Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00233/2018

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 20 August 2018	**On 20 September 2018**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR MIROSLAW SWEDROWSKI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person, with the assistance of an interpreter, and with assistance also from Ms J Wilkinson, as a McKenzie friend
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Poland who was born in October 1975. He claims to have arrived in the UK in 2005, which may or may not be true. Certainly, he was in the UK in 2008, because from then until the present he has amassed a number of criminal convictions (and cautions) in this country.

2. The appellant's first recorded conviction was on 18 October 2010, when for failing to provide a specimen for analysis (having been suspected of driving over the limit) he was fined £150 and disqualified from driving for twelve months.

3. The appellant disregarded the disqualification, because less than two months later, on 11 December 2010, for driving not just while disqualified, but again over the prescribed limit, he was disqualified from driving for a further three years. He was also made subject to an eighteen month supervision order, but the court very leniently suspended the twelve week period of imprisonment which was also imposed.

4. The appellant again disregarded this disqualification, because again less than two months later, he was stopped while driving while disqualified. Again he appeared to be drunk but refused to provide a specimen for analysis. On this occasion he was sentenced to 24 weeks' imprisonment, which this time was not suspended.

5. Following his release from prison, in October 2011 the appellant was conditionally discharged for being drunk and disorderly. Then on 20 September 2012, again for being drunk and disorderly he was fined £75. On 28 January 2013 he was yet again convicted of being drunk and disorderly and fined £100.

6. Then on 6 March 2013 he was again caught while driving while disqualified and apparently drunk as well; again he failed to provide a specimen for analysis. This offence was compounded by his assaulting a police constable when arrested. Remarkably, even though this was the third time he had been caught driving while disqualified and with excess alcohol, and even though he had assaulted a police constable during the arrest, he was again given a suspended sentence, both for the driving offences and for the assault on a police constable. He was sentenced to four months' imprisonment, suspended for twelve months and disqualified from driving for three years (the mandatory minimum) and he was also given a suspended sentence of one month for the assault on a police constable.

7. An obligatory alcohol treatment requirement was imposed as well.

8. The obligatory alcohol treatment requirement did not seem to have any effect on his behaviour, because two months later on 17 May 2013 he was again convicted of being drunk and disorderly, receiving the usual small fine of £50.

9. Then just three days later, for offences of battery and criminal damage, it appears that the court dealt with this by leaving the community order and sentence of imprisonment of March 2013 (of which the appellant was in breach) unaltered.

10. Again, the court's leniency did not have what was presumably the desired effect, because on 11 February 2015 while drunk and disorderly, the appellant again assaulted a police constable. For this offence, again the appellant was treated very leniently indeed, because he was made the subject of yet another supervision order.

11. Then just five months later, on 27 July 2015 for his fourth offence (within a five year period of first being disqualified) of driving while disqualified, again while over the prescribed limit, and for yet again assaulting a police constable, again the appellant was given a suspended sentence of imprisonment, a sentence to which he was

doubtless becoming accustomed. On this occasion he was sentenced to sixteen weeks' imprisonment suspended for eighteen months, a condition of rehabilitation activity was imposed and on this occasion he was disqualified from driving for 40 months.

12. Yet again he was in breach of this suspended sentence, because on 26 October 2016 for being drunk and disorderly and for being in breach of that suspended sentence order, it seems that again the court did not activate the suspended sentence but decided instead to vary the suspended sentence order by suspending it for a further 24 months.

13. Yet again the remarkable leniency of the courts failed to prevent the appellant from reoffending, because just two weeks later, the appellant was convicted of two further offences of criminal damage and two offences of battery. On this occasion the suspended sentence order imposed in July 2015 which had been left in place in October 2016 was activated.

14. The appellant was then again before the court, following his release on 11 September 2017 when following convictions for threatening to destroy property, he was again not sentenced to an immediate sentence of imprisonment but yet another suspended sentence was imposed, this time for eighteen months, suspended for 24 months, again with an alcohol treatment requirement.

