[61], she explained why she had concluded that the appellant's deportation was a proportionate course. The judge recorded at [62] that Mr Pipe (who represented the appellant then as he did before me) had not pursued any separate Article 8 ECHR argument but she considered that question in any event, and concluded that the appellant's deportation was a proportionate course. So it was that the appeal was dismissed.

The Appeal to the Upper Tribunal

7. Six separate grounds of appeal were originally pleaded by Mr Pipe but he sensibly grouped his oral submissions under three headings, which might properly be summarised as follows.

8. Mr Pipe submitted, firstly, that the judge had misdirected herself in law in considering an HMRC document spanning the tax years 2010/2011 to 2018-2019, since that document established that the appellant's earnings were at all times above the National Insurance threshold. Secondly, it was submitted that the judge had overlooked material matters in assessing the risk presented by the appellant to the fundamental interests of the UK. Thirdly, Mr Pipe submitted that the judge had made further misdirections of law in considering whether the appellant would commit further offences and whether he was integrated into the UK.

9. For the respondent, Mr Williams submitted that the judge had not fallen into error. There was very little evidence of employment and the HMRC record

suggested that the appellant had actually been out of work at material times. The judge's consideration of that evidence was adequate. Secondly, the judge had undertaken a rational assessment of whether the appellant posed a risk to the UK, and it had been open to her to attach weight to the fact that he owed significant sums to a gang. Thirdly, Mr Williams submitted that the judge had not erred in law in her consideration of the case as a whole, and had been entitled to reach the view that the appellant was not integrated to the UK despite his length of residence.

10. I asked Mr Williams why the respondent had made a decision to deport the appellant at such an early point in his custodial sentence, despite what was said at [6] of *MG & VC* [2006] UKAIT 53. He responded that the appellant might be eligible for the Early Release Scheme, through which he might be entitled to serve some of his sentence in Poland. Mr Pipe suggested that he was aware of similar cases in which that procedure had been followed.

11. Mr Pipe accepted that he was unable to take his first ground any further but that the judge's assessment of the risk of reoffending was clearly vitiated for the reasons set out in the remaining grounds.

Analysis

12. As will be apparent from my summary of Mr Pipe's submissions in reply to Mr Williams, his first ground of appeal rather withered on the vine. I should nevertheless deal with that ground of appeal, which concerns the judge's finding that the appellant had not accrued permanent residence.

13. It was the appellant's case before the FtT that he had been in work for a continuous period of five years, and therefore that he had acquired the right to reside permanently in the UK. It was not submitted, in other words, that there were periods of time during which he had been a first-time or second-time jobseeker[1], or that he had retained his status as a worker by any other means. Mr Pipe was characteristically clear in confirming that to be the case before me.

14. The evidence adduced by the appellant in support of his submission that he had been in work continuously for five years was a National Insurance schedule from Her Majesty's Revenue and Customs, as reproduced at page 89 of the respondent's bundle. There was no other evidence, whether in the form of letters from employers, payslips or bank statements. The judge engaged with the schedule at [39]-[44]. Whilst she was prepared to accept that the appellant had been employed for at least part of the tax years therein included, she did not accept that the employment was continuous. As she explained, the significant variation in the NI contributions over the years tended to suggest that the appellant's employment had not been continuous, and he had been unable to explain those variations when the point was put to him.

15. The ground of appeal which Mr Pipe initially advanced against this conclusion had two limbs. The first concerned guidance issued by the respondent to her decision-makers in October 2020, entitled *European Economic Area nationals: qualified persons.* Based upon that guidance, it was submitted by Mr Pipe that the appellant had been treated by HMRC as having eleven qualifying years and that this was determinative, in and of itself, of the question of whether the appellant was a qualified person for those years.

[1] *Shabani (EEA - jobseekers; nursery education)* [2013] UKUT 315 (IAC)

16. The guidance is now in its ninth iteration, issued in October 2022, but it was agreed before me that the relevant part of it is still in the same form. At p24 of the document, the relevant paragraph is this:

> HMRC has a primary earnings threshold (PET), which is the point at which employees must pay class 1 national insurance contributions. If an EEA national was earning below the PET, you must make further enquiries into whether the activity relied upon was genuine and effective.

17. In my judgment, this does not establish that a person who is adjudged by HMRC to have qualifying years for NI purposes must, without more, be treated by the Secretary of State for the Home Department as having worked throughout those years. All must turn on the facts, and the judge was entitled in this case to consider the significant variation in the amounts of NI paid by the appellant from year to year. In fairness to Mr Pipe, he accepted during oral argument that he was unable to submit that the policy compelled a different conclusion, and relied instead on the second limb of his ground, which was to submit that the judge's analysis of the evidence was insufficient.

