Upper Tribunal
(Immigration and Asylum Chamber) EA/06920/2019 (V)

THE IMMIGRATION ACTS

Heard at George House, Edinburgh by *Skype for Business* On 9 December 2020	Decision & Reasons Promulgated **On 30 December 2020**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ARTUR KULASINSKI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr H Ndubuisi, of Drummond Miller, Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Poland, born on 13 September 1976.

2. On 4 September 2019, at Edinburgh airport, the respondent refused the appellant admission to the UK under regulation 27 of the Immigration (EEA) Regulations 2016, based on his criminal convictions in Poland.

3. The decision stated that the appellant could appeal only from outside the UK.

4. The appellant sought judicial review of directions for his removal, and those were cancelled. Under cover of a letter dated 13 December 2019, from solicitors then acting for him, he filed an appeal to the FtT. Parties and the FtT accepted that there was jurisdiction to hear the appeal.

5. FtT Judge Farrelly dismissed the appeal by a decision promulgated on 3 April 2020.

6. The FtT refused permission to appeal to the UT.

7. The appellant applied to the UT, on differently framed grounds, alleging 4 errors, in summary as follows:

   (1) Failure to apply the principle of proportionality as required by regulation 27(5)(a); *A & Ors v SSHD* [2013] EWHC 1272 is cited.

   (2) Failure to take the correct approach to proportionality; *R (Lumsdon) v Legal Services Board* [2015] UKSC 41 and *Goroalczyk v SSHD* [2018] SLT 1183 are cited.

   (3) Error in considering the risk of re-offending, or in applying regulation 27(5)(d).

   (4) Failure to take account of all relevant considerations, specified as (a) – (j).

8. On 3 September 2020 UT Judge Finch granted permission, on the view that the FtT arguably failed to apply the necessary proportionality assessment, and arguably erred in assessing current risk, the appellant never having offended in the UK over a significant period.

9. I conducted the hearing from George House. Representatives attended remotely. The technology enabled an effective hearing.

10. The main points which I noted from the submissions of Mr Ndubuisi were these:

    (i) the judge erred by deciding on the risk of re-offending alone;

    (ii) the judge did not base his decision on any assessment of proportionality;

    (iii) the judge made an assessment which was contrary to regulation 27 (5) (d) and (e);

    (iv) the judge irrationally found there to be a risk of re-offending, when he could only have found to the contrary;

    (v) the finding at [33] of “no in depth integration” flew in the face of the evidence, when the appellant has been employed in his own business, there was evidence of his family life with a partner and her child, and he gave his evidence (as Mr Ndubuisi recalled) in English, and did not have a “poor command” of the language;

    (vi) in finding no evidence of rehabilitation, the judge overlooked that the latest official assessment by a probation officer in Poland was that his

conduct was satisfactory, his suspended sentence was to be revoked, and there was agreement to his living abroad;

(vii) for an accumulation of errors, the decision should be set aside;

(viii) on the evidence, the UT should substitute a decision, allowing the appeal, as originally brought to the FtT.

11. The main points which I noted from the submissions of Mr Avery were these:

(i) the judge set out regulation 27 in full, then systematically applied it;

(ii) the appellant misrepresented the meaning of regulation 27 (5) (d) and (e);

(iii) the conclusion drawn from the appellant's previous offending was carefully explained at [18] – [23];

(iv) the question was rightly identified as whether re-offending was likely in the UK;

(v) the statement at [35] of the "ultimate issue" as being "whether the appellant presents as a genuine serious and present threat to the interests of society" was perhaps an error of expression, but the decision as a whole showed that was taken as only one of the principles to be applied;

(vi) the judge went on immediately, and crucially, at [36] to explain his decision in terms of proportionality;

(vii) the judge was entitled at [33] to find only a small degree of integration, when the appellant's interactions were primarily in the Polish expatriate community;

(viii) the judge applied the law to the facts, without any error of legal approach, and reached a decision within his rational scope;

(ix) the grounds, in substance, were only disagreement;

(x) the decision should stand.

12. In reply, Mr Ndubuisi said that at [35] there was not only an error of expression, but a demonstration that the judge based his decision on the prior offending and on nothing else.

