Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00225/2018

THE IMMIGRATION ACTS

Heard at: (UT) IAC Liverpool
On: 30 November 2018

Decision & Reasons Promulgated
On: 10 December 2018

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

BZ
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In Person
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Poland, born on 26 October 1986. Following a grant of permission to appeal against the decision of the First-tier Tribunal allowing his appeal against the respondent's decision to deport him from the United Kingdom pursuant to regulation 23(6)(b) and regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), it was found, at an error of law hearing on 2 August 2008, that the Tribunal had made errors of law in its decision and the decision was set aside. Directions were made for the decision to be re-made by the Upper Tribunal.

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Background to the Appellant's Case

2. The appellant claims to have arrived in the United Kingdom in July 2012. He first came to the attention of the UK authorities on 17 November 2016 when he was convicted of three counts of battery. He was remanded in custody until 2 December 2016. On 6 December 2016 he was sentenced to a community order to run until 5 December 2017 with an unpaid work and rehabilitation activity requirement. He was made the subject of a restraining order prohibiting him from contacting his partner and he was ordered to pay costs, compensation and a victim surcharge. On 10 April 2017 the appellant was convicted of theft shoplifting and conviction for an offence whilst a community order was in force. He was sentenced to a 24 month conditional discharge and was ordered to pay costs and a victim surcharge. On 15 February 2018 the appellant was convicted of failing to comply with the requirements of a community order, the order was revoked and he was sentenced to 16 weeks' imprisonment.

3. On 23 February 2018 the appellant was served with a notice of liability to deportation to which he did not respond. On 22 March 2018 he was issued with a notice of decision to make a deportation order and it was also decided to certify his case under Regulation 33 of the EEA Regulations 2016. A deportation order was signed against him on 22 March 2018. On 4 April 2018 the appellant lodged an appeal against the decision to deport him, referring to his children and to his medical condition. The matters raised in his grounds of appeal were addressed in a supplementary letter dated 27 April 2018.

4. In the deportation decision, the respondent noted the absence of evidence of residing and exercising treaty rights in the UK for a continuous period of five years or more and therefore did not accept that the appellant had acquired a permanent right of residence under the EEA Regulations 2016. The respondent considered the appellant's criminal offending, noting that he had assaulted his partner by beating her on three occasions, on 8 August 2016, 27 September 2016 and 18 October 2016, and had been convicted of three counts of battery. He had received a community order with an unpaid work requirement but had failed to attend work sessions on 4 and 11 May 2017 and subsequently received 16 weeks' imprisonment. The respondent considered that the appellant had thereby shown disregard for orders placed on him by the courts which indicated an anti-social attitude towards the public and community. The respondent also noted that the appellant had been convicted of shop-lifting. It was considered that his offending indicated an established pattern of repeated acquisitive offending within a relatively short period of time. It was considered that there was insufficient evidence that he had adequately addressed the reasons for his offending behaviour and it was noted that he had provided no evidence of completing any rehabilitation programmes. The respondent accordingly concluded that the appellant had a propensity to re-offend and that he represented a genuine, present and sufficiently serious threat to the interests of public policy justifying his deportation on grounds of public policy.

5. The respondent noted that the appellant had been diagnosed with Ventricular Septal Defect (VSD) and pancreatitis and that he had been admitted to hospital twice whilst in detention but considered that there was adequate medical care and treatment available in

Poland. There was no evidence that the appellant had been in employment and exercising treaty rights in the UK. There was no evidence to substantiate the appellant's claim to have family ties in the UK with his two children D and O. It was therefore considered that the decision to deport the appellant was proportionate and in accordance with the principles of regulation 27(5) and (6) of the EEA Regulations. With regard to Article 8, the respondent did not accept that the appellant had a genuine and subsisting relationship with his children, noting that there was a restraining order in place restricting his access to his children, and considered that it would not be unduly harsh for his children to remain in the UK whilst he was deported. The respondent did not accept that the appellant had a genuine and subsisting relationship with his partner, noting that there was a restraining order prohibiting him from contacting her as a result of his conviction for battery. It was considered that the appellant could not, therefore, meet the requirements of paragraph 399(a) and (b) of the immigration rules. With regard to paragraph 399A the respondent considered that the appellant had not been lawfully in the UK for most of his life, that he was not socially and culturally integrated in the UK and that there were no very significant obstacles to his integration into Poland. Accordingly he could not meet the private life exceptions to deportation. The respondent concluded that there were no very compelling circumstances outweighing the public interest in his deportation and that his deportation would not, therefore, be in breach of Article 8. The respondent went on to certify the appellant's human rights claim under regulation 33 of the EEA Regulations 2016 on the basis that there was no risk of serious irreversible harm if he was removed pending the outcome of any appeal and that his removal pending an appeal would not be unlawful under section 6 of the Human Rights Act 1998.

6. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal on 30 May 2018 by First-tier Tribunal Judge Lal. The appellant appeared without a legal representative. He was in immigration detention at the time. He produced a witness statement entitled "supplementary letter" for his appeal, in which he set out his circumstances. He claimed, in his statement, that his former partner and another woman had lied and given false testimony in the magistrates' court leading to his unlawful conviction and that there had been no assault. He had breached the community order because he was depressed and was unable to work. He had had a breakdown after losing his freedom, his flat and his work. He did not have a propensity to re-offend and did not have a lack of respect for the law. He did not attend any courses whilst in detention as none were available to him. His illness had a big impact on his life. He was integrated into life in the UK and had many good friends and was a loving father and close friend to his children and a carer for his close friend HD. The appellant agreed with the respondent that he did not have a subsisting relationship with his partner and confirmed that they were getting divorced. He had contact with his children through a third party, a mutual friend of his and his former partner, and he fully participated in his children's upbringing. He wanted to remain in the UK with his children.

7. The appellant, in his oral evidence before the judge, said that he came to the UK in 2012 to seek work and found a job. He returned to Poland in 2013 as his wife had given birth to his daughter and she was unwell. He came back to the UK and worked in a restaurant. His wife and children joined him in the UK in March 2016. His conviction in

November 2016 was a result of a domestic incident when he found out that his wife was having an affair. He lost his job and his house. His divorce was being processed. He maintained contact with his children and had them on weekends, arranged through a third party. He spoke to his son every day on the telephone. His conviction in April 2017 for shop-lifting was when he was at his lowest and was homeless.

8. Judge Lal was satisfied that the appellant had come to the UK in 2012 and that he had shown through his oral evidence that he had been exercising treaty rights for more than five years. The judge considered there to be no evidence to suggest that the appellant posed a risk or that he had a propensity to re-offend. The judge accepted that the appellant had family life in the UK with his two children and considered that it would be disproportionate for him to be deported. He allowed the appeal under the EEA Regulations.

9. The respondent sought, and was granted, permission to appeal to the Upper Tribunal. At an error of law hearing on 2 August 2018, which proceeded in the appellant's absence, Upper Tribunal Judge Hanson found there to be material errors of law in the judge's decision. He referred to a letter produced on behalf the respondent from HMRC showing evidence of employment for the tax year 2012/13 but no employment recorded for 2013/14 or 2014/15, with work recommencing on 2 April 2016. He considered that to be consistent with the appellant entering the UK in 2012, returning to Poland in 2013 and then coming back to the UK in 2016 and, as such, did not show that the appellant had acquired five years exercising treaty rights in the UK. He considered that Judge Lal had therefore failed to give adequate reasons for finding there to have been five years continuous exercise of treaty rights on the basis of the appellant's oral evidence alone. UTJ Hanson also considered that the judge had failed to give adequate reasons for finding the appellant posed no risk, that there was credible evidence of insight and that he had meaningful relationship with his children, when there was only the appellant's oral evidence in those respects. He accordingly set aside Judge Lal's decision and made directions for the submission of further evidence in a resumed hearing.

10. The appellant's case initially came before me on 3 October 2018 for a resumed hearing, with Mr McVeety appearing for the respondent, but was adjourned part-heard as a result of concerns arising part-way through the hearing from the medical evidence produced by the appellant as to whether he had an infectious medical condition.

