Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-001688**
DA/00274/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 15 September 2022

Decision & Reasons Promulgated
On the 01 December 2022

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARIUSZ ADAM KREZEL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Clark, Senior Home Office Presenting Officer
For the Respondent: Ms J Bond, instructed by TNA Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission to the Upper Tribunal against the decision of the Judge of the First-tier Tribunal who allowed the appeal of Mr Krezel against the Secretary of State's decision of the 5 July 2021 making an order that his exclusion from the United Kingdom was

justified on grounds of public policy and dismissing any EUSS application made by him.

2. We shall refer hereafter to Mr Krezel as the appellant, as he was before the judge, and to the Secretary of State as the respondent, as she was before the judge.

3. In his EUSS application the appellant disclosed a conviction in Poland of rape and stated that he had served 53 months' imprisonment. The date of conviction was 4 June 2013. He was sentenced overall to five years and two months. He had been convicted of theft as well as rape.

4. He was released on parole on 23 January 2017 with a probation end date of 23 January 2019.

5. The judge noted the appellant's criminal history and also his immigration history. He had come to the United Kingdom in March 2017. He said that he had evidence on his mobile phone in Polish of his contact with the Polish Probation Service. He said that for the first six months after he came to the United Kingdom he had flown back to Poland every month to see his probation officer and thereafter the officer had told him that monthly emails would suffice, given that he was in employment in the United Kingdom and was living with his daughter, who had joined him in 2020.

6. On cross-examination he maintained that he had been wrongly convicted. He had denied the offences in court and had had an unsuccessful appeal against his conviction. He had worked in the community, both supervised and unsupervised, prior to his release from prison. He had been unsuccessful in his efforts to obtain work in Poland after his release. The probation officer had acceded to his request to leave Poland.

7. As regards his two periods of employment in the United Kingdom, he had admitted that the first employer had not been aware of his conviction, but his current employers knew of it, though he admitted that he had probably notified them of it some time after he was employed, due to the current proceedings. He said that he complained about suffering from depression while in the detention centre but, as he was not taken to see the doctor for the entire week, he declined intervention thereafter.

8. The judge heard evidence also from the appellant' daughter who said that, among other things, at the time when her father was in prison she was aged approximately 12. As regards her understanding of what had happened, she said her mother did not want her to know. She had seen her father regularly after he came to the United Kingdom in 2017, she having first come to the United Kingdom in 2015, and she was currently living with her father.

9. The judge noted the test set out at Regulation 23 and Regulation 27 of the Immigration Rules (European Economic Area) Regulations 2016. It had not

been suggested that the appellant was entitled to any more than the basic level of protection afforded by the Regulations. The judge noted that where a decision is taken on grounds of public policy or public security it must also comply with the principle of proportionality, and must be based exclusively on the personal conduct of the person concerned, which must represent a genuine, present and sufficiently serious threat affecting the fundamental interests of society, taking into account the past conduct of the person and that the threat does not need to be imminent. Matters isolated from the particulars of the case or which related to considerations of general prevention did not justify the decision and nor did a person's previous criminal convictions in themselves. Prior to taking a decision on grounds of public policy and public security in relation to a person who is resident in the United Kingdom, the decision maker is required to take account of considerations such as their age, state of health, family and economic situation, their length of residence in the United Kingdom, their social and cultural integration in the United Kingdom and the extent of their links with the country of origin.

10. The judge noted that on behalf of the Secretary of State it was accepted that there was little, if anything, beyond the conviction and the gravity of the offence of rape to place before the Tribunal.

11. The judge noted that the appellant denied and continued to deny the offences but rightly observed that he was unable to look behind the convictions and so was required to proceed on the basis that he was a person who had been convicted of rape and theft. The judge said that he appreciated the gravity of any offence of rape as it represented a gross violation of another individual. He observed however that he only had the details of the circumstances of the offence from the appellant as the comments in the decision letter were not shown to be based on any evidence in the criminal case but were rather speculative.

12. He was directed by the Presenting Officer to the appellant's bundle and in particular to considerations surrounding the removal of those with a conviction and the maintenance of public confidence in the ability of the authorities to take removal action as well as the protection of the public.

