Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00010/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
By Microsoft Teams	
On 7 July 2021	**On 15 December 2021**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MALWINA AGNIESZKA SLOWIK
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Secretary of State: Mr Avery, Counsel, instructed by Wimbledons Solicitors
For Ms Slowik: Mr M Bradshaw, Senior Home Office Presenting Officer

DECISION AND REASONS

1. For reasons of clarity, I will refer to the appellant as the Secretary of State and the respondent as Ms Slowik.

2. This hearing was held remotely via video link and neither party objected to the hearing being held in this manner. Both parties participated by Microsoft Teams. I am satisfied that a face-to-face hearing could not be held because it was not practicable because of the Covid pandemic and that all of the issues could be

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determined in a remote hearing. Neither party complained of any unfairness during the hearing.

Decision under Challenge

3. The Secretary of State appeals with permission the decision of First-tier Tribunal Judge Bird dated 8 January 2021 which allows Ms Slowik's appeal against a decision dated 24 December 2019 to deport her from the United Kingdom pursuant to Regulation 27 of the Immigration (European Economic Area) Regulations 2016. Permission to appeal was granted on 19 January 2021 by Upper Tribunal Judge Martin.

Background

4. Ms Slowik is a Polish national born on 18 December 1985. She entered the UK in 2010.

5. She came to the attention of the authorities on 7 July 2009 when she was arrested and charged with driving a vehicle with excess alcohol. She was charged with similar offences in August and September 2019. For her last offence she was sentenced to 18 week's imprisonment.

The decision to deport – Secretary of State's decision

6. On 24 December 2019 the Secretary of State made a decision to deport Ms Slowik pursuant to Regulation 27 of the Immigration (European Economic Area) Regulations 2016. The Secretary of State's view was that Ms Slowik had not obtained permanent residence in the UK and had the lowest level of protection against deportation. When deciding to deport her, the Secretary of State took into account that driving a vehicle while impaired by alcohol can have devastating effects on society in terms of road accidents, injuries and deaths. Ms Slowik re-offended by driving during a period in which she was disqualified, thereby displaying reckless and risk-taking behaviour. Her convictions indicated an established pattern of repeat offending, a lack of regard for the law, a lack of remorse and a lack of understanding of the negative impact of her offending. It was said that attendance at courses does not rehabilitate an offender. There remains a risk of reoffending and Ms Slowik continues to pose a risk to the public.

7. The Secretary of State considered the decision to be proportionate taking into account those factors in Regulation 27(6), including her age, health, and social and cultural integration. She had not provided evidence of her partner and children. Ms Slowik is familiar with the culture of Poland and could continue to be rehabilitated in Poland. In respect of Article 8 ECHR, it was not accepted that Ms Slowik had a genuine and subsisting parental relationship with her children and in any event, it would not be unduly harsh for the children to return with her to Poland. Similarly, it was not accepted that she had a genuine and subsisting relationship with her partner nor that it would be unduly harsh for him to return with her to Poland.

8. A supplementary decision letter was issued on 25 August 2020 summarising the HMRC records and clarifying the Secretary of State's position on "permanent residence". It was said that Ms Slowik had low earnings from 2010 indicating that her work was sporadic and low level. The letter also stated that earnings in the tax year 2014 to 2015 amounted to £756 and therefore did not demonstrate that she was a worker in that period. There was also reference to later years but these are not relevant to the decision of the First-tier Tribunal nor this decision.

9. On the morning of the substantive hearing the Secretary of State sent an email to Ms Slowik's counsel conceding that she was a family member of a qualified national for the tax year 2014 to 2015 because of her husband's earnings. The respondent also conceded that Ms Slowik was a qualified national for the tax years 2011 to 2012 because her earnings for that tax year exceeded the threshold for paying Class 1 National Insurance Contributions.

Ms Slowik's position

10. Ms Slowik's position was that she has acquired permanent residence in the UK. Her deportation can only be justified on 'serious' grounds of public policy, public security and public health. She has two children in the UK and the remainder of her family are in the UK including her mother and siblings. She is working with social services and trying to obtain custody of her children. She has a new partner. She is the victim of domestic violence. She is remorseful and seeking help for alcohol and mental health issues. The decision is not proportionate and beaches her rights under Article 8 ECHR and the Community Treaties.

