Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03301/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing	
On 5 April 2017	**On 13 June 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR NAGY ISTVAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not represented and not present
For the Respondent: Mr P Armstrong, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a national of Hungary. He is a lorry driver who had regularly been driving large lorries into this country.

2. On 3 November 2015 it was discovered that there were twelve clandestine entrants hiding in the vehicle which he was driving which he had not discovered. As a result of this the respondent made an immigration decision refusing to allow him to enter this country in the future. The reasons for this decision were set out in the notice of immigration decision as follows:

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> "You sought admission to the United Kingdom under EC law in accordance with Regulation 11 of the Immigration (European Economic Area) Regulations 2006 on the ground that you are a Hungarian national. However, I am satisfied that your refusal of admission is justified on grounds of public policy as authorised by a Border Force Senior officer. This is because on 3 November 2015, you brought twelve clandestine entrants into the Calais port United Kingdom control zone, concealed in the trailer of the heavy goods vehicle you were driving. Furthermore, by you own account of your security checks you conducted prior to arrival, you only checked the presence of your seal and did not check its integrity. You have also stated that you have run freight to the United Kingdom on a weekly basis for the last three to four years. I am therefore satisfied that you have enough knowledge of the problem of clandestine entrants around the ports of northern France.
>
> I therefore refuse you admission to the United Kingdom in accordance with Regulation 19".

3. The respondent also gave directions for the appellant to be taken from the control zone "to a place where you may be accepted back by the competent French authorities".

4. The appellant exercised his out of country right of appeal (under Regulation 26) which appeal was decided, on the papers, by First-tier Tribunal Judge Hutchinson. In a determination promulgated on 21 July 2016, Judge Hutchinson dismissed the appeal. The appellant was not represented before the First-tier Tribunal and is still unrepresented but representing himself as best he could he has submitted grounds of appeal.

5. Permission to appeal having been granted by First-tier Tribunal Judge Jeremy Gibb, on 17 February 2017, this appeal is now before me. The appellant was not present and neither was he represented, but the respondent was represented by Mr Armstrong, Senior Home Office Presenting Officer.

6. As the judge properly noted, the law is governed by Regulation 19 of the EEA Regulations, coupled with Regulation 21, which provides that with regard to decisions taken on public policy, public security and public health grounds, the following provisions apply:

> "21(1) In this Regulation 'relevant decision' means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> …
>
> (5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the

preceding paragraphs of this Regulation, 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 personal conduct of the person concerned;

(c) **the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;** [my emphasis]

(d) matters isolated from the particulars of the case or which relate to consideration of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision …".

7. As the judge also correctly noted in his decision, the burden of proof in this case lies with the respondent to demonstrate on the balance of probabilities that such a conclusion was justified on the grounds of public policy, public security or public health.

8. Having considered the submissions made in writing on his own behalf by the appellant, and all the documents in the case I am satisfied that there was a material error of law in Judge Hutchinson's determination such that his decision must be remade. Nowhere in this decision does the judge set out his reasons for considering that if granted admission this appellant would represent a "genuine, present and sufficiently serious threat" to one of the fundamental interests of this country. The furthest the judge goes is finding that he is not satisfied that the appellant had carried out all the checks that he ought to have carried out. On its own, that is an insufficient basis for concluding that allowing him to enter the country in the future would create a sufficiently serious risk that he should be excluded. The judge also failed to consider at all the fact (and this was in the papers before him) that the Border Force had taken what is stated on its face to be an "exceptional" decision not to impose any penalty on him for his conduct. He was written to by the Border Force in the following terms:

> "Further to an incident that took place on 03/11/15 at UK control zone in Calais, when twelve clandestine entrants were discovered concealed in [your lorry], of which you were the driver, it has been exceptionally decided that no penalty should be imposed on you on this occasion".

9. Later in the letter it is said that the procedures whereby the Border Force may impose a civil penalty "when a driver and/or company fails to have an

effective system to protect vehicles from being used by clandestine entrants" and so on, "are designed to target only those who have been negligent". It is in my judgment a reasonable inference from this letter that the Border Force formed the view that the behaviour of this appellant on this particular occasion was not sufficiently negligent to justify the imposition of any fine. Certainly this is a matter which should at least have been considered by the judge.

10. I consider that I can myself dispose of this appeal because in my judgment on the basis of the material before me, the respondent has simply not made out a case that this appellant represents a sufficiently genuine present or serious threat to the fundamental interest of society (which of course must include preventing illegal immigration) as to justify excluding the appellant on grounds of public policy or public security. The highest that this case can be put is that this appellant was insufficiently attentive on one particular occasion to the security of his lorry and although he carried out some checks did not carry out enough to ensure that illegal entrants did not gain admission to his lorry. There is no evidence presented that this was other than an isolated occasion and indeed the only evidence which this Tribunal has seen tends to suggest the Border Force regarded the culpability of this appellant as so minimal as to justify exceptionally not imposing any separate penalty.

11. In these circumstances, it follows that the appellant's appeal must be allowed and I so find.

Decision

The decision of First-tier Tribunal Judge Hutchinson, dismissing the appellant's appeal is set aside and the following decision is substituted:

The appellant's appeal is allowed under the European (EEA) Regulations 2006.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 7 June 2017