



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00300/2018

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal
On 5 November 2018

Decision & Reasons Promulgated
On 13 November 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAKUB CHROMIAK
(anonymity direction made)

Respondent

Representation:

For the Appellant: Mrs Aboni Senior Home Office Presenting Officer.
For the Respondent: no appearance

ERROR OF LAW FINDING AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Lal, promulgated on 20 June 2018, who allowed the appeal against the respondent's decision to deport Mr Chromiak, a national of Poland, from the United Kingdom.

2. The anonymity direction made by the First-Tier Tribunal is dismissed, there being no reason for such an order being made on the facts of this matter in which Mr Chromiak's name is already in the public domain through his criminal proceedings.
3. There was no attendance by Mr Chromiak at the hearing or any representative on his behalf. Before the First-Tier Tribunal Mr Chromiak was represented by counsel with oral evidence from his father. This Tribunal is satisfied there has been proper service of the notice of hearing specifying the date, time, and venue of today's proceedings at Mr Chromiak's nominated address for service. There has been no explanation for the absence of any party or individual. It is considered appropriate in the interests of justice and the overriding objectives, with the focus on the question of fairness, for the Upper Tribunal to proceed to hear this matter in Mr Chromiak's absence. It is noted that Mr Chromiak was removed from the United Kingdom on 11 May 2018 with no evidence of any application being made to facilitate his entry for the purposes of attending these proceedings.

Background

4. Mr Chromiak is a citizen of Poland born on 10 August 1990. The Judge notes it was disputed in the case whether Mr Chromiak had acquired a right of permanent residence and whether his deportation could be justified on the basis of 'serious grounds' by reference to the wording of the EEA Regulations.
5. The Judge sets out findings of fact from [13] in which it is found Mr Chromiak entered the United Kingdom in 2009. The Judge notes the first conviction was 13 November 2013 and the presence of an HMRC document going back to 2013 suggested employment for at least 5 years. The Tribunal accepted the account provided by Mr Chromiak's father that prior to a Galleon Hotel job his son was probably working cash in hand in the catering trade. The Judge accepts Mr Chromiak had been exercising treaty rights in the United Kingdom for in excess of 5 years was therefore entitled to a right of permanent residence and the second level of protection against removal.
6. The Judge notes at [15] what is said to be 13 convictions for 27 offences of which nearly 30 offences are for the theft of a pedal cycle, but found there was no credible evidence to show the appellant posed a serious risk on grounds of public policy or public security, finding the vast majority of the offences were a series of petty thefts disposed of in the Magistrates Court with the root cause being alcohol and illicit substance misuse.
7. At [16 - 17] the Judge finds:
 16. There was no evidence to suggest that the Appellant poses such a current risk and following Arraz, the Tribunal notes that the burden is on the Respondent to justify deportation. The Respondent has failed to do so other than noting the effect of the offences committed in general terms on UK society. There was no such evidence to suggest a serious risk to anyone else at the present time or as the Refusal letter implies a poor social attitude towards the public and wider community. There was no evidence to suggest a propensity to reoffend other than the fact of having convictions.

17. On the contrary the evidence that the Tribunal did have before it was that the Appellant appeared genuinely shocked that it had come to this and the Tribunal was satisfied that the father's recollection having spoken to the Appellant was credible and that he had shown some insight into the circumstances which led to his convictions. The Tribunal was satisfied that he has a good prospect of accessing work with his father in the latter's business as a gas fitter as well as accommodation provided by his father. These are both protective factors that would mitigate against any risk previously identified when living by himself in Maidenhead.
8. The Secretary of State sought permission to appeal which was granted by another judge of the First-Tier Tribunal who stated the Judge arguably erred in respect of the HMRC evidence and that relating to Mr Chromiak's lawful employment and that, whilst the individual offending is at the lower end of the criminal spectrum, its volume is such that could be regarded as a serious problem.

