Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: DA/00276/2018

THE IMMIGRATION ACTS

Heard At Field House
On 21 March 2019

Decision and Reasons promulgated
On 02 May 2019

Before:
LORD UIST
(Sitting as a Judge of the Upper Tribunal)
Upper Tribunal Judge McWILLIAM

Between:
JAROSLAW [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr S Ell, instructed by Turpin & Miller LLP (Oxford)
For the respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

1. This is an appeal by Jaroslaw [B], a citizen of Poland who has a permanent right of residence in the UK, against the decision of the First-tier Tribunal (Judge Ford), sitting at Birmingham on 16 November 2018, to dismiss the appeal by the appellant against the decision of the Secretary of State dated 20 March 2018 to deport the appellant on serious grounds of public policy and public security under the Regulation 23 (6)(b) of the Immigration (European Economic Area) Regulations 2016 with reference to Regulation 27 (SI 2016, No 1052).

2. The background to this case is the appellant's criminal history. On 15 August 2010 he pleaded guilty to battery against his former partner and received a conditional discharge of 12 months. On 25 October 2011 he pleaded guilty to two counts of battery against his former partner and breach of his conditional discharge, for which he was sentenced to 16 weeks imprisonment concurrent on each count and made the subject of a restraining order. On 14 May 2016 he pleaded guilty to destroying or damaging property and was again made the subject of a restraining order. On 2 December 2016 he was convicted of eight breaches of the restraining order protecting his former partner from harassment over a six months period between June and December 2016. He was sentenced to six months imprisonment suspended for 12 months and had a rehabilitation activity requirement of 35 days imposed on him. On 24 April 2017 he was sentenced to six months imprisonment for failing to comply with the terms of his suspended sentence. On 10 May 2017 the respondent wrote to the appellant (who was then detained in Winchester Prison) informing him that his case had been carefully considered and that he had concluded, in light of the sentence involved, to take no further action against him "on this occasion". On 25 July 2017 the appellant pleaded guilty to two counts of shoplifting and had a community order with a 60 hours unpaid work requirement imposed on him. On 5 December 2017 he was convicted of two breaches of his restraining order and sentenced to consecutive sentences of 26 weeks and 8 weeks imprisonment. The details of these breaches are set out at paragraphs 25 and 26 of the respondent's letter of 20 March 2018 in the following terms:

> "25. On the Memorandum of Entry from Berkshire Magistrates' Court dated 5 December 2017 it stated that between 9 February 2017 to 14 February 2017 you contacted MK directly via text message, which you are prohibited from doing. This offence was said to be so serious because the victim was vulnerable and it caused deep distress and psychological harm to her. There was also said to be a racially aggravated element to the message(s), which were said to be deeply unpleasant and which was further aggravated by your previous offending.
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> 26. Additionally, on 15 February 2017 you contacted MK via a telephone call and once again the offence was regarded to be so serious as it was racially motivated and caused your victim further deep distress. You also pleaded not guilty to these offences,

> indicating that you did not accept responsibility for your actions in this regard, although you were subsequently found guilty."

3. There are two grounds of appeal. The first ground is that, while the judge correctly identified that serious grounds of public policy and public security were required to justify the deportation of the appellant, she applied too low a standard as to what constitutes "serious" in Regulation 27(3) (*Secretary of State for the Home Department v Straszewski* [2015] EWCA Civ 1245 at paragraph 20). As the respondent had accepted in the letter of 10 May 2017, which was written at a time when he considered that the appellant did not have a right of permananent residence, that the deportation of the appellant could not be justified grounds of public policy and public security, his deportation in March 2018 could not be justified on serious grounds of public policy and public security as the only difference since May 2017 was the acquisition of a conviction for two offences of shoplifting and two further breaches of the restraining order. The second ground was that the judge had erred in her approach to the issue of proportionality in respect that she failed to take account of all factors, in particular, the fact that the appellant had permanent residence.

