



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00407/2017

THE IMMIGRATION ACTS

Heard at Glasgow
on 7 September 2018

Decisions & Reasons Promulgated
on 13 September 2018

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

K A SZAPIEL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr T Haddow, Advocate, instructed by Latta & Co, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This decision is to be read with:
 - (i) The respondent's decision, dated 5 July 2017, to make a deportation order.
 - (ii) The appellant's grounds of appeal to the First-tier Tribunal, and his statement.
 - (iii) The decision of FtT Judge P A Grant-Hutchison, promulgated on 14 February 2018.

- (iv) The appellant's grounds of appeal to the UT, stated in the application for permission to appeal dated 1 March 2018.
 - (v) The grant of permission by FtT Judge Scott Baker dated 13 March 2018.
2. The relevant parts of the Immigration (EEA) Regulations 2016 are set out in the decision of the FtT.
 3. Mr Haddow pointed out that the appellant had been legally in the UK and in employment, exercising treaty rights, and although he had not reached the 5-year point at the time of the decisions of the respondent or the FtT, he had now done so, so that the higher threshold would not be relevant for error of law purposes, but would apply in making a fresh decision, either in the UT or in the FtT, or on enforcement. Against that background, he said there were 3 elements to the argument on error of law:
 - (i) Error in reaching the conclusion that the appellant presented a "genuine and present threat". The judge discounted previous offending in Poland. That was followed by two fiscal fines in the UK and a candid admission (in oral evidence) of still smoking cannabis, the only reasons for finding the appellant to be a risk-taker and so likely to re-offend (paragraph 21). That was an inadequate basis for the conclusion reached.
 - (ii) Error in finding the threat "sufficiently serious". The FtT had to take account of all material factors, and explain why it decided as it did. This aspect required an assessment of proportionality, not only in terms of article 8 rights, but in terms of interference with treaty rights. Matters on the respondent's side were at paragraphs 19 - 21. The totality of the assessment of matters on the appellant's side was at paragraph 22. That might be sufficient in a case on article 8 issues only, but not in relation to treaty rights of residence and working.
 - (iii) Error in finding the facts to be such that deportation would be proportionate. Proportionality was a question of law. On the worst view for the appellant, there was no threat which met the test for removal. By reference to schedule I (3), there was no custodial sentence, no persistent offending, and only one repetition of offending at the lowest end of the scale. The state had chosen to proceed by way of a fiscal fine, not by prosecution in court, even on a re-occurrence. Deportation could in principle be justified as a deterrent, but, by comparison, for similar offending a UK citizen would not be threatened with loss of a place of residence or of employment. The approach of the state implied that the offending was "not very serious at all".
 4. Mr Haddow said finally that if error (iii) was accepted, the outcome should simply be reversed, and alternatively that (i) and (ii) would require a remit to the FtT.
 5. Mrs O'Brien submitted thus. The grounds in substance were only disagreement with lawful findings. The submissions conflated law and fact. The judge directed himself clearly on the law at paragraphs 10 - 15 and correctly identified the issues at paragraph

18 in terms of the burden on the respondent and factors relevant to proportionality. The judge did not agree with the respondent based on convictions in Poland only, but those contributed to his overall finding based on recidivism and on all offending being drug-related. The evidence was that despite knowing the potential consequences, and despite being caught, the appellant re-offended in the UK and was likely to do so again. That was why the judge accepted the argument of the presenting officer in the FtT that the appellant was a risk-taker. The decision was as long as it needed to be on matters on the appellant's side, mentioning his skills and work history, and obviously reflecting that he had used his right of free movement. The appellant had not specified any factor which had been left out of account. The fiscal fines were on record only as "pending prosecutions" at the time of the respondent's decision and so were not then considered. It was not likely, even if they had by then crystallised, that such matters by themselves would have triggered a deportation decision, but taken with past criminal history and a risk of similar re-offending, that point was reached.

6. Mr Haddow in reply said that the offending in Poland could properly only have weighed very little in the balancing exercise; that all the offending related to personal use of drugs, not to supply; and that if the decision were to be remade, the higher threshold should apply (which Mrs O'Brien accepted).
7. I reserved my decision.
8. While Mr Haddow submitted initially that proportionality was an issue of law, I understood him to accept my observation that it is rather perhaps a question of mixed fact and law. He did not go so far as to argue that the decision was irrational, but ground (iii) at least comes close.
9. A proportionality judgment is highly fact-sensitive, and every proportionality case turns ultimately on its own facts. It is for a judge to give appropriate weight to the various factors involved, an exercise in which error of law may arise only on "traditional public law lines" - *R (Iran) & others v SSHD* [2005] Imm AR 535, paragraphs 9 (i) - (vii) and 20.
10. The respondent's decision is based on the appellant's offending in Poland, the essence being, "You have committed serious criminal offences and there is a real risk that you may re-offend in the future" (page 2 of 5). His offending was serious but also quite historic. While the dates of convictions and of sentencing decisions run from 2005 to 2012, the dates of offences appear to be no later than 2006. The FtT judge held at paragraph 20 that those offences did not enable the respondent to discharge the burden of proof.
11. The crux of the FtT's decision was that although the offending in Poland did not by itself justify deportation, when taken together with further offending to date in UK and a risk of similar re-offending, the threshold was crossed.
12. Ground (i) is not made out. It aims essentially at the FtT's finding on re-offending. While the report which the appellant produced said this was unlikely, it also left the

issue open. The question was effectively decided by the appellant, whose evidence was that he was likely to re-offend.

13. I do not see scope for a remit in ground (ii). Like ground (iii), this calls for an assessment arising from the facts rather than for any fresh findings of fact. The primary facts are in no real dispute.
14. The appellant's offending in the UK is not at the very lowest level, but it is quite close. That aspect might attract some sympathy for him, as does his candour (although the judge acknowledges that, and a denial in absolute terms might have been treated sceptically). However, although the reference to the consequences of return to Poland is brief, the consequences of loss of employment and place of residence were obvious to the judge and plainly part of his proportionality judgment. Nothing has been mentioned for the appellant which cannot be found in the decision. The judge was careful to base his decision on the terms of the regulations, schedule I 7 (c), preventing social harm, and (h), combating the effects of persistent offending.
15. This was a finely balanced case, in which a different conclusion might have been reached by another judge, or might readily be reached by the threshold in regulation 27 (3) ("serious grounds") rather than regulation 27 (1). However, I do not find that this was a case with only one rational answer, or that error in any of the relevant categories is made out.
16. The decision of the First-tier Tribunal shall stand.
17. No anonymity direction has been requested or made.



12 September 2018
Upper Tribunal Judge Macleman