Upper Tribunal
(Immigration and Asylum Chamber)

VV (grounds of appeal) Lithuania [2016] UKUT 00053 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 October 2015	
Oral judgment delivered on 27 October 2015	

Before

THE HONOURABLE MR JUSTICE HOLGATE

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

S ECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VV

(ANONYMITY DIRECTION MADE)

Respondent

Representation :

For the Appellant: Ms A Brocklesby-Weller, Home Office Presenting Officer

For the Respondent: Mr J Plowright, Counsel instructed by Kent Immigration and Visa Advice

(1) An application for permission to appeal on the grounds of inadequacy of reasoning in the decision of the First-tier Tribunal must generally demonstrate by reference to the material and arguments placed before that Tribunal that (a) the matter involved a substantial issue between the parties at first instance and (b) that the Tribunal either failed to deal with that matter at all, or gave reasons on that point which are so unclear that they may well conceal an error of law.

(2) Given that parties are under a duty to help further the overriding objective and to co-operate with the Upper Tribunal, those drafting grounds of appeal (a) should proceed on the basis that decisions of the First-tier Tribunal are to be read fairly and as a whole and without excessive legalism; (b) should not seek to argue that a particular consideration was not taken into account by the Tribunal when it can be seen from the decision read fairly and as a whole that it was (and the real disagreement is with the Tribunal's assessment of the evidence or the merits); and (c) should not

challenge the adequacy of the reasons given by the First-tier Tribunal without demonstrating how the principles in (1) above have been breached, by reference to the materials placed before that Tribunal and the important or substantial issues which it was asked to determine in that particular case.

(3) Where permission to appeal is granted, an Appellant should review whether the grounds of appeal are genuinely arguable in the light of any response from the Respondent to the appeal. Whether or not the original grounds are pursued, it is generally inappropriate to seek to raise new grounds of appeal close to the date of the hearing if, for example, that would cause unfairness to a Respondent or result in the hearing being adjourned.

DECISION AND REASONS

Introduction

1.
This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal Judge promulgated on 22 December 2014 in respect of an appeal made by VV against a decision to make a deportation order under the Immigration (European Economic Area) Regulations 2006 (" the 2006 Regulations ") . For convenienc e we will continue to refer to the respective parties as Appellant and Respondent as in the Tribunal below. We are satisfied that an anonymity direction should be made as in the First Tier Tribunal.

2.
The Appellant was born on 11 August 1972. He is a national of Lithuania . He claimed to have first entered the UK on 5 March 2005 in order to work. He provided evid ence that he had exercised his T reaty rights as an EEA national. On 8 August 2013 he was convicted of a sexual assault on a female and on 15 September 2013 he was sentenced in the Crown Court to fifteen months' imp risonment. I n the usual way he was required to be registered on the Sex Offenders' Register for ten years and a restriction order was imposed for a period of five years. There was no appeal against conviction or sentence.

3.
On 28 October 2013 the Appellant was served with a liability to deportation notice and the Secretary of State's deportation order followed in due course. In this case the Respondent accepts that the Appellant has acquired a permanent right of residence pursuant to r egulation 15 of the 2006 Regulations. As a consequence the parties and the judge in the First-tier Tribunal proceeded on the basis that it was necessary for the Tribunal to consider whether the " relevant decision " , that is to say the decision to make the deportation order , was justified on "serious grounds of public policy or public security".

The determination of the First Tier Tribunal

4.
In paragraph 6 of his determination the judge quoted extensively from the sentencing remarks of the judge in the Crown Court which need not be repeated here. He referred to the circumstances of the offence at some length betwee n paragraph s 7 and 10 of the decision.

5.
Having summarised the evidence and submissions before him the judge then set out his findings between paragraphs 34 and 47. They fell into two parts.

6.

