



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00294/2017

THE IMMIGRATION ACTS

Heard at: Birmingham  
On: 17<sup>th</sup> September 2018

Decision & Reasons Promulgated  
On: 18<sup>th</sup> September 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Marcin-Krzysztof Janicki  
(no anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: -  
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Poland born on the 12<sup>th</sup> October 1981. He appeals with permission<sup>1</sup> the decision of the First-tier Tribunal (Judge James) to dismiss his appeal against the Respondent's decision to deport him in accordance with

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<sup>1</sup> Permission was refused by First-tier Tribunal Judge Bennett on the 7<sup>th</sup> September 2017; it was granted upon renewed application by Upper Tribunal Judge Pitt on the 17<sup>th</sup> October 2017

the terms of the Immigration (European Economic Area) Regulations 2016 ('the Regs').

2. The reason for the decision to deport was that the Respondent has concluded that the Appellant, by virtue of his persistent offending, poses a genuine, present and sufficiently serious threat to public safety, one of the fundamental interests of society. At the date of the decision to deport on the 15<sup>th</sup> May 2017 the Appellant had committed a significant number of criminal offences, including:
  - On the 3<sup>rd</sup> March 2017 the Appellant drove a motor vehicle with no test certificate, insurance or licence, whilst under the influence of excess alcohol. He was sentenced to 20 weeks in prison. Prior to this he had been convicted of 11 other serious motoring offences including taking a vehicle without consent, driving whilst disqualified, driving under the influence of alcohol and failing to provide a specimen. He had received various sentences arising from these offences including 3 months in prison in December 2014, 3 months in prison in July 2014, and a number of fines.
  - On the 2<sup>nd</sup> January 2015, whilst on bail for another offence, the Appellant was convicted of burglary and theft, and taking a vehicle without consent for which he was sentenced to 8 weeks imprisonment.
  - On the 22<sup>nd</sup> April 2014 the Appellant was convicted of possession of an imitation firearm with intent to cause fear of violence. He was sentenced to 8 months in prison. On the same date he was convicted of possession of a controlled drug, Class B amphetamine but received no separate penalty.
  - On the 22<sup>nd</sup> August 2012 the Appellant received a warning for possession of a controlled drug, Class B amphetamine.
3. The decision to deport was made with reference to regulation 23(6)(b) of the 2016 Regs. The Respondent was not satisfied that the Appellant had acquired a permanent right of residence in the UK. She noted his claim to have lived here for over 11 years but he had failed to produce any evidence of the same. The earliest record of his presence in this country was the arrest in 2011. The Appellant had provided only one payslip for the entire period, showing he had worked for a (plant) nursery in February 2017. He therefore failed to qualify for any enhanced protection from removal. The Respondent considered the matter of the Appellant's family life in the UK but concluded nonetheless that deportation was proportionate.

4. When the matter came before the First-tier Tribunal the Appellant resisted deportation on the following grounds.
5. First, he submitted that he had acquired a permanent right of residence. He asserted that he had worked since his arrival in the UK in 2007, although he conceded that his employment had not been continuous. There were for instance spells when his wife had worked so he had stopped work to look after the children. He produced some evidence from the HMRC to demonstrate that he had been paying tax.
6. Second, he submitted that even if he could not demonstrate a permanent right of residence, and so gain enhanced protection from deportation, there was mitigation for his offending behaviour in that he had been devastated by the death of his father and had not been thinking straight. He had remorse and insight into his offending and it could not be shown that his deportation was justified under the Regulations. He did not pose a threat to one of the fundamental interests of society.
7. Third, it was submitted that his deportation would have a very detrimental impact on his three children who all live in the UK; although he and his wife were separated at the date of the hearing, she confirmed his evidence that he continued to see the children on a daily basis. The Appellant was living only 200 metres from the family home. In all the circumstances the decision to deport him could not be said to be proportionate.
8. The First-tier Tribunal found against the Appellant in respect of all three matters and dismissed the appeal.

### **Error of Law: Discussion and Findings**

#### *Permanent Residence*

9. The First-tier Tribunal did not accept that the Appellant had accrued five years continuous residence in the UK in accordance with the Regulations. Between paragraphs 34 and 37 the determination sets out a detailed analysis of the HMRC records as compared to the payslips adduced by the Appellant. In summary it is found that the figures in the two sources did not tally. In particular it is found that that during the tax year 2013-14 there was a break in employment which was significant and unexplained. The Tribunal found there to be insufficient evidence from which it could be established that the Appellant was exercising treaty rights other than through employment in that period. There was no evidence that his wife had been working during that time.

