



**Upper Tribunal  
(Immigration and Asylum Chamber)**

**Appeal Number: EA/01658/2018**

**THE IMMIGRATION ACTS**

**Heard at the Royal Courts of Justice  
On 10 December 2018**

**Decision & Reasons Promulgated  
On 13 December 2018**

**Before**

**UPPER TRIBUNAL JUDGE FINCH**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**EMIL JANUSZ KORNECKI**

**Respondent**

**Representation:**

For the Appellant: Mr. T. Wilding, Home Office Presenting Officer

For the Respondent: Did not appear and was not legally represented

**DECISION AND REASONS**

**BACKGROUND TO THE APPEAL**

1. The Respondent is a national of Poland. It is his case that he entered the United Kingdom in 2015 and then resided and worked here. He asserts that in 2017 his sister and her husband accused him of committing an offence in Belgium.

2. It is said that in October 2017 he was extradited to Poland because he had committed offences of the possession, production and trafficking of drugs. He then went to Belgium where he was detained on 27 October 2017. It would appear that he was accused of theft and an offence relating to the misuse of drugs.
3. It would also appear from another document that, on 15 December 2017, the First Instance Court Chamber for Limburg, a division of Tongeren, did not extend his pre-trial detention.
4. The Respondent sought admission to the United Kingdom under regulation 11 of the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”) but he was refused admission on the grounds of public policy on 7 January 2018. The Respondent appealed on 3 February 2018 and requested a hearing on the papers. His appeal was heard by First-tier Tribunal Judge Mailer and allowed in a decision promulgated on 22 August 2018. The Respondent then appealed and First-tier Tribunal Judge Chohan granted him permission to appeal.

#### **ERROR OF LAW HEARING**

5. In reply to question from myself, the Home Office Presenting Officer stated that the Respondent had no record of the Respondent making a further attempt to gain entry to the United Kingdom. In addition, the Upper Tribunal had not received any response from the Respondent to the grant of permission for the Appellant to appeal against the decision on First-tier Tribunal Judge Mailer.
6. I noted that notice of today’s hearing was sent to the Respondent on 16 November 2018 at the address given for him in Poland. Therefore, I am satisfied, for the purposes of rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008, that reasonable steps were taken to inform the Respondent of today’s hearing and that he could have made written submissions, even if he was not able to gain admission to the United Kingdom. Therefore, I found that it was in the interests of justice to proceed to hear the Appellant’s appeal.
7. The Home Office Presenting Officer had not been able to obtain a full copy of the initial Respondent’s Bundle but confirmed that the existing documents, the Tribunal decisions and

an explanatory statement were now on the MOVEit portal, which was accessible to HMCTS and the Tribunal.

## **ERROR OF LAW DECISION**

8. Regulation 11 of the Immigration (European Economic Area) Regulations 2016 states that:

“(1) An EEA national must be admitted to the United Kingdom on arrival if the EEA national produces a valid national identity card or passport issued by an EEA State”.

9. However, Regulation 23 of the 2016 Regulations also states that:

“(1) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if a refusal to admit that person is justified on the grounds of public policy, public security or public health in accordance with regulation 27”.

10. Regulation 27 states that:

“(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 need not be imminent;
- (d) matters isolated from the particulars of the case of which relate to consideration of general prevention do not justify the decision;
- (e) a person’s criminal convictions do not of themselves justify the decision;
- (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provides the grounds are specific to the person”.

11. When considering the legality of the Appellant's decision, First-tier Tribunal Judge Mailer failed to take into account the principles contained in regulation 27. In paragraph 12 of his decision, he noted that the Respondent had been ordered to leave Belgium on the grounds that his conduct posed real, factual and sufficient threat to the fundamental interests of society. But he failed to consider whether this indicated that he posed a genuine, present and sufficiently serious threat to one of the fundamental interests of society in the United Kingdom.
12. I have also taken into account the fact that the original of the "Order to leave the territory of a state" was not before the Tribunal and that there was no date on the order. There was also no explanation of why the original had been in Dutch when this is not one of the two usual languages spoken in Belgium.
13. The First-tier Tribunal Judge also needed to consider whether the decision reached by the Appellant had been based exclusively on the Respondent's personal conduct. However, First-tier Tribunal Judge's ability to take this factor into account or to reach a proportionate decision depended on a finding about the Respondent's criminality. The other document relied upon by the First-tier Tribunal Judge merely stated that the Respondent was not remanded into custody in furtherance of the pre-trial detention which had commenced on 27 October 2017. There is nothing to suggest that the charges brought against him had been withdrawn or that he was no longer required to attend a trial in the future.
14. As stated by the Appellant in the grounds of appeal, the fact that a person is not remanded in custody in relation to charges levied against them does not automatically lead to the conclusion that all charges have been dropped.
15. The First-tier Tribunal Judge also failed to take into account the fact that it would have been lawful to refuse the Respondent admission on preventative grounds. This was particularly important in the light of paragraph 7 of Schedule 1 to the 2016 Regulations, which states that:  
  
"For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include-  
  
(f) excluding an EEA national with a conviction...and maintaining public confidence in the ability of the relevant authorities to take such action.

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension)”.

16. In these circumstances, the interests of justice suggested that the hearing should have been adjourned in order for a full bundle to be available from the Secretary of State for the Home Department and for the Respondent to file further evidence, which confirmed the status of the criminal proceedings initiated in Belgium and his removal from that country. First-tier Tribunal Judge Mailer should also have considered whether this was an appeal that was best resolved at an oral hearing.
17. For these reasons the decision reached by First-tier Tribunal Judge Mailer contained errors of law and must be set aside.

## **Decision**

- (1) The appeal is allowed.
- (2) The decision of First-tier Tribunal Judge Mailer is set aside.
- (3) The appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a First-tier Tribunal Judge other than First-tier Tribunal Judge Mailer or First-tier Tribunal Judge Chohan.

**Nadine Finch**

Signed

Date 10 December 2018

Upper Tribunal Judge Finch