Paragraphs 34 to 45 set out the judge's findings in relati on to the 2006 Regulations. In paragraph 45 he conclud ed that the Appellant ' s behaviour did not satisfy the "serious grounds of public policy or security " test and hence his appeal should be allowed under those Regulations. The judge plainly demonstrated his understanding that in this case the threshold under r egulation 21 to justify the decision to deport was more demanding than for someone who had not acquired a permanent right of residence.

7.
Having reached that conclusion , the judge took the view that it was unnecessary for him to make formal findings in relation to Article 8 , but he nonetheless set out his views in summary form (see paragraphs 46 to 47). A t paragraph 47 the judge said that he would have found that the removal of the Appellant would not have been proportion ate to the legitimate public aim sought to be achieved by the Respondent , paying particular regard to the best interests of the two children, one aged 14 at the time of the decision and the other aged 8.

8.
Although not raised in the grounds of appeal, it was pointed out at the outset of this hearing by both legal representatives that the proportionality findings made by the judge at paragraphs 46 and 47 should not have been expressed under Article 8 but should instead have been dealt with under the terms of r egulatio n 21 of the 2006 Regulations. However, after some discussion it became common ground that the merits of this appeal do not turn upon this point . Essentially the same issues would have been considered if the judge had expressed his conclusions under the 2006 Regulations. It is not suggested , for example, that in following the course he did the judge failed to take into account a ny consideration which would have been material had he dealt with proportionality under the 2006 Regulations. At o ne stage reference was made to S ection 117 of the Nationality, Immigration and Asylum Act 2002 but it was agreed during argument that that provision would not have been in play for a proportionality assessment made under the 2006 Regulations. Nonetheless , the Secretary of State maintains her legal challenge criticising the way in which proportionality was addressed by the judge.

9.
In paragraph 36 the judge noted that the Appellant had not been convicted of any other offence.

10.
In paragraph 37 the judge set out at some length the circumstances relating to the offence , referring once again to parts of the sentencing remarks. Although it is unnecessary for us to set out those m atters , we do note this sentence :

"Whilst I accept that the offence was out of character and the Appellant was remorseful the starting point is not the Appellant 's subsequent contrition but the fear not to say terror he inflicted upon the victim by his persistent efforts to obtain sexua l gratification over a prolonged period of time from a quite innocent neighbour with whom he had no relationship apart from that of neighbour. I find that the Appellant 's offence was serious."

11.
He then continued between paragraphs 38 to 42 by set ting out in some detail the cross-examination of the Appellant at the appeal hearing about his attitude to the offence, which was significant not least because this sexual offence had caused the victim to suffer significant harm. The judge noted that the Appellant had sought to deflect responsibili ty for the offence and had even gone so far as to suggest that he had simply fallen o n to the victim. It was at that point that the sentencing remarks of the

judge in the Crown Court were read out to the Appellant an d he was asked whether he accepted that the tou ching had been sexual , to which he replied “I would not say it was sexual”. The judg e then contrasted that answer with the quite different account given by the Appellant in his re-examination when he said, “very sorry I have no words to say …. I am remorseful about that”. The judge then gave a very careful assessment of his appreciation of this evidence and the Appellant ’s view of his offending. He referred to the significant inconsistency in the answers , which led him to doubt the genuineness of the remorse. He said that his conclusion was reinforced by the account of the offence set out in the NOMS Report and once again the Appellant ’s re action recorded t here. R esponding to the submissions he had heard, the judge said at paragraph 43 that:

“I am not persuaded in the light of the above that the Appellant has shown remorse for the offence of which he was convicted. He may be remorseful that he finds himself in his present difficulties but I find that he is not remorseful for the behaviour that he inflicted upon the victim.”