10. The grounds of appeal took no issue with those finding but in granting permission to appeal Upper Tribunal Judge Pitt identified what she thought to be a *Robinson* obvious point: the Tribunal had arguably erred in requiring the Appellant to demonstrate that he had been continually employed during a five year period, and further in failing to give adequate reasons in respect of the Appellant's wife and her employment. The Tribunal had heard directly from this witness and had apparently accepted her as a credible witness. She had said that she had been working. If the Appellant was living in the UK as her husband, he was residing in accordance with the Regulations.
11. In response the Secretary of State pointed to paragraph 38 of the determination, wherein the Tribunal specifically finds that the Appellant's wife had provided "no evidence" to show that she had been working during that 'missing' period in 2013-14.
12. I have read the statement of the Appellant's wife. She states that he had been the main breadwinner and has supported the family since their arrival in the UK. She works approximately 20 hours per week part time and earns £200 per month. She provided payslips, and a contract of employment, covering the period 2016-2017. I could see no specific evidence, nor reference in her testimony, to whether she was working in 2013-14.
13. Judge Pitt was correct to identify that there is no requirement for the Appellant to demonstrate that he was continually employed for any given five year period in order to have acquired a right of permanent residence. The burden lies on the Appellant to show that he has been residing in the UK for that continuous period "in accordance with" the Regulations. Although the First-tier Tribunal did place what was perhaps an undue focus on the Appellant's employment record, upon further consideration I am unable to find that it did ultimately apply the wrong test. That is because the determination clearly records at paragraph 39 that there is no evidence that he qualified in any other capacity, and at 38 that there was no evidence to show that his wife was working during the operative 'missing period' in 2013-14.
14. Accordingly the Appellant could not show that any error of law had been made in respect of the findings on 'permanent residence'.

*A Genuine, Present and Sufficiently Serious Threat?*

15. The Tribunal noted that the Appellant has committed numerous criminal offences over a 7-year period. His claims to have been rehabilitated were unsupported by any evidence of any actual steps in that regard. There was for instance no corroborative evidence from the organisation 'Coventry Rescue', a group that the Appellant claims to have sought help from. He has the support

of his wife, mother and sister, but he had their support during his offending spree. This failure to take action to address his own offending behaviour, coupled with the frequency of the offences, led the Tribunal to conclude that the relevant test in Regulation 27(5)(c) was made out. There was a sufficiently serious threat posed by the Appellant to engage the deportation provisions.

16. The Appellant took issue with these findings on the grounds that they were not open to the Tribunal. The Respondent had failed to supply any sentencing remarks from the trial judges in the criminal courts and as such there was insufficient evidence before the Tribunal to warrant a conclusion of future risk. Nor was there any material from probation services. In the absence of such evidence the Tribunal was not in a position to assess risk, or the prospects of rehabilitation.
17. It is trite law that the burden of establishing that the Appellant represents a threat rests upon the Respondent. In this case the Respondent submitted that she had done that not just by pointing to the offences themselves – an approach that would be expressly forbidden by the Regulations themselves – but to the persistent nature of the offending, and the fact that the Appellant had apparently done nothing to address his behaviour. That reasoning is summarised at paragraph 20 of the refusal letter:

“In the absence of evidence that there has been any improvement in your personal circumstances since your conviction, or that you have successfully addressed the issues that prompted you to offend, it is considered reasonable to conclude that there remains a risk of you re-offending and continuing to pose a risk of harm to the public”.

18. That was the Secretary of State’s case, and it was accepted by the Tribunal. I was shown no authority for the proposition that that burden could only be discharged by the production of the sentencing remarks, or by a probation assessment. What a trial judge might have said about the seriousness of the offending may have been helpful, but it was not a necessary prerequisite for the test being met. That is because it was obvious from the various sentences of imprisonment imposed on the Appellant what view the sentencing court took.
19. This ground is not made out. The First-tier Tribunal was entitled to reach the conclusions that it did about the threat posed by the Appellant.