Appeal hearing and submissions

11. The appellant appeared at both hearings, on 3 October 2018 and 30 November 2018, without a legal representative.

12. At the hearing on 3 October 2018 the appellant, when asked about HMRC's records showing no employment from 2014 to 2015, confirmed that he had done some work for cash in hand and had also received money from his parents and had savings in the bank. He said that he had finished treatment for his medical condition two weeks ago and had a hospital appointment on 6 November 2018. As for evidence of his relationship with his

children, he only had photographs. He lived in Warrington and his children were in Bristol. He would see them when he could afford to travel. He had been seeing them every two weeks but then his ex-wife tried to alienate him from them. He had now found a third party through whom he was able to arrange contact. He had not seen his children since February 2018.

13. At the hearing on 30 November 2018 the appellant produced more photographs including recent photographs taken when he last saw his children on 23 October 2018 in Bristol. He had previously been in immigration detention and so had not been able to see them after February 2018. The meeting on 23 October 2018 was arranged through a mutual friend, a third party, and she trusted him enough to leave him in charge of her own two children as well. He also kept in touch with his son by telephone. There was no written agreement for contact. As for the incident leading to the convictions, the appellant said that it was one mistake when he lost his temper. He accepted that it happened but he had spent a long time in prison for a false accusation. He had wanted to take courses such as English, addressing offending behaviour, but none of the courses were available. The restraining order against him was indefinite. The appellant said that he had been working cash in hand and also had savings. He had not asked the people for whom he had worked for letters of support as he did not know where they were. He had returned to Poland only once since coming to the UK in 2012, after Christmas in 2012. It was a short visit of about six to seven days. When referred to the evidence of his friend HD the appellant agreed that he had in fact gone to Poland twice. The appellant said that he was currently employed through an agency on a zero hour contract. When I asked the appellant why he did not attend the unpaid work sessions in May 2017 he said that he was sick and further that he had changed address and his probation officer had not sent his files to Warrington from Bristol.

14. Mr Bates made submissions before me. With regard to the appellant's length of residence in the UK he submitted that there was a gap in the appellant's employment record and inconsistencies in his evidence as to how many times he had returned to Poland. The appellant had failed to give reliable evidence of exercising treaty rights for five years and the respondent was accordingly entitled to consider his case under the simple policy provisions. As for the risk of re-offending, the appellant had been inconsistent as to whether he accepted that he had offended. There was no evidence of rehabilitation. The Secretary of State was entitled to conclude that he was a risk. With regard to contact with his children, the appellant had only provided undated photographs. If there had been a visit on 23 October 2018, that was after the error of law hearing and there was no confirmation from the third party. The appellant could maintain contact by telephone from Poland. If it was accepted that the appellant posed a risk, the nature of his family life was not sufficient to outweigh his deportation to Poland.

15. The appellant, in response, said that he was a simple man, that he was not a criminal, that he loved his kids and he was sorry for his mistake.

Consideration and findings.

16. I turn first of all to the appellant's length of residence in the UK. It is for the appellant, if relying on the higher level of protection in regulation 27(3), to demonstrate that he has been exercising treaty rights in the UK for a continuous period of five years. The respondent, in concluding that the five year period has not been demonstrated, relies upon evidence from HMRC confirming the appellant's employment record for 2012/13, 2015/16 and 2016/17, but with no employments recorded for 2013/14, 2014/15 and 2017/18. The appellant claims to have worked cash in hand and to have lived off savings for those periods where HMRC have no record of employment. However, there is no evidence of such employment. In the circumstances I agree with Mr Bates that there is insufficient reliable evidence of five years continuous exercise of treaty rights in the UK and the appellant has therefore been unable to show that he has acquired a permanent right of residence in the UK. As such, he is not entitled to the enhanced level of protection in regulation 27(3) and is subject to the provisions in regulation 27, with particular reference to regulation 27(5) of the EEA Regulations, which states as follows:

> **"Decisions taken on grounds of public policy, public security and public health**
>
> **27.**—(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends…..
>
> …
>
> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
>
> (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;
>
> (f)the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.
>
> (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin. "

17. Accordingly the next question is whether the appellant's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. There is a notable lack of evidence from both parties in this respect. I am mindful not to make the same errors made by First-tier Tribunal Judge Lal whose decision was set aside on the basis of inadequate reasoning in the light of an absence of supporting evidence in relation to the appellant's account. It is indeed the case that there is little by way of supporting evidence from the appellant, other than his oral evidence. I note that in his supplementary statement he denied the offending but yet was found guilty by the court. Before me he said that he felt guilty for the incident in which he lost his temper and that he regrets his mistake, but there is little other than his oral evidence in that regard. There is also little in the way of evidence of rehabilitation and the appellant's explanation for that was that there were simply no courses available to him despite his attempts to enrol on such courses. Having said that, there is evidence of one course undertaken by the appellant on an "Integration and Employability" course in May 2018 and a letter from Susan Blyth, manager of the Room at the Inn, dated 2 October 2018, in which she confirms having known the appellant for over 12 months and provides positive support for him as a "good person". Furthermore, having heard from the appellant on two occasions, I found him to be sincere in his evidence before me. I take all of this into account.

