



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00986/2012

**THE IMMIGRATION ACTS**

Heard at Glasgow  
on 1 August and 3 September 2013

Issued on  
On 6 September 2013  
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Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

KAMIL CZARNIECKI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr. S Winter, Advocate, instructed by Maguire, Solicitors

For the Respondent: On 1 August 2013, Mr. A Mullen, and on 3 September 2013, Mr. M Mathews, both Senior Home Office Presenting Officers

**DETERMINATION and REASONS**

Following the hearing on 1 August 2013, **reasons for finding error of law in the First-tier Tribunal determination** were issued, in terms of paragraphs 1 - 14 below.

- 1) The appellant is a citizen of Poland, born on 27 July 1994. (No anonymity order has been requested or made.)

- 2) The appellant decided to deport the appellant for reasons explained in a letter dated 5 November 2012, under reference to regulations 19(3)(b) and 21 of the Immigration (European Economic Area) Regulations 2006 ("the regulations").
- 3) A panel of the First-tier Tribunal comprising Judge Reid and Dr C J Winstanley dismissed the appellant's appeal for reasons explained in a determination promulgated on 12 April 2013.
- 4) The appellant applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal, on the following grounds:

#### Ground One

The panel were referred to the case law of *Boultif* and *Maslov* by the appellant's representative during submissions. The panel have not considered either of these cases in their Decision and Reasons.

... The panel have failed to consider all of the evidence before them and have therefore erred in law.

#### Ground Two

At paragraph 72 of the Determination it states that:

*"We found the appellant to be a young man who demonstrated no remorse for the index offence; displayed a lack of insight into his offence and consequences; had not demonstrated that he had changed his views or modified his behaviour. The index offence was a premeditated one with the appellant going armed with a weapon to commit a robbery."*

... The Panel have failed to consider all of the evidence before them, particularly all of the evidence contained in the Criminal Justice Social Work Report and the appellant's own evidence.

At page 62 of the List of Productions for the appellant, page 3 of 8 of Criminal Justice work Report it states:

*"Mr Czarniecki advises that custody afforded him time to reflect on the incident which occurred on 10 August 2011. He recognises that his then circumstances influenced his judgment and with reflection concludes that this was the wrong thing to do ... Mr Czarniecki stated that he is sorry to have hurt the shopkeeper."*

The appellant in his witness statement has stated that he *"has learned his lesson"*.

... The panel have failed to consider all of the evidence and have therefore erred in law by reaching the conclusion that they did.

#### Ground Three

At paragraph 78 of the Determination it states that:

*"There is no evidence of a reconciliation with his father beyond his father's witness statement. The father did not attend the hearing and no satisfactory explanation was provided."*

At paragraph 35 of the Determination the witness, Mrs Czarniecki, explained the absence of her husband that he was unwell with an upset stomach.

The appellant's father also provided a witness statement to support the appellant and his appeal. It is well-documented that the appellant had a turbulent relationship with his father. However, there is no

reason to disbelieve the explanation provide by the witness as to the appellant's father's absence. The appellant's father states in his witness statement, at paragraph 6 (page 315 of appellant's List of Productions) the following:

*"I want Kamil to come back home and live with us as a family unit. I hope he will change. I can see a desire in Kamil to change." The appellant's father's absence cannot be used against the appellant."*

... the appellant's father's witness statement was duly given and signed some seven days prior to the appeal hearing ...There is clear evidence of reconciliation between the appellant and his father. The panel's failure to acknowledge this is an error of fact resulting in an error of law.

The appellant's immediate family unit is in the United Kingdom .

#### Ground Four

The respondent seeks to remove the appellant under Regulation 19(3)(b) of the EEA Regulations. Regulation 19(3)(b) states the following:

*(3) Subject to paragraphs (4) and (5), a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if –*

*(b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his **removal is justified on the grounds of public policy, public security or public health** (our emphasis) in accordance with regulation 21."*

The panel at paragraph 84 of the Determination have concluded that:

*"We have come to the conclusion that the appellant's youth and limited family life with his parents and siblings does not outweigh the public interest in the appellant's deportation as a violent criminal. It cannot be said that the appellant's case is one which displaces the public interest in his removal"*

... the Panel have failed to have regard to the Risk Assessment Section of the Criminal Justice Social Work Report on page 64 of the appellant's List of Productions namely that:

*"There do not appear to be significant public protection issues, and should Mr Czarniecki receive a community based Court disposal it is anticipated that he could be safely managed in the community."*

... by failing to acknowledge the above evidence has resulted in an error of fact and thus an error of law.