#### *Proportionality*

20. The First-tier Tribunal determination addresses proportionality at its paragraph 42. It considers the fact that the Appellant has lived most of his life in Poland and that he speaks the language. He has diabetes but would be able to receive treatment for that condition there. He still has relatives living in Poland. His

opportunities for rehabilitation would not be diminished by his deportation. The paragraph concludes “taking these factors into account I am satisfied that the decision satisfies the test of proportionality”. The determination then proceeds, at paragraph 43, to consider the position of the Appellant’s children in the context of Article 8 ECHR. In doing so it applies the tests found in ss117C of the Nationality, Immigration and Asylum Act 2002, and paragraphs 398-399 of the Immigration Rules. It concludes that it would not be “unduly harsh” on the children if their father were to be removed, *inter alia* because they could maintain contact with him through modern social media.

21. The complaint made about that approach is that the Tribunal has failed to make any assessment of the best interests of the children in accordance with s55 of the Borders and Citizenship Act 2007 and that the findings on the impact on removal were inadequately reasoned.
22. I am satisfied that the First-tier Tribunal did err in its approach to proportionality.
23. The relevant parts of Regulation 27 are sub-sections (5) and (6):

(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.

24. The first difficulty is that the structure of the determination gives the clear impression that the Tribunal made two separate assessments. At paragraph 42 it considered, with no reference to the Appellant's family, the question of proportionality under the Regulations and concludes "taking these factors into account I am satisfied that the decision satisfies the test of proportionality". At paragraph 43 it then goes on to consider the position of the family under the Immigration Rules. That approach is manifestly wrong. The impact on the Appellant's children, and his family life with them, was at the heart of his defence under the Regulations. He and his wife had both given evidence about the detrimental impact it would have on the children, evidence that was supported by other family members. That was, as can be seen from Reg 27(6), a matter that fell to be considered in the context of proportionality under Reg 27(5)(a). Paragraph 42, wherein the Tribunal purports to conduct that assessment, says nothing at all about his life in the UK, his wife, children or other family members resident here. That omission was plainly material.
25. Mr Mills argued that the two paragraphs should be read together, and that the assessment of the children's position, as elaborated in paragraph 43, should be 'read-in' to the overall proportionality assessment at 42. Apart from the obvious problem that this is expressly not the approach the Tribunal took (see above), it raises a discrete error in approach. The relevant test was not that contained in paragraph 399 of the Rules. The Appellant is an EEA national and the Immigration Rules do not therefore apply. The test of undue harshness is not replicated in the Regulations, nor does that framework reflect the presumption in favour of deportation inherent in the statutory scheme under s117C NIAA 2002.
26. I am satisfied that this ground is made out. I set aside the reasoning of the First-tier Tribunal insofar as it relates to proportionality, although I note that upon remaking the decision overall I will be obliged to take into account any new evidence pertinent to the decision.

### **The Re-Made Decision**

27. I heard live evidence from the Appellant, and I had regard to his statement dated 10<sup>th</sup> July 2017. His unchallenged evidence is as follows.

28. The Appellant came to live in the United Kingdom in 2006. His whole family live here. His parents came around the same time as him, and since his father's death his mother has been living in Coventry. His sister is here (she accompanied him to the hearing before me), as is his wife, and their three children. The Appellant states that he has no relatives left in Poland. Even all of his in-laws are here: his wife's parents and siblings. They all live very close by to each other in Coventry.
29. The Appellant has three daughters, currently aged 15, 13 and 11 (it was her birthday the day of the hearing). The elder two have lived in the United Kingdom for approximately 12 years. The youngest was born here and has always lived here. At the time of the First-tier Tribunal hearing the Appellant's wife had given evidence in support of his appeal. She did not attend the hearing before me: the Appellant, who is unrepresented, explained that he did not know that it was necessary. Her evidence at that time (July 2017) was that their marriage had been placed under considerable strain by the Appellant's drinking and his criminal offending. They had decided to separate but remained on good terms. She and the children live only a few minutes walk away from the Appellant and his mother and they are in daily contact. In the week they see each other for about 2 hours each evening, but at weekends he is around all day. She believed that his deportation would have a "very negative impact" on the children, who had already suffered a lot when he went to prison. They have a very good relationship with their father and turn to him for support.
30. The Appellant told me that this continues to be the case. The girls regularly stay overnight with him and his mother - particularly the younger two - and he sees all of them every day. They are close. He has attended parents evening and end of term events at their schools. He did not ask any of them to attend the hearing because he does not want to frighten or worry them. They do know about the Home Office decision but he and his wife have decided not to involve the children. As to his marriage it is the Appellant's hope that once "all of this" is resolved (ie the deportation action) they could be reconciled.
31. The Appellant states that he has regularly worked since his arrival in this country. He has had various jobs, including working in the same plant nursery as his mother, working as a machine operator and in a factory. At the moment the Home Office have his passport so he is unable to get a job. He is making money as a self-employed person by buying and selling second-hand clothes online. Since his release from prison he has been living with his mother in Coventry. He is managing to support himself and gives his wife £220 per month towards maintenance of the children.
32. The Appellant is a qualified chef but has never actually worked in the catering industry. He has gained work experience in the United Kingdom and worked before he ever left Poland. He had his own business selling fruit and vegetables