Appeal before the First-tier Tribunal

11. There were various Case Management Review hearings prior to the substantive hearing. On 27 April 2020 First-tier Tribunal Bird made an Amos direction for Ms Slowik's HMRC records to be disclosed. The Secretary of State then issued a supplementary refusal letter with further documents and reasons as set out above. At the appeal hearing, the Secretary of State clarified that the decision had been made on the basis that Ms Slowik had neither acquired permanent residence in the UK nor had resided in the UK for a continuous period of ten years. It was conceded by the respondent that the appellant was a qualified national in the years 2010 to 2011, 2011 to 2012 and 2014 to 2015. The substantive hearing was adjourned and Ms Slowik's representative submitted a further letter requesting an Amos direction in respect of Ms Slowik's husband. His HMRC records were also before the Tribunal. There was then a resumed hearing.

12. There were two main issues to be resolved:

Issue 1 – applicable level of protection

13. The first issue for the judge to decide was the applicable level of protection acquired by Ms Slowik in accordance with Regulation 27 of the 2016 Regulations. The judge found that Ms Slowik had acquired permanent residence in the United Kingdom

through a combination of her own status as a worker and as a family member of a qualified national. The judge found that the appellant's work, although low paid, was not marginal nor ancillary.

14. The judge also found that Ms Slowik had acquired the enhanced level of protection under Regulation 27(4)(a) on the basis that she had resided in the United Kingdom for a continuous period of ten years. Her removal could only be justified on "imperative grounds".

15. The judge considered the caselaw on "imperative grounds" and concluded that the Secretary of State had not made out the "imperative grounds" test. In the alternative she considered whether the respondent had discharged the burden in respect of "serious grounds".

16. The judge considered whether Ms Slowik had a propensity to re-offend in a similar way and found that she has addressed her behaviour by accepting that she needs help, undertaking some courses and seeking support. The judge also took into account that she has not reoffended since leaving prison, has the support of her mother and unsupervised contact with her children.

17. The judge found that the respondent had failed to discharge the burden of proof that there were "serious grounds" that required Ms Slowik's removal on the grounds of public policy, and public security.

The Grounds of Challenge

18. The Secretary of State submits that the decision of the First-tier Tribunal is flawed in the following material respects. These were clarified and amplified in oral submissions.

Ground 1 - Legal misdirection/ Reasons challenge – applicable threshold.

(a)The judge erred in applying a higher threshold than applicable. The finding that the appellant has acquired ten year's continuous residence is an error. The judge should have looked back ten years from the date of the decision which was taken on 27 September 2019. Since the appellant arrived in 2010, she cannot have accrued ten years continuous residence.

(b)The judge also erred in finding that Ms Slowik had acquired five year's continuous residence as a qualified person. There was insufficient evidence that prior to her marriage on 3 January 2014, she was cohabiting with her husband or that he was a qualified national. Secondly the judge was not entitled on the evidence before her to find on the balance of probabilities that the appellant was a qualified national in her own right between 2013 and 2014. In particular as a jobseeker she could only retain her status for 91 days pursuant to Regulation 6(1)(b) of the EEA Regulations 2016.

Since the judge applied the incorrect threshold, her finding that the appellant does not pose a genuine, present and sufficiently serious threat is unsustainable.

Ground 2 - Reasons challenge – risk of reoffending

The judge gave inadequate reasons for finding that Ms Slowik has addressed her offending behaviour. Ms Slowik was assessed as a medium risk to the public. The Probation Service was concerned about her lack of intention to stop drinking. It is too soon to say that she is not a threat because she was only released in February 2020. The judge failed to give adequate reasons why she could not be rehabilitated in Poland.

Ground 3 – Schedule 1

The judge failed to engage with Schedule 1 of the EEA Regulations 2016.