12.
The paragraphs which are criticised in this appeal then follow at paragraphs 44 and 45. In paragraph 44 the judge expressed the view that the NOMS Report gave conflicting messages. He then went on to set out correctly his understanding tha t the NOMS Report had concluded that the likelihood of reconviction is in the low category but that was offset or counterbalanced by the conclusion that the risk of serious harm , if further offending were to occur , was in the medium category. The judge expressed the view that that was consistent with the circumstances of the offence and at that point he brought back into his analysis his earlier conclusions about the nature of this offence starting at paragraph 37 of his decision. He then said this, “I find that there is little comfort in knowing that while the risk of re-offending is low, the harm attached to any re-offending is serious”.

13.
Paragraph 45 states:

“Taking these matters together the scales tip slightly but decisively in the Appellant ’s favour. Were it the case that the risk of re-offending was in the medium category it would be possible to conclude that the requirement of serious grounds of public policy had been established but because the risk of re-offending is low it cannot be the case that even with a medium risk of serious harm that the grounds of public policy have not been established. I find that the Appellant ’s behaviour does not come within the serious grounds of public policy and his appeal should be allowed under the 2006 Regulations.”

<u>Grounds of appeal</u>

14.
It was suggested in the wri tten grounds of appeal that the judge had committed the error of regarding himself as bound by the conclusions expressed in the NOMS Report as opposed to making an assessment for himself of t he circumstances. Quite properl y that argument was no t pursued at the oral hearing. It was untenable.

15.
At the hearing before us Ms Brockle sby -Weller for the Respondent advanced a completely new point . She suggested that the words at the beginning of paragraph 45 “taking these matters together” showed that the judge’s conclusions in that paragraph were based upon nothing else other than the NOMS Report as summarised in paragraph 44. On that reading of paragraph 45 , it was then submi tted that it followed that the jud ge had applied the test set by r egulation 21(3) where the risk of “serious harm” resulting from re-offending lies in the medium category, simply by drawing a

distinction according to whether the risk of re-o ffending occurring is medium or low . It was then submitted that on that reading of the determination the judge erred in law because, in particular, he failed to take into account other material consideration s, namely the circumstances and ser iousness of the offence and an y implications they have for the assessment of " serious grounds " .

16.
The merits of this challenge therefore depend critically upon the way in which the decision letter is to be read. It is a well-established legal principle that a decision is to be read fairly and as a whole .

17.
We have reached the firm conclusion that the correct way to understand paragraph 45 , and in particular the words "taking these matters together" , is that the judge was taking into account everything which preceded paragraph 45 going back to paragraph 36 and not simply his summary of the NOMS Report in paragraph 44. We have no doubt about this , partl y because paragraph 44 itself refers to the circumstances of the offence and therefore was referring back to what had been set out in paragraph 37 . It is impossible to read paragraphs 44 and 45 as if they constitute a hermetically sealed piece of reasoning which left out of account the earlier parts of this carefully express ed decision.

18.
Despite the fact that the judge had made a series of findings which were plainly adverse to the Appellant (see paragraphs 37 to 43) he took the view that the scales were tipped slightly in the Appellant 's favour. It is therefore clear how his thinking proceeded. Taking paragraphs 36 to 44 together, he plainly reached the view that there were a number of adverse findings against the Appellant which brought this case relati vely close to the " serious grounds " threshold s et by r egulation 21(3). It is perfectly clear that according to the judge's evaluation he concluded that the circumstances of this case taken as a whole did not reach that threshold. B ut he went on to explain how with one change in circumstance the case would have crossed it, namely if the risk of re-of fending had been thought to be medium rather than low. Thus, i t is clea r that in paragraph 45 of his determination the judge did take into account all the matters set out betwe en paragraphs 36 and 44 and no t just simply the NOMS Report as summarised in paragraph 44. It therefore follows that the judge did have in mind his careful assessment of the nature of the offence and indeed the Appellant 's unsa tisfactory evidence on the issue of remorse as set out between paragraphs 38 and 43 . We are left in no doubt that it would be wholly unrealistic to think that this judge, having taken the trouble to set these matters out in such detail , simply put them to on e side when he came to reach his critic al conclusion in paragraph 45. It is quite possible th at another judge faced with the same evidence might have reached a different conclusion under regulation 21(3), but that is nothing to the point in an appeal which is confined to errors of law. This judge's reasoning was logical and clearly expressed. It discloses no error of law.

