



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01957/2013

THE IMMIGRATION ACTS

Heard at Victoria Law Courts, Birmingham
on 18th March 2014

Determination Promulgated

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JACEK JAN BUCH

Respondent

Representation:

For the Appellant: Mr D Mills – Senior Home Office Presenting Officer
For the Respondent: Ms Wawrzynczyk of ILAS.

ERROR OF LAW FINDING AND DIRECTIONS

1. This is an appeal against a determination of a panel of the First-tier Tribunal composed of First-tier Judge Cox and Mr F T Jamieson JP (hereinafter referred to as 'the Panel') who in a determination promulgated on the 6th December 2013 allowed the appeal against the order to deport the Mr Buch from the UK on the basis the decision to deport him was "not in accordance with the law".
2. This finding is challenged by the Secretary of State.

Background

3. Mr Buch is a Polish national born on the 11th September 1980. He was found to have entered the United Kingdom on 21st May 2004 and bar a period between 21st March and 25th June 2011 when he returned to Poland in order to renew his passport he has remained here since.
4. Mr Buch is a single man with no children who was employed in Poland as a paint sprayer for the Polish Air Force and who also undertook gardening work. He came to the United Kingdom to join his sister who entered in 2001 and who has remained in employment since. She has acquired a permanent right of residence too.
5. Their father came to the United Kingdom to join Mr Buch's sister in 2001 to assist with childcare but he died in 2007. That same year she was joined by her mother who has lived here ever since.
6. The periods of Mr Buch's employment are set out in paragraph 10 of the determination. At paragraph 11 it is noted that between 23rd February 2011 and 9th February 2012 he was convicted on five occasions for theft by way of shoplifting for which he received a community order or fine. He did not comply with the terms of the community order which led to a resentencing on 4th March 2013 when he received a suspended sentence coupled with a drug rehabilitation requirement and was also sentenced for an offence of using threatening and abusive or insulting words or behaviour under Section 4 Public Order Act 1986. This was at the point he was awaiting sentence on the index offence of Section 47 assault at Reading Crown Court.
7. The Panel set out the sentencing remarks of the Crown Court Judge at paragraph 12 of the determination, showing that the index offence was an assault causing actual bodily harm to a 15-year-old Polish boy. The starting point in relation to the sentence for actual bodily harm was said to be twenty four months although as a result of a guilty plea at an early stage the actual sentence passed was one of sixteen months.
8. The Panel considered a preliminary submission made by Ms Wawrzynczyk to the effect that on the basis of the index offence Mr Buch was not liable to be deported, as a result of which the decision was not in accordance with the law.
9. Having considered the competing arguments, some of which were rejected, the Panel set out their primary conclusions in paragraph 21 in the following terms:
 21. Fortunately, there is an authoritative source from which we can ascertain how the "guiding principle" in the Respondent's Criminal Casework instructions plays out in a level 2 case. It is to be found in Bulale v SSHD [2008] EWCA Civ 806. In that case the Court of Appeal said that in

considering deportation of an EEA national who had five years continuous residence in the UK, previous convictions could only be taken into account so far as they were evidence of personal conduct constituting a present threat to the fundamental interests of society. Protecting members of society from violent crime of a sufficiently serious nature was such a fundamental interest. The Secretary of State's guidance suggested that a serious offence of violence carrying a penalty of ten years imprisonment or more might constitute serious grounds of public policy and that guidance should be followed.

Now that of course does not mean that the offender in question must have received a sentence of ten years or more but rather that the index offence itself should carry, as a maximum, a sentence of that length. The maximum sentence for an offence of Section 47 assault is one of five years imprisonment. There is nothing put before us to suggest that the Secretary of State's policy in this matter has altered since 2008 and equally nothing before us to suggest that a sentence of sixteen months' imprisonment (or even of 24 months before discount for guilty plea) would come anywhere near sufficing as a threshold for serious grounds of public policy. The Appellant's index offence was undoubtedly a very nasty one and, as a matter of description, was serious of its kind but we are driven to conclude that it could not meet the level 2 threshold and that therefore the submission on behalf of the Appellant that he was not a person liable to deportation under the Regulations must be upheld. We find that the Respondent's decision was not in accordance with the law (including with her own policy) and the Regulations and that the Appellant is entitled to succeed in his appeal.