15. As some (although it seems not the sentencing court) might have predicted, this did not prevent the appellant from reoffending either, because just two months later, on 14 November 2017, the appellant was again convicted of battery, which offence was in breach of the September 2017 suspended sentence order. The appellant appealed this conviction to the Crown Court but his appeal was heard and dismissed on 8 and 9 January 2018 on which occasion the appellant was sentenced to 26 weeks' imprisonment plus the whole of the eighteen month sentence of imprisonment (the suspended sentence) was activated and a restraining order was imposed on the appellant (in respect of his wife) without limit of time.

16. In addition to the convictions set out above the appellant had also been cautioned for being drunk and disorderly in August 2008 and for attempting to damage property in December 2008.

17. After having given the appellant an opportunity to set out reasons why he should not be deported, on 13 March 2018 the respondent made a decision that he should be deported from the UK in accordance with Regulation 23(6)(b) and Regulation 27 of the Immigration (EEA) Regulations 2016, the relevant parts of which provide as follows:

> "**Exclusion and removal from the United Kingdom**
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> ...
>
> 23.—(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom … may be removed if—
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> …
>
> (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27 …

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.

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

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; …

(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.

…".

18. The appellant appealed against that decision and his appeal was heard before First-tier Tribunal Judge Ian Howard, sitting at Harmondsworth on 30 May 2018. The appellant represented himself during that hearing, with the assistance of an interpreter, and as the judge notes in the course of his decision, the appellant continued to challenge the decision of the judge who had imposed his last substantial prison sentence.

19. In a Decision and Reasons promulgated on 6 June 2018, Judge Howard dismissed the appellant's appeal, and the appellant now appeals, with leave, to this Tribunal.

20. The grounds of appeal, consisting of two handwritten pages, were settled by the appellant himself and do not identify any arguable error of law in the judge's decision. However, First-tier Tribunal Judge R C Campbell, having given independent consideration to the decision, set out his reasons for granting permission to appeal as follows:

> "…
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> 3. The judge found that the removal was justified and lawful under the 2016 Regulations. The Secretary of State's letter giving reasons for the removal decision includes a contention that the appellant has not shown that he has acquired a right to reside in the United Kingdom permanently, by virtue of a continuous period of five years' residence in accordance with the 2016 Regulations. In the decision, the judge notes the appellant's immigration history, finding that he first arrived in the United Kingdom as a Polish national in 2005. At paragraph 19, mention is made of the judgment of the Court of Appeal in *Straszewski*, in relation to a decision to remove an EEA national with a permanent right of residence. At paragraph 29 of the decision, the judge accepts that the appellant has been exercising treaty rights in the United Kingdom.
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> 4. A careful reading of the decision discloses no finding of fact by the judge regarding any rights to reside acquired by the appellant. Moreover, the decision does not contain a finding regarding the relevant level of protection against removal acquired by the appellant since he arrived here in 2005. In particular, there is no finding regarding Regulation 27(3) or (4) of the 2016 Regulations or which, if either, provision applies in the appellant's case. There is no clear finding either as to the judge's acceptance or rejection of the Secretary of State's case that no permanent right of residence has been acquired.
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> 5. The grounds are rather imprecise but the appellant asserts that he has worked hard in the United Kingdom and married (although his relationship with his wife seems to have ended).
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> 6. It is arguable that the judge may have erred in failing to find which level of protection applied in the appellant's case. The findings made do not appear to relate precisely to Regulation 27 of the 2016 Regulations and so it is arguable that the overall conclusion that removal is justified and proportionate is flawed …".

The Hearing

21. The appellant had asked if he could be assisted at the hearing by a Ms Jacquie Wilkinson, who was assisting him in sorting out his financial affairs and whom he trusted. Ms Wilkinson does not have rights of audience in this Tribunal, but having ascertained from her that she was receiving no payment from the appellant for her assistance in this appeal, I allowed her to assist the appellant. She addressed the Tribunal, as did the appellant himself, the appellant with the assistance of a Polish interpreter.

