



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: EA/03343/2018

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
On 20 December 2019**

**Decisions & Reasons Promulgated  
On 14 January 2020**

**Before**

**MR C. M. G. OCKELTON, VICE PRESIDENT**

**Between**

**TOMASZ BLACHEWICZ**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr G Rea of Rea Law.

For the Respondent: Mr Clarke, Senior Home Office Presenting Officer.

**DECISION AND REMITTAL**

1. The appellant is a national of Poland. He came to the United Kingdom in March 2011. At the beginning of March 2016 he was extradited to Poland to answer criminal charges against him there. On his attempted return to the United Kingdom on 3 February 2018 he was served with a notice of refusal of admission.
2. He appealed, and his appeal came before Judge David Clapham on 8 November 2018. For various reasons the hearing did not begin until nearly 4 o'clock, and it may be that that affected what happened at it. Be that as it may, the judge's decision, issued on 14 December 2018, contains a number of errors, as the parties before me agreed. My own

suspicion is that, although the judge allowed time for written submissions of law to be made after the hearing, the truth of the matter was that there was not sufficient time to explore the issues he needed to determine.

3. There appears to be no doubt in this case that the burden of proof is on the respondent to establish that the appellant's exclusion from the United Kingdom is justified on grounds of public policy, public security or public health, and that the appellant poses a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society": that is the effect of Regulations 23(1) and 27(5) of the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052). The judge expressed doubt about the allocation of the burden of proof (though he did assume *de bene esse* that the burden of proof was on the respondent): he distinguished Arranz [2017] UKUT 00294 solely on the ground that it applied only to removals and not to exclusion. It is difficult to see the basis for the distinction the judge drew, given that the principles of both EU and national law appear to be the same in either case. But he wholly failed to determine the appeal, instead providing a hypothetical response based on review, as follows:

"47. In view of the nature of this Appellant's criminal history I consider that the Respondent was entitled to reach the decision that the Appellant should be excluded from the United Kingdom and if the position is that what I am required to do is to review the Respondent's decision, I consider that the decision that was reached in the case of the Appellant was the correct one standing the fact that he had been convicted of assaulting a minor and had been sentenced to a significant term of imprisonment.

48. ... Had the Appellant had a right of permanent residence, I consider that I might well have had to come to a different conclusion but in light of my finding that no right of permanent residence has been established, the Respondent's decision should be upheld."

4. Not only did the judge fail to reach his own conclusion on the matter at issue: he reached no very firm conclusions on the appellant's circumstances or his criminal history either. It is thus not readily possible to substitute a determination.
5. In any event, the appellant's appeal has not had the consideration in the First-tier Tribunal to which the appellant was entitled. Both parties before me asked me to remit the appeal for a fresh hearing in the First-tier Tribunal. It seems to me that that is the appropriate outcome in this case.
6. For the foregoing reasons I set aside Judge Clapham's decision for error of law and direct that the appellant's appeal be heard afresh by the First-tier Tribunal.

C. M. G. OCKELTON  
VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER  
Date: 9 January 2020