19. Ms Slowik submitted a rule 24 defence to the grounds of appeal.

Preliminary point regarding jurisdiction

20. The Immigration (European Economic Area) Regulations 2016 have now been revoked by The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 Schedule 1(1) paragraph 2(2) (December 31, 2020. Revocation, however, has effect subject to savings specified in The Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020, Regulation 2 and Schedule 1 and The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 Regulations ("The Transitional Provisions").

21. Schedule 3 paragraph 5 of the Transitional Provisions deals with existing appeal rights and appeals and as this appeal was extant prior to commencement day, I consider that I retain jurisdiction. Regulation 27 of the 2016 Regulations is specified in Schedule 3, paragraph 6 of the Transitional Provisions.

Existing appeal rights and appeals

5.— (1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply—

(a) to any appeal which has been brought under the Immigration (European Economic Area) Regulations 2006 and has not been finally determined before commencement day,

(b) to any appeal which has been brought under the EEA Regulations 2016 and has not been finally determined before commencement day,

(c) in respect of an EEA decision, within the meaning of the EEA Regulations 2016, taken before commencement day, or

(d) in respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or

the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which is taken on or after commencement day.

(2) For the purposes of paragraph (1)—

(a) an appeal is not to be treated as finally determined while a further appeal may be brought and, if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned; and

(b) an appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom.

(3) The revocation of the EEA Regulations 2016 does not affect the application of the Immigration (European Economic Area) Regulations 2006 to an appeal that falls within paragraph 3(1) of Schedule 4 to the EEA Regulations 2016.

Analysis and decision

Ground 1 - Misapplication of the law/ reasons challenge

Ten years continuous residence (imperative grounds)

22. This was the basis on which permission was granted, although the grant of permission was not limited.

23. It was conceded by Mr Bradshaw in the rule 24 response and at the hearing that the judge erred in finding that Ms Slowik had acquired ten year's continuous residence. Mr Bradshaw also pointed out that the appeal had not been argued in this way in any event.

24. In B [2018] EUECJ C-316/16 it is said at [65],

> "65 It follows, in particular, that the 10-year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of the decision ordering that person's expulsion (judgment of 16 January 2014, G., C-400/12, EU:C:2014:9, paragraph 24).

25. Since Ms Slowik had not been resident in the UK for ten years at the date of the decision to deport, she could not have accrued ten years continuous residence in the UK and is not entitled to the enhanced level of protection.

26. It is agreed that the judge misapplied the law. However, since the judge also found in the alternative that the respondent had not discharged the burden in respect of "serious grounds" (a lower level of protection), this error is not material to the outcome of the appeal.

Permanent residence

27. Mr Avery enlarged on the grounds of appeal in his oral submissions. The Secretary of State's view is that the appellant's work record between 2013 and 2014 is erratic even on her own evidence and shows lengthy periods of unemployment. It is

submitted that pursuant to the Regulation 6 of the EEA Regulations the appellant could only be a jobseeker for a maximum of 91 days in any 12 months.

28. Mr Avery submitted that the judge's findings in relation to the appellant's earnings were very brief and did not reflect the complexity of the evidence before her. There was evidence that certain parts of the appellant's earnings were very low. In 2012 her earnings amounted to £4000 which is £70 to £80 per week. This is insufficient for the judge to find that the work was not marginal or ancillary when compared with income from benefits. This is not reflected in the assessment carried out by the judge.

29. His submission is that the judge has not demonstrated that she grappled with the evidence and has not dealt with it sufficiently.

30. Mr Bradshaw submitted in response that the judge's findings regarding the tax years 2013 to 2014 have to be seen in the context of the other years. The judge recorded that prior to the hearing the Secretary of State had conceded that Ms Slowik was a qualified national in the years 2011 to 2012 and 2014 to 2015. In the supplementary letter of 25 August 2020 which replaced the original decision, no specific issue was taken as to whether she was a qualified national in the tax years 2012 to 2013 and 2013 to 2014 apart from an assertion that her work was low-paid and sporadic.

31. Mr Bradshaw submitted that the Secretary of State's grounds and approach is inconsistent. The Secretary of State, in the grounds to the Upper Tribunal, has not challenged the judge's finding that Ms Slowik was a qualified national in the tax year 2012 to 2013. It is not asserted that the judge's approach to this earlier period is unlawful. In the tax year 2012 to 2013, her earnings were £4,000, the same level as in the tax year 2013 to 2014, thus it is not clear why the Secretary of State has challenged the judge's approach to the later period.