Error of law

9. The Secretary of States grounds set out Mr Chromiak's offending history in the following terms:
- On 4 November 2009 Mr Chromiak received a sentence of 6 months imprisonment, suspended for 12 months for the possession of a knife blade/sharp pointed article in a public place. He was also charged costs and received an unpaid work requirement of 100 hours. He failed to comply with the unpaid work requirement, therefore 14 hours was added.
 - On 25 October 2010 Mr Chromiak failed to surrender to custody at the appointed time for which he received a 12-month conditional discharge. On 23 December 2010 Mr Chromiak was found to have committed a further offence during the operational period of a suspended sentence.
 - On 22 November 2012 Mr Chromiak was cautioned for possession of a controlled drug – Class B.
 - On 11 March 2013 Mr Chromiak was found guilty of resisting or obstructing a constable and for the breach of the earlier conditional discharge. He was fined £100, ordered to pay £360 costs and a victim surcharge.
 - On 2 April 2013 Mr Chromiak was found guilty of resisting or obstructing a constable and was remanded on unconditional bail, he received a supervision requirement, community order, a four-year antisocial behaviour order and was required to pay a victim surcharge.
 - On 18 April 2013 and 19 April 2013 Mr Chromiak was found guilty of 11 counts of theft of a cycle and breach of conditional

discharge for which he received a community order and an antisocial behaviour order.

- On 26 November 2013 Mr Chromiak was found guilty of resisting or obstructing a constable for which he was fined and ordered to pay costs and victim surcharge.
- On 1 October 2016 Mr Chromiak was found guilty of shoplifting and failing to surrender to custody at the appointed time. He was fined, detained at the courthouse and charged a victim surcharge.
- On 4 December 2017 Mr Chromiak was found guilty of theft of a cycle; going equipped for theft of a motor vehicle and possession of a controlled drug – Class B. He received an 18-month prison sentence suspended for 12 months; an unpaid work requirement; ordered to pay costs and victim surcharge and forfeiture.
- On 30 January 2018 Mr Chromiak was found guilty of failing to comply with the community requirements of a suspended sentence and was imprisoned for 17 weeks, unserved from the original sentence of 4 December 2017.

10. There is arguably clear evidence that Mr Chromiak's offending history is more involved than may be suggested at [15] of the decision under challenge.

11. Ground one of the Secretary of States challenge asserts the Judge failed to have regard to a material matter. The grounds submit the evidence from HMRC considered by the Judge only resulted in a finding to 'suggest employment' rather than the Judge making a clear finding that there had been employment. The Secretary of State argues the Judge erred in failing to make a finding as to when in 2013 the suggested employment commenced which is material to assessing whether the requisite 5 years exercising treaty rights have been established. There is arguable merit in this ground which is also supported by the reliance of the Judge on the testimony of Mr Chromiak's father that his son was probably working 'cash in hand' in the catering trade during the requisite period. Such a statement does not demonstrate legal employment in accordance with the terms of the Directive sufficient to establish the exercise of treaty rights. Mr Chromiak was sent to prison on 30 January 2018 after which he passed into immigration detention prior to his removal back to Poland. The relevant 5-year period would therefore have to be from the 30 January 2013 to 29 January 2018. The skeleton argument prepared by the appellant's representative for the hearing before the First-Tier Tribunal states: "13. In order to evidence that he has PR, the Appellant needs to show that he was resident in the UK from 20 March 2013 given that the deportation order is dated 20 March 2018. HMRC records show that the Appellant was in receipt of ESA from 30 April 2013 to 4 July 2013 (HMRC record; A's bundle, p.35). In order to qualify for ESA, he would have needed to show that he was habitually resident in the UK. It can therefore reasonably be inferred that he was resident in the UK on or before 20 March 2013. The skeleton argument then refers to employment on various occasions until 20 December 2017. It was not submitted in this document that there was sufficient evidence of the lawful exercise of treaty rights for the requisite period. Even though Mr Chromiak's physical

