Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00195/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons**
On 28 September 2015	**Promulgated**
	On 2 October 2015

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PATRICK TURZYNSKI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State against the decision of First-tier Tribunal Judge Burnett promulgated on 28 July 2015 in which the judge allowed the appeal under the EEA Regulations. For the purposes of continuity I shall refer to Mr Turzyinski as the appellant as he was in the

First-tier Tribunal. He is a citizen of Poland and therefore also a union citizen. He was born on 5 June 1982 and he appealed against the decision of the Secretary of State to make a deportation order against him in accordance with Regulations 19, 21 and 24 of the Immigration (European Economic Area) Regulations 2006 as amended. The decision is dated 29 April 2015.

2. The 29 April 2015 decision is a complex piece of thinking covering some fourteen pages of text. The appellant had stated that he was a Polish national who had resided in the United Kingdom since June 2011. As the decision was made in April 2015 this was a period of less than four years since his arrival.

3. The basis upon which his claim to remain appears to be that he was entitled to join his wife Marta who is also a Polish national, but it was she who was exercising treaty rights. The couple have two children who are described in the decision letter as H who was then 6 years old, and born in Poland, and a daughter, G, who was 8 years old and arrived in the United Kingdom aged 4. Accordingly, at least as far as G is concerned, she had only been in the United Kingdom for a relatively short period.

4. The reason for the making of the deportation order centred upon the appellant's conviction for affray and possessing an offensive weapon in a public place for which he was sentenced on 1 July 2014 at Bristol Crown Court to a period of imprisonment of some four years. He did not appeal against that conviction. The circumstances of the offence were that under the influence of alcohol on Christmas Eve he and his father-in-law armed themselves with a cricket bat and a metal pole and forced their way into the home of the father-in-law's former partner and there a scene of some terror ensued. The sentencing judge made these comments:

> "On 24 December 2013 you had with you a cricket bat and metal pole. You forced your way into the house and there was a violent struggle involving all persons present and the use of those weapons to which you attacked the son and daughter. She and her son sustained injuries. Fortunately the actual injuries were not as serious as they might have been. However for the occupants of the house this must have been a very frightening incident in the privacy of their own home. This must be one of the more serious affrays that one can imagine where you barge into someone's home and attack the occupants, aggravated by the use of weapons."

5. The seriousness of the offending cannot be better expressed by the fact that there was a sentence of imprisonment of as long as four years.

6. The Secretary of State went on to consider the proportionality of the applicant's removal. It was, according to the Secretary of State, a question of whether it was justified on grounds of public policy. The expression "grounds of public policy " is directly taken from Regulation 21 of the EEA Regulations. The section provides a three tier level of protection against removal of EU citizens and the lowest form of protection

is an EEA decision taken on grounds of public policy, public security or public health. We are not concerned with public security or public health but with the meaning of the expression grounds of public policy.

7. The Regulation then goes on to consider those with a heightened or a more protected status, namely those who have a permanent right of residence. Under the 2006 Regulations a permanent right of residence is acquired by individuals who have been continuously in the United Kingdom for a period of five years. In their position removal is prevented except on serious grounds of public policy or public security. However, it is clear that this appellant had no permanent right of residence as a result of the period of his stay in the United Kingdom. There is one final category, the most extensive form of protection provided by the Regulations and that is to those people who are Union citizens who have resided in the United Kingdom for a continuous period of at least ten years. They are entitled not to be removed except on imperative grounds of public policy.

8. The decision of the Secretary of State to which I shall now return then went on to deal with proportionality in these terms.

> "31. You are 32 years of age and believed to be in good health. It should be noted that you are not conversant with English and that an interpreter is required when discussing complex issues with you in English. There therefore would be no language barriers to overcome if you are deported to Poland. You have spent 28 years of your life outside of the United Kingdom and it is considered that you would have had all of your formal education outside the United Kingdom. You have had an extensive experience of life in Poland the country where you are a national. If is therefore considered that you would have no difficulty in adjusting to life there."

9. The Secretary of State also went on to consider the issue of rehabilitation. That arises principally from the decision of the Court of Appeal in **Essa [2012] EWCA Civ 1718**. Although it has been reconsidered in the case of **MC (Essa principles recast) Portugal [2015] UKUT 520**, a decision by a panel chaired by Upper Tribunal Judge Storey. On consideration of the principles of rehabilitation the decision maker considered that there was no evidence that the appellant had undertaken any rehabilitative work while in custody, and no evidence that he had successfully completed such programmes or addressed the issues that led to his conviction and imprisonment. It was of course accepted that he had a wife and two children residing in the UK, none of whom were of course British citizens and in the absence of evidence to the contrary they were unlikely to provide the appellant with the necessary support to aid his rehabilitation.

10. On the basis of this reasoning the Secretary of State concluded that this was a serious criminal offence and that the threat of serious harm was a real one and it did not therefore preclude the appellant's deportation pursuant to the Rules. It was therefore considered a just and proportionate response to the level of offending.