32. The Secretary of State did not challenge the judge' approach to the law on "marginal and ancillary" in the original grounds. The judge applied the appropriate legal tests in relation to the issue of whether the work was "marginal and ancillary".

33. The judge was entitled to make the findings she did on the evidence before her. There was a detailed skeleton before her as well as written and oral evidence. Her findings are adequately reasoned and grounded in the evidence.

My analysis

34. The grounds of challenge which assert that the judge erred in her consideration of permanent residence focus on the tax year 2013 to 2014.

35. The judge had before her a skeleton argument setting out in detail the history of the appellant's work as well as an appellant's bundle with the appellant's statement, HMRC records, wage slips and statements from her mother. She also heard oral evidence from the appellant and her mother.

36. At [12] to [25], the judge recorded the appellant's evidence regarding her work and activities in the UK over the period from her arrival in 2010 until 2019. The judge records that the appellant was living with her partner from May 2010 that is, from shortly after she arrived in the UK and subsequently married him on 3 January 2014.

37. Ms Slowik's evidence regarding the tax year 2013 to 2014 is set out at [18] and [19].

38. At [18] she states;

> "In 2013 her sister came to the United Kingdom with her baby boy. She lived with the appellant to start with and found work in different warehouses. At that time the appellant did not have a permanent job, so she looked after her nephew and her sister paid her money for that. She worked in the evenings as a cleaner in a nursery and her partner worked in the mornings".

39. At [19] she states;

> "In June 2013 she had a miscarriage, and this had a bad impact on her mental health. She stopped working as a cleaner and stayed at home and looked after her daughter and nephew. She also took part in employment courses provided by the Job Centre. Between August and October 2013, she worked in a warehouse".

40. It is said by Mr Bradshaw that Ms Slowik additionally gave evidence that she was supported by her husband in the periods she was not working and that this evidence was not challenged by the Secretary of State. The skeleton argument also submitted that prior to her marriage in January 2014 that Ms Slowik was in a durable relationship with her partner and that HMRC records demonstrated that he was also working in 2013 to 2014 particularly from August 2013 increasing from November 2013 which addressed the period after the appellant stopped working in October 2013.

41. At [10], the judge refers to the skeleton argument which contained a detailed chronology. At [58], the judge takes into consideration the evidence from HMRC. The HMRC document demonstrated that for the tax year 2013 to 2014 the appellant earned £4095.14 plus Jobseeker's Allowance of £1372 and Employment Support Allowance of £134. The same document also confirmed that she earned £4266.88 in the tax year 2012 to 2013. Mr Bradshaw correctly points to the fact that in the grounds the Secretary of State does not take issue with the judge's finding that Ms Slowik was a qualified national during this earlier period where she had the same earnings over a longer period. It is not asserted that there is a legal error in the findings relating to the earlier period.

42. There is no challenge to the finding that Ms Slowik was the family member of a qualified national from the date of her marriage from 4 January 2014.

43. The judge made findings on whether the appellant was a qualified national from 2010 onward;.

44. At [58] she stated;

> "Turning to consider the facts of the appellant before me I note from the the (sic) statement from the HMRC that the appellant was working in 2010/2011 (this was accepted by Mr Yates at the hearing). Between 2011 and 2012 the appellant was again working and earned around £6,000. This was not marginal and ancillary work. Between 2012 and 2013 again the appellant was working and earned about £4000. Again this work is not ancillary or marginal. This may be low paid work, but the appellant was performing services under the direction of another in return for remuneration. This work can be described as genuine and effective".

45. And at [59];

> "There is evidence of work in 2013/2014. During 2014 the appellant married her EEA national who was also working. There is evidence of his employment in the appellant's bundle and this was not disputed. When taken together on a balance of probabilities I find that the appellant was a qualified person between 2013 and 2014 on the evidence I have seen and heard – both in her own right and as the family member of a qualified person".

