Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA002252016

THE IMMIGRATION ACTS

Heard at Birmingham Victoria Law Court on 27 June 2017	**Decision and Reasons promulgated on 10 July 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KAMIL SEMRAV
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mrs Aboni Senior Home Office Presenting Officer.
For the Respondent: In person.

ERROR OF LAW FINDING AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Birk ('the Judge') promulgated on 20 March 2017 in which the Judge allowed Mr Semrav's appeal against the order for his deportation from the United Kingdom.

Background

2. Mr Semrav is a national of Poland born on 26 March 1983 who claims to have entered the United Kingdom in 2006.

3. Mr Semrav has several criminal convictions. The PNC printout provided for the purposes of the original appeal hearing shows Mr Semrav first came to the attention of the authorities on 29 November 2006 when he was cautioned for an offence of theft and kindred offences (shoplifting). A further caution issued on 8 July 2007 followed an incident of disorderly behaviour or threatening/abusive/insulting words likely to cause harassment alarm or distress.

4. In relation to convictions, the record shows six entries in the following terms:

   i. 10 December 2008. Gwent magistrates Court, criminal damage. Fined £180, compensation £250 and costs £43.

   ii. 6 May 2009. Gwent magistrates Court. Disorderly behaviour – Public order act 1986 s.5 (1)(a). Fined £75 and costs £60.

   iii. 14 September 2009. Gwent magistrates Court. Theft – shoplifting. Fined £120 and costs £85.

   iv. 10 March 2010. Gwent magistrates Court. Drunk in charge for pedal cycle. Fined £100, victim surcharge of £15, costs £85.

   v. 16 August 2010. Gwent magistrates Court. Drunk and disorderly. Fined £175, costs £85 and victim surcharge £15.

   vi. 15 May 2012. Cardiff Crown Court. Murder. Life imprisonment with a recommendation of minimum of 30 years being served before release.

5. The decision to deport arises from the murder conviction.

6. Mr Justice Evans, sitting at the Cardiff Crown Court, sentenced both Mr Semrav and three other defendants. The sentences related to two incidents occurring in Newport in March 2011. The sentencing remarks indicate Mr Semrav was not involved in the first offence but was involved in the second offence with three co-defendants.

7. The Sentencing Judge noted that a lot of alcohol has been consumed which was a common feature of both incidents. The victim of the first incident was severely beaten and then, whilst asleep or unconscious on a mattress, one of the accused set fire to the mattress with a cigarette lighter causing a serious fire. The charges arising from that incident were of attempted murder by setting fire to the mattress, arson being reckless as to whether the lives of other occupants of the house would be endangered and, for one of the accused, attempting grievous bodily harm.

8. That first incident occurred on Monday, 7 March 2011. Two days later, on the Wednesday, the second incident occurred which the Sentencing Judge explains in the following terms:

"The second incident occurred on the Wednesday evening. The four of you were then in Semrav's bedsit with your victim, Ramunas Raulinautis. He was apparently an acquaintance of you all but in particular, a friend of you, Kalkowski. Again, alcohol was consumed, and again, over a protracted period, your victim was subjected to violence. That must have been a ferocious beating to have caused the loss of blood which stained the bedsit and the hallway outside, together with the clothes and shoes which were washed, but also to have caused the extremely serious injuries sustained by Raulinautis. In addition to the external injuries illustrated in the graphics which the jury saw, there must have been external injuries in areas which were so badly burnt by the fire to which he was later subjected, that they were not able to be seen by the pathologist. In addition to that, he sustained brain damage, multiple rib fractures, a perforation of his bowel and tears to his masentery. Neither the evidence given by Semrav during the course of the case nor the cases advanced by the rest of you comes anywhere near explaining the severity of those injuries, and I am not prepared to accept as accurate and reliable Semrav's description of who did what, which he gave in evidence.

…

When Raulinautis was badly injured and unconscious, he was taken out of the bedsit, he was carried out and dumped, unconscious and very badly injured, in the forecourt of a neighbouring property. There he remained perhaps for about two hours before you, Lysonik, and you, Semrav, went out, found a bag of shredded paper which had been put out for recycling by neighbours, stuffed that paper into Raulinautis's clothing, and set him alight. Even in his injured state he must have been in agony and he continued to suffer until he died on the Saturday morning some three days later.

There are several aggravating features to this incident, they include firstly, the severity of the non-burn injuries which were afflicted upon Raulinautis, secondly, there were four of you, each party to the violence against Raulinautis; thirdly, the use of a shod foot or shod feet to injure him, and I am perfectly satisfied that the copper pipe was also used as a weapon against him; fourthly, the killing was premeditated and planned. You sought and obtained fuel, the shredded paper, which you then used to set fire to Raulinautis. Fifthly, the killing was in a public place and members of the public saw part of the incident, and sixthly, of course, there is the obvious extreme suffering to which I have already referred.

