Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00263/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 February 2022	**On 17 March 2022**

Before

THE HON. MRS JUSTICE FOSTER,
SITTING AS A JUDGE OF THE UPPER TRIBUNAL

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A K
(ANONYMITY DIRECTION MADE)

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent: Mr M Moriarty, Counsel, instructed by Duncan Lewis Solicitors

DECISION AND REASONS

Introduction

1. For ease of reference, we shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is once more "the Respondent" and A K is "the Appellant".

2. This is an appeal brought by the Respondent against the decision of First-tier Tribunal Judge Pooler ("the judge"), promulgated on 25 March 2020. By that decision, the judge allowed the Appellant's appeal against the Respondent's decision, dated 15 April 2019, refusing to revoke a deportation order made on 11 January 2017 pursuant to the Immigration (European Economic Area) Regulations 2016 ("the Regulations").

3. The Appellant is a citizen of Poland and of Roma ethnicity, born in 1980. He arrived in United Kingdom in 1997. An asylum claim was made in 2002. This was refused and a consequent appeal dismissed. Between 2003 and 2020, the Appellant accrued an extensive history of offending in this country. Convictions for theft from the person in 2016 led the Respondent to initiate deportation proceedings. A deportation order was made on 11 January 2017 and the Appellant was deported to Poland on 10 February of that year. In January 2018, he re-entered the United Kingdom in breach of the deportation order with the assistance of his mother. An application to revoke the deportation order was made in March 2018. The refusal of this resulted in the appeal to the First-tier Tribunal with which we are now concerned.

4. During much of his residence in this country the Appellant had suffered from drug addiction, a factor that had been linked to his offending. In addition, he had been diagnosed with schizoaffective disorder and had been assessed as having significant cognitive impairment, placing him in or around the bottom 0.2% of individuals in his age cohort. The Appellant had family members in this country from whom he had obtained some support in addition to that provided by relevant medical professionals.

5. In rejecting the Appellant's application to revoke the deportation order, the Respondent concluded that he had not acquired a permanent right of residence in United Kingdom, that his offending demonstrated an established pattern of anti-social behaviour, that he represented threat of harm to the public, and that the enforcement of the extant in order would be proportionate.

The decision of the First-tier Tribunal

6. The judge had an extensive body of evidence before him amounting to over a 1000 pages. This largely comprised documents arising from the offending history (PNC printouts, OASys reports, and letters from Probation Officers) and medical evidence (letters from treating clinicians,

confirmation of periods of admission under the Mental Health Act, and detailed reports from psychologists and psychiatrists).

7. Having summarised this evidence at [12]-[32], the judge set out the relevant provisions of the Regulations at [33]-[35]. At [37] he found that the Appellant had not acquired a permanent right of residence in this country and so was subject to only the lowest level of protection under the Regulations. He concluded that the Respondent had demonstrated that the Appellant represented a genuine, present and sufficiently serious threat affecting a number of the fundamental interests of society, accepting evidence to the effect that there was a medium risk of harm to the public and his father and a high risk of future violent reoffending: [41]-[43].

8. The judge moved on at [44]-[51] to consider the non-exhaustive factors set out in regulation 27(6) of the Regulations. The length of residence in United Kingdom was not given significant weight. The Appellant's parents had provided him with "a degree of support." The judge found it to be "probable" that the Appellant had no relatives in Poland. The reliance on state benefits in this country was recognised, as was his partial financial dependency on his parents. There was "little, if any" evidence of social and cultural integration in the United Kingdom. In respect of Poland, the Appellant's nationality and linguistic ability was referred to, as was the fact that his only period of residence since leaving that country in 1997 had resulted in a deterioration of his mental health to the extent that he was admitted to hospital prior to re-entering the United Kingdom in early 2018.

9. The Appellant's mental health and cognitive impairment were then addressed. The diagnosis of schizoaffective disorder was accepted, this being described as a chronic and enduring condition. The judge found that the Appellant was receiving antipsychotic and mood stabilising medication, had been placed in supported accommodation, and that the care package included daily support from staff at the accommodation, key worker sessions, regular input from a care coordinator and a drug and alcohol worker, and access to a psychologist: [52]. The very significant cognitive impairment was alluded to at [53]. A psychiatrist had assessed the Appellant as having a Full Scale IQ of 57, placing him in the extremely small minority of individuals referred to earlier in our decision.