11. There was then a further consideration of Article 8 and that entailed a consideration of paragraphs 398 to 399 and 399A of the Regulations as well as the new section 117 of the 2002 Act as incorporated by the Immigration Act 2014.

12. The appellant was convicted and sentenced to imprisonment for a period of four years and it was considered, using the format of the Regulations the Rules and the statute as I have set out above, that the decision to remove him was a lawful one.

13. The matter came before the Tribunal on 13 July 2015. At that time the judge was aware of the period of time that the appellant had spent in the United Kingdom. He heard evidence that the appellant was unlikely to offend again and he did accept, as I accept, that the appellant expressed both to the judge and to me sincere expressions of remorse and contrition as to what had occurred. The judge then went on to consider whether the personal conduct of the appellant represented a genuine present and sufficiently serious threat affecting one of the fundamental interests of society. That was indeed the test that he was required to perform in accordance with reg.21 (5)

Where a relevant decision is taken on grounds of public policy … it shall…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

14. The ‘serious threat’ referred to in paragraph (5) is distinct from the serious grounds referred to in reg. 21(3):

A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

The reason for this is that if the two were the same, there could never be a removal pursuant to reg. 21 (1) taken on the grounds of public policy unless there were also serious grounds of public policy or public security. This would then make nonsense of the distinction so carefully constructed in the hierarchy of protection set out in reg. 21.

15. The Judge, however appears to have elided the two concepts by conducting an assessment of risk by reference to the higher level of risk associated with the second level of protection which is set out in Regulation 21(3) of the EEA Regulations. The Judge was there to consider whether as a matter of public policy the removal of the appellant was not proportionate. He went on to look at the OASys Report and then concluded in paragraph 49

“I consider that the decision of the respondent is not justified on serious grounds of public policy and security”.

16. It seems to me that this language of the judge was unfortunate in that it was an express reference to the wrong test, if that is the test the judge was applying; the correct test, being the test set out in reg. 21(1) of the Regulations, namely public policy and not the test set out in reg. 21(3): serious grounds of public policy derived from the status of a person who benefits from a permanent right of residence. In those circumstances I find that the error of law was a material one and it is necessary for me to remake the decision.

17. The circumstances of the appellant's offending were considered by the OASys assessment and the circumstances of the offence were set out in page 9 of the report and the impact on the victim was dealt with at paragraph 2.5. It was said that the motivation behind the attack and the circumstances which had triggered the attack was that the appellant had been drinking heavily on the day of the offence, something that he did not do very often, and that this disinhibited him when his father-in-law came to see him in order to involve him in the offence. The appellant stated that he would not have been involved had he been sober. It was the effect of this conduct that led him to realise that the consequences were not those he should have intended.

18. The OASys system assessment continued that the appellant felt a sufficient degree of loyalty to his father-in-law to comply with his request and that it was fortunate that the injuries were not more serious as they well could have been.

19. At the stage of the making of the report the appellant had informed the Home Office, although it is a matter that he denies, that he was actively seeking his removal from the United Kingdom and that he himself had decided to apply for the early removal scheme and return back to Poland with his family. Although he denies that this is something he had said, there must have been a basis upon which the OASys report maker was able to report the matter. The appellant's time in custody had involved limited engagement with the education department because his spoken and written English was poor and he required an interpreter to discuss anything that was complicated. He hoped to continue to improve his English during the period of his imprisonment. It has to be said, however, that as far as the hearing today was concerned, the hearing was conducted through the assistance of a Polish interpreter.

20. The OASys assessment spoke of the contributory factors towards risk. It was said that due to the manner to which Mr Turzynski was manipulated and felt obliged to support his father-in-law to become involved, this was a potentially material risk factor linked to a risk of serious harm and linked to a risk of reoffending.

21. Similarly, in relation to his thinking and behaviour, the report writer assessed that the appellant's thinking and behaviour was linked to a risk of serious harm and linked to a risk of reoffending. The same was said as to the risk posed by his drinking.

22. Finally at page 38 of the report there was an assessment of medium risk of serious harm. This is defined as where there are identifiable indicators of risk of serious harm:

> The offender has the potential to cause serious harm but is unlikely to do so unless there is a change of circumstances. For example failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse.

In relation to the assessment of risk, at paragraph R 10.6, the report writer concluded that there was a medium risk in the community to the public, and that there was a medium risk in the community to a known adult.

23. The current situation was dealt with at paragraphs R11 – 12. It was said he was assessed to be a medium risk to the public and to a known adult in the community but he was considered to be a low risk of reconviction, OGRS, a low risk of general reoffending, a low risk of violent reoffending and that the appellant was being currently managed as a MAPPA nominee.