13. It was emphasised by the Presenting Officer that the appellant was still protesting his innocence and it was submitted that this was a significant factor for the Tribunal to consider when assessing the issue of rehabilitation. It was also asserted that it was a matter to take into account when assessing the appellant's overall credibility. The judge remarked that it was true that given that the appellant was convicted by a court in Poland after pleading not guilty he must have been disbelieved by it, but that that did not necessarily lead to the conclusion that he could not be believed in anything he said to the Tribunal. The judge noted comments the appellant had made in the course of his oral evidence which might not be considered to be advantageous to him. For example he had admitted that his first employer in the United Kingdom was unaware of his conviction and that his current employer was not aware of it at the time

when he was offered the position. The judge considered this to be evidence of a considerable degree of honesty. Also the appellant had not sought to exaggerate his mental health issues. He had given a detailed account of his detention in Poland and progress after release. As a result of these various considerations the judge found the appellant to be a credible witness before the Tribunal.

14. The judge went on to say, at paragraph 24 of his decision, that it was true that an ongoing denial of criminal responsibility, following conviction, could have an impact upon the risk of further offences and the issue of rehabilitation, as offence related work would frequently lack focus. Nevertheless it did not demonstrate, alone, that there was a risk of further offences and each case required to be considered on its own merits. The judge noted that the incident had occurred nearly ten years previously and the appellant had thereafter spent time in prison but he had not reoffended and had been in the United Kingdom for nearly five years at the date of the hearing. The judge was satisfied that he could properly describe the incident, although serious, as isolated.

15. In terms of rehabilitation, in his witness statement the appellant had said that he had ultimately accepted the judgment of the Polish court and went through the process of rehabilitation from closed prison to an open prison. He had participated in all social activities as well as programmes for counteracting aggression, violence and pro-criminal behaviour and this would have served to reduce risk. The judge considered it significant that he was granted conditional early release. He noted what was said in the court order for agreeing to the early release including that he had not caused any behavioural problems and displayed correct attitude and behaviour. He was deemed to be at low risk of reoffending.

16. The judge considered that substantial weight should be attached to the early release. He noted that there was an order made by a court which would have been seised of all appropriate facts and it signified that another EEA state must have been satisfied that any risks were manageable in the community. The judge accepted the appellant's oral evidence that for the first six months after his arrival in the United Kingdom he was returning to Poland on a monthly basis to see his supervising probation officer. The judge was impressed by this, as many people having left a particular jurisdiction would have considered that as discharging them from their responsibilities.

17. The judge noted the fact that the appellant was working in the United Kingdom and was regarded positively by his work colleague and site manager and was clearly also a model tenant.

18. The judge considered that in reality the respondent was unable to offer anything other than the appellant's conviction in support of the argument that he still presented a risk to society. The judge said that in light of all the evidence before him he was not persuaded that the appellant presented a risk of reoffending or that the public required protection from

him. He concluded therefore that his personal conduct did not represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

19. The judge went on in assessing the proportionality of the decision to take into account the appellant's candour in disclosing his conviction in his EUSS application. He found the appellant's daughter to be an honest and credible witness and it was abundantly clear that she and her father had an extremely close relationship. There was a possibility that she would leave the United Kingdom, despite her pre-settled status, if her father were removed. The appellant was clearly a hardworking man. The references in his bundle from people who knew who indicated a level of social integration in the United Kingdom. He had no real links with Poland at this time other than the fact that he speaks Polish. He and his daughter were financially independent. The judge had attached particular weight to his conclusions on the lack of a risk of a reoffending in finding that the decision did not comply with the principle of proportionality in this case. As a consequence the appeal was allowed.

20. The Secretary of State was granted permission on three grounds. At the hearing before us Mr Clark abandoned ground 2 and concentrated his arguments first on the first part of ground 3 and thereafter on ground 1 and the second part of ground 3. He placed reliance on the decisions that had been put in in Bouchereau: case 30/77, in Robinson [2018] EWCA Civ 85 and K and HF C-331/16 (2 May 2018). He argued with respect to the first part of ground 3 that the judge had failed to have proper regard to Schedule 1 of the 2016 Regulations as required by Regulation 27(5). Subparagraph 7 of Schedule 1 concluded, in the list of fundamental interests of society in the United Kingdom at (f):

> "excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;"

With reference to Bouchereau at paragraph 34 it was argued that public policy considerations might differ from state to state and hence there was an area of discretion. Though K was concerned with war crimes, it was relevant to see from paragraphs 44 and 45 a reference to measures which could contribute to the protection of fundamental values including public confidence in the immigration system. The point was, in light of the case law, that paragraph 7(f) was a lawful public policy and did not go beyond what the United Kingdom was entitled to do.

