Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00270/2018

THE IMMIGRATION ACTS

Heard at Glasgow	**Decisions & Reasons Promulgated**
On 20 December 2019	**On 6 March 2020**

Before

MR C. M. G. OCKELTON, VICE PRESIDENT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADRIAN LUKASZ PAWLIKOWSKI

Respondent

Representation:
For the Appellant: Mr Clarke, Senior Home Office Presenting Officer.
For the Respondent: Mr Rea, of Rea Law.

DECISION AND REASONS

1. This is an appeal by the Secretary of State. The respondent, whom I shall call "the claimant", is a national of Poland, who appealed to the First-tier Tribunal against a deportation order made against him on 12 January 2018. Judge Farrelly allowed his appeal.

2. The facts are, for the most part, not in dispute. The claimant was born in June 1990. His parents, both Polish nationals, are separated; they both live in the United Kingdom. The claimant first came to the United Kingdom in 2008. He did not obtain work, and returned to Poland. He came back to the United Kingdom in September 2015. He worked until January 2016 and then from June 2016 until June 2017. He has also worked more

recently: there are payslips showing work from 20 July 2018 to 5 October 2018.

3. He met a Polish woman living in the United Kingdom. She has a son whose father is Polish and also lives in the United Kingdom. The claimant and she began to cohabit when she became pregnant: twins were born on 4 November 2016. The relationship was soon in difficulties. They are not now living together. The evidence of the claimant's contact with his twin daughters and with his former partner's son is very far from clear, but there is no evidence of close or necessary contact.

4. The claimant has a long criminal record. There is an account of at least six convictions in Poland in the period 8 July 2009 to 30 November 2011, including robbery, assault, theft, fraud, perjury and drugs offences. The penalties include a sentence of two years imprisonment, a sentence of ten months imprisonment, a sentence of eight months imprisonment suspended for four years, and other penalties. His record also shows failure to comply with the terms of bail or probation, and the revocation of release on parole as recently as June 2015.

5. On discovery of his criminal record, the Secretary of State wrote advising them that he was liable to deportation. He responded by letter dated 16 November 2017 to the effect that he had a partner and twins by her and that he was acting as a stepfather to his partner's son: he said that he cared for the children when she was at work. In fact it appears that he was charged with assault of his partner in the summer of 2017 and was admonished; part of the terms for the disposal of that offence involved a requirement that he have no contact with her. That order was still in force in November 2017 when he was in contact with her, in breach of the terms of his undertaking. He pleaded guilty to assaulting her and was sentenced to a term of imprisonment of 163 days, apparently including some sanction for breach of bail. I do not have any official details of this offence, but Judge Farrelly records that:

> "The appellant has sought to play down the incident by blaming his lawyers for pressurising him into pleading guilty and suggesting he accidently had his hands on his former partner's neck."

6. The respondent did not accept that the claimant was in the relationship he claimed with his partner: there was no evidence that any family members were dependent upon him. The deportation order was made and signed.

7. In the course of his appeal to the First-tier Tribunal, the claimant provided documentary evidence relating to the births of his twin daughters. No details were provided about his stepson. There was a statement of support from his mother, with whom he was living. There was no statement from his former partner. As I have already indicated, the evidence about his contact with the children was somewhat vague.

8. Judge Farrelly decided that the claimant had only the lowest level of protection afforded under the EEA regulations. He set out the law, correctly in my view as follows:

> "21. The burden of proving that a person represents a genuine, present and sufficiently [serious] threat affecting one of the fundamental interests of society under Regulation 21(5)(c) of the EEA Regulations [2016] rests on the Secretary of State. The standard of proof is the balance of probabilities (see Arranz (EEA Regulations – deportation – test) [2017] UKUT 00294 (IAC)). The decision must be based exclusively on the personal conduct of the appellant which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The decision must comply with the principle of proportionality. Previous criminal convictions do not, in themselves, justify the decision. I must have regard to the appellant's age, state of health, family and economic situation. Relevant also is the appellant's length of residence in United Kingdom and his integration as well as the extent of his links with Poland."

9. In making his decision, the judge first noted the offences in Poland, which he said "did not indicate any great planning or premeditation [but] they are serious and repetitive and resulted in custodial sentences". He then said that he accepted Mr Rea's contention that a distinction could be made between his offending in Poland and in the United Kingdom. That is a reference to Mr Rea's submissions, but in noting those submissions the judge did not give any indication of what Mr Rea's basis for the distinction was. In any event, the judge makes it clear what his assessment of the United Kingdom offences was. The first offence was "following an argument with his partner"; the judge makes no further comment on it. As to the second offence, the judge said that it was more serious; the claimant had sought to play down the incident by blaming his lawyers; it was aggravated because it was committed on bail and the judge specifically indicated that he did not accept that the claimant did not understand the conditions of his bail. The judge also pointed out that the domestic nature of the violence was an aggravating factor. He then said this:

> "However, there is no evidence of premeditation. There is nothing to indicate drink or drugs was a contributing factor. Further, the wider public was not affected."

10. The judge went on to deal with family matters. He noted that there was no letter of support from the claimant's partner, an omission that he described "significant". There was, as I have indicated, little evidence of his contact with the children other than the claimant's own statement that he "sees" them every day: the judge says that the claimant's mother's statement supports that, although in fact her assertion was that he sees them almost daily". The judge concluded "on balance, I am prepared to accept that he does see his children." He commented that the interests of the children are of paramount consideration and that "it is in their interests to know their father": meaningful contact would end if the appellant returned to Poland.