- 5) On 8 May 2013 First-tier Tribunal Judge Robertson refused permission to appeal, on the view that it was not arguable that the panel did not have in mind the Boultif and Maslov criteria, and the grounds were no more than an attempt to re-argue the merits of the case.
- 6) The appellant renewed his application for permission to appeal to the Upper Tribunal, referring to Essa v SSHD [2012] EWCA Civ 1718 on the distinction between proportionality in Article 8 of the ECHR and in regulation 21, and on failure to distinguish between the appellant's prospects of rehabilitation in the UK and in Poland. On 29 May 2013, Upper Tribunal Judge Chalkley granted permission to appeal.

- 7) Mr Mullen argued that there was no error of law, because without referring to case law the panel in effect did take the "European dimension" and the relative prospects of rehabilitation in the UK and in Poland into account, and said all that would have been required.
- 8) While no two cases are exactly alike, I prefer the submission by Mr Winter that the respondent's argument here fails for the same reasons as a similar argument failed in Essa (paragraph15):

... although this submission is not unarguable, in the end it does not hit its target. Even when benevolently construed, the tribunal cannot be said to have done what Tsakouridis and Lang J required of it...
- 9) The outcome in Essa can now be followed up at [2013] UKUT 00316 (IAC).
- 10) A fresh decision must be based on up to date circumstances and further evidence.
- 11) Paragraph 8 of Essa records the Advocate General's view that the authority taking an expulsion decision must state precisely in what way that decision does not prejudice the offender's rehabilitation. The appellant appears now to have completed 5 years residence. That brings in a higher criterion to justify deportation, which has also not yet been considered by the respondent.
- 12) One practical way forward might be for the respondent to withdraw the decision currently under appeal, with a view to making a comprehensive fresh decision. That would require the Upper Tribunal's consent under Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008, but such consent would readily be granted. Any such application should be made as soon as possible.
- 13) The respondent, if not choosing to proceed in accordance with that suggestion, is **directed** to provide not less than 7 days before the next hearing a note of further reasons to justify deportation, under reference to (a) the principles explained in the case law and (b) the relevant criterion in regulation 21(3).
- 14) The appellant is of course under a duty to advise the respondent without delay of any circumstances not yet made known which he may cite against deportation.

**UKBA letter of 23 August 2013.**

- 15) This letter runs:

Since the directions ... no further evidence has been received ...

Regulation 21(3).

The subject claimed to have arrived in the UK in April 2007. He was remanded ... on 23 January 2012 and ... convicted on 26 July 2012 of assault and robbery to injury and sentenced to 2 years'

imprisonment and a 6 months supervised released order. His sentence ended on 19 January 2013. On 18 February 2013 he was granted temporary admission.

Regulation 21(3) states that a permanent right of residence is generally acquired after 5 years continuous residence in accordance with the regulations on exercising treaty rights ... continuous residence was broken by time spent in prison ... as he does not have permanent residency ... he may be deported on grounds of public policy or public security ...

Rehabilitation.

... Essa concerned the prospects of rehabilitation in the context of deportation decisions. It established that in applying Regulation 21 a decision maker must consider whether a decision to deport may prejudice the prospects of rehabilitation from offending in the host country and weigh that risk in the balance when assessing proportionality under Regulation 21(5)(a).

There is no evidence that the subject has undertaken any rehabilitative work while in custody.

The social work reports states that the subject was homeless when he committed the offence and that his parents had thrown the subject out of the family home on two occasions before the offence. The subject confirmed that he has a number of acquaintances who are involved in criminal behaviour. The report identified several risk factors including the subject's difficult relationship with his parents, training and employment, criminal acquaintances and substance misuse. It identified a moderate risk of recidivism as the subject would return to the same area on release and the situation would be identical or worse than prior to incarceration.

The subject resided in the UK for 4 years and 9 months before he was imprisoned and has demonstrated no significant integration ... the subject has been unsuccessful finding employment in the UK ... the skills he has obtained during his time here are transferable and he confirms ... that he has retained the Polish language. He last visited Poland in 2009 for one month. He stayed with his grandmother and uncle who continue to reside in Poland ... He spent his formative years in Poland.