Error of law finding

10. There are a number of issues that arise in relation to the Panel's approach and decision. The first of these is identified in the grounds on which permission to appeal was sought by the Secretary of State in that although the Panel referred to the case of Bulale they make no mention of the late reported case of LG and CC (EEA Regs: residence; imprisonment; removal) Italy [2009] UKIAT 00024 in which it was found, at paragraph 106:

"The threat in the "serious grounds" category (level 2) requires to be differentiated from that posed in a level 1 case, bearing in mind that a level 2 person has acquired a permanent right of residence in the United Kingdom. We can see from the section of the instructions concerning level 2 that a conviction for any of a number of listed offences might constitute "serious grounds". We see merit to the list of offences as a means of differentiating between level 1 and level 2, but it must be emphasised that it is the present risk arising from conviction for the offence in question that must be established. As the instructions recognise, the list of offences

represents guidance rather than prescription, but properly represents a higher level of seriousness. One can imagine, for example, a serial shoplifter being properly removable under level 1, but being unlikely to represent the level of risk that is required to be posed in the case of a person with a right of permanent residence.”

11. There is also no reference to the decision of the Upper Tribunal in Jarusevicius (EEA Reg 21 – effect of imprisonment) [2012] UKUT 00120(IAC) (Blake J) who found:
 65. However, even if, contrary to our assessment, it were concluded that he had acquired a right of permanent residence, we do not regard the UKBA Criminal Casework Directorate Instructions (attached as Appendix B to LG and CC) to be exhaustive or conclusive of which convictions will lead to an assessment of serious grounds of public policy or public security. We recognise that conspiracy to handle stolen goods is different from the kinds of offences referred to in that guidance note, but like serious sexual and violent offences it carries a maximum penalty of more than ten years imprisonment.
12. The Panel specifically refer in the determination to the fact that they were unable to access a link mentioned in the case worker instructions which is because it is a link to which the public do not have access. There is no clear indication from the papers that the Panel asked the Presenting Officer in court for a copy of the list of offences and Mr Mills submitted that no such request had been made. As a result it is arguably not open to the Panel to speculate what may or may not be contained within that document.
13. The Panel also make specific reference to the fact they did not consider there was anything before them to suggest that the Secretary of State's policy has altered since 2008 whereas the document to be found in Mr Buch's appeal bundle is the policy valid from 23rd July 2013. The document is described as being guidance to case workers and sets out the process for considering non national offenders who are also EEA nationals. It specifically states that in the case of an EEA national the workflow teams must check the referral form to make sure that person meets the internal deportation threshold criteria which are:
 - i. If a person receives a custodial sentence of two years (24 months) or over for any offences, or
 - ii. Custodial sentences of one year (12 months) or over if the offence is related to drugs, sex, violence or other serious criminal activity (for details of these specific offences see related link: EEA National 12m offences list).

14. Mr Mills also confirmed that the instructions contain reference to various aggravating features that could warrant deportation for the lesser sentences, which includes offences against a child. Not only did Mr Burch receive a custodial sentence of more than twelve months for an offence of violence it was an offence committed against a 15-year-old boy.
15. The Panel seem to have treated the guidance to criminal case workers as policy. It is clear that the language is one of guidance and discretion. The specific reference that, whilst in the majority of cases the two-year threshold would apply there may be rare occasions when a criminal case worker is instructed to accept a case that falls below the threshold, demonstrates this point. In the reasons for refusal letter there is specific consideration of the nature of the offence and the sentence received and it is not suggested that the caseworker failed to follow established procedure in accordance with the guidance.
16. Guidance to individual case workers of the way in which they are expected to undertake tasks assigned to them does not have the same legal status as policy. It is also important to note that the terms of the guidance do not mandate the outcome in all cases. This language is clearly and unequivocally the language of internal guidance and discretion, within the margin of appreciation that is available to Member States in dealing with this issue, and it is simply not open to the Tribunal to interpret it in any other way. For the Tribunal to do so is to amend the guidance not to interpret it.
17. The Panel seem to have concluded that as the sentence was for a Section 47 assault, for which the maximum period of imprisonment is one of five years, it was unlawful to make the deportation order for a person with a permanent right of residence. Applying this logic an individual convicted of a number of offences of this nature charged under Section 47, who has such a right of residence, could never be the subject of a deportation order. I accept Ms Wawrzynczyk's submission that this may be the case because there is a differentiation between the different levels at which an individual may be removed, but to find this is the case in such absolute terms as the Panel did when the instructions to the criminal case workers clearly provides discretion when considering those committing repeated offences or even one offence for which the sentence is below the two-year threshold, has not been shown to be legally sustainable.
18. An individual who is an EEA national becomes liable to be deported if it is found by the Secretary of State that their removal is justified on grounds of public policy, public security or public health. The finding that Mr Buch has acquired a right of permanent residence in the United Kingdom is not challenged and nor is the fact he is entitled to a higher level of protection as a result. Guidance on the way in which the Panel should have approached this appeal has been provided by the Court of Appeal in the case of BF (Portugal) v SSHD [2009] EWCA Civ 923 which involved a Portuguese citizen who acquired