from a market stall. The Appellant states that his biggest concern upon returning to Poland would be accommodation. He doesn't have anyone he could stay with and renting is very expensive.

33. Mr Mills confirmed that the Appellant is not known to have committed any further offences since his conviction for possession of amphetamines in July 2017. In evidence he said that he has not consumed alcohol – the root of most, if not all, of his offending behaviour – since being diagnosed with Type 1 Diabetes in April/May of last year. He is now unable to tolerate alcohol in any quantity.
34. I have weighed all of that evidence in the balance. I remind myself that the Appellant had not managed to establish that prior to enforcement action being taken he had accrued five years living in the United Kingdom “in accordance with the Regulations”. Although I accept that he has been living and working in this country for some 12 years his status as a qualified person, or as the family member of a qualified person, has not been consistent, or at least has not been consistently proven. I further remind myself of the reason that the Secretary of State seeks to deport this man: between 2014 and 2017 he committed a series of no less than 18 criminal offences, ranging from possession of a class B drug to possession of an imitation firearm. Most of these offences were committed under the influence of alcohol, a problem which by the Appellant's own admission also led to the breakdown of his marriage.
35. The burden rests on the Secretary of State to show that the Appellant's deportation is necessary to protect the fundamental interests of society. Having regard to the factors set out at Regulation 27 I find as follows.
36. The offences themselves are, I find, a serious indication that whilst he was committing them the Appellant had little to no regard for the safety of the wider public or indeed himself. For instance, driving under the influence of alcohol shows a marked disregard for those around him. Whilst Mr Mills very fairly acknowledged that there has been no further offending, and that the spree does appear to have come to an end once the Appellant ended his troubled relationship with alcohol, the multiple offences and the repeated nature of the offending is something that I must give significant weight to. The question is whether those factors can be outweighed in the proportionality balancing exercise by the Appellant's family life.
37. Having considered all of the evidence I find it is such that I am unable to find the Appellant's deportation is a proportionate response.
38. The Appellant has, the Respondent accepts, a genuine and subsisting parental relationship with three children who have grown up with him as a 'present' father. He has, since his separation from their mother, maintained daily contact with them. They stay with him, and their paternal grandmother, at least one night

per week. He supports them, and their mother, not just financially but emotionally: he takes an active role in their upbringing. Whilst it cannot be said that the relationship would be entirely nullified by his removal, I accept that the interference would be substantial - their normal day to day interaction would be a thing of the past. I find that it would be strongly in the best interests of these children if their father were not deported. The entire extended family is here, settled in this country. The girls are all in full time education in this country and regard it as their home. The prospects of them and their mother returning to Poland now are negligible. If they did so in order to preserve their relationship with their father, it would come at the price of their relationships with both sets of grandparents, aunts, uncles and of course their established friendships and positions in school. If, in the alternative, they did not go, they would in effect lose their 'normal' relationship with their father, a relationship to be replaced by phone calls and occasional visits. They are not to be in any way blamed for their father's criminality, yet it is they who would bear the brunt of the consequences.

39. It is of course trite that sometimes, separation and the breakup of families is the inevitable and tragic consequence of criminal behaviour. However in a case like this, where the criminality appears to have been driven by - or at least connected with - a particular life event (the death of the Appellant's father) and where the underlying cause (alcohol abuse) has been effectively dealt with, serious consideration must be given to whether it is right to make the children suffer the grave consequence of losing their father. In all the circumstances I do not consider that this would be the proportionate response.
40. For those reasons I allow the appeal.

### **Decision**

41. The determination of the First-tier Tribunal is set aside to the extent identified above.
42. There is no order for anonymity.
43. The decision in the appeal is remade as follows: "the appeal is allowed with reference to the Immigration (European Economic Area) Regulations 2016".



Upper Tribunal Judge Bruce  
17<sup>th</sup> September 2018