10. At [54] the judge re-stated his findings that the Appellant was not socially and culturally integrated in United Kingdom and that he represented a genuine-present and sufficiently serious threat affecting the fundamental interests of society. Importantly, for the purposes of our decision, at that stage he also found that the Appellant had been unable to demonstrate a reduction in the threat posed by virtue of any rehabilitation.

11. The remaining passages of the judge's decision focus on the issue of proportionality, a mandatory consideration under regulation 27(5)(a) of the Regulations. He began with what he described as "weighty factors" on the Respondent's side of the scales. With reference to what had already been said, the matters included: the existence of the threat to the interests of

society; the pattern of offending both before and after deportation; the risk of future violent offending if there was a relapse, inadequate support or medication, or the use of drugs; the absence of social and cultural integration; the problematic relationship with his parents; and the ability to speak Polish.

12. Against this, the judge took account of the Offender Manager's views that the offending had not escalated in seriousness, the presence in this country of the only meaningful familial relationships, and the Appellant's mental health and cognitive ability. In respect of this final consideration, the judge said the following at [58]-[62]:

> "58. Taking the evidence as a whole and acknowledging, as I do, the weighty arguments in favour of deportation, I am nevertheless persuaded that the evidence relating to mental health and learning disability is such as to render the decision disproportionate.
>
> 59. The appellant now has in place a care plan which is designed to distance him from his parents and to provide him with very high levels of support. This support is designed to ensure that the appellant takes his prescribed medication, preventing a relapse of his mental health and to increase visibility to resist the use of illicit drugs. He has been moved to an area away from his former drug taking associates and has the assistance of a drug and alcohol worker. He is living in supported accommodation where staff are on hand 24 hours a day to provide help and support.
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> 60. Without the support which is offered to him in the UK, the appellant would, in the opinion of Dr Preston, be unable to care for himself on return to Poland. Indeed, the history clearly indicates that the appellant was unable to maintain his mental health when he was deported in 2017. His mental health deteriorated such that he was admitted to hospital in Poland and, on his return to the UK, he required another lengthy hospital admission.
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> 61. Not only does the appellant suffer from a serious underlying mental illness but also he has a learning disability and has, as a result, extreme difficulties with intellectual functioning. There was no challenge to the compelling expert evidence.
>
> 62. The measure of the appellant's disabilities could barely be more extreme yet only in 2021 do they appear to have been fully assessed. His high degree of vulnerability has now been recognised, and appropriate care plan has been put in place and he has the level of support which has been recognised as necessary by the Care Act assessment."

13. The appeal was duly allowed.

The grounds of appeal and grant of permission

14. The Respondent's challenges to the judge's decision all fall under the heading entitled "Failing to give adequate reasons for findings on a material matter." It was said that there were "no family reasons" as to why deportation would be disproportionate. In respect of the Appellant's health, there was reference only to the schizoaffective disorder and it was asserted that the judge failed to consider what medical treatment might be available for that condition in Poland. Further, the grounds alleged that the judge failed to consider the Appellant's reliance on public funds, that the finding on the absence of relatives in Poland was inadequately reasoned, and that inadequate consideration had been given to the breach of the deportation order.

15. Permission to appeal was granted by the First-tier Tribunal on all grounds.

16. Prior to the hearing, Mr Kotas provided a skeleton argument and Mr Moriarty a rule 24 response. We are grateful for these helpful written submissions.

The hearing

17. Mr Kotas relied on the grounds of appeal and his skeleton argument. The central thrust of his submissions was that the judge had based his decision "almost exclusively" on the issue of rehabilitation - the Appellant's offending and mental health condition being "bound-up together" - and that there had been no proper consideration of what treatment would be available in Poland. Linked to this error was the fact that the Appellant could only rely on the lowest level of protection under the Regulations. In such cases, rehabilitation should not be afforded significant weight in the proportionality assessment, with reliance being placed on what was said in Dumliauskas [2015] EWCA Civ 145: [2015] Imm AR 773, at paragraph 54. The judge's decision was flawed on this basis alone, but Mr Kotas also maintained reliance on the other matters set out in the grounds and relating to public funds, the finding on relatives in Poland, and the breach of the deportation order.