a right of permanent residence and therefore can only be removed on the serious grounds of public policy or public security. The Court set out a four stage approach to the issues as follows:

- i. The Tribunal first had to determine the appellant's relevant personal conduct;
 - ii. The Tribunal then had to determine whether the conduct represented a genuine present and sufficiently serious threat;
 - iii. The Tribunal then had to assess whether the threat affected one of the fundamental interests of society;
 - iv. The Tribunal had to assess whether deportation will be disproportionate in all the circumstances.
19. Had the Panel considered the evidence they were asked to consider in this logical order they would have been able to reach a conclusion as to whether the threat, which was clearly present at the time of the offence, was still present at the date of the hearing. It was also incumbent upon the Panel to decide whether there was a present serious threat and if so the extent of the threat. The focus upon the offence that had been committed in the past and whether that complied with guidance given to case workers appears to have deflected the Panel's attention from the correct approach to be taken in relation to the appeal.
 20. I conclude that the Panel applied the wrong test by looking backwards at the question of whether the index offence could satisfy the test of seriousness rather than looking at the situation at the date of the hearing and risk going forward, and in misdirecting themselves in relation to the guidance to case workers.
 21. Having found that the Panel erred in law the next issue is to consider whether the error is material to the decision to dismiss the appeal. In this case I find it is for even though the outcome may be that the appeal is allowed, in light of the fact Mr Burch has been found to have a right of permanent residence, it cannot be said that this is the only outcome in the absence of a proper analysis of the facts. This was a nasty assault on a child and it has been found that there is a risk of reoffending in the reports. Although the Secretary of State initially considered the matter at the lower level there is also a finding in the alternative that deportation is warranted in all the circumstances of the case, in any event.
 22. As there has been no proper examination of the merits of the appeal by the First-tier Tribunal in accordance with the guidance provided by the Court of Appeal in BF (Portugal) it was agreed that the appropriate way to proceed was for the matter to be remitted to that Tribunal and for the case to be considered by a differently constituted panel.

23. Mr Burch's immigration history and the finding he has acquired a right of permanent residence in the United Kingdom are not subject to any challenge by the Secretary of State.
24. The following direction shall apply to the future conduct of this appeal:
 - i. The appeal shall be remitted to the First-tier Tribunal sitting at the Victoria Law Courts, or any other secure court that may be available, on the next available date with a time estimate of three hours.
 - ii. The appeal shall be heard by a Panel of the First-tier Tribunal nominated by Resident Upper Tribunal Judge Renton in accordance with the operational requirements of Sheldon Court, but excluding First-tier Tribunal Judge Cox and Mr Jamieson.
 - iii. The parties shall file indexed and consolidated bundles containing all the evidence they intend to rely upon no later than 14 days before the hearing. Such bundles are to contain their respective skeleton arguments. Witness statements are to stand as the evidence in chief of the maker.
 - iv. A Polish interpreter is required.

Decision

25. **The First-tier Tribunal Panel materially erred in law. I set aside the decision of the original Panel. This appeal is remitted to the First-tier Tribunal at Birmingham.**

Anonymity.

26. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order as there is no application for anonymity and it has not been justified on the facts.

Signed.....
Upper Tribunal Judge Hanson

Dated the 18th March 2014