46. The judge manifestly accepted Ms Slowik's evidence that she was working from April 2013 to June 2013 as a cleaner and that she was also working on a self-employed basis looking after her sister's child. The judge accepts that after her miscarriage, Ms Slowik stopped working because of her ill health and that she was working in a warehouse between August to October 2013. There was evidence before the judge that she earned over £4,000 in this tax year as well as receiving Jobseeker's Allowance. The judge also accepted that Ms Slowik was living with her partner since 2010 prior to the marriage. I do not agree with Mr Avery that this evidence is thin. The judge was entitled to accept the appellant's detailed evidence.

47. I am satisfied that the judge's finding, that on the balance of probabilities, the appellant was a qualified national for continuous period of five years including the tax year 2013 to 2014 (and 2012 to 2013) and had therefore obtained permanent residence was adequately reasoned and grounded in the evidence before her. Her reasons may have been brief but it is clear that she took into account all of the evidence including Ms Slowik's written and oral evidence, the HMRC records for Ms Slowik and her husband, her claim to be living with her husband prior to the marriage and the arguments set out in the skeleton argument as well as the letter written by her representatives dated 23 October 2020 and the reasons for refusal given by the Secretary of State.

48. I have had regard to the various authorities in relation to the adequacy of reasons and interference with factual findings. I refer to the words of Dingemans LJ in Terghazi v SSHD [2019] EWCA Civ 2017 at [45];

> "A further principle which it is relevant to note is that, even if an appellate court is entitled to hear an appeal because of an error of fact (because the appeal court has jurisdiction to hear appeals on facts) appellate courts should be very cautious in overturning findings of fact made by a first instance judge. This is because first instance judges have seen witnesses and take into account the whole "sea" of the evidence, rather than indulged in impermissible "island hopping" to parts only of the evidence, and because duplication of effort on appeal is undesirable and increases costs

> and delay. Judges hearing appeals on facts should only interfere if a finding of fact was made which had no basis in the evidence, or where there was a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence so that the decision could not reasonably be explained or justified".

49. I am not satisfied that there was a demonstrable misunderstanding by the judge of the evidence nor that there was a failure to consider relevant evidence. The findings cannot be said to be either inadequately reasoned, nor can they be said to be "perverse" or "irrational" which is a demanding concept with a high threshold.

50. Mr Avery expanded on the written grounds in his oral submissions. He stated that as a "jobseeker", Ms Slowik was only entitled to claim JSA for a maximum of 91 days and therefore could not have been a qualified national after 91 days. Firstly, this issue was not raised in the original refusal letter nor the supplementary refusal by the Secretary of State. Nor was this argument made at the First-tier Tribunal appeal hearing. The first reference to Regulation 6 is in the grounds of appeal to this Tribunal. This argument does not appear to have been made by the Secretary of State in the original appeal and appears to be an attempt to reargue the appeal.

51. Mr Bradshaw's argument in response in the rule 24 reply is that Ms Slowik was not claiming to be a jobseeker in June 2013 but rather a worker or self-employed person who had retained her worker status either by reason of illness pursuant to Regulation 6(2)(a) of the EEA Regulations. Unsurprisingly, since this argument was not before the judge, she did not address it, but as judge of a specialist Tribunal she can be taken to be aware of the EEA Regulations 2016 in this regard. The judge accepted that Ms Slowik stopped working in June 2013 due to ill-health and therefore she would have fallen under this Regulation. From October 2013 after she stopped working at the warehouse, she may have been a jobseeker but the time between then and when she married is covered by the 91-day period. The judge can also be taken to be aware of both Regulations and in any event it is manifest from her findings that she accepted that from October 2013 Ms Slowik was living with her partner, had been doing so since 2010 and that he was working in this period. I reject Mr Avery's submission accordingly.

52. The written grounds of appeal do not challenge the judge's approach to whether the work was genuine or effective and do not assert that she has misapplied the law in this respect. Mr Avery attempted to argue in his oral submissions that the earnings in 2012 to 2014 were very low and were "marginal and ancillary". He did not seek permission to amend the grounds. I am not satisfied that he could properly make this submission since this argument was not raised in the grounds.

