



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00163/2018

THE IMMIGRATION ACTS

Heard at Field House
On 8 November 2018

Decision & Reasons Promulgated
On 18 December 2018

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR TOMASZ NYSZTAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal previously came before me on 20 August 2018 when I set aside the decision of First-tier Tribunal Judge Chana promulgated on 24 May 2018, allowing Mr Nyształ's appeal against the decision of the Secretary of State made on 2 March 2018 to make a deportation order against him pursuant to the Immigration Act 1971 and the Immigration (European Economic Area) Regulations 2016.
2. As noted in my decision made on that date (a copy of which is annexed) it was not possible to remake the decision on that date as although the nature of Mr Nyształ's

criminal activity in the United Kingdom was clear, there were difficulties about the nature and sentences imposed for his offending in Poland. For that reason, I made a direction on that occasion for the appellant to obtain evidence from the Polish authorities confirming the criminal sentences he received in Walbrzych on 20 February 2013. There has been no response to that direction.

3. When the matter came before me at 10 a.m., there was no appearance by the appellant nor any explanation for this. I am satisfied from the court file that due notice of the time, date and venue for the appeal had been served on the appellant but no explanation for his failure to attend was provided. In light of the history of this case and the overriding objective, I was satisfied that it would be appropriate for me to proceed to determine the appeal in the appellant's absence.
4. I heard brief submissions from Ms Holmes which I have taken into account in reaching my decision.

The Law

5. The starting point in considering an appeal against a deportation decision under the EEA Regulations is Regulation 27(5) which provides as follows:
 - “(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. In considering this issue I must also have regard (see Regulation 27(8)) to the considerations set out in Schedule 1 of the Regulations.

7. The circumstances, and indeed the sentences imposed for the crimes committed in Poland, are unclear. The appellant did on the last occasion explain that they had been thefts from shops after breaking in - what would, under English law, be burglaries of commercial premises.
8. As Ms Holmes accepted, there is an inconsistency in the PNC record which is the sole evidence showing that immediate custodial sentences were passed on the appellant. On his account, he was responsible for burglaries. Irrespective of whether the sentences was suspended or not these were clearly crimes of sufficient seriousness to deserve (even if not immediately imposed) custodial sentences.
9. The appellant does not appear to have learnt from his experience in Poland as can be seen by the circumstances in which, as he said, at the error of law hearing, and it appears before Judge Chana, that he had stolen a mobile phone because he entered into a warehouse, found nobody there and simply took the phone. He was it appears tracked down in a short time after that as its owner had used tracking software and he was apprehended by the police.
10. The appellant is an inept criminal and displays a significant lack of thinking skills. Taking into account the evidence given before Judge Chana in the First-tier Tribunal and viewing the evidence as a whole I conclude that there is no indication that he would not offend again. Whilst the offending is clearly at a low level, it is nonetheless an offence of theft and there is no prospect that this will not reoccur, nor is there any real evidence that the appellant has changes his ways. Further, he was also convicted of unlawful possession of a knife. I have only his word that he had it in his bag as it was a knife used for cutting carpet and was a tool of his trade.
11. Whilst he is not a persistent offender his personal conduct is such as to cause me to conclude that he does present a genuine and sufficiently serious threat to the public interest in that his offending, whilst at a low level, is against the public interest and as he shows little or no concern for the norms of behaviour.
12. There is little evidence of any integrating factors in the United Kingdom. There is no statement from the appellant's brother nor any evidence of him holding employment in the United Kingdom or, for that matter, being in a relationship with any other person. There is no indication that he has children here and other than seeking employment over an extended period, there is little or no evidence of his economic activity in this country.
13. Taking all of these factors into account and I am satisfied that on the particular facts of this case the decision to deport is proportionate and I therefore remake the appeal by dismissing it.

Summary of Conclusions

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the appeal by dismissing it on all grounds.

No anonymity direction is made.

Signed

Date 15 November 2018

A handwritten signature in black ink, appearing to read 'Jeremy Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul

ANNEX - ERROR OF LAW



IAC-FH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00163/2018

THE IMMIGRATION ACTS

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TOMASZ NYSZTAL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondent: In person

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals with permission against a decision of First-tier Tribunal Judge Chana promulgated on 24 May 2018 in which she allowed Mr Nyształ's appeal against a decision of the Secretary of State dated 2

March 2018 to make a deportation order against him pursuant to the Immigration Act 1971 and the Immigration (European Economic Area) Regulations 2016.

2. Mr Nysztal arrived in the United Kingdom relatively recently, first coming to the attention of the authorities on 9 October 2017 when he was arrested on suspicion of burglary. The following day he was convicted of possession of a knife in a public place and also of burglary and theft. He was sentenced for a total of three months' imprisonment which was suspended for two years and required to place a victim surcharge of £115.00.
3. The Secretary of State's case is set out in her refusal letter, but in essence it is her view that the respondent presents a genuine and sufficiently serious threat to public interest, such that he should be deported, the Secretary of State concluding also that deportation would in this case be proportionate.
4. The judge heard evidence from Mr Nysztal who was not represented and she accepted that he was remorseful. She also took into account the offences of burglary in Poland for which he was given a five-year suspended sentence. She took into account his personal circumstances and that he could return to Poland and integrate there. She concluded that he had demonstrated he is not a potential danger, given the crime he committed was opportunistic, concluding that public policy and the fundamental interests of society and the appellant's circumstances do not make this a proportionate decision to deport him from the United Kingdom. SH concluded: "I find that the public interest will not be compromised because the appellant does not constitute a present threat to the requirements of public policy or public security, therefore the deportation would not be proportionate."
5. The Secretary of State sought permission to appeal on the basis that the judge misdirected herself in respect of the decision in Essa; had not given sufficient weight to the offending in the United Kingdom, overlooking that he had been convicted of burglary as well as theft and that the judge had failed to provide adequate reasons as to why she concluded that he would not present a genuine and sufficiently serious threat to public policy or security.
6. I consider, having heard submissions from Mr Tarlow and from the respondent, that the judge did err. What the judge has failed properly to do is to explain how she came to the conclusion that the appellant did not represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society yet the judge accepted that the crime is opportunistic and that the respondent had committed offences of burglary in Poland and that he had committed crimes in the United Kingdom. The suspended sentence is at the lower level, but what the judge did not do is firstly address herself properly as to the relevant test and then to explain properly why the appellant did not constitute a sufficiently serious threat. The wording of the decision at [43] and [44] is different from the test and there is no indication that the judge has properly considered the seriousness of the offending or the seriousness of the threat that the respondent provides. On that basis I consider that the decision did involve the making of an error of law and I set it aside.

7. A question then arises as to whether I send this back to the First-tier to make it again or whether I remake the decision today. I conclude that it would be better to remake on a later date once the issue of the exact nature of the respondent's sentence in Poland is clarified. The respondent states his sentence was suspended for five years; the Secretary of State that he received five years' imprisonment, yet the PNC record shows sentences of three years six months, and three years, said to be a total of five years. There is a significant difference between these, and the evidence from the PNC record does not appear to be make sense.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. The decision will be remade in the Upper Tribunal on a date to be fixed.

Directions

Mr Nysztal must within 28 days of the issue of this decision send to the Upper Tribunal and to the Home Office Presenting Officer's Unit a document from the Polish Authorities confirming the criminal sentences he received in Walbrzych on 20 February 2013

No anonymity direction is made.

Signed

Date: 24 August 2018



Upper Tribunal Judge Rintoul