Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00227/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th December 2018	**On 15 January 2019**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SEBASTIAN LUKASZEWSKI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Poland born on 1 May 1990. His appeal against the Respondent's decision to make a deportation order was allowed by First-tier Tribunal Judge Parkes on 14 September 2018. The Secretary of State for the Home Department appealed.

2. The Respondent appealed on the ground that the judge erred in law in assessing whether the Appellant was a genuine, present and sufficiently

serious threat to one of the fundamental interests of society pursuant to Regulation 27 of the Immigration (EEA) Regulations 2016. The grounds submit that the judge erred in finding that the Appellant's criminal record was at the lower end of the offending scale, in giving him credit for the two and a half year gap between the offences he committed, and failing to give consideration to the totality of the Appellant's criminal behaviour including his failure to comply with a community order. Therefore, the judge's conclusion that his behaviour did not reach the threshold justifying exclusion was materially flawed. Further, the judge failed to have regard to Schedule 1 of the 2016 Regulations.

3. Permission was granted by First-tier Tribunal Judge Haria on 9 October 2018 on the grounds it was arguable the judge erred in law in concluding that the Appellant's conviction for possession of a knife was a 'serious matter' but then later finding that the Appellant's record was at 'the lower end of the scale of offending behaviour.' Furthermore, it was arguable that the failure to have regard to Schedule 1 of the 2016 Regulations was capable of materially affecting the outcome of the appeal.

Immigration History

4. The Appellant claims to have arrived in the United Kingdom in February 2012. His first offence was committed on 12 October 2014, resulting in a conviction for possession of a knife, for which he received a fine. He was convicted on 21 March 2017 for going equipped for theft and possessing a class B drug – amphetamine. He was sentenced to a one year community order with an unpaid work requirement of 50 hours. On 21 June 2017 he was ordered to undertake a further 20 hours of unpaid work because of his failure to comply with the requirements of the community order. On 8 September 2017 the unpaid work requirement was increased to 100 hours due to the Appellant's failure to comply.

5. The Appellant did not attend the appeal hearing before the First-tier Tribunal because he was removed from the UK on 15 July 2018. He did not attend this hearing or apply for re-admission to the UK in order to do so. The notice of hearing was served by email on 7 November 2018. The email address corresponded to that given in the grounds of appeal to the First-tier Tribunal and there was no indication on the court file that the notice had not been properly delivered. I was satisfied on the material on the court file that notice of hearing had been properly served and therefore, there being no reasons from the Appellant for why he did not apply to attend the hearing, I proceeded to hear the appeal in the absence of the Appellant.

6. Mr Melvin submitted that the judge's conclusion that the Appellant's criminal record was insufficient to amount to a genuine, present and sufficiently serious threat to one of the fundamental interests of society was fundamentally flawed because the judge took into account irrelevant

matters and failed to take into account relevant ones. The judge had erred in law in his application of Regulation 27.

Discussion and Conclusions

7. The Appellant has five convictions, one for possessing a knife in a public place, the second for going equipped for theft, the third for possessing a controlled drug and the fourth and fifth for failing to comply with a community order. The Appellant's previous record shows an escalation in criminal behaviour and the more serious sentence given in respect of the second and third convictions indicates an escalation in the seriousness of the offences. There was also the failure to comply with the requirement of a community order on two occasions, which shows the Appellant's disregard for the law.

8. Schedule 1 states that the fundamental interests of society in the United Kingdom include maintaining public order; preventing social harm; excluding or removing an EEA national or family member of an EEA national with a conviction and maintaining public confidence in the ability of the relevant authorities to take such action; and tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm. Had the judge had regard to the totality of the Appellant's offending behaviour in the context of Schedule 1 then he may well have come to a different conclusion.

9. The judge made the following findings:

> "15. Does this limited criminal record justify the Appellant's exclusion from the UK on the grounds of public policy or security? To do it has to show that he presents a sufficiently serious threat on that basis the higher thresholds do not apply as the Appellant has not shown that he has acquired permanent residence.
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> 16. Even assuming that since mid-2014 the Appellant has been exercising treaty rights as his record stands I find that his record does not reach the basic threshold that applies. It is not a good start to his time in the UK and only one or two more convictions at that level would quite possibly enough to justify his exclusion but in my view that point has not been reached. I say that as the offences are at the lower end of the scale and with the gap between the dates of the commission of the offences the element of persistence that might have aggravated the situation is lacking. That absence of persistence removes a suggestion that he is likely to re-offend. If he does re-offend then this is an issue the Secretary of State would be entitled to reconsider.
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> 17. As it stands his behaviour, if repeated, could easily reach the threshold justifying his exclusion but the Appellant has not quite reached that point yet."

10. I find that the judge erred in law in failing to take into account the nature and pattern of the Appellant's offending behaviour such that it shows an escalation in the seriousness of the offences committed and a complete disregard for the law. Secondly, in taking into account and giving weight to the fact that the Appellant's first conviction was in 2014 and the second conviction was in 2017 when the Appellant has failed to provide any evidence that he remained in the UK during that time. That matter could not go in the Appellant's favour, given the lack of evidence as to what he was doing. Lastly, the judge failed to consider and specifically refer to Schedule 1. Had he done so and looking at the evidence as a whole, he should have concluded that the Appellant's behaviour did pose a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

11. On that basis, I find that the judge erred in law. I set aside his decision and remake it. I dismiss the Appellant's appeal against deportation.

Notice of decision

The Respondent's appeal is allowed.

The decision of 14 September 2018 is set aside.

The Appellant's appeal against deportation is dismissed under the Immigration (EEA) Regulations 2016.

No anonymity direction is made.

J Frances

Signed Date: 7 January 2019

Upper Tribunal Judge Frances