I am unable to identify any positive mitigating factors to that incident. The motive for these two attacks is unknown, as is much of the detail of what happened during the second incident. That is because the way that those of you who did answer questions of the police answered them and because of three of you have not given evidence. Much of what Semrav said in evidence is totally beyond belief. None of you is entitled to the credit which a guilty plea would have attracted, but I note that while none of you is of good character, none of you has a previous conviction of such seriousness that it aggravates your present position."

9. The Judge considered the evidence before setting out her findings of fact at [16] – [29] which can be summarised in the following terms:

   i. I find that the circumstances do not establish that there are grounds for the Appellant representing a genuine, present and sufficiently serious threat to the fundamental interests of society [17].

ii. Factors in Regulation 21(5) and (6) of the EEA Regulations 2006 have been taken into account [18].

iii. The decision to deport letter does not elaborate upon the reasons for deportation safe to say at paragraph 7 "you have committed a serious criminal offence and the Home Office takes the view that there is a real risk that you may reoffend in the future"[19].

iv. The sentence given by the Crown Court is an accurate reflection of the regard that the offence offends against public policy and public security [20].

v. The Judge also took account of the fact the appellant had provided no evidence of remorse or a change in his character or any indication of rehabilitation. The appellant pleaded not guilty and so was found guilty after a trial. Weight was given to the sentencing judge's remarks as to the appellant's role in the offence, the aggravating features and lack of positive mitigating factors [20].

vi. The appellant's record of previous convictions sets out that between 2006 and 2010 he had five convictions. The criminal record shows a wilful disregard for the UK criminal law although the convictions in themselves do not justify the decision [21].

vii. At [23] "his current conviction means that he is not eligible for consideration to parole until 2041. This means that he is not liable for release for many years and so cannot be considered to be a present or even imminent threat to public security or policy. Therefore, the risk of the Appellant reoffending is non-existent at the date of hearing".

viii. The appellant is aged 33, in good health, has no family in the UK and has demonstrated little by way of social and cultural integration in the UK save that he refers to some friends. [24].

ix. The appellant claims to have arrived in 2006 but there was no evidence to confirm precisely when he arrived but he would have been in the UK around 2006 based on his criminal record. The appellant continues to have links to Poland where all his family reside and he is in contact with his mother and has her support. None of those factors weigh in his favour against a deportation order [24].

x. No weight was placed upon the appellant's contention he will be at risk of harm on return to Poland because of his co-defendants and their allies. There was no evidence to support such a threat. No weight was placed upon the complaints of poor prison conditions and privileges in Poland [25].

xi. At [26] "having balanced all the relevant factors I find that the decision is not a proportionate one as the Appellant is not a present threat to the public interest in terms of public policy and public security".

xii. Based on the above findings the Judge allowed the appeal under the EEA Regulations [27].

xiii. On the same findings, the Judge dismissed the appeal under Articles 2 or 3 ECHR [28].

xiv. The appellant conceded he has no family members in the UK. He has a private life which consists of friends. Any contact with friends can be continued whilst he is in prison in Poland. The appellant has not established that his rights and privileges in prison in the UK are significantly different from those in Poland and not sufficient to consider the decision is disproportionate. The appeal based on Article 8 private life was dismissed [29].

10. The Secretary of State sought permission to appeal asserting the Judge has materially erred in law by failing to consider the decision of the Upper Tribunal in *Restivo (EEA – prisoner transfer) [2016] UKUT 00449 (IAC)*.

11. Permission was granted by another judge of the First-tier Tribunal and the matter comes before me for the purposes of an Initial hearing to ascertain whether the Judge made a material error of law and if so whether the Upper Tribunal can proceed to remake the decision.

Error of law

12. The decision in *Restivo* was promulgated on 24 January 2017. As the decision under appeal was promulgated on 20 March 2017 this is a relevant decision.

13. The second part of the headnote, which accurately reflects the findings of the Upper Tribunal at [34], reads:

> *"Where the personal conduct of a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, the fact that such threat is managed while that person serves his or her prison sentence is not itself material to the assessment of the threat he or she poses. The threat exists, whether or not it cannot generate further offending simply because the person concerned, being imprisoned, has significantly less opportunity to commit further criminal offences."*

14. The Judge therefore erred in law as the only reason the appeal was allowed was because Mr Semrav could not present a present danger due to his ongoing detention, without considering the fact that his personal conduct represented a genuine, present and sufficiently serious threat even though it could not generate further offending against the wider public as a result of Mr Semrav's incarceration.