4. So far as the first ground of appeal is concerned, the judge dealt with this at paragraphs 38 and 39 of her decision as follows:

> "38. Mr Ell argued that the Secretary of State's position was untenable because the only offences the appellant had committed since the letter of April 2017 *(sic)* was sent to the appellant and he was told that no action would be taken at that time were the two shoplifting offences which could not reasonably be said to have heightened the public interest in the appellant's removal. He argued that because the only offences the appellant had committed since April 2017 were the shoplifting offences his deportation cannot be justified.
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> 39. I do not accept these submissions. On closer examination, at the time that the letter was written in April 2017 the breaches of the restraining / harassment order that led to the imposition of custodial sentences of 34 weeks in December 2017 were not known to the Secretary of State. It is slightly unclear when these breaches occurred as the appellant appears to be saying that they occurred in December 2017, whereas the PNIC refers to the breaches being in February 2017. But it makes no differnce to the outcome because either way the appellant had not been sentenced to 34 weeks imprisonment for those breaches as at April 2017. The 34 *(sic)* period of imprisonment was the second period of imprisonment for repeated breaches of the domestic violence orders."

She went on to set out the reasoning for her decision at paragraph 55 as follows:

> "I have concluded that in the absence of any understanding on the part of the appellant as to the underlying causes of his repeated *violent and* threatening behaviour and his failure to engage in any

> work to equip himself to resist such behaviour in future there is a genuine and present risk that those behaviours will be repeated once the appellant comes out of detention and seeks to resume contact with V (his daughter). He urgently needs to engage with anger management and domestic violence courses to avoid such difficulties in future relationships. He needs to recognise the terrible impact of domestic violence on children and their wellbeing. Until he does so and in light of the seriousness, repeated nature and extended timescale of his *violent and* aggressive behaviours and his contempt for court orders and probationary supervision, I am satisfied that there are serious grounds of public interest and public policy for deporting the appellant as a persistent *(sic) violent* offender." (The italicising is ours.)

5. We are satisfied that the judge was wrong to reject the submission by Mr Ell set out at paragraph 38 of her decision. In our opinion that submission was well-founded. Mr Ell's point was that the respondent had accepted in his letter of 10 May 2017 that the appellant's then criminal record did not bring him within grounds of public policy and public security and the acquisition thereafter of a conviction for two counts of shoplifting and breaches of his restraining order could not, when added to his pre-May 2017 record, bring him within **serious** grounds of public policy and public security. We doubt, from what she said in paragrpah 39 of her decision, that the judge fully appreciated the force of this point. In any event, even if there had been no letter of 10 May 2017 from the respondent, the appellant's criminal record up to December 2017 could not on any conceivable view be said to justify his deportation on **serious** grounds of public policy and public security. We do not doubt that his behaviour was highly distressing and frightening for his ex-partner and daughter, but he has been punished for what he did and the question in these proceedings is whether his deportation can be justified on **serious** grounds of public policy and public security. The answer is that it cannot. This case is far removed from the type of case which the legislature intended to be covered by the words "serious grounds of public policy and public security". Moreover, the judge was in error when she considered the appellant's criminal history. She used the word "violent" three times in paragrapah 55 of her decision, at one point referring to "his repeated violent and threatening behaviour". The fact is that his only convictions for physically violent behaviour were on 15 August 2010 and 25 October 2011 and were known to the respondent when he wrote his letter of 20 May 2017. He has had no convictions for violence since October 2011. The details of his breaches of the restraining order in 2017 are set out at paragraphs 25 and 26 of the respondent's decision letter of 20 March 2018: they do not involve violence. For the above reasons the judge materially erred. The decision to dismiss the appeal is set aside.

6. In light of our decision on the first ground of appeal we can deal with the second ground of appeal briefly. In his oral submission Mr Ell made clear that he was not contending that permanent residence equalled integration. His point was that it was a strong factor to be taken into

account in the proprtionality assessment. In our view the judge did not err in her approach to proprtionality and the submission on this point is unsound. Recital 17 of Directive 2004/38/EC explicity states that "enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State … is a key element in supporting social cohesion". Having regard to the findings which she made the judge was fully entitled not to be satisfied that the appellant had integrated socially or culturally in the UK.

7. We re-make the appeal. The respondent has failed to establish serious grounds under Regulation 27(3). In the light of this, it is not necessary to consider Regulation 27 (5) or (6). The appeal is allowed under the 2016 Regulations.

Appeal allowed.

Signed Lord Uist dated 30 April 2019

Lord Uist
(Sitting as a Judge of the Upper Tribunal)