



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/08160/2017

THE IMMIGRATION ACTS

Heard at Field House
On 29 October 2018

Decision & Reasons Promulgated
On 7 November 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHRISTIAN LEISTER
[NO ANONYMITY ORDER]

Respondent

Representation:

For the appellant: Mr A McVeety, a Senior Home Office Presenting Officer
For the respondent: No appearance or representation.

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against his decision to refuse the claimant admission to the United Kingdom pursuant to Regulations 23 and 27 of the Immigration (European Economic Area) Regulations 2016. Admission was refused, and removal directions given, on 15 September 2018.

The EEA Regulations 2016

2. Regulation 23 of the 2016 Regulations excepts from the automatic right of admission certain categories of person. In relation to the present claimant, the exception is to be found in Regulation 23(1):

“23.—(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.”

3. Regulation 27, so far as relevant here, is as follows:

“Decisions taken on grounds of public policy, public security and public health

27.—(1) In this regulation, a “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) 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.).”

4. Schedule 1, so far as relevant, is as follows:

“Considerations of public policy and public security

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA

agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time. ...

The fundamental interests of society

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include – ...

- (b) maintaining public order;
- (c) preventing social harm; ...
- (i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;
- (j) protecting the public; ...
- (l) countering terrorism and extremism and protecting shared values.”

5. That is the statutory regime against which this decision to exclude falls to be considered.

Background

6. The claimant is a citizen of Germany. He and a number of other persons arrived at Stansted Airport on a flight from Berlin on Friday 15 September 2017, seeking to attend a music concert in Birmingham called Blood and Honour, in honour of the late Ian Stuart Donaldson, due to take place on the third weekend of September, to mark the 25th anniversary of Mr Donaldson’s death on 23 September 1993. Ian Donaldson was the lead member of Skrewdriver, a far right extremist music group whose songs and materials incite racial hatred.

7. The Secretary of State has provided documents from the Skrewdriver and Combat 18 website, setting out the aims of these organisations, including excerpts from a Field Manual on the Skrewdriver website, which is headlined ‘Combat 18, Blood & Honour’. The Manual is dedicated to the late George Lincoln Rockwell and Ian Stuart Donaldson. Chapter 2, headed Organization, sets out the structure of Ian Stuart Donaldson’s Blood and Honour movements in the United Kingdom and abroad:

“As a rule, the Blood & Honour movement is organised as a network, which activities to a large extent is based on leaderless resistance. (The exception being Germany, where – probably for ethnic and cultural reasons – the B&H comrades have chosen the classic and traditional organisational structure, with officials and membership). ... The purpose of the Blood & Honour movement must be to attract and activate young Whites through White Power music and other White Pride cultural activities, along National Socialist Political guidelines. These followers should then be led into existing political parties/organisations of the NS kind. Where no such groups exist, the B&H should either create its own, or continue working solely through the B&H apparatus. Despite its flaws, the network model is still the best and proven alternative. No self-styled ‘leaders’, no membership cards: guided forward by an elite of active idealists and united by a common bond of purpose and goal. ...”

8. Another document sets out the aims of the linked organisation, Combat 18. It is a profoundly unpleasant list:

1. To ship all non-whites back to Africa, Asia, Arabia, alive or in body bags, the choice is theirs.
2. To smash the IRA and anyone else who kills British Squaddies and civilians. There are NO legitimate targets!
3. To execute all Queers.
4. To execute all white race mixers.
5. To weed out all Jews in the government, the media, the arts, the professions. To execute al Jews who have actively helped to damage the white race and to put into camps the rest, until we find a final solution for the eternal Jew.
6. To form a white commonwealth containing Europe, America, Canada, South Africa, Australia etc.
7. the building up of our Armed Forces.
8. To stop killing white babies before they are even born and return to traditional family values.
9. To make Britain as self-sufficient as possible, by wresting back control of our national assets, and in vesting in British industry, banning foreign imports and only trading with like-minded white countries. To go and plunder whatever raw materials we require from Africa, Asia, etc.
10. To hang all rapists and child molesters, after chopping their bollocks off.
11. To re-educate and reintroduce decent white values and promote a healthy white community free from Jewish poison and phoney ideas of 'freedom' and 'democracy'."

