



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: DA/00402/2014

THE IMMIGRATION ACTS

**Heard at Columbus House,
Newport
On 13 November 2014**

**Determination Promulgated
On 27 November 2014**

Before

The President, The Hon. Mr Justice McCloskey

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADRIAN WOJTOWICJ

Respondent

Representation:

Appellant: Mr I Richards, Senior Home Office Presenting Officer.

Respondent: Not in attendance and unrepresented.

DETERMINATION AND REASONS

INTRODUCTION

1. This appeal originates in a decision made on behalf of the Secretary for the Home Department (hereinafter the "*Secretary of State*"), the Appellant herein, dated 14 February 2014, whereby it was determined that the Respondent, a national of Poland now aged 27 years, should be deported. The Respondent appealed,

successfully, to the First-tier Tribunal (the “FtT”). The Secretary of State appeals, with permission, to the Upper Tribunal.

STATUTORY FRAMEWORK

2. In making her decision, the Secretary of State purported to act under regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 (the “EEA Regulations”) which provides:

“Subject to paragraphs (4) and (5), a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if

(b) the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.”

In passing, neither of paragraphs (4) or (5) of regulation 19 is engaged in this case. Within the discrete regime of regulation 21, a “relevant decision” means “an EEA decision taken on the grounds of public policy, public security or public health”. By regulation 21(4), where the EEA national concerned has resided in the United Kingdom for a continuous period of at least 10 years prior to the relevant decision or is under the age of 18, an expulsion decision may not be made “except on imperative grounds of public security”. Accordingly, in this sphere, there is a category of EEA nationals, with two separate types of membership, in respect of whom the threshold condition of “imperative grounds of public policy” must be satisfied.

3. There is a second category of EEA nationals who are not members of either of the two groups belonging to the first category. In their case, by virtue of regulation 21(5), the expulsion decision must be taken on (mere) “grounds of public policy or public security”: the “imperative” requirement does not apply. In all cases, expulsion decisions must 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

- (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."*

See regulation 21(5). In addition, per regulation 21(6):

"..... The decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

In the present case, the assessment made was that the Respondent does not belong to the *"imperative grounds of public security"* category. Thus the decision was based on the lower threshold of intervention applicable to the second category.

THE SECRETARY OF STATE'S DECISION

4. It is clear from the Secretary of State's decision that the precipitating factor was the Respondent's conviction, on indictment, on 28 November 2012, in respect of two counts of unlawful wounding, which generated a commensurate sentence of 30 months imprisonment. The decision also draws attention to the Respondent's criminal record generally. During the period May 2005 to December 2012, he has been convicted of three offences against the person, four offences against property, six offences of theft and kindred crimes, two public disorder offences and thirty miscellaneous other offences, including repeated offences of breaching the requirements of a community order and failing to surrender to custody.
5. The Secretary of State's decision analyses the Respondent's criminality and reasons in the following way:
 - (a) there was an established pattern of repeated acquisitive offending within a relatively short period of time, undeterred by previous convictions and sentences imposed, indicating a lack of regard for the law, a lack of remorse and a lack of understanding of the Respondent's offending behaviour on others;
 - (b) there has been an escalation in the seriousness of the Respondent's criminality;
 - (c) alcohol consumption has been a factor in some of the Respondent's offending and the assessment has been made that his continued consumption of alcohol will increase the risk of his re-offending;
 - (d) drug ingestion was a factor in the Respondent's robbery conviction in 2005;

- (e) the assessment has been made that the Respondent's thinking and behaviour skills, problem solving skills and temper control, with associated impulsivity and aggressive and controlling behaviour, are all factors giving cause for concern; and
- (f) the Respondent's offending indicates that he has acted without giving any consideration to the consequences of his conduct and that he has the potential to act violently, unprovoked, particularly when under the influence of alcohol.

Based on the above assessments and reasoning, the decision letter continues:

"All the above evidence indicates that you have a propensity to re-offend and that you represent a genuine, present and sufficiently serious threat to the public to justify your deportation on grounds of public policy."

This is a classic illustration of an evaluative judgement.

6. The decision then examines the other factors which must compulsorily be considered and evaluated under regulation 21. I summarise this as follows:
- (i) The Respondent is considered to be in good health.
 - (ii) The information provided does not demonstrate that he has been exercising Treaty rights in the United Kingdom and does not establish that he has acquired a right of permanent residence pursuant to a period of five years continuous residence. Further, and in any event, any continuous residence he may have accrued has been fractured by his successive terms of imprisonment.
 - (iii) The Respondent's parents are divorced, his mother residing in the United Kingdom and his father, together with certain other relatives, in Poland.
 - (iv) Having undertaken a brick laying course while in custody, the Respondent will be able to utilise this skill upon his return to Poland and this, in turn, will facilitate his readjustment to life there.
 - (v) Given that the Respondent lived in Poland from birth until around the age of 16 years, his claim regarding loss of his Polish language skills is not considered credible. In any event, if necessary, he will be able to undertake language courses there upon his return.

