Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00041/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 November 2019	**On 16 December 2019**

Before

THE HONOURABLE LORD MATTHEWS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE KEBEDE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PAWEL [D]

Respondent

Representation:
For the Appellant: Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: Mr A Buchan, Counsel, instructed by Cloisters

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a determination of Judge of the First-tier Tribunal Kainth promulgated on 17 July 2019 after a hearing on 4 July 2019. The respondent in that case, the Secretary of State, whom we shall continue to call the respondent in the body of this determination, was represented today by Ms Fijiwala, a Home Office Presenting Officer, and Mr A Buchan of Counsel appears for Mr [D], whom we shall call the appellant.

2. The appellant is a national of Poland with a declared date of birth of 13 March 1987. On 31 December 2018 the respondent made a decision that he should be deported from the United Kingdom on the grounds of public policy/public security in accordance with Regulation 23(6)(b) and Regulation 27 of the Immigration (European Economic Area) Regulations 2016. The appellant lodged an appeal against that on 22 January 2019 and the determination under attack is the result of that appeal.

3. It appears that the appellant claims to have entered the United Kingdom in 2006. On 4 October 2017 before the Crown Court at Reading, he was convicted of sexually assaulting a female by penetration. It is noted that it was digital rather than penile penetration. On 3 November 2017 he was sentenced to two years' imprisonment and became subject to the notification provisions of the Sexual Offences Act 2003, the so-called Sex Offenders Register.

4. As a consequence of that, on 15 November 2017 he was served with a Notice of Liability to Deportation. Certain representations were submitted and he himself made written submissions on 2 October 2018, setting out why he should not be deported. Further representations were received from his wife on 15 October 2018 but a decision was made to refuse her representations and deport him. A deportation order was signed against him that same day, namely 15 October 2018. On 31 December 2018 the original deportation decision which had been certified under Regulation 33 of the European Regulations was reviewed and a replacement decision issued as of 31 December 2018.

5. Before the First-tier Tribunal a number of documents were lodged, including a copy of the appellant's immigration history, a pre-sentence report, the sentencing remarks of the judge at Reading Crown Court, an OASys Report, certain financial documentation and the appellant's written representations, as well as deportation documentation. There was also a copy of the Reasons for Refusal Letter and other documentation. The appellant's bundle was received by the Tribunal Office on 27 June 2019, consisting of some 187 pages. The respondent considered that the deportation was justified on grounds of public policy, as we have indicated, because of the conviction for a serious sexual assault.

6. The law makes it plain that any deportation must be proportionate and in accordance with Regulation 27 but there are, as is well-known, three levels of protection against deportation in the Regulations. They are basic level, a level of protection acquired where the EEA Regulations apply, serious or middle tier protection, acquired after obtaining permanent residence and imperative or top tier protection, acquired after obtaining permanent residence and ten years' continuous residence. These factors were set out plainly in the determination of the First-tier Judge.

7. As far as the determination itself is concerned, the judge allowed the appeal, finding that the respondent had failed to substantiate any lawful reason, as it is put, as to why the appellant's rights should be curtailed.

The view was taken by the judge that the respondent's actions were not proportionate because the respondent was unable to satisfy the criteria for deportation. Any question of Article 8 was not considered because the grounds upon which the respondent sought to rely upon deportation were not satisfied, according to the judge.

8. That decision is under challenge in a number of respects. It is submitted on behalf of the Secretary of State that the appellant only enjoyed the basic level of protection and the First-tier Tribunal had erred by applying a higher threshold than applicable. It does appear to us that it is not entirely clear whether the First-tier Tribunal Judge applied the imperative test or the serious grounds test but when looking at paragraph 40 it is apparent that at least the imperative grounds were considered because what is said there is the following:

> "Based on my finding above, the appellant is entitled to the higher level of protection and accordingly it is for the respondent to show that there are imperative grounds. The continuous period of residence has not been broken because in calculating the ten year period I have worked backwards from the date of the custodial sentence having been imposed."

That custodial sentence was imposed in November 2017 and, as we have indicated, the deportation decision was not made until December 2018. In fact, what should have happened, as is conceded, is that the back calculation in respect of the ten year period should have run from the date of the deportation decision, not the date of the imposition of the custodial sentence.

9. That being so, Counsel has conceded that there is an error of law and Ms Fijiwala obviously contends that that is also the case. We agree with that. It is clear, we think, from the authorities that the back calculation has to come from the date of the deportation decision. Therefore, the judge falls into error.

10. That is, however, not the end of the story. The mere fact that a prison sentence has interrupted the period does not necessarily mean that the ten year period has been itself interrupted. What has to happen is that the judge has to make an assessment of all the circumstances to see if the appellant's integrative links with the community, such as they are have been broken, and no such assessment was carried out in this case. The result of that is that we find that there is an error of law in that respect.

11. There are other grounds in the Secretary of State's appeal. They relate, amongst other things, to the merits of the appeal. We do not wish to say too much about that at this stage in view of the decision we have reached but it is plain to us also that as far as the permanent residence is concerned, although the judge has made certain findings that the appellant acquired permanent residence, basing this on certain evidence about his arrival in the country and certain evidence about his work, there is a gap in the period of certification of the documentation as far as his

work is concerned. Now, it may be that that is of no consequence if the position is that the judge has found that he worked for five years exercising his treaty rights before that period, namely from about May 2006 until about May 2011 or thereby, but it is not clear what the continuous period of five years is thought to be. So, in those circumstances, it cannot be clear to the respondent just what it is that has been found as far as that period is concerned.

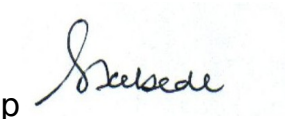
12. We have been asked by the Home Office Presenting Officer to remit the case to the First-tier Tribunal, having found that there is an error of law. On the other hand, Mr Buchan suggests that the matter could be dealt with in this Tribunal. Having considered what the Home Office Presenting Officer has had to say, we are in agreement with her position. It seems to us that, while certain further evidence has been submitted setting out statements from not only the appellant and certain relatives and charity workers (apparently he works in a charity shop), the upshot of all this being that he has maintained community ties here, the respondent is entitled to challenge that evidence, not merely to have it thrust upon her and accept it at face value, so it is important, we think, that the question of the community ties be properly explored.

13. It is important also that the question of the permanent residence, namely the exercise of treaty rights for a continuous period of five years, whenever that is, should be properly explored and determined and the question of the proper level of protection is a matter which obviously requires to be determined properly.

14. In these circumstances, we are in agreement that the matter should be remitted to the First-tier Tribunal. We therefore set aside the decision of the First-tier Tribunal. None of the findings of fact will be maintained. The matter will be remitted to the First-tier Tribunal and we direct that any evidence which is sought to be relied upon should be submitted no later than two weeks before any hearing and a respondent's bundle should be submitted. The bundle we have is almost illegible, in fact completely illegible in many respects. It is possible if one strains one's eyes to make out what it is all about but clear documentation requires to be submitted to enable the First-tier Tribunal to consider the matter properly.

DECISION

15. The Secretary of State's appeal is allowed. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard afresh before any judge aside from Judge Kainth.



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LORD MATTHEWS
Sitting as a Judge of the Upper Tribunal
(Immigration and Asylum Chamber) Date: 13 December 2019