53. I have had regard to Talpada v The Secretary of State for the Home Department [2018] EWCA Civ 841 at [69] in this respect:

> "Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation."

54. In any event, the judge addressed the law on this issue in detail at [56] and [57] and applied the correct test. I am satisfied that there is no error in the judge's finding that although the work was low paid, it was genuine and effective because Ms Slowik was performing services under the direction of another in return for remuneration (see [58]). Further the Secretary of State does not challenge the finding that Ms Slowik was a qualified person between 2012 to 2013. I agree with Mr Bradshaw that this approach is inconsistent and suggests that the Secretary of State's challenge is not to the judge's application of the law in this respect but to her findings in relation to 2012 to 2013.

55. I am satisfied that the judge was rationally entitled to find on the balance of probabilities that the appellant was a qualified national between 2012 to 2013 and in total for a continuous period of five years and that she had therefore acquired permanent residence in the United Kingdom and that the challenge to this finding is no more than a disagreement with this.

Grounds 2 and 3 – risk of reoffending/schedule 1

56. I deal with these grounds together as they are both pertinent to whether the Secretary of State could demonstrate that Ms Slowik's deportation was justified on "serious grounds" of public policy or public security.

57. Mr Avery submitted that the judge did not sufficiently take into account the level of damage of harm to society in drink driving. The decision does not address the consequences to society if the behaviour persists. The judge has failed to address schedule 1. Although the sentence was light, the offence causes serious harm to society. The judge gave inadequate reasons in respect of the risk of reoffending. In particular, the judge did not address the comments of the offender manager about Ms Slowik's attempts to minimise her drinking. Ms Slowik is at medium risk of reoffending, and this is not in the decision. The judge's conclusion that Ms Slowik had addressed her behaviour was based on very thin evidence and does not bear close scrutiny. The reasoning is inadequate.

Schedule 1

58. The judge acknowledged schedule 1 of the EEA Regulations at [5] of the decision when referring in detail to the respondent's reasons for deportation which included the seriousness of the harm to the public of drink driving.

59. The judge addressed the legal framework at [45] and [46] of the decision where she refers specifically to Schedule 1. At [50] she summarises schedule 1 and lists the fundamental interests of society in the United Kingdom as including maintaining public order, preventing social harm and combatting the effects of persistent offending.

60. Further the schedule was set out in full in the skeleton argument filed on Ms Slowik's behalf to which the judge makes express reference at [10] and [42].

61. It is inconceivable that an experienced judge would direct himself to the correct test and then fail to adhere to the self-direction. I remind myself of the principles set out by Lady Hale at [30] in AH (Sudan) v SSHD [2007] UKHL 49. A considerable degree of deference must be given to a specialist Tribunal which will be assumed to have directed itself appropriately even if the decision is not perfectly expressed or a judge has not expressly set out every step.

62. Here the judge had a detailed skeleton argument before her which set out the relevant law in detail, the judge set out the legal tests and manifestly had them in her mind when making her findings. I am not in agreement that she did not have regard to schedule 1 when making her findings. I am not satisfied that Ground 3 is made out.

Reasons challenge

63. At [66] the judge states;

> "The appellant in the appeal before me has been convicted of a number of offences between a short period of time in 2019 (July to September). She has three convictions and for all three sentenced to 18 weeks imprisonment. Prior to this period the appellant had not been charged with or convicted of any offence and since her release she has not committed any further offences. Although her Offender Manger says that she is a medium risk of re-offending, there has been no incidence of further re-offending since her release".

64. There is a clear reference to the view of the Offender Manager and the risk of reoffending in this paragraph. At [26] the judge also addresses Ms Slowik's evidence about the view of the offender Manager that she was minimising her problems. Ms Slowik's response was that she did not agree and had sought help. The judge was manifestly aware of the views of the offender manager but ultimately preferred the evidence of the appellant herself based on the evidence she heard.