... The subject's parents reside in the UK, however he has a difficult relationship particularly with his father. When granted bail his parents did not act as cautioners and the address provided was that of a friend not of his family. In the absence of evidence to the contrary it is considered [his family] are unlikely to provide the subject with the necessary support to aid rehabilitation and reduce the risk of re-offending.

The Immigration Judge found that:

*The appellant said that if returned to Poland he would probably fall back into the same behaviour but in Scotland he would not. There was no satisfactory explanation for this geographical change in attitude.*

*...There is no reason why the subject could not continue to work towards rehabilitation in Poland with the support of family members living there and he does not need to remain in the United Kingdom to be rehabilitated.*

### **Further Evidence for the Appellant .**

16) In a supplementary statement dated 28 August 2013 the appellant says that he has stayed out of trouble since his release on immigration bail on 22 January 2013. He has no intention of getting into trouble in future, has learned his lesson and grown up a lot. He has no contact with his previous associates and has stopped smoking cannabis. He has complied with bail reporting. On 8 August 2013 his bail conditions were amended to allow him to reside with his mother, his younger brother and his sister. He is very close to them. His father was jailed for assaulting his mother from

May until August 2013. His mother is now obtaining legal assistance with a view to divorce. He has been applying for jobs although without success. He has been involved in an allotment project for 2 years, growing produce. He would like to enter horticulture as a career and is hoping for an interview at college. He does not wish to be separated from his mother, his brother and his sister.

- 17) In a statement dated 28 August 2013 the appellant's mother confirms that the appellant is now living with her. Her husband has twice been jailed for violence against her and she is now to initiate divorce proceedings. The appellant has good contact with her and the 2 other children. "I cannot imagine Kamil living in Poland, we only have my grandmother in Poland, and 2 of my brothers stay with her."
- 18) Mr Winter also filed copies of a letter dated 4 June 2013 from Langside College to the appellant, inviting him to an informal interview on 18 June 2013 regarding a Level 1 course in Horticultural Practice; a letter dated 14 June 2013 from solicitors to the appellant's mother regarding an exclusion order to be sought in respect of her husband; and a letter dated 19 August 2013 from Social Work Services to the appellant offering him a voluntary aftercare appointment on 27 August.

### **The hearing on 3 September 2013.**

- 19) The appellant adopted his supplementary statement as evidence-in-chief. In cross-examination he said that he left school at the end of 2009 or early in 2010, at the age of 15. He has never obtained employment. He was on a college course after leaving school and had training placements. He was never in any trouble at school and did not then take drugs. He only associated with people taking drugs after leaving school. He has not smoked cannabis since November 2011. He did not have access to drugs while in prison. Other drugs he has mentioned he tried only once, but his cannabis use was daily. He confirmed that he explained his offending by drug taking and lack of money. It was put to him that he had therefore committed the robbery to get money for drugs, which he denied. He said he committed the robbery to obtain money to spend and to feed himself. At the time he had not been claiming Job Seeker's Allowance or other benefits and was homeless. He remains unemployed. He moved in with his mother around 24 August. He asked to change address because he could no longer live with his friend's mother. She did not have money to feed him, his friend and his friend's brother. If he had to go to Poland the only person he could live with is his maternal grandmother.
- 20) In re-examination the appellant was unable to explain any further assistance he might obtain from Social Services. He was hoping to find a course through Careers Scotland and has an appointment on the Friday following the hearing. He no longer takes any drugs. At the time of his offence he was not eligible for Job Seeker's Allowance as he was still in education. He believes he is eligible to receive Job Seeker's Allowance now, and he has applied.

