IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-4502
On appeal from: DA/00229/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 May 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

MILOSZ PIOTR MACZKOWSKI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Ubah Dirie of Counsel, instructed by Wilsons Solicitors LLP
For the Respondent: Mr Tony Melvin, a Senior Home Office Presenting Officer

Heard at Field House on 24 April 2023

DECISION AND REASONS

Introduction

1. The appellant challenges the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 18 April 2019 to deport him as a foreign criminal. He is a citizen of Poland.

2. For the reasons set out in this decision, I have come to the conclusion that the appeal must be dismissed, and the decision of the First-tier Tribunal upheld.

Procedural matters

3. **Mode of hearing.** The hearing today took place face to face.

4. The appellant's representatives, Wilsons Solicitors LLP, made an application on 18 April 2023 to adjourn the error of law hearing, because the appellant was said to be 'struggling to obtain the evidence to assess whether he is currently eligible for legal aid following change of circumstances'. There was no supporting evidence and Wilsons have been instructed for many months.

5. I refused the adjournment. In the event, Ms Dirie was able to appear at the hearing. She has been the appellant's Counsel throughout and he was not, therefore, prejudiced by whatever the problems are with his finances.

Background

6. The appellant was born on 14 December 1992 and arrived in the UK in 2001, on his account. His mother's account is that he arrived in 2004, as set out in a letter from her. He was about 11 or perhaps 12 years old on arrival. The appellant's mother, father and two siblings are all in the UK and all now naturalised as British citizens.

7. From 2005/2006, the appellant studied at St Edward's Royal Free Ecumenical Middle School. From 2007, he studied at Windsor Boys' School. He did not complete his schooling. He travelled regularly to Poland for holidays while he was growing up, visiting his grandparents, who still live there. His mother says he worked in a number of restaurants as a chef, and also took on security warden work, and tried working in construction with his father. He eventually settled as a chef.

8. On 29 June 2010, the appellant was convicted by the East Berkshire Juvenile Court of driving without a licence and using a motor vehicle while uninsured. He was still a minor: he was fined £160 and his driving licence endorsed (8 points).

9. On 10 June 2013, when he was 20, the appellant was convicted at South West Surrey Magistrates Court of travelling on the railway without paying a fare, and was fined £400 plus costs and victim surcharge. On 12 June 2013, the appellant was convicted by Berkshire Magistrates' Court of travelling beyond the distance for which his rail fare had been paid. Sentence was postponed.

10. In December 2013, the appellant incorporated a limited company, Milosz Security Limited. In March 2014, Companies House reminded him of accounting period and dates for payment of tax. From 19 May 2014 he was enrolled on a business degree at Wrexham Glyndwr University. He did not complete his degree. As well as the security work, the appellant worked in a leisure centre and an ice cream van.

11. In 12 November 2014, the appellant was convicted of using a vehicle while uninsured and driving without a licence. He was nearly 22 years old. The appellant was fined £550 plus costs and victim surcharge, and his licence endorsed (7 points). The offences had been committed while the appellant was on bail. He was also convicted of failing to surrender to custody as soon as practicable after the appointed time, with no additional penalty for that.

12. From 2014-2017, the appellant had a girlfriend, a woman with a dependent child. He involved her in the robbery which is the index offence in these proceedings. On 28 January 2016, the appellant was sentenced at Kingston Crown Court to 5 years' imprisonment having been convicted on the robbery charges. He was 23 years old.

13. The appellant was not present for the sentencing in Kingston Crown Court. He absconded on the third day of the trial, and travelled to Poland, where he stayed in an hotel and found work as a courier. The sentencing judge found that he had played a leading role in the robbery, that the robbery had been planned, and that force was used, leading to injuries which fortunately 'were not as it turned out that serious'. The three robbers stole a Range Rover worth approximately £35000 and a mobile telephone worth £800. The Range Rover was later recovered, but had been damaged.

14. On 18 and 19 April 2016, while working in Tczew, Poland as a courier for TBA Courier Services Company in Pruszcz Gdanski, the appellant stole the money paid to him by the recipients of parcels he was delivering to them. When arrested on 19 April 2016, he falsely claimed to have been robbed of the money, a total of PLN 2834.98 (£545.50 at today's rates). He failed to collect the summonses for the trial, for which two postal advice notices were left. Service was deemed. The appellant neither appeared, nor challenged the conviction or sentence. He was sentenced by the regional court in Gdansk to 14 months' imprisonment, of which 2 days were treated as served.

15. The appellant returned to the UK in August or September 2016 but did not surrender to custody to serve his sentence. After about a year, he was arrested, and he served his sentence between September 2017 and September 2019. He was allowed to work in the prison servery, and completed a number of courses, including 'victim empathy'.