19.
The Respondent's misconstruction of the determination comes about because of an elementary error, namely by reading paragraphs 44 and 45 in isolation and not by reading the decision fairly and as a whole. Experience in this and other appeals by the Respondent leads us to express concern as to whether , before formulating grounds of appeal, sufficient care is being taken within the Home Office to apply well-established principles for identifying an error of law and to appraise fairly and realistically the manner in which judges of the First-Tier Tribunal have expressed their conclusions.

20.

The same concern applies to the secon d ground of appeal relating to the T ribunal's determination under A rticle 8. Although this ground did not find any favour with the judg e granting permission to appeal , we have listened to the argument and will address it briefly . It is plain from what we have said already that the appeal must fail because t he judge's reasoning on the application of Article 8 was not essential to his decision to allow VV' s appeal.

21.
I t is important to recall tha t the judge began paragraphs 46 and 47 by expressly stating that i n view of his conclusion under r egulation 21(3) it was unnecessary to make findings in relation to Article 8. In other words the judge was making it plain that he was expressing himself in abbrev iated terms, something which ought readily to have been appreciate d, bearing in mind also t he very considerable case load with which the First-T ier Tribunal has to deal. Nonetheless , the Secretary of State has advanced what is no more than a "r easons challenge " to paragraphs 46 and 47 .

22.
Again we feel bound t o question w hether those responsible for launch ing ground s of app eal of this nature are correctly applying in e ach case the law on what must be demonstrated in order to vitiate an a ppeal decision for legal inadequacy of reasonin g. T he case law on this subject is well-established and clear (see eg . Save Britain 's Heritage v Secretary of State for the Environment [1991] 1 WLR 153; South Bucks DC v Port (No 2) [2004] 1 WLR 1953) and we merely summarise some fundamental principles.

23.
A n allegation that reasons a re inadequate cannot normally get off th e ground unless the appellant can show firstly that the mat ter to which the complaint relate s was raised in the proceed ings before the First Tier Tribunal as a substantial issue between the parties for the judge to determine . If the matter was not a substantial issue , or a " principal important controversial issue " , th en generally it cannot fall within the ambit of t he duty to give reasons in that case . There is no obligatio n on a Tribunal to deal with each and ever y point which has been raised in an appeal process .

24.
But secondly, even if the matter relates to a substantial issue or principal controversial issue , it is essential for an a ppellant to show either that the judge has simply failed to resolve that dispute , in other words there is a gap in the reasoning on that point , or alternatively, that even though the issue has been dealt wit h, the reasoning is so unclear that the Tribunal is satisfied that it may well conceal a public law ground of challenge (see eg Save Britain's Heritage at [1991] 1 WLR at page 168) . Likewise in the South Bucks DC case Lord Brown reiterated (at [2004] 1 WLR at page 1964) that an Appellant must show "a substantial doubt as to whether the d ecision-maker erred in law …". But he then added " such adverse inferences will not readily be drawn".

25.
In South Bucks DC the House of Lords approved (at paragraph 33) the well-known statement by Sir Thomas Bingham MR that an issue as to whether the reasons for a decision were inadequate "is to be resolved … on a straightforward reading [of the decision] without excessive legali sm or exegetical sophistication." The degree of particularity required for reasoning will depend entirely on the nature of the issues which have been raised by the parties for the judge to determine (paragraphs 28 and 36).

26.

W e also note that at paragraph 35 Lord Brown said that the restatement of the relevant legal principles in South Bucks DC sh ould “serve to focus the reader’s attention on the main considerations to have in mind when contemplating a reasons a challenge” and tend to discourage such challenges.