65. The judge then looks at whether the appellant has a propensity to act the same way in the future.

66. In the skeleton argument it was submitted that the offences themselves took place over a period of 19 days between July to September 2019. There were 4 separate offences over a period of less than 3 weeks with no reconviction after the 18-week sentence. The submissions highlighted that the sentence was modest in the context of deportation proceedings. During the offending Ms Slowik was in an abusive relationship which was acknowledged in the GP records also before the judge. By the time of the hearing, she had been in the community for 8 months, had not committed any offences despite facing challenges and having poor mental health. The comments of the probation officer are addressed, and it is pointed out that she completed an online course. The GP records indicated that she had sought a referral for both alcohol and psychological support. She also sought help for her previous sexual abuse. She had returned to employment. She had problems through many years, but the offences took place over a short period. She was able to work in the past despite her problems and the judge was asked to look at the evidence in that context.

67. From [71] to [78] the judge considers the evidence about Ms Slowik's propensity to re-offend. She considers the report from the consultant psychologist and finds that since there was no record of the length of the interview and the expert did not have access to Ms Slowik's GP notes, the report was of limited assistance.

68. The judge placed weight on the appellant's medical records which showed that Ms Slowik's drinking had escalated in March 2019 after her children were removed from her care and placed with her sister. She had also been left with her husband's debts. The judge noted that there was a casual link between alcohol misuse and Ms Slowik's life experiences in that when she felt low she used alcohol as a coping mechanism. She noted Ms Slowik's evidence that she recognised the need to change and was adamant that she was motivated to do so.

69. The judge accepted that the appellant was motivated to change because she had gone on some courses, contacted organisations for help and because she wanted to get her children back. The courses included an Intuitive Recovery Course in Addictive Desire Recognition undertaken in August 2020. There was evidence before the judge of the completion of the course. There was also evidence of a referral for further psychological help and her contact with the Doncaster Rape and Abuse Counselling Centre. The appellant was waiting for CBT. The skeleton arguments points to this as evidence of Ms Slowik breaking the cycle. These evidence was

70. At 78 the judge states;

> "Looking at the evidence as a whole I find that the appellant has accepted that she needs help and has explored the possibilities that have been offered to her. The evidence does not show that the appellant since leaving prison has reoffended. She has the support of her mother and is currently being allowed to see her children – it appears unsupervised. In her evidence she said she wanted to get her children back – she feels motivated to change her life around because of them. This was reiterated by her mother and is what the appellant told the psychologist".

71. The judge took into account all of the evidence before her and having heard oral evidence and taken into account all of the factors was persuaded by the evidence of the appellant. Her consideration was based on her previous finding that the Secretary of State would need to demonstrate that there were "serious grounds" for excluding Ms Slowik.

72. This might be seen as a generous view of the facts and another judge may have taken a different view. However, I am satisfied that these findings were open to the judge on the evidence before her and were not irrational or perverse. The judge has adequately explained why she formed this view of the evidence. The finding is perhaps generous but was firmly rooted in the evidence and does not reach the high threshold of perversity as alleged by the Secretary of State.

73. In this respect I take into account the words of Reed LJ in Henderson v Foxworth Investments Ltd [2014] UKSC 41 at [62];

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

74. I also remind myself of the comments of Carnworth LJ in Mukarkar approved by the Supreme Court in MM (Lebanon) 2017 SC10 that;

> "The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new… However on the facts of a particular case the decision of a specialist tribunal should be respected".

75. I am satisfied that it was open to the judge to find, having had regard to all of the facts of the case and directing herself appropriately on the law, that the respondent has not discharged the burden that Ms Slowik's removal is not justified on serious grounds of public policy and public security. I find that Ground 2 is not made out.

76. I also agree that the issue of whether Ms Slowik could be rehabilitated in Poland is irrelevant as it is only relevant to the issue of proportionality and not to her current threat. Since the judge found that the Secretary of State had not discharged the burden in respect of the threat, it was not necessary for her to go on and consider the issue of proportionality in accordance with MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC).

Decision

77. It follows that none of the Secretary of State's grounds of appeal are made out and the Secretary of State's appeal is dismissed.

78. The decision of the First-tier Tribunal allowing the appeal is upheld.

Signed *R J Owens* Date 3 December 2021

Upper Tribunal Judge Owens