22. At the outset, in addition to the reasons which had been given by Judge Campbell for granting permission to appeal, I identified one other matter within Judge Howard's decision which was problematic. At paragraph 16 of his decision, he had stated as follows:

> "16. In determining the appeal, I must focus on the personal conduct of the appellant and issues such as the prevention of crime by others and expression of society's condemnation of his behaviour as identified in cases such as *N (Kenya)* [2004] EWCA Civ 1094 and *OH (Serbia)* [2008] EWCA Civ 694".

23. As accepted on behalf of the respondent by Mr Duffy in the course of the hearing, it is specifically provided within Regulation 27(5)(d), as set out above, that "matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision". Accordingly, the judge's statement at paragraph 16 of his decision that he must focus on "issues such as the prevention of crime by others and expression of society's condemnation of his behaviour" is, as a statement of the judge's task when considering whether a deportation under the EEA Regulations is justified, is incorrect.

24. A possible explanation could be that the judge had intended to add the words "cannot be taken into account" at the end of this paragraph, because it is clear from the substance of the decision that the judge did not in fact focus at all on the deterrent effect of deportation or on the expression of society's revulsion at such behaviour. Indeed, at paragraph 17, the following paragraph, the judge stated in terms and correctly that "matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision".

25. When addressing the Tribunal on behalf of the appellant, Ms Wilkinson acknowledged that having been referred to the various reports, the appellant's case "did not look too good". She also referred to one of the reasons which had been advanced by the appellant before the First-tier Tribunal in support of his argument that he should not be sent back to Poland which was that he might be imprisoned for his failure to make the financial payments for the children of his previous marriage which he had been ordered to make. The judge at paragraph 29 had specifically rejected what the appellant had told him in this regard, stating that "I have heard and been shown no evidence to satisfy me that the claim of the prospect of detention in Poland is other than a self-serving and ultimately misleading statement".

26. Ms Wilkinson asked the Tribunal to note that the appellant's case was that he had always paid for his children in Poland and that what he really meant was that he was not earning money at the moment.

27. To summarise what the appellant himself told the Tribunal during this hearing, with the assistance of a Polish interpreter, everything was essentially all his wife's fault. She had been the one who had generally assaulted him, and it was not fair that he was being deported because she had also driven while over the limit and she was being allowed to stay. When asked by the Tribunal whether he appreciated that driving while drunk (and disqualified) was a danger to the public, he told the court that as far as his driving was concerned, he had been driving for a very long time and was a good driver. He had had a driving licence since he was 17 years old and never had any offences. Until he was 35 in 2010 he had never had any problems with the law.

28. So far as his convictions for assault on police were concerned, the appellant could only recollect two convictions. He did not think that the third one happened. In one of them, he said he believed he had spat on a policewoman by mistake.

29. So far as his drinking was concerned, he believed that he would no longer be a danger because he had now been on a course within prison, which was the first time he had addressed the problem of his drinking. When it was pointed out to him that he had been on courses previously, because it was a condition of not being sent to prison that he went on a course, he replied that that course was not very good, because there was insufficient time given to his problems.

30. On behalf of the respondent, Mr Duffy submitted that although what was said at paragraph 16 of the decision was obviously not correct, this did not actually go anywhere, because it was clear from the decision itself that the judge had not focused either on the need to deter others from committing crimes or on the need to express society's condemnation of such behaviour. So far as the ground identified by Judge Campbell was concerned, it was clear from the reasons given by the judge for his decision that there were indeed serious grounds for considering that the appellant's personal conduct represented a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" such that the decision to deport him needed to be made.

Discussion

31. I deal first with the judge's self-direction at paragraph 16 of his decision, which, as already noted above, and as accepted on behalf of the respondent, was clearly incorrect, as the judge was in fact precluded from taking account of issues such as the prevention of crime by others. However, it is, as I have already noted, clear from the decision itself that the judge did not in fact do so, and so even if he had intended to direct himself as it appears within this paragraph, this error was not a material one, because he did not when making his decision pay any regard to these factors.