27.
It follows from the authorities, and also from the duty of parties to help further the overriding objective and co-operate with the Upper Tribunal, that those drafting grounds of appeal (a) should not seek to argue that a particular consideration was not taken into account by the Tribunal when it can be seen from the decision read fairly and as a whole that it was (and the real disagreement is with the T ribunal’s assessment of the evidence or the merits) and (b) should not treat a reasons challenge as a “softer option” . When seeking permission to appeal an Appellant is obliged to demonstrate how the threshold of arguability is reached.

28.
Similarly, judges in the First Tier Tribunal dealing w ith applications for permission to appeal should also have the principles governing reasons challenges well in mind when considering whether a ground of appeal alleging inadequacy of reasons is genuinely arguable. If the party raising a reasons challenge does not give proper particulars as to how those principles have been breached, by reference to relevant materials placed before the judge who dealt with the appeal , then ordinarily permission to appeal on that ground should be refused .

29.
Unless practitioners considering grounds of appeal adhere to established legal requirements for demonstrating inadequate reasoning, and more generally on what may qualify as an error of law, there is a real likelihood of appeals to the Upper Tribuna l being pursued without any genuine legal merit. That would represent an improper use of the Tribunal’s limited resources and generally extend the time for which litigants would have to wait before their cases can be determined.

30.
We should also refer to an other matter. In this case, and in others, we have observed the Secretary of State obtaining permission to appeal on grounds which are not pursued at the hearing in the Upper Tribunal , because it is eventually acknowledged that they are un arguable. Plainly an Appellant should review the arguability of grounds of appeal, for example in the light of any response from the Respondent to the appeal. An Appellant should not continue to pursue points which are not properly arguable. But where points are abandoned, there is a tendency then to seek to rely upon a skeleton argument, served only just before or even on the day of the hearing, so as to adva nce one or more new arguments not previously n otified either to the other party or to the Tribunal. Raisi ng new points in this manner plainly can cause unfairness to the opposing party and, if so, the Upper Tribunal may well refuse to allow the new point to be argued. That is even more likely to be the case where a new point could not fairly be dealt with without adjourning the hearing so that the opposing party has a proper opportunity to deal with it. The resources of this Tribunal are finite and have to be allocated fairly and proportionately as between all cases before it and not wasted. These are important considerations which those who draft, or advise upon, grounds of appeal must keep well in mind.

31.
In this case it appears to us that th ose launching or pursuing the appeal can not have applied basic principles on what an Appellant needs to demonstrate in order to es tablish an error of law . That point is further illustrated by two additional criticisms now being advanced by the Respondent . The judge said in paragraph 47, “the children are integrated into the UK school system and the

Respondent accepts that it is in the best interests of the two children that they both remain in the UK with the mother". The Respondent complains that the judge's use of the word "is" does not accord with paragraphs 64 and 65 of her decision letter in which it was said that it may b e in the best interests for the children to remain in the UK. But the Resp ondent's attempt to argue a reasons challenge on this difference of language is flawed , because no attempt was made to put before this Tribunal any evidence as to how the Respondent's case on this aspect was presented in the appeal before the First-tier Tribunal . It is quite conceivabl e that during the hearing before the judge the Secretary of State accepted that there was no longer any issue that it "is" in the best interests of t he children to remain in the UK .

32.
The other criticism which was made of the judge's reason s related to his finding that it was not in the best interests of the children to be separated from their father. We say very little about this criticism for two reasons. First, as we have said the judge expressed himself in summary terms having already decided the case in the Appellant's favour under r egulation 21(3). Second, the Respondent has not provided information as to how this point was dealt with before the Tribunal, so as to justify an argument that any further reasoning on this point in this particular case was required .

Conclusion

33.
For the reasons set out above we conclude that the decision of the First Tier Tribunal did not involve any error of law, its decision must stand and the Respondent's appeal must be di smissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

The Hon. Mr Justice Holgate

TO THE RESPONDENT

FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date

The Hon. Mr Justice Holgate