9. Combat 18 and Blood & Honour organise the concerts which the claimant wished to attend in September 2018.

Evidence before the First-tier Tribunal

10. The evidence before the First-tier Tribunal consisted of the Border Force officer's statement and a transcript of the notebook of an officer from the Essex Counter-Terrorism Police, who did not interview the claimant but another member of the group of 10 persons who travelled to Stansted from Berlin on the day in question. The Counter-Terrorism police officer says that part of his role within the unit is to monitor the threat posed by individuals linked to domestic extremism, including those associated with extreme right-wing activity.
11. The Counter-Terrorism police had been provided with intelligence identifying those likely to attend the September 2018 Skrewdriver concert, and had a list of 10 names of persons who were said to be suspected of extreme right-wing activities and sympathies. The list included this claimant. They were to be stopped, to obtain an account of their intentions whilst in the United Kingdom. All 10 were apprehended at Stansted Airport, spoken with by Border Force, and detained for further enquiries.
12. The Counter-Terrorism police officer's statement records an interview with another member of the group, Thomas Hempel, who confirmed that he had come to attend the

concert as part of the same group of 10 arriving from Germany. Mr Hempel admitted that he had been to two or three previous Ian Stuart Donaldson memorial concerts. The location of the concerts is not given out in advance, making it more difficult for the police to interrupt and close them down. Mr Hempel asked where the claimant was, and confirmed that the claimant was one of those who was going to attend the concert on the next day. Mr Hempel said that he did not yet know where the concert was, but that 'my friend will let me know'.

13. The statement of a United Kingdom Border Force Officer at Stansted airport says that officers from Essex Police Counter Terrorism Division apprehended the claimant on entry as they were satisfied that he had the intention to attend the banned extreme right-wing concert, which was known to have been planned for somewhere in the United Kingdom over the weekend of 15-17 September 2017.
14. The Border Force Officer interviewed the claimant, who was reluctant to answer questions. The Border Force Officer did not consider that the claimant was telling the truth. Describing the risk from those attending the concert, the Border Force Officer said this:

“6. These types of events are known to use the music scene to provide an international stage to exploit the ideological beliefs of the Far Right, enabling the open preaching of different hate messages, often without any law enforcement interference. Attendance at these events has been linked to public disorder, acts of violence, and in extreme cases, direct acts of terrorism. One such group, known as 'Blood and Honour' is engaged in the distribution of extreme material and racist ideology via websites, magazines and other literature, particularly through the lyrics of the 'white power' music scene. ...

12. The appeal also confirms that the concert went ahead unhindered and equally has taken place every year since 1994. The 'Ian Donaldson Memorial Concert' was not granted a licence to operate and therefore any event taking place or otherwise, under the auspices of being this type of event, is therefore illegal, regardless of whether there were any specific instances of breaching any of the fundamental interests of society. ...”

15. The claimant was refused leave to enter on the basis that the Border Force Officer believed that he planned to attend the concert and that therefore his planned activities while in the United Kingdom presented a serious threat to the fundamental interests of society and were likely to incite tensions between local communities here. Removal directions were set for 1900 hours on 15 September 2017 and the claimant was removed to Germany.

Appeal to First-tier Tribunal

16. The claimant appealed to the First-tier Tribunal through his German legal representative, Rechtsanwalt Alexander Heinig. The basis of the appeal is summarised in Herr Heinig's covering letter:

“As stated in [the appeal form], my client did not seek immigration into the United Kingdom but only wanted to spend a weekend there.

As cause for his refusal of admission, it is stated in the immigration decision that he wanted to attend a memorial concert for Ian Stuart Donaldson and that this activity would bear a serious threat to the fundamental interest of society and is likely to incite tensions between local communities in the United Kingdom.

Even assuming that it is true that my client wanted to attend this concert, the decision is not consistent with the action of the authorities concerning that concert in general. The concert was not stopped by the police or other authorities and went ahead. If such a concert would really be a threat to the fundamental interest of the British society, or were likely to incite tensions between local communities in the United Kingdom, this would certainly be cause enough to stop such an event. In spite, the concert went ahead unhindered. ...this sort of concert has taken place every year since 1994 and has never caused any tensions between local communities in the United Kingdom.

In truth, the decision is simply based on the assumed political beliefs of my client and is therefore unconstitutional and a violation of his personal freedom.”

17. The claimant had visited the United Kingdom before, and intended to do so again.

First-tier Tribunal decision

18. The First-tier Tribunal considered the appeal on the papers, neither party having arranged representation. The Judge noted the evidence from the Border Force officer that the claimant had denied any involvement with far-right extremist groups. The claimant had not admitted that he intended to attend the concert, but the Immigration Officer did not believe his denial and was satisfied that the claimant intended to attend an extreme right-wing concert while in the United Kingdom. The memorial concert had not been granted a licence to proceed and was an illegal event.

19. The claimant relied on an unreported Upper Tribunal decision in the appeal of Niela Kremtz (the *Kremtz* decision) in March 2018. Upper Tribunal Judge Blum concluded in that case that the decision of the First-tier Tribunal was unsafe, and remade the decision in favour of that appellant, finding on the facts, that there was no evidence that that appellant’s presence at the concert was likely to incite community tensions in the United Kingdom or that the appellant in that matter intended to foster international links between extremist groups.

