Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/13121/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 March 2018	**On 09 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SILVESTER AKSAMIT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Gribble sitting at Manchester on 17 March 2017) dismissing his appeal against the decision of the Secretary of State to remove him under Regulation 19(3)(a) of the Regulations 2006, as he was specifically to be considered to be a person who was not exercising Treaty rights because he failed to provide information to the Home Office when prompted to show that he was exercising his rights. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the

appellant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 18 December 2017, Upper Tribunal Judge McWilliam granted permission to appeal for the following reasons: "*It is arguable that the Judge did not consider the concession by the respondent in the response to the PAP letter of 28 October 2016 that the appellant had worked in the UK. Whilst this is not a concession that he was working at the date of the hearing, it is arguably material when assessing proportionality.*"

Relevant Background

3. The appellant is a national of Poland, whose date of birth is 9 January 1980. He claims to have entered the UK in either 2010 or 2011. On 17 June 2015 he was convicted of an offence of burglary committed on 15 September 2014, and he was sentenced to 2 months' imprisonment. On 23 May 2016 he was served with IS151A and ISI15B EEA Notices and appeal papers, via recorded delivery. He was thereby informed of the decision to remove him on the ground that he had not shown that he was exercising Treaty rights. He was also required to report, but he failed to do so, and so was he deemed to have absconded.

4. On 2 October 2016, the appellant was arrested by Cheshire police at premises in Crewe, where he was found sleeping rough. He was subsequently interviewed by immigration officers. Following this, he was arrested, served with enforcement paperwork and detained at Morton Paul Immigration Removal Centre, pending removal from the UK.

5. Fadiga & Co came on the record for the appellant, and they sent a pre-action protocol ("PAP") letter to the Home Office on 18 October 2016, challenging the proportionality of the respondent's decision to remove the appellant from the UK. They submitted that the decision to remove the appellant was disproportionate and illegal, as he was exercising treaty rights and he was a person of good moral character.

6. The Home Office replied to the PAP letter on 28 October 2016. They acknowledged that he had demonstrated that he had been working in the UK. However, it was noted that he was encountered by the police on 2 October 2016 "*sleeping rough".* It was considered that the appellant's removal from the UK was proportionate for the following reasons:

    - He had been sentenced to 2 months' imprisonment for burglary;

    - He was given 30 days to appeal the decision to remove him from the UK and he had failed to appeal within the time limit;

    - *"He appears to be working in the UK sporadically and despite his claim to have been working since April 2016 he has only provided 2 weeks of payslips for the 2 weeks prior to his detention";*

    - Despite him claiming to have worked in the UK since April 2016, he had

failed to obtain a place of residence;

- Although his mother lived in the UK, he was no longer in contact with her;

- He had submitted no evidence to demonstrate that he had socially and culturally integrated into the UK.

7. The Home Office went on provide additional commentary on some of the above points.. The solicitors claimed that the appellant had failed to exercise his right of appeal as he had lost his paperwork and did not realise the importance of lodging the appeal. However, the appellant had been served with the relevant notices in May, and he was given a month to appeal, and he failed to do so. He was advised of the importance of attending and reporting events, but he failed to do so. Following the failure of the appellant to comply with reporting conditions, an enforcement visit was conducted to the appellant's alleged place of residence on 7 September 2016. The appellant was not encountered, and his mother advised that she had not seen him since March 2016. The appellant was deemed an absconder, and he was later encountered on 2 October 2016 and detained.

The Hearing Before, and the Decision of, the First-tier Tribunal

8. The appellant's appeal against the decision to remove him came before Judge Gribble sitting in Manchester on 17 March 2017. Both parties were legally represented. The Judge noted that the documentary evidence before him included a refusal dated 28 October 2016 in respect of an application made by the appellant for leave to remain on human rights grounds. Ms Bremang, instructed by Fadiga & Co, confirmed that Judge Gribble was only hearing an appeal against the EEA removal decision made on 23 May 2016.

9. The Judge received oral evidence from the appellant, and his attention was directed to the documentary evidence which had been assembled in the appellant's bundle.

10. In her closing submissions, Ms Young for the Home Office submitted that the appellant was not exercising Treaty rights and so removal was proportionate. She submitted that the bundle did not contain any original documents, and there was no good reason for not producing the originals. There was a gap in his employment record. There was no evidence that he had been working in November and December 2016. He had provided no bank statements to show payment in of money into his account.

11. On behalf of the appellant, Ms Bremang submitted that the documents in the bundle from Acorn Recruitment showed that he had worked from 2008. She acknowledged that there were some gaps in his employment. She invited the Judge to accept the appellant's oral evidence that he was working now, although she accepted that the most recent documentary of him working was contained in payslips for 25 September 2016 and 2

October 2016.