21. It was clear from Bouchereau at paragraph 29 that it was possible for past conduct to be a threat to public policy. This was considered in Robinson by the Court of Appeal. In an extreme case, the present threat could be found from past conduct causing deep revulsion and it was clear that this required extreme facts. It was argued that a crime such as that in this

case could come within the Bouchereau exception. It was necessary to consider the threat to the public interest in applying Schedule 1(7)(f). The judge, at paragraph 21 of his decision and paragraph 22 was aware of this, and it could be seen that a reminder was given to the judge by the Presenting Officer of what amounted to the terms of the Schedule. The judge however fell into error. Earlier in paragraph 22 he addressed the propensity to reoffend as saying that this was crucial, so he was not engaging with the fundamental interests set out in paragraph 7(f) but it was more akin to what was set out in paragraph (j) concerning protection of the public. This misdirection was continued at paragraphs 23 and 24 noting the passage of time since the offence and the causes, the return to Poland and the other matters addressed at paragraphs 27 and 28. There was no engagement with paragraph 7(f) or consideration as to why the substance of the crime was not enough to bring it within the exception and no reference to revulsion or to confidence in the immigration system. If the judge had done so, he could have reached a different outcome.

22. With regard to ground 1 and the second part of ground 3, this was a challenge to the judge's findings on credibility as amounting to perversity. The judge found the appellant to be honest. The appellant had accepted he had not disclosed his criminality to the first employer and had only disclosed it to the second employer after he gained his position. On this basis the judge seemed to accept the appellant was honest, having noted he said he was innocent. There was an issue about the appellant's criminality and the reasons for finding him to be honest were perverse. He was not honest because he had admitted previous dishonesty. This fed into ground 3(b) and as regards Schedule 1 paragraph 7(j). The findings were not open to the judge. There was clear evidence at the hearing of the appellant's dishonesty and his denial and previous dishonesty and it was not open to the judge to find as he did and this was relevant to future risk. The offence was a very serious one. There was a degree of victim blaming and blaming the appellant's family to be seen in the summary of some of the appellant's evidence at paragraph 6. The judge had referred to the low risk of reoffending but given the facts it was not open to him to find that risk was not made out.

23. In her submissions Ms Bond argued that there was no reference to revulsion in the refusal letter but if it were implicit then it were argued that in any event, even if it had been before the Tribunal, the case was not one where the level of criminality was such as to give rise to the Bouchereau exception. Otherwise she relied on the points made in her Rule 24 response/skeleton argument.

24. In the Rule 24 response Ms Bond, in response to ground 3, argued that there was no material error of law. It was clear that in drawing the judge's attention to page 157 of the appellant's bundle the Presenting Officer had been referring to the Schedule 1 considerations. The judge had clearly had these in mind. The judge had given not merely adequate but cogent reasons as to why he preferred to base his findings on the decision of the Polish court to grant early release and the court's findings, to the

submissions of the respondent in the refusal letter. The challenge was a matter of disagreement only.

25. With regard to ground 1, it was argued that the judge had properly directed himself as to the impact of lies and dishonesty on a witness's testimony and gave cogent reasons for finding the appellant to be a credible witness. He had already disclosed his conviction with his current employers and they held the job open for him and his site manager had provided two short emails in support of his appeal and also attended the hearing. The judge's evaluation of the various considerations led him to find the appellant to be credible.

26. Ms Bond noted what had been said by the Polish court in finding that the appellant was suitable for early release. She relied on what had been said in Essa and also in MC [2015] UKUT 520 (IAC). There was a burden on the respondent under Regulation 21(5)(c) to show a propensity on the part of the appellant to act in the same way in the future. There was no evidence to suggest that the appellant represented a genuine, present and sufficiently serious threat to the public to justify deportation. Reliance was placed on the fact that the Polish court had found that the appellant presented a low risk of reoffending. There was no evidence to indicate a propensity to reoffend. He had been assessed as being a suitable candidate for early release. His integrative links in the United Kingdom were strong and this was relevant to proportionality. He had no family members in Poland. The Secretary of State had erred in consideration of the Article 8 claim. The matters to be considered under Regulation 21(5) and (6) were wider than the considerations in a "ordinary" Article 8 case. The decision should be upheld.

