



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

Appeal Number: EA/08192/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 22 March 2018**

**Decision & Reasons Promulgated
On 26 March 2018**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

**NIELA KREMTZ
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Lal (the judge), promulgated on 4 December 2017, in which he dismissed the appellant's appeal against the respondent's decision dated 15 September 2017 refusing him admission to the UK in accordance with regulations 23 and 24 of the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations).

Factual Background

2. The appellant is a national of Germany, date of birth 21 May 1990. According to the decision under challenge (headed 'Immigration (European Economic Area) Regulations 2016 Refusal of Admission Under European Community Law (no in-country right of appeal)') the appellant sought admission to the UK pursuant to his right of free movement enshrined in regulation 11 of the 2016 Regulations. The decision refusing him admission is dated 15 September 2017 and I therefore assume that this was the date that the appellant arrived in the UK. Removal directions were issued for his removal at 07:50 hours on 16 September 2017.
3. In refusing to admit the appellant the immigration officer stated,

“In your personal belongings you have items of clothing with slogans and symbols indicative of far-right extremism and by your own admission you have previously attended an Ian Stuart Donaldson concert.

As such I believe that your activities whilst in the United Kingdom bear a serious threat to the fundamental interests of society and are likely to insight [sic] tensions between local communities in the United Kingdom.

I therefore refuse your admission to enter the United Kingdom in accordance with Regulations 24 and 23.”
4. There was no further description of the slogans and symbols on the appellant's clothing. In respect of the reference to the Ian Stuart Donaldson concert, I take judicial notice that Ian Stuart Donaldson was a neo-Nazi singer who died in 1993.

The decision of the First-tier Tribunal

5. The appellant elected to have his appeal decided on the papers only. The grounds of appeal were accompanied by a covering letter from Alexander Heinig, a 'Rechtsanwalt' (legal counsel) in Germany. Mr Heinig was identified in the appeal notice as the appellant's legal representative. The covering letter claimed that the appellant had no clothing matching the respondent's description and that even if he wished to attend the concert it was one that was known to the authorities and went ahead. It was claimed that if the concert really was a threat to the fundamental interests of British society, or that it would incite tensions between local communities, it would not have proceeded. There was said to be no reason to stop a single person, such as the appellant, from attending the concert. The concert had taken place every year since 1994 and it was claimed that it had never caused any tensions between local communities in the UK. The decision was said to be unconstitutional and a violation of the appellant's personal freedom.

6. There was very limited documentary evidence before the judge. The decision under challenge was not accompanied by any other documentation. The grounds of appeal were only supported by the German lawyers covering letter.
7. At paragraph 5 of his decision the judge stated,

“The Tribunal has applied the civil standard of a balance of probabilities, namely whether is [sic] something is more likely than not to have happened and or will happen in the future. In immigration appeals the burden of proof is on the Appellant.”
8. The judge accepted that the appellant was stopped with far-right material in the form of clothing with neo-Nazi/White Power iconography on it. The judge also found that, in all probability, it was the appellant’s intention to attend an Ian Stuart Donaldson Memorial concert. This was noted to be an annual gathering of neo-Nazi and white nationalist individuals.
9. At paragraph 8 the judge stated,

“The Tribunal finds the presence of the Appellant at such an event is a serious threat to the interests of society and likely to incite tensions between local communities in the UK. This is because such an event promotes neo-Nazi ideology in terms of fundraising and the maintenance of international contacts between those that share that ideology. Such ideology is rooted in white supremacy and therefore likely to incite tension between communities here in the UK.”
10. And at paragraph 9 the judge stated,

“The fact that the event has happened in the past, albeit with strict policing, is not relevant. Rather it is the presence of the Appellant at that event as part of fostering and maintaining international links within the neo-Nazi movement as well as presumably being a paid attendee and thereby contributing to that ideology, that is the relevant factor. Such a factor is likely to increase community tension in the UK it was its [sic] to be known that entry had been granted to overseas extremists to foster and develop such links in the UK.”
11. The judge consequently dismissed the appeal.

The grounds of appeal and the error of law hearing

12. The grounds are poorly drafted and insufficiently particularised. They note that the concert wasn’t stopped by the police and went ahead and repeated much of the covering letter accompanying the initial appeal notice. It was claimed that the decision was not based on sufficient evidence and that there was no evidence that the appellant’s presence at the concert was likely to incite tensions between local communities in the UK. There was said to be no evidence that the appellant’s presence at such a concert alone would incite tensions. There was also said to be an absence of evidence that the appellant intended to foster and

maintain international links within the neo-Nazi movement. It is claimed that the appellant would simply listen to music, 'have a couple of drinks' and then go home.

13. In granting permission judge of the First-tier Tribunal Saffer stated,

“The Appellant was seeking to attend a memorial concert that apparently had neo-Nazi associations, had been held since 1994, and he had attended before. It is unclear from the decision what personal conduct of the appellant the judge had concerns about (regulation 27 of the Immigration (European Economic Area) Regulations 2016), however distasteful the appellant’s political views may or may not be. All grounds may be argued.”
14. No representative appeared on behalf of the appellant at the 'error of law' hearing. At the commencement of the hearing I indicated to Mr Bramble that I had several concerns with the determination. The judge appeared to proceed on the basis that the burden of proof in respect of a refusal to admit an EEA national on public policy and public security grounds rested on the appellant. This is not the case. The judge did not accurately cite the test in respect of public policy and public security considerations and there appeared to be little if any evidence capable of supporting his finding that the appellant intended to foster and develop links within the neo-Nazi movement.
15. Mr Bramble accepted that the judge appeared to invert the burden of proof. I took into account his additional submissions and indicated my satisfaction that the decision was vitiated by a material error of law. I indicated that I would remake the decision and gave Mr Bramble an opportunity to make any further submissions. In the absence of any further substantive submissions I indicated that I would allow the appeal.