- 21) In response to my questions the appellant said that since he left prison he has seen his father a couple of times by chance in the local area. He does not know where his father is living now and has no plans to see him again, but it is probable that he may bump into him in the street.
- 22) Neither representative had any further questions arising from the evidence I had elicited.
- 23) Following development of the issues in submissions, Mr Winter was given the opportunity to put some further questions to the appellant regarding the nature of his residence in the UK since his release from prison. The appellant confirmed that he has not been employed since his release in January 2013, nor has he attended any courses. He believed that he had received Job Seeker's Allowance in June to July 2013. He had believed that it was a condition of his bail that he did not take employment and did not receive benefits, but later was advised that he could claim. His solicitor then advised him that he was not entitled, so he withdrew his claim again. [It was common ground that if the appellant was given such advice, it appears to be incorrect.]
- 24) Mr Matthews adopted the position in the UKBA's further letter that not only was continuity of residence broken by the appellant's imprisonment, the period starts to run again from his release. He said that the proposition is contentious, but did not wish to elaborate on it further. He submitted that the appellant did not reach the 5 year threshold in any event, because he has not resided in the UK in accordance with the regulations. The legal nature of his residence since arriving as a child is obscure, and he could not show that he had been residing in the UK in accordance with the regulations since he was released. He thus fell at the lowest of the three thresholds for removal. His offence was very serious - robbery of a shop involving the use of an imitation firearm and a crowbar, associated with illegal drugs, and involving injury to the shop-owner. The sentence of 2 years' imprisonment reflected that, notwithstanding that the appellant was aged under 18 at the time and tendered a guilty plea. Although the appellant had not reoffended during his 8 months of liberty to date, the assessment of risk was moderate, not low. The factors identified in the Social Work Report which might tend to recidivism were not in the appellant's favour at present. He had no offer of employment and although he appeared to be eligible for Job Seeker's Allowance there was no real prospect of his obtaining employment, which he had failed to do to date. In view of his mother's non-attendance at the hearing, little weight should be given to the evidence in her supplementary statement. The reason given for non-attendance was lack of funds, but that was a poor explanation, as she lives in Glasgow. The appellant's father has been only a negative influence in the past. There was no evidence from his siblings, and no explanation of why they could not provide statements or attend the hearing. There was no suggestion that they would be adversely affected by his departure, and they could visit him in Poland. There was no evidence of any significant positive family influences in the appellant's life in the UK. He had been reported for one incident while in prison. Removal did not always have to be justified by a risk of

reoffending, but in any case such a risk was present here. The prospect of rehabilitation was only one factor, but there was little, if anything, to suggest that the appellant was more likely to be rehabilitated in the UK than in Poland. He has substantial links there, being fluent in the language and having his grandmother and uncles with whom to reside. He lived until very recently apart from his family in the UK and is not shown to have any strong links with them. He has reached the age when a person would be expected to be establishing his own life apart from his birth family. There was no evidence the appellant had been a worker in the past, so he has not ceased economic activity. Even if he could be regarded as seeking employment, there was nothing to show that he had any genuine chance of finding it. He therefore fell under the lowest test. His removal would be proportionate in the interests of public policy and public security, and would be justified even if the test of serious reasons applied.

- 25) Mr Winter in course of submissions produced a record of the appellant's indications of seeking employment for purposes Job Seeker's Allowance indication of seeking employment. He argued further as follows. The appellant's periods of residence were in accordance with the regulations and should be taken cumulatively (no authority was cited). The circumstances which led the appellant to be assessed as presenting moderate risk of reoffending are now mitigated by his up to date situation. He has been on immigration bail since January 2013, and has stayed out of trouble. He is not in contact with his previous associates. There are hopeful signs in the direction of further education and eventual employment. He has the benefit of living with his mother and siblings. The problematic influence of his father is absent. He appears now to be properly eligible for Job Seeker's Allowance, which should alleviate any financial problems which might lead to criminal behaviour. He has consistently maintained an involvement in community work on an allotments project. He would be able to provide emotional support to his mother who is evidently going through a difficult period. All those factors tend to suggest that he will be better rehabilitated in the UK and that it would be disproportionate to return him to Poland. The factors identified in Essa at paragraphs 33 and 34 are all in his favour, and he is not in the same vulnerable situation as prior to his incarceration. He is no longer homeless and has prospects of employment or at least of training. Mr Winter accepted that the record of contact with employers showed no positive response, but even if he could not be found to have a genuine chance of being employed, it should be found to be disproportionate to remove him, even on the lowest test.

### **Conclusions.**

- 26) Notwithstanding the ground of appeal against the First-tier Tribunal on the point, no submission was made that in remaking the decision there is any point of distinction between proportionality in Article 8 of the ECHR and in regulation 21. I find nothing which might have force under Article 8 which would not equally apply under the regulation.