- presence in the United Kingdom was made out for the 5-year period it was not made out he was exercising treaty rights during that time, which is the important element needed to establish a right of permanent residence.
12. I find the Secretary of State has made out his case that the Judge has erred in law in failing to provide adequate analysis and reasoning in support of the finding Mr Chromiak was exercising treaty rights in the United Kingdom for a period of 5 years sufficient to entitle him to a right of permanent residence.
 13. Consideration has been given to a point in the skeleton argument that Mr Chromiak completed 5 years as the family member of an EU national, but there is no finding that either parent was exercising treaty rights themselves and Mr Chromiak was 19 in 2009 and could not have completed 5 years in the UK before turning 21.
 14. I find the Judge has erred in law in a manner material to the decision to allow the appeal. The Judge was clearly concerned that the higher test of 'serious grounds' was the relevant test when this is not arguably made out on the evidence. I set aside the decision of the First-Tier Tribunal. The factual findings relating to Mr Chromiak's nationality, criminality, and immigration history are preserved findings.
 15. The directions issued for an error of law hearing make it clear that any further evidence to be relied upon should be lodged with the Upper Tribunal. Direction [4] states: *"there is a presumption that, in the event of the Tribunal deciding that the decision of the FtT is to be set aside as erroneous in law, the remaking of the decision would take place at the same hearing. Fresh decision will normally be based on the evidence before the FtT and any further evidence submitted, together with the parties' arguments. The parties must be prepared accordingly in every case."*
 16. The appellants nationality is not disputed and therefore any decision to remove him from the United Kingdom must be made in accordance with the EEA Regulations 2016.
 17. The starting point is to establish the level of protection against removal that Mr Chromiak is entitled to. In light of the issues set out above and concern that part of the period of employment when Mr Chromiak is said to have been exercising treaty rights has not been shown to be lawful through payment of cash in hand suggesting an attempt to avoid declaring such income to HMRC and to pay tax and National Insurance due upon the same (supported by lack of reference to the same in the documents from HMCR), and in light of the failure to establish that Mr Chromiak has exercise treaty rights for the requisite 5 years, I find he has failed to establish an entitlement to a right of permanent residence in the United Kingdom. The level of protection shall therefore be that at the lower end of the scale namely whether deportation is justified on the basis Mr Chromiak poses a threat to public policy or public security of the United Kingdom and that the decision is proportionate.
 18. The Judge relied upon the decision in *Arraz (EEA Regulations) [2017] UKUT 00294* which found that the burden of proving that a person represents a genuine, present and sufficiently threat affecting one of the fundamental interests of society under Regulation 21(5)(c) of the EEA Regulations rests on the Secretary of State and that the standard of proof is the balance of probabilities.

19. The Secretary of State relies upon Mr Chromiak's offending history is set out above. The 2016 regulations, schedule 1, paragraph 3, state that where an EEA national/family member has received a custodial sentence or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the UK represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society.
20. I find that in addition to the main offences giving rise to criminal sanction the ancillary convictions of failing to comply with community orders and unpaid work requirements does, as submitted by the Secretary of State, demonstrate a lack of respect for the law, a failure to accept responsibility or a willingness to make amends for his crimes. If, as identified by the Judge alcohol and/or drugs are the root of the offending behaviour there is no evidence either of remorse or that Mr Chromiak has taken any steps towards rehabilitation to deal with these issues. The situation at date of hearing therefore appears to be the same as that that was present during the time Mr Chromiak committed the offences, which gives rise to a clear indication of a real risk of reoffending.
21. There is also arguable merit in the submission that the finding by the Judge that Mr Chromiak appeared genuinely shocked that his behaviour had led to his deportation from the United Kingdom illustrated a lack of insight into what he was doing.
22. It is important that any decision takes into account the question of the proportionality of the proposed action, but there is little evidence available to demonstrate that Mr Chromiak's deportation is not a proportionate reaction. There is no evidence that since being returned to Poland efforts at rehabilitation have been made or to show the facilities to enable successful rehabilitation would not be available in Poland if Mr Chromiak sought to make use of the same.
23. It is not made out on the evidence that Mr Chromiak is integrated into life in the United Kingdom, his extensive criminal history suggesting that he is not; see paragraph 4 (a), (b) and (c) of the Schedule to the Regulations. Paragraph 7(h) of the Schedule is also pertinent to any argument as it provides something that may combat the continued offending and persistent offending illustrated above.
24. The public policy ground for removal is an exception to the fundamental principle of the free exercise of EU rights and, as such, has to be construed restrictively.
25. I find the Secretary of State has discharged the burden of proof upon her to the required standard to show there is a real risk of reoffending sufficient to establish a threat to the fundamental principles of the United Kingdom and that removal of the appellant has been shown to be proportionate on the facts of this matter.
26. Accordingly, I substitute a decision to dismiss the appeal.

Decision

27. **The First-tier Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

28. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated the 6 November 2018