Discussion

16. Under regulation 11(1) of the 2016 regulations 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. There is no suggestion in any other documents that the appellant did not produce a passport or valid national identity document issued by the German state.
17. Regulation 23(1) of the 2016 Regulations states,

‘Exclusion and removal from the United Kingdom

(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 grounds of public policy, public security or public health in accordance with regulation 27.’

18. Regulation 27 of the 2016 Regulations concerns decisions taken on grounds of public policy, public security and public health. The regulation states, in material part,

‘...
...

(2) A relevant decision may not be taken to serve economic ends.

...
...

(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.

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).’

19. Schedule 1 of the 2016 Regulations establishes various considerations relevant to any decision involving public policy, public security and the fundamental interests of society. Paragraph 7 of Schedule 1, headed ‘The fundamental interests of society’, states,

‘For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and

effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

- (b) maintaining public order;
- (c) preventing social harm;
- (d) preventing the evasion of taxes and duties;
- (e) protecting public services;
- (f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) 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 as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);
- (h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);
- (i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;
- (j) protecting the public;
- (k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);
- (l) countering terrorism and extremism and protecting shared values.'

20. Headnotes (i) and (ii) of **Arranz (EEA Regulations - deportation - test)** [2017] UKUT 00294 (IAC) read,

“(i) The burden of proving that a person represents a genuine, present and sufficiently [serious] threat affecting one of the fundamental interests of society under Regulation 21(5)(c) of the EEA Regulations rests on the Secretary of State.

(ii) The standard of proof is the balance of probabilities.”

21. The reference to regulation 21(5) in **Arranz** is to the Immigration (European Economic Area) Regulations 2006. Regulation 21(5) has been transposed to regulation 27 of the 2016 Regulations (see paragraph 18 above).
22. It is apparent from **Arranz** that the burden of proving that a person represents a genuine, present and sufficiently serious threat affecting

one of the fundamental interests of society rests on the respondent. At paragraph 5 of his decision the judge inverted the burden of proof. This is a fundamental legal error and undermines all the judge's subsequent findings. On this basis alone, I am satisfied that the judge's decision is unsustainable.

23. I am satisfied that there are other material legal errors. In paragraph 8 the judge found that the appellant's presence at the concert was a "serious threat to the interests of society and likely to incite tension between local communities in the UK." The existence of a 'serious threat' is only part of the test in regulation 27(5). Nowhere in the decision does the judge consider whether the threat said to be posed by the appellant was genuine or present. More significantly, there was simply no evidence that the appellant's attendance at the concert was to foster and develop links between communities of neo-Nazis and other right wing extremist groups. The appellant was found to have clothing with slogans and symbols indicative of far-right extremism and to be attending what appears to be an annual memorial concert for a neo-Nazi. While such clothing is unarguably objectionable to any right-minded member of society, the respondent has produced little if any evidence capable of entitling the judge to conclude that the appellant wished to foster and develop such links. While the judge and the respondent may harbour a suspicion that the appellant may wish to develop links, mere suspicion, without any further evidential support, is insufficient to discharge the burden of proof to the balance of probabilities standard. There was no evidence that the appellant was a member of an extremist group or that he held any role in such a group, there was no evidence that he had a criminal history or that he had previously been identified as someone whose activities were likely to threaten the fundamental interests of society. There was no evidence that a criminal offence was likely to be committed at the concert, which, it is said, would have a heavy police presence, and there was no evidence that the appellant's presence at the concert would itself incite tension between communities in the UK. While the appellant admitted having previously attended an Ian Stewart Davidson Memorial concert there was no suggestion that his presence had increased community tensions or undermined the fundamental interests of society.
24. For these reasons I am satisfied that the First-tier Tribunal's decision is unsafe.

Remaking the decision

25. I proceed to remake the decision. The burden rests on the respondent to prove, on the balance of probabilities, that the appellant's personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct and that the threat does not need to be imminent. I take into account all of the public interest factors identified

in Schedule 1 to the 2016 Regulations, including the need to maintain social order, protect the public and prevent social harm. I note that a decision under regulation 27 may be taken on preventative grounds, even in the absence of a criminal conviction, provided that the grounds are specific to the person.

26. I have no reason to doubt that the appellant was found to have clothing with neo-Nazi and far right insignia amongst his personal belongings. The respondent's decision does not suggest that the appellant was wearing such clothing when he entered the UK. No evidence has been produced suggesting that the appellant is a person with a criminal history or that he is actively involved in any neo-Nazi or far right organisation. While his political views will be repugnant to the overwhelming majority of those residing in the UK, there is nothing to suggest that his attempt to gain admission to the UK was for any reason other than attend a gathering of neo-Nazis at a music concert. The concert is apparently held annually and is strictly policed. There is simply no evidence that the appellant's presence at the concert, even if wearing clothing with highly offensive iconography, is likely to incite community tensions in the UK. There is no evidence that the appellant intends to foster international links between extremist groups. I am not satisfied that the requirements of regulation 27(5), with reference to Schedule 1 of the 2016 Regulations, have been met. I consequently find that the respondent has not discharged the burden of proof upon her and I therefore allow the appeal.

Notice of Decision

The judge made material errors of law.

I remake the decision, allowing the appellant's appeal.



Signed
Upper Tribunal Judge Blum

Date 22 March 2018