20. In this appeal, the First-tier Judge was not satisfied that the decision taken by the Immigration Officer was based exclusively on the personal conduct of the claimant or that the claimant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, recognising that the threat did not need to be imminent. The First-tier Judge found as a fact that the claimant did indeed intend to attend an illegal concert, along with 9 other individuals arriving on that

Berlin flight. However, he did not accept the evidence of the Border Force officer that the claimant would use the concert as an opportunity to express or support extremist groups, nor that there were any 'planned activities' beyond attendance.

21. The First-tier Judge allowed the claimant's appeal.

Permission to appeal

22. The Secretary of State sought permission to appeal, reminding the Upper Tribunal that the government's Prevent (2011) and Counter Terrorism (2018) strategies state that 'intelligence indicates that [the risk of] a terrorist attack in our country is SEVERE and highly likely and that the threat is large, multifaceted, diverse and evolving'. The Secretary of State relied on the 5 terrorist attacks in the United Kingdom in 2017 and stated that four far right extremist plots had been disrupted in 2017. Refusal of entry to the claimant was necessary and lawful.

23. Evidence of 'planned activities' was beyond the evidential remit in this appeal: the Secretary of State should be permitted to take imperative preventative measures to mitigate against any threat from extremism and any intelligence, however limited, must be given due regard, to protect public safety. The Secretary of State submitted with her grounds of appeal further intelligence from Border Force which has been set out above.

24. The Secretary of State's grounds argued that evidence from the Essex Counter-Terrorism police officer and the Border Force officer should have been given determinative weight, and that the fact that the proposed event was unlawful should be taken into account when considering its having been able to proceed unhindered:

"10. ...regarding the threat of extremist activity and radicalisation to and from those attending the concert. It is submitted that from the Blood and Honour excerpt [paragraph 15] it could be considered that there is a clear intention to radicalise 'white youth'. The ideology of Blood and Honour and Combat 18 needs to be understood when considering appropriate action at the United Kingdom border and it is respectfully submitted that the First-tier Judge has failed to have due regard to the public interest to do so.

11. In addition, the lyrics of songs performed at such events as the Ian Stuart Donaldson Memorial Concert certainly reflects extremist and Nazi ideology. Whilst some individuals may be seeking to enter the United Kingdom to attend such events, perhaps for the first time and unaware of the actual content, it is reasonable to conclude that most visiting individuals to such events openly display their support for neo-Naziist [sic] ideologies, may with tattoos such as 88, representing the eighth letter of the alphabet twice, HH i.e. Heil Hitler, or 18 as in Combat 18, AH=Adolf Hitler. Such ideologies run counter to the fundamental interests of society and such individuals are clearly not those whose entry, if facilitated to the United Kingdom, is conducive to the public good."

Permission to appeal

25. Permission was granted by First-tier Judge PJM Hollingworth, who considered that it was 'arguable that the Judge has attached insufficient weight to the factors bearing upon public policy and has introduced requirements going beyond that which has to be demonstrated'.
26. First-tier Judge Hollingworth also granted permission on the basis that it was arguable that a differing interpretation could be attached to the available evidence. That is not a proper basis for a grant of permission to appeal: in order for the Upper Tribunal to interfere with a finding of fact or the weight given to evidence, there must be more than the possibility of a different interpretation (see Lord Justice Brooke at [90] in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982).
27. I consider this appeal therefore only on the basis of the weight to be given to public policy factors and whether the Judge introduced requirements going beyond the provisions of the 2016 Regulations.

Rule 24 Reply

28. There was no Rule 24 Reply on behalf of the claimant, and he did not arrange for representation at the hearing today.
29. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

30. In the absence of any Rule 24 Reply or submissions from the claimant, or any attendance by him, Mr McVeety relied on the Secretary of State's grounds of appeal.

Discussion

31. At the hearing, I indicated that in the absence of any representation by the claimant, I was likely to allow the Secretary of State's appeal and set aside the decision of the First-tier Tribunal. I reserved my decision, and it is the written decision which is the decision of record.
32. In preparing my decision, I have reluctantly come to the conclusion that despite the unsavoury nature of the organisation which is behind this annual concert, the Secretary of State has failed to show that the *personal* conduct of this claimant constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, by reference to his own past or intended actions.
33. In reaching that conclusion, I have considered the evidence which was before the First-tier Tribunal. The claimant was identified on a list of 10 persons of interest to Essex Police Counter Terrorism Division based at Stansted airport because of their proposed attendance at this event. The evidence before the First-tier Judge consisted of a witness statement from a Counter-Terrorism police officer, relating to an interview of someone else, not this appellant, and one from a Border Force officer which took the

listing of this claimant by the Counter-Terrorism police as determinative of the right of exclusion.