18. Mr Moriarty relied on his rule 24 response. This, combined with his oral submissions, put forward the argument that the judge had not considered the case on the basis of rehabilitation as that term is normally understood, but had instead taken a cumulative view of the Appellant's circumstances, in particular the mental health condition and significant cognitive impairment, and had reached sustainable conclusions. The Respondent's challenge overlooked the cognitive impairment and failed to acknowledge what had happened to the Appellant when he was deported to Poland in 2017. Beyond this, the judge was cognisant of the Appellant's reliance on public funds and his re-entry in breach of the deportation order. The judge's finding on the absence of relatives in Poland had been open to him.

19. At the conclusion of the hearing we reserved our decision.

Conclusions on error of law

20. We have concluded that there are no material errors of law in the judge's decision and that the Respondent's appeal must be dismissed. Before setting out our reasons for this conclusion, we make the following general points.

21. First, we remind ourselves of the need for appropriate restraint before interfering with a decision of the First-tier Tribunal, bearing in mind its task as primary fact-finder on the evidence before it, allocator of weight to relevant factors, and overall evaluator within the applicable legal framework. Exhortations to this effect have emanated from the Court of Appeal on numerous occasions in the last few years: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31 and AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41.

22. Second, we must read the judge's decision sensibly and holistically.

23. Third, it is important to appreciate what had not been challenged before the judge. In particular, there had been no dispute as to the substance of the voluminous and comprehensive medical evidence adduced on the Appellant's behalf.

24. With the above in mind, we turn to the central aspect of the Respondent's challenge, namely that of rehabilitation (we note in passing that this issue is not clearly identified in the grounds of appeal, but their content provides a sufficient link to the position taken by Mr Kotas).

25. In our judgment, the judge's overall conclusion on proportionality was not in truth based wholly, mainly, or indeed at all, on rehabilitation, as that term is properly understood in the context of deportation.

26. That context strongly implies that rehabilitation relates to ongoing efforts to prevent, or at least reduce, the risk of re-offending. Whilst an individual's mental health may be linked to offending, it is not the case that treatment relating to the former is coterminous with rehabilitative steps concerning the latter. We do not read what is said in Dumliauskas as requiring, as a matter of law, a judge to always consider health as part and parcel of a consideration of the rehabilitation of an offender. The reference at paragraph 48 of the judgment to rehabilitation being "not infrequently linked" to an offender's health is only really a recognition of common experience. It does not preclude a judge from legitimately delineating the two issues, depending on the facts of an individual case. Indeed, the Court's observation implicitly recognises a distinction between rehabilitation and health.

27. In the present case, the judge clearly recognised the existence of the risk of re-offending and, by implication, the risk of causing serious harm to others. At [54] he expressly found that there was no substantive evidence of rehabilitative progress such as to reduce the risk. In our judgment, this is a clear indication that he was addressing the issue of rehabilitation at that stage, prior to and separate from, the proportionality exercise which he then went on to undertake. Our view is supported by the fact that in the operative passages of the decision relating to proportionality, there is no mention of rehabilitation in the context of re-offending.

28. Mr Kotas referred us to [32] of the judge's decision as an indicator of his reliance on rehabilitation as the basis for his overall conclusion in the case. We disagree with that analysis. The passage in question refers to a psychiatrist's opinion that the supported accommodation offered an opportunity "to escape this cycle of relapse." It did not expressly refer to rehabilitation as such.

29. In light of the foregoing, we are satisfied that the judge did not err in respect of the approach to rehabilitation and proportionality. In particular, he did not place significant weight on rehabilitation in a case in which the Appellant could rely only on the lowest level of protection under the Regulations: see Dumliauskas, at paragraph 54. No weight was attributed to rehabilitation under the proportionality exercise. In this regard, the Respondent has mischaracterised the basis of the judge's decision.