18. I do not consider that alternative argument to be made out. As Mr Williams observed, the amounts of NI paid by the appellant varied significantly. He also noted a more fundamental problem for the appellant, which is that the sixth column of the schedule is a record of NI Credits made. Mr Williams submitted, and Mr Pipe did not disagree, that this was a record of the number of weeks in which HMRC had credited the appellant's NI record because he was failing to make contributions. In 2010/2011, there were 49 such credits. In 2013/2014, there were 52, and in the following year there were 32. The reality, as Mr Williams pointed out, is that it would not have been open to the judge on the face of this evidence to conclude that the appellant had been in continuous employment over the period in question.

19. I should note that further evidence has subsequently been provided to the Upper Tribunal by way of an application under rule 15(2A) but Mr Pipe confirmed that this evidence was only to be relied upon in the event that the FtT's decision was set aside; it was not suggested that it was somehow relevant to the question of whether the FtT's decisions was vitiated by legal error.

20. The appellant's first ground is not made out for these reasons.

21. By his second ground, Mr Pipe submits that the judge erred in her assessment of the risk posed by the appellant. He criticised the judge for failing to engage with the statistical analysis of risk in the OASys report in particular, and the respondent's acceptance of that analysis at [33] of the decision letter.

22. As Mr Williams submitted, however, it was not incumbent on the judge to do so. She clearly considered the OASys report and she was aware of all that had been said about the efforts made by the appellant since his conviction. She was undoubtedly entitled, notwithstanding what had been said in those documents, to find that the appellant would present a higher risk of reoffending when he was released. That was because he had revealed to the judge that he owed as much as £100,000 to people in the criminal underworld as a result of the drugs which were seized when he was arrested and it was said in the OASys report that he was most likely to offend when he was under financial pressure. The drugs debt had not been revealed to the author of that report, however, and the judge

justifiably felt that this was a material omission which affected the weight she was able to attach to what had been said in that report and elsewhere about the appellant's likelihood of reoffending. The judge's process of reasoning in this respect is clear and beyond proper criticism.

23. Mr Pipe also submitted that the judge had misdirected herself in law in various respects in this part of her assessment. She had erred, he submitted, by overlooking the injunction in regulation 27(5)(e) of the 2016 Regulations that a person's criminal convictions cannot in themselves justify their deportation. But the judge set out regulation 27 at [13] of her decision and there is nothing in her subsequent analysis which suggests that she failed to heed the principle in reg 27(5)(e). In fact, her careful analysis of the risk of reoffending and proportionality both suggest that she did not consider that the appellant's serious offending sufficed *in itself* to justify his deportation.

24. Mr Pipe also subjected [54] of the judge's decision to criticism. He accepted that the judge had been correct, at [54](a), to consider paragraph 3 of Schedule 1 to the 2016 Regulations and to conclude that the length of the appellant's sentence served to 'increase the likelihood of this appellant's continued presence representing the necessary threat'. He submitted that the judge had fallen into error in the subsequent paragraph by reversing the burden of proof.

25. With respect to Mr Pipe, however, I consider that to be an incorrect reading of the paragraph in question. The judge noted in that paragraph that there was evidence which pointed in favour of the appellant but she returned to her concern that there remained a risk as a result of the drug debt which was only revealed at the hearing. Properly understood, there is nothing which suggests that the judge wrongly placed the burden on the appellant. It should obviously be assumed that a specialist judge in the FtT is familiar with basic and long-established[2] principles such as this, and there is nothing to demonstrate the contrary in this careful decision.

26. In his fifth ground of appeal, Mr Pipe suggested that the judge had made an irrational finding about the appellant's integration. He wisely said very little about that in his oral submissions. In my judgment, there is nothing at all in this criticism. The judge was demonstrably aware of the appellant's ability to speak English and his length of residence in the UK. She was perfectly entitled to conclude, however, that his continuing involvement with the Polish community in Coventry militated to some extent against a conclusion that he was fully integrated to the UK. Her conclusion is not tainted by any legal error and is certainly not one to which the epithet of irrationality could properly be applied.

27. By his final ground, Mr Pipe submitted that the judge had otherwise failed to undertake a lawful assessment of proportionality in compliance with the guidance in *R (Lumsdon & Ors) v Legal Services Board* [2015] UKSC 41. The particular suggestion in the grounds was that the judge had failed to consider whether a less onerous method might have been a more proportionate course. That submission attempts to force a round peg into a square hole, however. The judge was faced not with a range of options but with a binary choice; she was to decide whether it was proportionate to deport the appellant, or not. It would have been an error of law for her to conclude, for example, that the appellant should have been warned not to commit further offences, or that he could have been subject

[2] *SSHD v Straszewski* [2015] EWCA Civ 1245; [2016] 1 WLR 1173 and *Arranz* [2017] UKUT 294 (IAC)

to electronic tagging rather than being deported. The scheme of the 2016 Regulations simply does not permit a judge of the IAC to consider a range of options in that way, and the judge's analysis of the binary choice presented was not deficient for this reason, or for any other.

28. In the circumstances, the appellant's appeal to the Upper Tribunal will be dismissed and the decision of the FtT shall stand. It is a matter for the appellant whether he wishes to bring the additional evidence of employment to the attention of the Secretary of State.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 February 2023