34. In *Arranz* (EEA Regulations-deportation-test) [2017] UKUT 00294 (IAC) the Upper Tribunal held that the burden of proof that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society is on the Secretary of State, to the standard of balance of probabilities.
35. In *Secretary of State for the Home Department v Robinson* (Jamaica) [2018] EWCA Civ 85, Lord Justice Singh (with whom Lord Justice Underhill and Lord Justice Lindblom agreed), the Court of Appeal considered the *Bouchereau* exception as it applies to deportation, rather than exclusion from entry. At [84]-[86], Singh LJ said this:

“84. ... Although the CJEU did not expressly refer to *Bouchereau* with approval in *CS*, nor it did in terms overrule it or depart from it. Further, there is no reason, in my view, to regard the two decisions as being necessarily inconsistent with each other. This is because, as I have said in my earlier analysis of *Bouchereau*, that case itself recognised that what one is looking for is a present threat to the requirements of public policy; but it also recognised that, in an extreme case, that threat might be evidenced by past conduct which has caused deep public revulsion.

85. However, with all of that said, I am also of the view that the sort of case that the ECJ had in mind in *Bouchereau*, when it referred to past conduct alone as potentially being sufficient, was not the present sort of case but one whose facts are very extreme. It is neither necessary nor helpful to attempt an exhaustive definition but the sort of case that the court was thinking of was where, for example, a person has committed grave offences of sexual abuse or violence against young children.

86. I would not wish to belittle the seriousness of the offence in the present case but it is not the sort of offence in which public revulsion at a past offence alone will be sufficient. I note that, in *Straszewski*, Moore-Bick LJ referred to "the most heinous of crimes" at para. 17. That gives an indication of the sort of offence the ECJ had in mind when it said that a past offence alone might suffice. I also note that, in *ex p. Marchon*, the defendant was convicted of an offence of conspiracy to import 4½ kg of a Class A drug (heroin); he was a doctor; and he was sentenced to 11 years' imprisonment. As Moore-Bick LJ observed in commenting on that case in *Straszewski*, at para. 18, the offence had been described by this Court in *ex p. Marchon* as being "especially horrifying" and "repugnant to the public" because it had been committed by a doctor. In contrast, as the UT noted at para. 28 of its judgment in the present case, the sentence of 30 months' imprisonment that was imposed on this Respondent was at the lower end of the scale for offences of supplying Class A drugs."

There is no suggestion that the present claimant or any other member of the 10-person group detained and questioned at Stansted airport have any previous conviction which could engage the provisions of Regulation 27(5).

36. The question of the requirement in Regulation 27(5) for personal conduct also arose in the *Kremtz* decision in March 2018. That decision is not a reported decision. There has been no application for permission to rely upon an unreported decision but as the claimant is represented by a German lawyer, I do not take that point against him. Judge Blum considered that Mr Kremtz was intending to do no more than attend a neo-Nazi music concert, with no evidence that he intended to foster international links between extremist groups. The Upper Tribunal allowed the *Kremtz* appeal, finding that the Secretary of State had not discharged the duty on him of showing personal conduct which presented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
37. I have considered whether the First-tier Judge in this appeal correctly applied Regulation 27(5) to the facts of this application. The First-tier Judge found that the claimant came to the United Kingdom to attend an illegal concert and accepted the evidence of the Counter-Terrorism police that all 10 of the group on their list were intending to do so. The matters advanced in the grounds of appeal are matters of general prevention. Nothing in the materials before me refers to the claimant's *personal* conduct, past or future, save for his intention to attend the illegal concert. The Secretary of State has not asserted that mere attendance at an illegal event is a criminal offence. He has provided no evidence of past occurrences at these concerts, which might indicate future problems, or of this claimant's other personal conduct.
38. The evidence before the First-tier Tribunal did not identify why, other than their attendance at the concert, the Counter-Terrorism police were interested in these individuals. It may well be that the Counter-Terrorism police, or indeed the security services, have more information specific to this claimant than appears in the materials before me. If that is the case, then in order to discharge the burden of proof upon the Secretary of State, the gist thereof should have been made available to the Judge.
39. The Secretary of State's evidence in this appeal comes to this: that the Counter-Terrorism police are satisfied that this claimant and his 9 colleagues present a risk, and that the Tribunal must take the police's word for that. That is not enough. Reluctantly, in view of the nature of the organisation and its aims, I conclude that the Secretary of State had not discharged the burden upon him of showing why he considered that this claimant's conduct in attending the Ian Stuart Donaldson memorial concert, or any other conduct which the Secretary of State considered he would commit while in the United Kingdom, would incite local tensions or cause criminal offences to be committed.
40. The decision of the First-tier Judge was open to her on the evidence and the respondent's grounds of appeal disclose no material error of law therein.
41. This appeal is therefore dismissed.

DECISION

42. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Date: 29 October 2018

Signed [Judith AJC Gleeson](#)
Upper Tribunal Judge Gleeson