13. I reserved my decision.

14. The high point of the appellant's challenge is the judge's use at [35] of the term "the ultimate issue". The respondent acknowledged that this expression is problematic. Whether the appellant presented a threat in terms of regulation 27 (5) (c) was a *decisive* issue ("must") but it was one

among several principles, including (a) proportionality (also a "must"); and it was to be applied along with regulation 27 (6), requiring consideration of matters such as age, family and economic situation, length of residence, integration, and links with the country of origin.

15. The decision as a whole cannot sensibly be read as turning on the threat posed by the appellant, or on risk of re-offending, alone. The judge directed himself on the full effect of the regulations, set out at the beginning, and he went on to deal specifically with all the matters mentioned in the previous paragraph. His conclusion is summarised not at [35] only, but by reading on to [36], which is expressed in terms of proportionality.

16. The appellant's grounds and submissions tend to overstate his position, both on the law and on the facts.

17. Regulation 27 (5) (d) provides that "matters isolated from the particulars of the case or which relate to considerations of general prevention" do not justify a decision. Neither the respondent nor the tribunal made any suggestion that this is a case which depends on anything but its own particulars, or on any consideration of general prevention.

18. Regulation 27 (5) (e) provides that previous convictions do not "in themselves" justify a decision. Mr Ndubuisi sought to convert that into the notion that previous convictions do not count at all, which is contrary to the scheme of the regulations.

19. There is nothing in the decision to the effect that the convictions alone led to the failure of the appeal.

20. The submissions on the appellant's degree of integration raise a curious matter, although it is a minor one. Mr Ndubuisi said that, from his recollection, the appellant gave evidence in English. However, I note while considering this decision that Mr Ndubuisi was not the representative in the FtT. The respondent's decision of 4 September 2019 records that it was explained to the appellant in Polish. The appellant says on his appeal form that he requires an interpreter. The file is endorsed for one to be provided. The FtT's decision does not state whether the appellant gave his evidence in English or Polish, but the grounds do not specify a challenge to [33], where he is said to have "a poor command of English".

21. The appellant did not counter the submission that his life in the UK is rooted within the expatriate Polish community. He may disagree, but the finding that he has not demonstrated any in-depth integration into life in the UK is not shown to have involved the making of any error on a point of law.

22. The appellant had been in the UK without offending for over 3 years from the time of the hearing, as was stressed on his behalf, but the proposition that his crimes were "economic" and that his circumstances in the UK

proved that there was no risk of repetition is glib, and goes too far. There was nothing to show a combination of the nature of previous offending, and of present circumstances, such that offending could never happen again. The FtT noted the time which had gone by, but at [18 – 23] it also noted the seriousness of the offences; the appellant's repeated failure to acknowledge any responsibility; and commission of offences when the appellant was already not a juvenile, but a man with family commitments.

23. The appellant in the UT said that evidence from Poland showed rehabilitation, but that is selective. The judge at [23] noted that the letter from the probation officer was based on limited contact.

24. The grounds at [12] and at [15 i] contend that there can be no risk of re-offending in the UK because previous offending did not take place here. That is incorrect. The regulations aim at the risk of future offences being committed in the UK, regardless of where previous offending took place.

25. The conclusion that the appellant did pose a threat of re-offending was within the judge's rational scope. No error has been shown in the reasons given.

26. The judge at [24 – 32] found the evidence of the appellant's relationships in the UK unsatisfactory and weak, giving clear reasons, in which no error has been alleged.

27. Grounds 1, 2 and 4 are overlapping ways of making much the same points on proportionality. They do not fairly represent the decision. They do not show that the judge failed to consider all relevant factors, that he had regard to anything which was irrelevant, or that his decision was perverse. They disagree, but show no error on a point of law, which might justify interference.

28. Ground 3 shows no error on risk of re-offending.

29. This was a case which might rationally have gone either way, perhaps even a finely balanced one; but the grounds and submissions have not shown that the outcome should be disturbed for any error on a point of law.

30. The decision of the First-tier Tribunal shall stand.

31. No anonymity direction has been requested or made.

11 December 2020
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.