30. Even if it were to be said that the judge had implicitly placed weight on rehabilitation within that exercise, it is clear to us that it was only counted *against* the Appellant. The high risk of future violent offending was stated to be a "weighty factor" in favour of deportation: see [56]. Thus, the point relied on by the Respondent would take her case no further.

31. An interconnected strand of Mr Kotas' submissions was the absence of consideration of available medical facilities/treatment for the Appellant's mental health condition in Poland. We reject this argument for three principal reasons.

32. First, the Respondent's case has, in our view, repeatedly overlooked the fact of what was described by the judge as "extreme difficulties" with cognitive functioning. The unchallenged "compelling expert evidence" clearly painted a very bleak picture for the Appellant were he to find himself in a position without the comprehensive care package in place in the United Kingdom. That package comprised a range of support going beyond psychiatric/psychological intervention: it included relevant assistance relating to his cognitive impairment and a degree of input from his parents, notwithstanding the past difficulties in that relationship. In this regard, we agree with Mr Moriarty's reference in his rule 24 response to "a range of cumulative factors" having been taken into account by the judge. Having read the underlying expert evidence for ourselves, the judge was fully entitled to conclude that the Appellant's overall disabilities "could barely be more extreme".

33. Second, and unusually, there was a firm evidential basis for what might confront the Appellant were he to be deported to Poland. This came in the form of what had transpired when he was deported in 2017. At [60] the judge referred to the evidence from Dr Preston, whose opinion it was that the Appellant would not be able to care for himself if removed to Poland. The judge was plainly entitled to link this prospective assessment with what had happened in the past. The hospitalisation in Poland is mentioned, but the underlying evidence (in respect of which the judge was undoubtedly cognisant) provided greater detail: the Appellant had had no form of support: had disappeared for a month; became severely unwell; could not speak once admitted to hospital; and, put shortly, had ceased to function in any meaningful sense.

34. Whilst the judge did not state in terms that a similar fate was likely to face the Appellant if deported again, it is in our view implicit in the judge's assessment at [58]-[62]. Reading his conclusions sensibly and holistically, the existence of certain facilities in Poland had been taken into account (with reference to the previous hospitalisation), but past events were deemed to be a good indicator of the future. It was open to the judge to conclude, in effect, that a repetition of these events was a significant factor in the Appellant's favour, notwithstanding the availability of at least some "treatment" in Poland.

35. Third, it is apparent from the overall tenor of the judge's conclusions, in particular those expressed at [62], that he regarded this case as being highly exceptional. On the evidence before him, this was a view to which he was entitled.

36. We now turn to the remaining elements of the Respondent's challenge. We are satisfied that the judge was aware of, and took into account, the Appellant's reliance on public funds, the lowest level of protection under the Regulations, and the fact that he re-entered the United Kingdom in breach of the deportation order. The first of these factors is specifically mentioned at [48] and is implicit in what is said at [56]. The second is addressed at [37], wherein the judge expressly acknowledged that the Appellant could not rely on the medium or higher thresholds under the Regulations. In respect of the third, it is quite clear that the judge was cognisant of the Appellant's immigration history and his offending after re-entering United Kingdom is referred to at [56]. We would be slow to conclude that the judge had simply overlooked matters which were not only before him on the face of the evidence, but to which he had actually referred in his decision.

37. A final point taken by the Respondent, but not expressly referred to by Mr Kotas at the hearing, relates to the judge's finding that the Appellant had no relatives in Poland. This finding was clearly open to the judge. As noted at [47], the Appellant's evidence on this had gone unchallenged.

38. In summary, we reject all aspects of the Respondent's challenge in respect of what was, on any view, a highly fact-specific and exceptional case. There is no proper basis for us to interfere with the judge's decision.

Anonymity

39. The First-tier Tribunal made an anonymity direction. Whilst reasons for this were not provided, we assume that it was on the basis of the Appellant's significant vulnerability on account of his mental health condition and cognitive impairment. The public interest in open justice is very significant. However, in the particular circumstances of this case, we are satisfied that the maintenance of the anonymity direction is appropriate.

Notice of Decision

40. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision shall stand.

41. The appeal to the Upper Tribunal is dismissed.

Signed: H Norton-Taylor Date: 24 February 2022

Upper Tribunal Judge Norton-Taylor