- 27) I also record my views on the grounds of appeal which were not pressed once Essa became the focus. Ground one: there was no need to recite case law, and relevant matters in light of those cases were all taken into account. Ground two: an expression of regret made to the author of a social work report did not require the panel to conclude that there was no risk of reoffending, which they had to consider on all the evidence, including the professional assessment of moderate risk. Ground three: the panel was entitled to find the reasons given for non-attendance of the father unsatisfactory, and to reject the suggestion that he and the appellant were reconciled. Ground four: an assessment that the appellant could be managed in the community did not displace the risk assessment, nor did it remove the public interest in removal. Nothing in the grounds, other than omission to take the relative prospects of rehabilitation in the UK and in Poland into account, would have required the determination of the First-tier Tribunal to be set aside. However, the further decision has to be a fresh one in light of up to date circumstances.
- 28) In the absence of any useful submissions, I assume in the appellant's favour that his residence prior to imprisonment was in accordance with the regulations; that the clock does not reset to zero; that any such residence after his release would be added on; and that if he has resided since release in accordance with the regulations, his removal would now have to be justified by the higher test of serious reasons. There was no dispute that he has been seeking employment. It was common ground that on this approach the decisive question is whether he "has a genuine chance of being engaged", in the words of regulation 6(4).
- 29) I do not think that a genuine chance means a probability in the near future, but it must be more than a remote prospect. The appellant has never had a job. He was able to show that he has made a series of job enquiries, all with negative results. The plain if rather sad reality is that these relate more to retaining Job Seeker's Allowance than to a chance of obtaining a job, and that at present his prospects are negligible.
- 30) By the test agreed between representatives, the appellant has not acquired a permanent right of residence under regulation 15 and his removal may be justified on grounds of public policy and public security under regulation 21(1).
- 31) The latter regulation includes the following:
- (5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles –
- (a) the decision must comply with the principle of proportionality;
  - (b) the decision must be based exclusively on the personal conduct of the person concerned;
  - (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
  - (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
  - (e) a person's previous criminal convictions do not in themselves justify the decision.

- (6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.
- 32) There is little dispute on the primary facts affecting the appellant. The significant differences of interpretation of them in submissions went to the prospects of employment (resolved above), the strength of family links, and the level of risk of re-offending.
- 33) The Presenting Officer expressed some scepticism on whether the appellant moved back in with his relatives for family reasons, or to enhance his case. I do not find any cynical motive, but I note that he explained the move not by any strong desire on his part or on his relatives' part to live together but because he no longer could stay where he was. There was a weak explanation for his mother's non-attendance at the hearing, which involves a matter of great family importance if bonds are close. There was no explanation for the absence of evidence from the appellant's siblings. There is now acknowledged to be no meaningful relationship with the appellant's father. Scarcely anything has emerged about family relationships which would promote anyone's interest in the appellant's residence here rather than in Poland.
- 34) The appellant has not re-offended from January this year, but the assessment of the risk of re-offending as moderate remains realistic. There has been no change to justify changing that assessment to low.
- 35) There has been no reference to anything which significantly varies the prospects of rehabilitation or the chances of re-offending between the UK and Poland. Although it was not prayed in aid, there would be the threat of deportation hanging over the appellant if he were to reoffend in the UK, but I do not think that can make the difference. He is a young man with an unfortunate background who has seriously offended once and says he has decided not to do so again. Whether he learns from experience and sticks to that is essentially up to him, in either country. There is not shown to be substance to any prospect of access to useful courses or programmes here. Poland is a fully fledged member of the European Union, and there is no reason to think that the appellant's chances of training or employment are any worse there. Although he has spent a significant part of his formative years here, speaks English fluently (with a readily identifiable local accent) and is culturally assimilated, he is a native Polish speaker, lived there in his early years, and has relatives with whom he would propose to live, at least initially. His Polish links and UK links are roughly equivalent.
- 36) No considerations set out in the regulations, when applied to the circumstances of the appellant, significantly favour his remaining here.

- 37) Given the nature of the crime and all that is narrated above, there is a public interest in removing the appellant as a serious offender who presents some future risk. In the round, removal to Poland has not been shown to be significantly against the appellant's interests, while such removal is in the UK public interest.
- 38) The determination of the First-tier Tribunal is set aside, but the decision is remade by again dismissing the appeal.

A handwritten signature in black ink, appearing to read "Hugh Maclean". The signature is written in a cursive style with a large, stylized initial 'H'.

6 September 2013  
Judge of the Upper Tribunal