18. It is also the case that there is a lack of supporting evidence from the respondent, which is particularly relevant given the first paragraph of the headnote to the Presidential panel's decision in Arranz (EEA Regulations - deportation - test : Spain) [2017] UKUT 294, that "*The burden of proving that a person represents a genuine, present and sufficiently threat affecting one of the fundamental interests of society under Regulation 21(5)(c) of the EEA Regulations rests on the Secretary of State*". It is relevant to note that, aside from the offence of shop-lifting, the appellant's criminal history was solely related to the domestic incidents involving his ex-wife. Whilst the conviction in that respect was for three counts of battery, and therefore comprised three separate incidents, there is no elaboration on the nature and extent of the battery and no evidence to support the description of assault by beating as provided by the respondent at [17] of the supplementary letter. The respondent's evidence consists solely of the PNC at F1 of the respondent's appeal bundle, which simply refers to the offence of battery with no further details, whereas the offence itself varies in degrees of seriousness. In that respect I take note of the limited nature of the sentence initially imposed upon the appellant for the offence. The appellant's further offence arose from his failure to attend unpaid work sessions in respect of the community order issued against him for the offences of battery, but it seems to me that two missed sessions in one year, albeit warranting the imposition of a 16 week sentence, is not particularly consistent with the respondent's description at [20] of a history of failure to comply with court orders. Neither do I find the appellant's offending to amount to a pattern of repeated offending as stated by the respondent at [22] of the supplementary deportation decision. Whilst in no way seeking to underplay the appellant's offences, with respect to the domestic incidents, the failure to attend two sessions of unpaid community work and the shop-lifting, I do not consider there to be evidence to suggest that the appellant poses a future risk to the public. I note that the appellant has respected the restraining order against him and has had the consent of his ex-wife to see his children by way of arrangements made through a third party. Accordingly, having taken all the evidence into account, I do not find that the

evidence establishes that the appellant represents a genuine, present and sufficiently serious threat for the purposes of regulation 27(5).

19. Having concluded as such I do not consider that the respondent's decision to deport the appellant is proportionate. Whilst there is very limited supporting evidence of the appellant's contact with his children, I accept from the photographs and the appellant's own evidence that there has been some contact and I also accept that the appellant's intentions in regard to maintaining contact are genuine and are not simply motivated by a desire to avoid deportation. I note that his intentions are supported by the letter from Susan Blyth and I found the appellant's oral evidence in regard to his children to be sincere and credible. Susan Blyth also confirms in her letter that the appellant has recently obtained employment. The appellant's employment is further supported by the contract from Single Resource and the credits to his bank account from Single Resource, as evidenced by his Lloyds bank statements. Whilst I have to agree with Mr Bates that, in view of the very limited evidence, the nature of the appellant's family life would not be sufficient in itself to outweigh the public interest in his deportation if it were accepted that he posed an ongoing risk. However, in light of my findings that he does not pose such a risk, and weighing up all the evidence, it is my conclusion that the respondent's decision to deport the appellant is not proportionate and is not justified on public policy grounds.

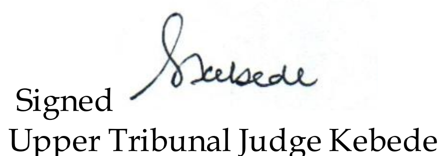
20. Accordingly I find that the respondent's decision is not in accordance with the EEA Regulations and I allow the appeal on that basis.

DECISION

21. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside. I re-make the decision by allowing the appellant's appeal under the EEA Regulations.

Anonymity

The anonymity order previously made is continued, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.



Signed
Upper Tribunal Judge Kebede Dated: 3 December 2018