11. The judge then said that he bore in mind the claimant's age and the fact that he had been in employment. He concluded that there was no evidence of any real integration in the United Kingdom. The claimant does not understand English. There is no evidence of any involvement with anyone outside the Polish community. The judge then continued by repeating that there was a distinction between the claimant's criminality in Poland and his offences here. He said that time elapsed since the commission of the offences was to be taken into account. He repeated what he had said in relation to the second offence, but added "I do accept the point made that the appellant now appreciates offending can equate to removal". The judge said that he accepted the claimant had no family support in Poland, but added that he could see no reason why the claimant could not re-establish himself there but "I accept the appellant's only family are here and he sees his future here". The judge concluded as follows:

> "I have taken all these factors into account. I am influenced by the appellant's age and the distinction drawn between the convictions in Poland and those here. His immediate family are here and he has children. He is not engaged in criminality here affecting the wider public. The offences here were spontaneous. Their domestic nature is aggravating but does explain the context. On balance, I find that the appellant's deportation is not justified."

Thus, he allowed the appeal.

12. The grounds of appeal challenge the judge's conclusion on a number of bases. First, they submit that the judge failed to justify the distinction he made between the convictions in Poland and the convictions in the United Kingdom. Secondly, the judge failed to take into account the claimant's seeking to minimise the seriousness of his convictions and his failure to accept responsibility of his actions. In those circumstances, the judge erred in his finding that the claimant does not pose a genuine present and sufficiently serious threat to the fundamental interests of society. Finally, there was no real basis in the evidence before the judge to show that it would be disproportionate to deport the claimant.

13. At the hearing before me Mr Clarke relied on the grounds. He queried the relevance of some factors which the judge took into account, including the assertion that the United Kingdom offences were spontaneous and that they were not influenced by drink or drugs. He submitted that the judge appeared to have relied particularly on the distinction between the Polish and the United Kingdom offences, a matter of which he gave no explanation. Further, he had not indicated why the claimant's criminality did not affect the wider public. There was clearly a risk to others. So far as proportionality is concerned, the true position, according to Mr Clarke was that there was no evidence of care to any child and that contact could be maintained by phone or videophone from Poland.

14. Mr Rea submitted that Mr Clarke was simply trying to reargue the appeal. There were only three convictions in the United Kingdom. In Mr Rea's view

the claimant was not a danger to the public. There was a distinction between the Polish and the United Kingdom offences, in particular because of the period of time since the Polish offences. Further, the offences in the United Kingdom were, as Mr Rae put it, "only" against his partner. Mr Rea accepted that there might be said to be flaws in Judge Farrelly's decision, but they were not sufficient to show that he was not entitled to reach the assessment he did, or to justify setting that decision aside.

15. I approach this matter with great caution. It was for the First-tribunal Judge to assess the evidence and to reach a judgment on the issues posed by the Regulations. It would be quite wrong for me to set his decision aside solely on the basis that I did not agree with him. In my judgment, however, the difficulties with Judge Farrelly's judgment go much more deeply than that. Although he relied very heavily on a supposed distinction between the claimant's criminality in Poland and his criminality in this country, most of the matters that he mentioned in identifying the distinction were similarities. Further, it was quite wrong to reach the conclusion that the appellant was not a danger to the public simply on the basis that his offence of assault was against his partner. There was no evidence of that. Further, the judge wholly failed to take into account that both in Poland and the United Kingdom there are offences of failing to comply with orders of the Court. In these circumstances I accept the submission that the judgment shows that the judge failed to take properly into account all the material before him in relation to the claimant's offending. I set Judge Farrelly's decision aside and I remake the decision on the claimant's appeal.

16. Although there is no additional evidence formally before me, I note that in the course of his submissions Mr Rea referred to two additional relevant facts. First, his view was that the claimant was in prison in Poland up to about the time he left, in summer of 2015. That is relevant, because it reduces any credit that the claimant might otherwise have for keeping out of trouble after his offences in 2011 or 2012. Secondly, Mr Rea told me that although the claimant sees his former partner's son (who is not related to him), he does not see his own children, the twin girls.

17. The claimant has, as I have said, a considerable criminal record in Poland. He has also committed offences here. The offences here are not in my judgment properly distinguishable from those in Poland. In particular, he has continued to be demonstrably violent, and has continued to decline to accept the judgments of the Courts and to comply with orders made against him. As the law of Scotland properly recognises, that violence is committed in a domestic context is an aggravating factor. There is in my judgment no reason to suppose that the claimant's propensity to violent crime is confined to his ex-partner, or that, even if it were, he should now be regarded as not a danger to the public. On the contrary, it appears to me that on his record of offending in Poland, continued as it was in the United Kingdom, the Secretary of State's case is clearly made out. He is, and remains, a person who by his offending has shown that he represents a genuine, present and sufficiently serious threat affecting one of the

fundamental interests of society: the interest in question is that of other members of society in being able to conduct their lives without risk of the claimant's criminality, and the interest of society as a whole that those taking the benefits of living in society comply with the law and orders made for the purposes of the restraint of crime. The risk is evidently genuine and present: the most recent offences show that. In my judgment the claimant's history also shows that the threat is sufficiently serious to merit his removal.

18. The decision must be proportionate. The position is that the claimant is a national of Poland. There is no reason to suppose that he cannot reintegrate himself in Poland. He has been in the United Kingdom for a relatively short time, for only part of which he has worked. He does not speak English. He has contact with his mother but not with his children. The only other contact of which there is any evidence is with a child who is not related to him by blood or by any subsisting quasi matrimonial relationship. The claimant's age, state of health, family, economic situation, length of residence in the United Kingdom and integration do not begin to suggest that it would be disproportionate to remove him.

19. For these reasons, which are essentially those advanced before me by Mr Clarke, I substitute a decision dismissing the claimant's appeal.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 03 March 2020