**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00193/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination & Reasons Promulgated** |
|---|---|
| **On 3 July 2017** | **On 14 July 2017** |

**Before**

**UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**DOMINIK SZWAJKOZWSKI**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: No appearance

**DETERMINATION AND REASONS**

1. I shall refer to Mr Szwajkozwski hereafter as the appellant as he was before the judge, and to the Secretary of State as the respondent, as she was before the judge.

2. The appellant is a national of Poland. He appealed to a Judge of the First-tier Tribunal against the respondent's decision of 20 April 2016 to make a deportation order under the Immigration (European Economic Area) Regulations 2006.

3. There was no appearance initially by or on behalf of the appellant before the judge. However, after a short adjournment it was learned that the appellant was detained at Morton Hall IRC and a video link was set up and the hearing was resumed later in the day. According to the judge's decision at paragraph 6, the appellant confirmed that he spoke some English although it was apparent that he sometimes had difficulty in expressing himself in English and was unable to understand some of the information which the judge gave to him or questions which he put. The judge considered whether it was appropriate to adjourn the hearing so an interpreter could be present bearing in mind there was little realistic prospect of obtaining the services of an interpreter other than on another day. The respondent clearly intended to remove the appellant at the earliest opportunity and it seemed therefore that an adjournment would serve no useful purpose. The judge bore in mind the overriding objective and decided that he would do his best to ensure that the appellant understood what was said and he would adopt an appropriate degree of caution in assessing his evidence because of the possibility of a lack of understanding. He concluded that in the event the appeal did not turn on the appellant's oral evidence.

4. He heard brief oral evidence from the appellant and in the absence of an interpreter did not consider that cross-examination in any normal sense was appropriate. He invited the Presenting Officer to indicate if there were any matters on which he would wish to cross-examine in respect of which the judge would have been prepared to put questions to the appellant but there were no such issues. The judge heard closing submissions from the appellant and the Presenting Officer.

5. The judge noted the appellant's convictions which included a conviction for robbery on 16 July 2001 in Poland, a conviction on 3 September 2002 in Poland for kidnapping and threatening to harm a witness or juror with intent to obstruct, pervert or interfere with justice, and a conviction on 6 April 2010 of an attempted sexual assault by penetration. For the first offence he was sentenced to two years' imprisonment, for the second six months and eight months with an overall penalty of ten months and for the third offence to two years' imprisonment suspended for five years. With regard to that offence it seems that the suspension of the term of imprisonment was revoked on 9 June 2015, but from the respondent's decision letter it appears that that decision itself was revoked on 22 March 2016. The judge noted that on 18 June 2013 the appellant was convicted in Germany of importing or exporting goods with intent to evade duty on 18 June 2013 for which he was fined.

6. On the evidence the judge was not satisfied the appellant had proved he had acquired a permanent right of residence in the United Kingdom, and accordingly, given that the relevant decision was taken on grounds of public policy or public security, it had to comply with the principle of proportionality, it was to be based exclusively on the personal conduct of the person concerned, his personal conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, matters isolated from the particulars of the case or

which related to considerations of general prevention did not justify the decision and his previous criminal convictions did not in themselves justify the decision.

7. The judge noted what was said by the respondent that the appellant had been convicted of offences whose seriousness was reflected in the sentences imposed and that evidence of risk was provided by the requirement that he should register on the Sex Offender Register in the United Kingdom. The seriousness of the offence indicated that he posed a significant threat for the safety and security of the public of the United Kingdom and that should he reoffend any offence would be of a similar or more serious nature. He had been assessed as posing a high risk of serious harm and a medium risk of reconviction. Those matters the judge noted were wholly unsupported by any evidence. There was no OASys or similar report provided. The only recent conviction was one for attempting to evade payment of duty. It could not be ignored, but it was far from the most serious. The judge considered that since 2006 the appellant had not committed any offence on the basis of which he might be said to pose any risk to the public nor was there was any evidence to support the assertion that any future offence would be as serious as or more serious than those committed in 2000 and 2006. It was not clear what conclusion should be drawn from the revocation of the suspension of the 2010 sentence of imprisonment or the reference to the revocation of that order subsequently. The judge was not persuaded that the appellant's conduct represented a genuine, present and sufficiently serious threat and accordingly the decision was not in accordance with the principles set out in Regulation 21(5) of the Immigration (European Economic Area) Regulations 2006 and was in breach of his EEA rights. The appeal was accordingly allowed.

8. In the grounds of appeal the respondent argued that the fact that the appellant was required to register on the UK Sex Offender Register and was expected to report regularly to the police was indicative of the fact that he was considered to present an ongoing threat to the public. The judge had not mentioned why this was not relevant to the overall assessment under Regulation 21(5) or why it did not carry any weight. The point was also made that the appellant, when he had returned to the United Kingdom illegally, having left voluntarily, had used ID which although genuine was obtained by him in a different name, through use of his grandmother's surname. This suggested he was aware that he was re-entering the UK illegally and obtained the ID to avoid immigration controls which displayed a total disregard for the law. The respondent also attached the Presenting Officer's minute from the hearing which among other things set out concerns about the procedural feasibility of the video link process given that the appellant had not applied to return for the hearing, was unaware of the hearing date and had not had the opportunity to arrange representation or a proper defence and there was an interpreter available. The Presenting Officer said in his statement that it was clear that the appellant spoke some English but only a little and was struggling to understand many questions and formulate an answer in

English and it was difficult to get full meaningful answers from him. On the grounds it is said that although the judge did not consider the decision turned on the appellant's oral evidence that might have been different if the Presenting Officer had not been disadvantaged but in a position to carry out a confident cross-examination knowing the appellant understood what was being asked of him.