- (vi) Noting that the Respondent has, while in prison, completed programmes of drug awareness, alcohol awareness, stress management, understanding conflict resolution and others, it is acknowledged that while these “*could possibly reduce the risk of re-offending in the future*”, it is not necessary for the Respondent’s rehabilitation that he remain in the United Kingdom.
 - (vii) It was clear that the Respondent’s English partner had been unable to prevent him offending and re-offending.
7. The decision then considers Article 8 ECHR and section 55 of the Borders, Citizenship and Immigration Act 2009 (the “2009 Act”). Consideration is given in particular to the relationship which the Respondent has had with a partner for some six years, the partner’s child who is now seven years old and the younger child of whom the Respondent is the father, now aged two years. Evidence of police visits to the family home triggered by the Respondent’s alcohol consumption, together with evidence that his partner, in 2012, informed the social worker that their relationship was at an end is considered. The following is then stated:

“If [the partner] wishes to maintain a relationship with you, she can continue this via modern means of communication and via visits to Poland

[A report] received from the [G] social services states that there had been several incidents of domestic violence which took place between your partner and yourself, dating back to 2007 and that [the older child] was a witness to or heard the majority of the incidents. As a result, the Offender Manager has assessed that you pose a high risk of harm to [the older child]

Taking into consideration the nature of your serious crime, your extensive history of behaviour and the risk you pose to [this child] it is not considered that your deportation would have a significant impact on [her] day to day life and that contact could be maintained via modern methods of communication and via visits to Poland.”

The same assessment is made in respect of the second child. Furthermore, it is noted that the primary carer of both children is their mother.

THE FtT’S DECISION

8. In its determination, the FtT recorded:

"[The partner] has told the Appellant that she will be prepared to accompany him to Poland if he is deported but the Appellant and his whole immediate family wish to be allowed to remain living together in the UK."

It was noted that none of the other three family members has any links-linguistic, cultural or otherwise - with Poland. Referring to his evidence at the hearing, the determination states:

"About his offending generally the Appellant stated that he did not know why he has committed those offences but that every time he was under the influence of alcohol he seemed to commit criminal offences. The Appellant emphasised at length that he has learned by his mistakes."

Reference is then made to the various courses which the Respondent completed in prison. This prompts the following finding:

"We find that in the context of the Appellant's offending from 2004 [his] behaviour (albeit) in prison shows an encouraging and consistent commitment to change."

The second identifiable finding is the following:

"We consider that [the Appellant's offending prior to the index offence] can be accurately described as relatively low level, boorish, nuisance type offending."

The third discernible finding is expressed thus:

"There is now some evidence that his most recent sentence may well have had a most welcome and desirable effect upon the Appellant."

This is followed by a recitation of evidence, but no further findings. Next, there is a finding that the partner had to incur loans for subsistence purposes during the Respondent's incarceration and that, when employed, the Respondent is a hard working person.

9. The determination then rehearses the *soi-disant* Maslov criteria, considering each in turn. It also notes the assessment of the sentencing Judge and that of the Respondent's Offender Manager, which was that the Respondent -

"... poses a high risk of harm to the public and known associates ... [and] ... poses a medium risk of reoffending."

The key passage in the determination is the following:

*“.... We find that the interference [with Article 8 rights] is not in accordance with the law and does not have legitimate aims due to our finding that the Appellant’s deportation is not in accordance with regulation 21 of the 2006 Regulations; we find that the decision does not comply with the principle of proportionality **for all the reasons set out above and below.**”*

[Emphasis supplied]

The FtT allowed the appeal under the EEA Regulations and Article 8 ECHR.

APPEAL TO THIS TRIBUNAL

10. The main contentions advanced in the application for permission to appeal were the following:
 - (i) The FtT *“have failed to make findings as to the principles in Regulation 21(5), nor have they given reasons pertaining to why the Appellant is not a genuine, present and sufficiently serious threat*”
 - (ii) *“.... the Appellant is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and the [FtT] were materially misdirected in failing to address this*”
 - (iii) *“, the [FtT] have outlined that the Appellant’s partner would be prepared to accompany him to Poland if deported. It is submitted that the best interests of the children can be provided for in the care of their family unit in Poland.”*

Permission to appeal was granted on the grounds that the FtT had, arguably, failed to engage adequately with the principles enshrined in regulation 21(5) of the EEA Regulations, had failed to give adequate reasons for the principal conclusion (which I have rehearsed in [9] above) and had given inappropriate weight to the Appellant’s family life.

11. I refer particularly to the crucial passage in [36] of the determination, reproduced in [9] above. This yields the following analysis. There are **no** reasons set out *“below”*. As regards reasons set out *“above”*, I have, following careful examination, rehearsed in [8] above the three findings properly identifiable in the text of the determination. Duly analysed, these reduce to two findings, as the first and third are in essence the same.

12. The question for this appellate Tribunal is not whether it agrees with the FtT's decision on its merits or whether it would have made the same decision. Rather, this Tribunal must determine whether the FtT's decision is legally unsustainable on the basis of any of the permitted grounds of appeal. I conclude, on balance, that the decision of the FtT cannot be upheld. I have already adverted to the "*reasons set out above and below*" issue. Particular attention must be focused on how the FtT dealt with the index offence viz the most recent one, the commentary of the sentencing Judge and the reoffending assessment of the professional concerned. Properly analysed, I consider that the FtT failed to address these key parts of the evidence, adequately or at all. It was not enough for the Tribunal to rehearse briefly these aspects of the evidence. Rather, it was incumbent on the Tribunal to engage with them, to make appropriate findings and to give sustainable reasons. Furthermore, the necessary identification of and engagement with the public interest followed by a balancing exercise are both missing. I consider that the determination fails in all of these respects.

DECISION

13. On the grounds and for the reasons elaborated above, I conclude that the decision of the FtT is infected by material errors of law.
14. Consequent upon the above:
- (a) I set aside the determination of the FtT.
 - (b) I remit the appeal for a fresh hearing and decision.
 - (c) This will be undertaken by a differently constituted panel of the FtT.
 - (d) I preserve no findings.

Seamus McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Date: 20 November 2014