32. It is right, as noted by Judge Campbell, that there is no express finding regarding whether Regulation 27(3) or 27(4) applies, or whether neither of them applies, but it is quite clear that on any view Regulation 27(4) does not apply. If it did, the decision could only be taken on imperative grounds. It is now well-established that periods of

imprisonment interrupt a "continuous period" of residence in the country, and the appellant has never been continuously resident in this country for a period of ten years. Also, one needs to count backwards, and when one counts backwards from the deportation decision, his presence in this country is interrupted by his last sentence of imprisonment. Although there may be circumstances where notwithstanding such a recent period of imprisonment, a person may be so integrated within UK society that Regulation 27(4) may apply (which has still to be decided) this is clearly not the case here.

33. Regarding whether the appellant had acquired a right of permanent residence pursuant to regulation 27(3), the respondent's submission is that the appellant has never established that he was exercising treaty rights for a continuous period of five years, which may or may not be correct, but I do note that in his decision, the judge accepted that the appellant had established treaty rights. Accordingly, I approach this appeal on the basis that it is at least arguable that the deportation decision would have to be justified on serious grounds of public policy etc., and consider whether or not, on the basis of the facts within this appeal, as found by the judge, it would be open to any judge to find other than that this deportation decision was entirely justified.

34. It is quite clear to this Tribunal that on the facts of this case, as found by the judge, and as indeed would have been bound to be found by any judge, a decision not to have deported this appellant would have been perverse. Not only does this appellant have numerous convictions, but some of them represent a clear and obvious danger to the public. I set out what is said in the OASys assessment with regard to the writer's obligation to "identify thinking/behavioural issues contributing to risks of offending and harm", in which the writer is asked to "include any positive factors", which is as follows:

> "[The appellant's] offending during the most recent two incidents indicates a lack of consequential thinking skills of the impact of his behaviour on himself and on others. His alcohol use appears to distort his thinking and clearly affects his behaviour. [The appellant] identified in his SAQ that he struggles at times to make good decisions and can act on impulse without thinking things through.
>
> Given the nature of the index offences, it is my view that his behaviours shows a lack of insight into his offending behaviour and I am linking this to risk of serious harm or reoffending. Additionally, previous custodial sentences have not deterred him from committing further offences against the same victim. I note that he was released on 11 September 2017 and reoffended on 25 September 2017".

35. Not only has the appellant committed serious assaults on his wife, and assaulted police officers, but he has no fewer than four convictions for driving drunk while disqualified. It appears that nothing deters him from doing so and the appellant's suggestion which he made during the course of the hearing that he is a good driver emphasises his lack of insight into the seriousness of his behaviour. When one considers the "fundamental interests of society", members of the public have a right to go about their day-to-day lives in safety, as far as is possible free from the risk of being killed or seriously harmed by drunk drivers. The threat that this appellant, if

allowed to remain in the UK, would pose to the public is clear and obvious and is exceptionally serious. The appellant has shown by his past conduct that unless removed from this country it is extremely likely that he will continue to drive while drunk, and the public interest in protecting society from this threat is immense.

36. It follows that none of the possible errors identified in Judge Howard's decision, whether by Judge Campbell or myself, were material ones, because on the facts as he found them to be, his decision was inevitable. For the sake of completeness, I should add that even if I had felt obliged to set aside his decision, I would have had no need to hear any further evidence, but would have myself remade the decision by again dismissing this appeal, for the reasons I have already set out.

37. It follows that this appeal must be dismissed and I will so find.

Decision

There being no material error of law in the decision of First-tier Tribunal Judge Howard, the appellant's appeal is dismissed and Judge Howard's decision, dismissing the appellant's appeal against the respondent's decision to deport him, is affirmed.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Dated: 17 September 2018