9. There was no appearance by or on behalf of the appellant before me. Mr Jarvis' notes showed that he had voluntarily departed from the United Kingdom on 7 February 2017. As regards a question I put to Mr Jarvis about the fact of the appellant being on the Sex Offender Register, Mr Jarvis understood the register was a consequence of the conviction and if the Secretary of State gave her view she had to do so concerning the risk of reoffending and harm. There was no OASyS Report but that was not a barrier to the giving of such a view. The Secretary of State would take into account the general material about sex offenders. The judge's approach fettered the Secretary of State's approach to risk. It was taken with regard to the overall assessment of the history and there was room in EU and domestic law for a court to consider that the offence itself was so serious that the person's presence was contrary to public policy. With regard to deportation the Secretary of State's position was to show current risk and everything went into the assessment and she was looking at present day conduct. She had not merely looked at the offence itself but pointed overall to factors to show historically over time recourse to conduct justifying deportation. The conduct of the appellant was the test. The judge had erred because he looked at the case from the unlawfully narrow position of the offences and what had been shown but it was a question of the conduct of the appellant which included the fact that he had re-entered using an ID card not in his name.

10. There were also concerns about the procedure adopted as set out in the grounds. It would be hard for the Presenting Officer to decide whether the appellant's lack of facility in English was a problem. It was unclear why it was different for the judge rather than the Presenting Officer to ask questions. The judge had taken the view as to how to proceed and the Presenting Officer was in difficulty. The judge was not looking at conduct but the offences as recorded and there was procedural unfairness. This could have affected the appellant adversely. The issue about re-entering into the United Kingdom and with regard to the ID card was not properly considered.

11. Mr Jarvis was unsure whether this was a matter that had been raised by the Presenting Officer with the judge. The issue of re-entry had not been explored. It seemed that the Presenting Officer could not have put it to him and he could not answer it with regard to the revocation of the suspended sentence. The only information on this was at page 1 of the refusal letter and the matter could have been dealt with by an adjournment and the provision of an interpreter. It was important on both sides to be clear. The Presenting Officer needed to be able to cross-examine. The emphasis of the decision moved away from the issue of conduct. The act of requiring registration showed an underlying policy.

12. Mr Jarvis undertook to send in submissions with regard to the system of registration and the number of years during which a person would be expected to have their name on the register. If the Tribunal found an error of law then it was asked to remit the matter back to the First-tier bearing in mind the procedural error that had been perpetrated.

13. I reserved my determination.

14. I have a greater concern about the procedural issues in this case than the substantive ones. I think that in the absence of any procedural unfairness the judge would have been entitled to conclude if the evidence remained before him as was considered by him that the Secretary of State had not discharged the burden of proof on her. I am grateful to Mr Jarvis for the Note he provided very soon after the hearing. This clarifies the appellant's criminal record from Poland and gives information as to the legal provisions behind the issuing of a Notification Order. Such an order was granted in respect of the appellant on 26 July 2013, placing him on the register until 6 April 2020 (ten years from the date of his conviction). The purpose is that of protection of the public in the UK, but the criteria relate essentially to past conviction rather than current risk. The judge clearly took account of the appellant's criminal record, bearing in mind that the decision must be based exclusively on the personal conduct of the person, and that previous criminal convictions do not in themselves justify the decision. The index conviction was in 2010 in relation to an offence committed in 2006. The only offence thereafter was the offence of exporting goods with intent to evade duty, which the judge was entitled to consider to be minor. There is the point of re-entry to the United Kingdom on legitimate documentation but in a false name, which was of relevance, but it is entirely unclear whether that point was in fact put to the judge. There is no reference to it in the decision letter and the first time it appears is in the grounds of appeal.

15. As regards procedural matters however, I consider that the judge erred in proceeding without an interpreter. He took the risk that if the decision had been adverse to the appellant there would clearly have been procedural impropriety in dismissing the appeal without the appellant being properly represented. Clearly one does not know what might have come out of a proper cross-examination where the appellant had notice of the hearing, had the opportunity to obtain representation and had the benefits of an interpreter. The judge's decision to proceed bearing in mind the overriding objective and the particular circumstances was understandable. In the circumstances however I consider that he erred as a matter of law in proceeding as he did and leaving the Presenting Officer in a situation where he was inhibited from cross-examining. It may well be that on a rehearing the same result will be reached. One simply does not know, but I consider that the case needs to be reheard whether or not the appellant is able to attend or not, on the basis of the proper procedures having been observed. Accordingly I allow this appeal to the extent that it is remitted back to the First-tier for a rehearing in light of the fact that the error of law is one of procedural error.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Allen 5 July 2017