16. On 5 June 2018, the Polish court issued an European Arrest Warrant. The appellant remained in immigration detention after the end of his sentence, pending the outcome of the extradition proceedings.

17. The appellant was served by the respondent with notice of liability to deportation. He responded, claiming to be from the Czech Republic and to have a Czech Republic passport. He has since admitted that this was not true. A search of SIRENE, the record of European Arrest Warrants,

disclosed the Polish conviction, the warrant and sentence on which remained outstanding.

18. On 27 March 2019, the appellant appeared at Westminster Court where he was placed on remand until 22 September 2019, when his custodial sentence from 2016 would be complete. On 18 April 2019, the appellant was served with the respondent's deportation order and he appealed to the First-tier Tribunal.

19. The appellant remained detained until the end of the extradition proceedings. On 25 May 2021, the extradition order was quashed in the High Court by Sir Ross Cranston, sitting as a High Court Judge, because the sentence had expired. The appellant was released, and went to live with his mother. He completed some courses and spent time with family and friends. He was not permitted to work due to his immigration status.

20. The respondent in her two deportation decisions accepted that the appellant had acquired a right of permanent residence but not at the imperative level, given his lack of integration into UK life and his recidivism. The appellant had no partner at that date and she considered that he could not bring himself within the Exceptions in section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended). There were no compelling circumstances in his case.

21. The appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

22. First-tier Judge Ruth dismissed the appeal, following a hearing on 13 June 2022. The appellant had been out of prison for just over 12 months at that date and was 30 years old.

23. The First-tier Judge found the appellant to be a most unsatisfactory witness who 'demonstrated a failure of insight into his offending' and gave very little weight to the appellant's protestations of reform. His types of offences, which had escalated over a relatively short period, indicated a pattern of disregard for social norms. In his initial evidence to the Tribunal, the appellant continued to dispute and downplay his role in the robbery, despite not having appealed either the conviction or the sentence.

24. Whilst it was right that there had been no further convictions in the UK since 2016, the appellant had committed further offences in Poland, and of course, had been detained, either serving his sentence or in immigration detention, between 2017 and May 2021. The judge took adverse notice of the appellant's failure to surrender to custody in 2016, of his false claim to be a national of Czech Republic, and his evidence to First-tier Judge Russell, whose decision was overturned on appeal, that he was not in Poland when the European Arrest Warrant offences were committed. The appellant's evidence to Judge Ruth was that this was a lie.

25. The appellant was an unimpressive witness, his account of his claimed reform being ‘mere and vague assertion’ and his presentation ‘flat, colourless and lacked any real internal conviction’. The judge concluded that the appellant, who had lied to Judge Russell ‘fully four years after the robbery…in a context where he must have known he was obliged to tell the truth’, did not understand the norms of UK society, or ‘what it means to play a positive role in society in this country’.

26. The appellant had not reformed: the evidence before the judge ‘demonstrates a continuing failure to take responsibility for his actions, to show insight into his behaviour, and to reform and amend himself’. First-tier Judge Ruth found the appellant not to have the highest level of protection because his integrative links had been broken and/or weakened by imprisonment and subsequent anti-social behaviour.

27. The judge considered the probation evidence at [42], noting that it consisted of three very short letters, which were uninformative. They contained ‘hardly any information at all’ and he gave them such limited weight as they would bear. The appellant had not been out of prison for very long. Evidence from his family, while well intended, took matters very little further as they had not been able to restrain him from his previous criminality and general disregard for the laws of the UK and Poland.

28. If the appellant really wanted to rehabilitate himself, he could do it just as well in Poland. It might benefit him by separating him from his anti-social behaviour in the UK. The sentences in Poland had expired, and he could make a fresh start there. He had grandparents living in Poland who could help him resettle. His mother had visited him in Poland in 2016, around the time of the European Arrest Warrant offences. The appellant was a healthy young man and his removal to Poland would not be disproportionate.

29. The judge considered Article 8 ECHR outside the Rules, in the alternative. He considered that:

> “…I would reach the same conclusions when considering the proportionality of any removal in relation to Article 8. This is particularly because of the appellant’s limited private life, despite his long res, limited and superficial integration, and the fact that there would not be very serious obstacles to his reintegration into Poland, a country where I have already concluded he would be sufficiently an insider within a reasonable time to be able to re-establish his private life there. …”

30. The appellant had neither partner nor child in the UK and there were no very compelling circumstances to balance against the public interest in his deportation.