15. I find this error to be material based on a misdirection in law and accordingly set the decision aside.

16. The factual findings of the Judge have not been challenged by Mr Semrav and shall be preserved.

Discussion

17. It was accepted the Upper Tribunal could proceed to remake the decision.

18. Mrs Aboni relied upon the Secretaries States decision to make the deportation order to Poland in light of Mr Semrav's conviction on 15 May 2012 at Cardiff Crown Court.

19. Details of the offence are set out in the Sentencing Remarks above.

20. The Secretary of State asserts Mr Semrav poses a genuine threat to the community of the United Kingdom such as to justify his deportation.

21. It was submitted by Mrs Aboni that Mr Semrav had not acquired a right of permanent residence in the United Kingdom and was only entitled to the lowest level of protection. Which Mrs Aboni acknowledged that the sentencing remarks referred to Mr Semrav working, it was asserted there was insufficient evidence to establish that he been exercising treaty rights in the UK for at least five years. The notice of liability to deportation served on 7 September 2015 also indicated there was no evidence of that his circumstances were known.

22. It was submitted that the decision was proportionate in relation to consideration of EU free movement rights and under Article 8 ECHR. It was a serious offence and nothing had been advanced to show that it was not a proportionate decision.

23. Mrs Aboni referred to the decision of the First-tier in which the Judge did not accept the appellant's assertion that he faced a risk on return or that it had been established that prison conditions in Poland would make any transfer to Poland to complete a sentence, or at the conclusion of his sentence, a disproportionate decision. It was also found by Judge Birk that there was no evidence of remorse and a finding the appellant posed a present and serious threat.

24. Mr Semrav was asked by the Tribunal whether he had worked in the United Kingdom to which indicated he had worked between 2006 and 2011 as a production worker, although there was no evidence of the same in the papers. He thought it was from October 2006 to March 2011 a period of approximately 4 ½ years, indicating that he had not exercised treaty rights for a continuous period of five years and I find is therefore only entitled to the lower level of protection as submitted by Mrs Aboni.

25. Mr Semrav also stated that he disagreed with his conviction and did not accept the same. When asked what he accepted he did, he admitted he hit the deceased victim as he alleges this person had stolen his telephone but claims that he did not kill him. When asked why he hit the person concerned he stated it was because he wanted his telephone back.

26. The Tribunal had been assisted prior to Mr Semrav being brought into court by a short discussion with a criminal advocate who was in the Birmingham Magistrates

Court on other business but who was a member of the firm instructed by Mr Semrav in relation to criminal but not immigration matters. The basis of the instruction was a desire by Mr Semrav to appeal against both his conviction and sentence. The criminal advocate confirmed that prior to being able to obtain advice on appeal it was necessary to obtain a transcript of the criminal proceedings but that there had been delay as a result of the original transcription service no longer being in business. There was therefore no advice on the merits of an appeal against either conviction or sentence at this time.

27. The criminal advocate was given permission to visit Mr Semrav to enable him to see his client and sign for the release of papers held by the custody officers. This Tribunal is grateful for the intervention and assistance rendered which will also have been of value to Mr Semrav on the day.

28. The reality of the matter is, however, that notwithstanding Mr Semrav's desire to challenge his conviction and sentence and the document he handed up indicating there were no eyewitnesses to the attack and that the jury had taken eight days to convict, this Tribunal cannot go behind either the conviction or sentence imposed by the Cardiff Crown Court. For the purposes of this appeal hearing Mr Semrav is a convicted murderer.

29. When asked whether he had undertaken any courses to deal with his propensity for violence or other matters, Mr Semrav indicated that he had attended a violence course in 2015 but had no certificates proving this although claimed that the course taught him to think and not to react. He claimed if he was allowed out he would never do what it did previously before in that he had "changed my mark" now and that he was a different person. He claims to have a good record in prison and to have privileges.

30. Mr Semrav referred to [23] to the decision of Judge Birk claiming that that decision could not be wrong in law on the basis he cannot impact on anyone as he is in prison and can therefore not be a risk to people. This is, of course, a matter dealt with above in the error of law consideration.

31. Mr Semrav asserted he may face a risk back in Poland. It was thought his co-accused were still in prison but will be returned to Poland eventually and that they may blame him for what had happened. When asked to expand on this belief he claimed they may blame him due to his statements, not for the offence, but because they got caught and are now in prison.

32. Mr Semrav confirmed he signed a repatriation agreement because he was told that it would not be until nine months from the end of his sentence when he will be deported. If he knew what he now knows he would not have signed the repatriation agreement.

33. In relation to [26] of Judge Birk's decision, Mr Semrav claimed the decision was not proportionate as he is not a threat. Mr Semrav stated no one could know he was going to reoffend or how he or anyone will know if they can reoffend. He

repeated his claim that he was in prison and was likely at the end of his sentence to be deported to Poland which indicates he could not pose a risk to the wider society in the UK.