12. The Judge's findings of fact were set out in paragraphs [23] to [28] of his subsequent decision. The Judge held that the appellant had not satisfied him to the required standard of the balance of probabilities that he was working in May 2016 or subsequently. This was because his oral and documentary evidence was not satisfactory. His oral evidence was vague and dismissive as to why he had no originals of the payslips he provided for that period. He did not say how the payslips for Impact CS got into the bundle. His excuse for not bringing originals was that he was rushing for a train, and this was not accepted in the light of how long he had to prepare and how important it was to show that he was exercising Treaty rights. He produced no bank statements to show cheques being paid into a bank account, either in May 2016 or at the current time. The bank statements would be relatively easy to obtain, in his view, and they would have gone a long way to support his assertion that he was exercising Treaty rights. Therefore, he was not satisfied to the required standard that the appellant was exercising Treaty rights in May 2016 or at the date of the hearing.

13. On the issue of proportionality, the Judge found that the level of abuse of rights was significant because he was not satisfied that the appellant was exercising Treaty rights. He was squatting in May 2016 on his own account, and it was also clear that there had been some criminal activity. The appellant did not abide by the reporting requirement, and he could not be satisfied that the appellant was now exercising Treaty rights.

14. In terms of his personal circumstances, there was no letter from his mother with whom he said that he had been living until either February 2016 or January 2017. He was a young, healthy man. His personal circumstances showed that he was not particularly integrated within the UK society, because he had not abided by reporting requirements, he had committed a crime for which he was imprisoned, and he spoke limited English despite (on his account) having spent almost 10 years in the UK.

The Hearing in the Upper Tribunal

15. In advance of the hearing before me to determine whether an error of law was made out, the appellant's solicitors unsuccessfully applied to the Upper Tribunal for an adjournment. When giving written reasons for refusing the adjournment request, the Upper Tribunal stated that a Polish Interpreter would be provided if the appellant chose to attend in person.

16. In the event, there was no appearance by or on behalf of the appellant. I was satisfied that the appellant and his legal representatives were aware that the hearing was taking place, and had chosen not to attend. So I was satisfied that it was in accordance with the interests of justice to proceed with the hearing in the appellant's absence.

17. Ms Brocklesby-Weller produced a copy of the response to the PAP letter referred to by Judge McWilliam. She submitted that the Judge had not

erred in law in failing to take the PAP response into account when assessing proportionality.

18. She explained that the removal decision of 23 May 2016 had been preceded by the appellant being served with an EEA Questionnaire in which he was asked to provide evidence of the exercise of Treaty rights. The appellant had not completed this Questionnaire, and hence the removal decision had been triggered.

Discussion

Alleged Irrationality

19. The primary case put forward by the appellant's representatives is one of irrationality. It is pleaded that it was irrational for the Presenting Officer to submit that the appellant was not exercising Treaty rights when the Home Office had acknowledged the opposite in the response to the PAP letter.

20. It is not suggested that Judge Gribble was shown the response to the PAP letter, and thus it is the respondent who is accused of irrationality, rather than the Judge. However, the argument runs, since the decision of 23 May 2016 is unlawful in the light of concession in the PAP letter, the Judge should have allowed the appeal to the limited extent that the decision to remove the appellant was not in accordance with the law.

21. The reasoning in the grounds of appeal is very muddled. If the Judge was unaware, as he was, of the response to the PAP letter, he could not make a judgment as to whether its contents retrospectively cast doubt on the lawfulness of the removal decision of 23 May 2016.

Whether Material Unfairness resulting from non-disclosure of PAP response

22. Although this is not the case put forward in the grounds of appeal, I ask myself the question whether the non-disclosure of the response to the PAP letter has led to material unfairness. I answer this question in the negative for two reasons.

23. Firstly, the solicitors acting for the appellant in the appeal before Judge Gribble were the same firm of solicitors as had received response to the PAP letter. So, if they considered that the contents of this letter were material to the appeal before Judge Gribble, it was open to them to ensure that he had sight of it.

24. Secondly, the concession made in the PAP response was not unequivocal. The Home Office accepted that the appellant had worked in the past "*sporadically*". The Home Office did not concede in the PAP response that this meant that there was no longer a proper basis for maintaining the decision to remove the appellant.

Whether Judge was perverse to find the Appellant was not exercising treaty rights in May 2016 or at the date of the appeal hearing

25. Before Judge Gribble, it was not in dispute that the appellant had worked in the UK in the past. On his own case, he had worked until 2014, but he had then ceased working for some two years. The issue in controversy was whether he had resumed working for Acorn from April 2016 – and thus was working for Acorn in May 2016 when the removal decision was served - and whether he had carried on working up until the date of the hearing.

26. The appellant's solicitors submit that the Judge made findings of fact on these issues which were unreasonable. It is pleaded that the documentary evidence in the appellant's bundle established on the balance of probabilities that the appellant was exercising Treaty rights in May 2016, and that he had carried on exercising Treaty rights on a continuous basis thereafter.

27. The threshold for establishing perversity/unreasonableness in factual findings is a very high one. I consider that the Judge has given adequate reasons for finding that the appellant had not discharged the burden of proving that he was exercising Treaty rights in May 2016 or, more importantly, at the date of the hearing; and hence that the decision to remove him was proportionate.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date 3 March 2018

Judge Monson
Deputy Upper Tribunal Judge