31. The appellant appealed to the Upper Tribunal.

Upper Tribunal proceedings

32. There were four grounds of appeal, settled by Ms Dirie, who has been Counsel both before the First-tier Tribunal and today:

    (1) That the First-tier Judge erred at [26] in ascribing the burden of proof to the appellant, not the respondent. Ms Dirie contends that 'such a fundamental error is plainly material' because it is indicative of the judge's approach to the appeal;

    (2) That the judge erred in finding that the appellant's integrative links to the UK had been broken (see [29]-[38] of the First-tier Tribunal decision). She sets out a number of factors which she contends were given insufficient weight: his age on arrival, his UK schooling, the relatively short periods he has spent outside the UK (in Poland, his country of origin), his entire family being settled here, his fluent English, and the fact that he has had periods of work in the UK;

    (3) The judge's treatment of the probation evidence adduced on the appellant's behalf, and his good behaviour in prison which resulted in his being given a role in the servery there, also his compliance with the terms of his probation since his release; and

    (4) The judge's approach to credibility and to the late admission by the appellant of responsibility for his past actions. There was no lengthy cross-examination of the appellant, and the grounds argued that the judge erred in taking into account the appellant's demeanour during his evidence.

33. Permission to appeal to the Upper Tribunal was granted by First-tier Judge Bulpitt, mainly in relation to ground 1: see *Arranz (EEA Regulations – deportation – test* [2017] UKUT 000294 (IAC). Judge Bulpitt considered that it was appropriate to grant permission, rather than to set aside what might be 'a slip which did not affect the rest of the decision-making process'. Grounds 2-4 were considered less meritorious but the judge did not restrict the appellant's ability to argue them.

34. By a Rule 24 Reply of 12 August 2022, the respondent acknowledged that the judge had erred in his statement of the burden of proof in an EEA deportation appeal, but contended that even had the burden of proof not been erroneously assigned, the outcome would inevitably have been the same and that therefore, the error was not material.

35. The respondent contended that grounds 2-4 were mere disagreement to properly reasoned findings of the weight which could be attached to the evidence before the judge.

36. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

37. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I have had regard to all of the documents

and submissions before me today. For the appellant, Ms Dirie explained the arguments in her grounds of appeal, and Mr Melvin relied principally on his Rule 24 Reply. I had access to all of the documents before the First-tier Tribunal.

Discussion

38. My attention was drawn to the guidance of the Court of Appeal in *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022), summarised at [65]-[66] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed:

> "65. This appeal demonstrates many features of appeals against findings of fact:
>
> (i) It seeks to retry the case afresh.
> (ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called "island hopping").
> (iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.
> (iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence.
> v) It concentrates on particular verbal expressions that the judge used rather than engaging with the substance of his findings.
>
> 66. I re-emphasise the point that it is not for an appeal court to come to an independent conclusion as a result of its own consideration of the evidence. Whether we would have reached the same conclusion as the judge is not the point; although I am far from saying that I would not have done. The question for us is whether the judge's finding that the money was a loan rather than a gift was rationally insupportable. In my judgment it was not. In my judgment the judge was entitled to reach the conclusion that he did. I would dismiss the appeal."

I find that the present grounds of appeal display the *Volpi* errors and that grounds 2-4 are in reality no more than a disagreement with findings of fact and credibility which were unarguably open to the First-tier Judge on the evidence before him.

39. The probation evidence was brief and lacking in detail; the appellant's disregard for the legal norms of both the UK and Poland was undisputed; he accepted his personal responsibility only very late in the process; and he had lied, absconded, and failed to turn up in the courts of both countries. There was no error in the First-tier Judge's approach to the evidence overall. The judge's comment as to the appellant's unconvincing oral evidence went beyond mere demeanour and she was entitled to reach the conclusions she did for the reasons given.

40. As to ground 1, which was really the basis of the grant of permission to appeal, it is right that the Upper Tribunal in *Arranz* held that the burden is on the respondent to show that a person represents a genuine, present

and sufficient threat affecting one of the fundamental interests of society, pursuant to Regulation 21(5)(c) of the Immigration (European Economic Area) Regulations 2016. The judge correctly stated that the standard of proof was balance of probabilities. It is common ground that at [26] the judge erroneously applied the wrong burden of proof, but in order to reopen the decision, I must be satisfied that the error is material.

41. On the evidence before the First-tier Judge, I am entirely satisfied that had the judge not made that error she would inevitably have concluded that the respondent had discharged the primary burden upon her and would have reached the same conclusion. The appellant had shown himself to be an untruthful person who ignored legal proceedings and the societal norms of both the UK and Poland. He had stayed out of trouble for just over a year since being released, but given his history, it was open to the First-tier Judge to find that such was not sufficient to show that he had been rehabilitated.

42. The error in [26] is not, in all the circumstances, a material error of law and the appeal is dismissed.

Notice of Decision

43. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of no error on a point of law
I do not set aside the decision but order that it shall stand.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 24 April 2023