34. It is of concern that Mr Semrav seeks to deny his involvement in the offence for which he was convicted. It is noted the Sentencing Judge specifically noted that much of what Mr Semrav had said in his defence when giving oral evidence in the criminal trial was "totally beyond belief".

35. Under the terms of the Immigration (European Economic Area) Regulations 2006 (as amended), at Regulation 19(3), 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:

> (a) he does not have or ceases to have a right to reside under these Regulations; or
>
> (b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but 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.

36. Although both options are equally applicable to this appeal the decision to deport has been made pursuant to Regulation 19 (3) (b) on the basis Mr Semrav's removal is justified on the grounds of public policy, public security or public health, although the latter aspect, that of public health, is not applicable on the facts of this case.

37. Regulation 21(5) states that where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of the regulation, 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.

38. Regulation 21(6) states that before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom 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.

39. In *GW (EEA reg 21: 'fundamental interests') Netherlands [2009] UKAIT 00050* the Tribunal said that the 'fundamental interests' of a society within the meaning of reg 21 (a threat to which may justify the exclusion of an EEA national) is a question to be determined by reference to the legal rules governing the society in question, for it is unlikely that conduct that is subject to no prohibition can be regarded as threatening those interests.

40. It is a preserved finding from the First-tier Tribunal that the appellant has provided no evidence of remorse or of a change in character or any indication of rehabilitation. I refer above to his denial of culpability as illustrated by his desire to overturn both conviction and sentence, and his admitted use of violence in inappropriate circumstances. The nature of that violence is recorded in the sentencing remarks indicating extreme violence resulting in serious injuries to the now deceased victim, irrespective of Mr Semrav and others having been found to have set the individual alight, whilst still alive, which no doubt contributed substantially to his eventual (very painful) death.

41. In LO (Portugal) v Secretary of State for the Home Department [2014] it was held that the burden of proof was upon the Claimant to show that the decision of the Respondent to deport an EEA national was not in accordance with the EEA Regulations. In this appeal, Mr Semrav has failed to discharge that burden.

42. The Secretary of State has submitted sufficient evidence to show that Mr Semrav's presence or conduct constitutes a genuine and sufficiently serious threat. He has been found to be an individual with a propensity to violence, especially when in drink, in relation to which there is no evidence that he has undertaken sufficient work to minimise any future risk. The fact he subjected a third party to a severe beating over a mobile telephone is clearly illustrative of the risk Mr Semrav is likely to pose to others in a situation where he considers himself to be wronged.

43. The Tribunal also notes the decision in *Secretary of State for the Home Department v Straszewski; and Kersys [2015] EWCA Civ 1245* in which the Court of Appeal noted that Regulation 21(5) provided that a decision to remove an EEA national with a permanent right of residence must be based exclusively on the personal conduct of the person concerned and matters that did not directly relate to the particular case or which related to considerations of general prevention did not justify a removal decision. The Court also noted *R v Bouchereau (Case C-30/77)* in which the Advocate General agreed that in exceptional cases, where the personal conduct of an alien had caused deep public revulsion, public policy required his removal. There was an element of pragmatism in *Bouchereau* in the recognition of the right to deport those who had committed the most heinous of crimes, which was at odds with the principles of the Citizens Directive.

44. Mr Semrav is only entitled to the lowest level of protection and the offence which he has committed with others, of severely beating an individual, abandoning him but then returning, stuffing his clothing with shredded paper that had been found nearby, and setting that paper alight, effectively seeking to burn his victim to death and/or dispose of the evidence, is an act that will cause deep public revulsion giving rise to a strong public policy requiring his removal.

45. In relation to the proportionality of the decision, Judge Birk made a preserved finding which identified the nature of Mr Semrav's ties to the United Kingdom and Poland and his limited integration into society of the UK. The prospects of rehabilitation, should Mr Semrav be willing to engage with the same has not been shown to be any different in Poland than in the UK although in Poland his prospects may be improved as his mother and other family members may be able to visit him in prison and to support and encourage him.

46. Having carefully considered the evidence made available and the competing arguments I find that Mr Semrav's deportation from the United Kingdom will not be a disproportionate interference with his right of free movement. It is an action necessary to protect members of the public from the genuine and sufficiently serious threat of violence posed by Mr Semrav.

47. It is also in accordance with the legitimate aim relied upon by the Secretary of State that any interference with any protected right established in the United Kingdom is proportionate, pursuant to Article 8 ECHR.

48. The appeal against the decision that Mr Semrav be deported is therefore dismissed.

Decision

49. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

50. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson
Dated the 6 July 2017