27. We reserved our decision.

28. It is relevant to observe at the outset that we do not consider the Bouchereau exception applies in this case. Though clearly the offence of rape is a considerably serious one, the case has to be an extreme one and one causing deep revulsion, and we do not consider that the judge erred in not finding that this case fell within that category. It must follow therefore that what has to be shown is a genuine, present and sufficiently serious threat affecting the fundamental interests of society taking into account the past conduct of the person and the fact that the threat need not be imminent. It is a question of there being a present threat rather than it being a case where the nature of the offence is such as to enable an appeal to be dismissed on the basis of the gravity of the offence.

29. Schedule 1 of the Immigration (European Economic Area) Regulations 2016 sets out considerations of public policy, public security and the fundamental interests of society etc. As noted above, paragraph 7 lists the fundamental interests of society in the United Kingdom as including for the purpose of the Regulations the exclusion or removal of an EEA national with a conviction including where their conduct is likely to cause or has in

fact caused public offence in maintaining public confidence in the ability of the relevant authorities to take such action.

30. It is true, as is observed at paragraph 1 of Schedule 1, that the EU Treaties do not impose a uniform scale of public policy or public security values and member states enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA Agreement, to define their own standard of public policy and public security.

31. It is clear that the judge was, it seems, referred to the Schedule by the Presenting Officer, but equally there is no express reference to it by the judge and it is rather the case, at paragraph 22 where he had been directed to these issues, that the judge focused on whether the personal conduct of the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The judge made nothing of the submission which related to the Schedule. Clearly this is a case of an EEA national with a conviction, and it may also be said in relation to the offence committed that the conduct of the appellant is likely to cause public offence and the fundamental interests include the maintenance of public confidence in the ability of the relevant authorities to take such action.

32. In our view the judge should have factored into his evaluation of the appellant's claim this particular fundamental interest in deciding the appeal. Though the crime is not one, as explained above, which per se should give rise to an adverse decision, nevertheless it required to be considered in light of the fundamental interests of society which are required to be taken into account.

33. We also consider that the judge erred in his credibility evaluation and through that the issue of present risk. The judge properly noted at the start of paragraph 24 that an ongoing denial of criminal responsibility, following conviction, can have an impact upon the risk of further offences and the issue of rehabilitation. He was also right to observe that it did not demonstrate alone that there is a risk of further offences and that each case must be considered on its own merits. We consider however that the judge did not properly factor into his findings of credibility and as a consequence his findings of risk on return this point, in considering at the close of the previous paragraph, that the appellant was a credible witness before the Tribunal. A denial of responsibility of a serious offence is a matter which clearly, in our view, must have significant weight attached to it, in an assessment of future risk. Tied into this is the fact that the judge, in our view, erred in his evaluation of credibility. As was pointed out in the grounds, there was always the potential for the appellant's testimony being checked with regard to the admission he had made that his first employer in the United Kingdom was unaware of his conviction, and it is the case of course that he did not disclose that conviction to the employer, which is dishonest, and also obtained his current employment without admitting to the conviction. This, in our view, goes beyond being simply a question of weight. In light of these significantly damaging matters, we

consider that it was not open to the judge to conclude that the appellant was a credible witness for the reasons he gave.

34. These factors all are relevant to the evaluation of a genuine, present and sufficiently serious threat. The appellant has shown a tendency to be dishonest in material respects, in particular the denial of the offence for which he was convicted, in respect of which an appeal was unsuccessful. These matters required to be properly balanced against the positive factors such as the evidence given on his behalf, and the copy of the reasons given by the Polish court for his early release. Undoubtedly there are positive aspects on the appellant's side of the balance. But these required to be weighed properly with the negative factors and in our view the judge did not do this.

Notice of Decision

35. As a consequence we find that the judge erred in law materially in two respects and as a consequence his decision is required to be set aside. The decision will require to be remade in full, and we consider that that can most appropriately be done in the First-tier Tribunal.

No anonymity direction is made.

Signed Date 24 November 2022

Upper Tribunal Judge Allen