24. This was the material that was before the judge. He dealt with it in this way. He took into account the ages of the children and the length of time the applicant had spent in the United Kingdom. He took into account the parental role that he had adopted in the children's lives although said it was yet to be fully tested whether in the future his relationship with his wife and children and his responsibility towards those children would change the appellant's offending behaviour and his attitude. He recorded the OASys report assessment that this was a factor which would help the appellant reduce his offending behaviour. It was properly recorded by the judge that it was not in the children's best interests to have a parent in their lives who continues to commit violent offences.

25. The judge then went on to say that he found that the appellant did not represent a genuine, present and sufficiently serious threat to society but nevertheless went on to consider the proportionality and it was at that stage that he dealt with the issue of rehabilitation, considering that his wife and children are in the United Kingdom and that if his father-in-law were to leave to go to Poland then the appellant's reoffending chances were reduced. Finally he concluded that the support provided by his wife and children was a material factor, notwithstanding the fact that the appellant has spent the vast majority of his life in Poland.

26. Accordingly the factors that the judge took into account were relatively limited in their scope and did not, in my judgement, take into account the full impact of the OASys system report and in particular the grounds of public policy which are contained in the legislation surrounding deportation. The report to which I have referred as some length clearly indicates that there is a medium risk to the public. The risk referred to was a risk of history repeating itself: in other words, the risk of violence. The risk of violence is unquestionably *a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*. It is said to be a medium risk to the community at large but obviously also a medium risk to known individuals. That does not simply arise from the fact

that there was an altercation in which he was involved with his father in law with whom he is no longer in contact. It arises because of the risk that occurs when the appellant has been drinking. It is also arises where the appellant is persuaded by other people who are of a more forceful nature to join him in inappropriate behaviour of one sort or another. Accordingly, whilst the specific circumstances which resulted in the commission of this offence may well no longer apply, there is an underlying problem in relation to the risk posed by the appellant when he is disinhibited after the use of alcohol and where he is subject to the more forceful persuasion of other people. Consequently there is a two-pronged risk that is faced by the community at large. That is sufficient in my judgement to come within the ambit of the expression 'public policy' found in reg. 21(1). It is therefore in my judgement a legitimate aim for the control of non-nationals (including importantly European citizens) that the community at large should be protected against acts of violence when an individual's conduct is disinhibited by the use of too much alcohol and being persuaded to act to the detriment of others by third parties.

27. Given these circumstances, it was vital that the judge demonstrated that he was applying the right test and that to impose a heightened threshold gave the impression, at least, of requiring the Secretary of State to overcome a burden that did not exist. It is clear that there is a public interest – described in the regulations as a public policy – to remove those who present a risk to the maintenance of social order. For these reasons I am satisfied that this is a proper case to say that there was a material error of law and that the requirements of the 2006 Regulations have been met justifying the appellant's removal.

28. This brings me on to a consideration of proportionality. The essential foundation of the Secretary of State's view on proportionality is the risk that is posed to the community by the appellant as a result of his past history. Accordingly on the balance in favour of his removal there is a substantial weight that has to be attached to the medium risk that is identified in the OASys Report. It is true that there are passages in the report which deal with the low risk of reoffending but these are on the basis that circumstances do not repeat themselves in such a way that a further offence will take place. There was little evidence to say that the appellant had engaged with the issue of rehabilitation, although he had stated that he was motivated to address his offending.

29. If that is on one side of the balance then there is on the other side of the balance the fact that the appellant is married with two children who are nationals of Poland. It is of course true that where there are children who are involved, they must be a primary consideration although not a principal or indeed an overarching consideration. In the circumstances of this case the children are aged 8 and 6. At least as far as the daughter is concerned, she has spent a relatively short period of time in the United Kingdom, arriving at the age of 4. I am not entirely sure when the appellant's son entered the United Kingdom but he is aged 6. Accordingly neither child has spent a substantial period of time in the United Kingdom and during the period of time that they have spent in the United Kingdom

they have inevitably been involved in a Polish home, if only because the appellant himself has according to the evidence only a very limited grasp of English.

30. For these reasons the family may have to make choices. If the choice is made that the entire family are to return to Poland that is a choice that will not violate the rights of the children involved, bearing in mind their history. For these reasons I am satisfied that the removal of the appellant is proportionate and that this is a proportionate response to the fact that the appellant has been convicted of a very serious offence and an offence which cannot be said to have no repercussions as far as a risk of further offending is concerned. In these circumstances I have formed the view that the appellant's removal is proportionate, using the proportionality test that is contained within reg. 21(5)(a) of the 2006 Regulations.

31. I therefore allow the appeal of the Secretary of State and substitute a decision that the appeal of Mr Turzynski against the decision of the Secretary of State to make a deportation order is dismissed.

DECISION

The Judge made an error of a point of law and I re-make the decision allowing the appeal of the Secretary of State and dismissing the appeal of Mr Turzyinski.

No anonymity direction is made.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL