



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

Appeal Number: IA/17105/2012

THE IMMIGRATION ACTS

**Heard at Field House
On 21 April 2015**

**Determination Promulgated
On 10 June 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

LUKASZ TOMASZ WOZNIAK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The appellant appeared in person
For the Respondent: Mr J Parkinson, Senior Home Office Presenting Officer
Interpreter: Ms K Medwicz-Starba from Applied Language Solutions
Interpreted the Polish and English languages

DECISION AND REASONS

- 1 I see no need for, and do not make, an order restricting publication of details about this appeal.
- 2 The appellant is a citizen of Poland who was born in 1984.
- 3 He has lived in the United Kingdom for some time although the precise time of arrival has not been accepted by the respondent.

- 4 Clearly he was present in the United Kingdom in April 2006 because he is known to have committed driving offences at that time.
- 5 He has been in trouble on several occasions and I set out below a record of his criminal convictions:

8 Sep 2006	Fined for careless driving.
15 May 2007	Curfew order and electronic tagging and conditional discharge for failing to surrender to custody and theft from shops.
2 Feb 2008	Fined and disqualified from driving for twelve months for fraudulent use of vehicle documents, driving whilst uninsured and breach of conditional discharge of conditional discharge.
16 Dec 2011	Sentenced to 32 months' imprisonment for offences of robbery.
- 6 In a letter dated 23 July 2012 the respondent explained her decision to make a deportation order with reference to the Immigration (European Economic Area) Regulations 2006. I have not been able to find the date of that decision but it was clearly about 23 July 2012, if not actually on that date.
- 7 The terms of the letter were unequivocal. The Secretary of State did not accept that the appellant had achieved five years' continuous residence in accordance with the Immigration (EEA) Regulations 2006. The right of an EEA national to be in the United Kingdom is to exercise treaty rights. Typically this means to be working but seeking work or consuming services such as education very often satisfied the requirements of the Rules. The Secretary of State observed that there was no evidence that the claimant had done any of these things. As is well understood by people familiar with this area of the law an EEA national who has accrued five years' residence has acquired a permanent right of residence and can only be removed on "serious grounds of public policy or public security". An EEA national who has accrued ten years' continuous residence has even better protection and can only be removed on "imperative grounds".
- 8 An EEA national who has achieved neither of these things may be removed on grounds of public policy, security or public health but there are restrictions on the power to deport that are set out in the Regulations. One of the requirements, recognised in the refusal letter is that the "conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".
- 9 The Secretary of State addressed this point at paragraphs 21 and 22 of her letter. The Secretary of State said that the appellant had not shown that he had addressed his propensity to alcohol abuse or to lose his temper when drunk, or that he had distanced himself from the co-defendant in the offence for which he was most recently convicted. The Secretary of State

concluded that the appellant had a “propensity to re-offend and that you represent a genuine, present and sufficiently serious threat to the public to justify your deportation.”

- 10 Other matters were considered but they did not cause the Secretary of State to change her mind.
- 11 The appellant appealed the decision and the appeal came before the First-tier Tribunal in October 2012. The First-tier Tribunal dismissed the appeal.
- 12 The appellant appealed to the Upper Tribunal. The Upper Tribunal found the First-tier Tribunal had erred in law particularly for failing to show it had had regard for paragraph 21(6) of the Immigration (EEA) Regulations 2006. The Upper Tribunal allowed the appeal. It found that the appellant had rehabilitated himself. Crucially, it found that the appellant had weaned himself off alcohol dependence and, unremarkably, behaved himself as a consequence. The Upper Tribunal allowed the appeal but that decision was overturned by the Court of Appeal. The Upper Tribunal’s error lay in being overly concerned with the prospects of reintegration rather than the considerations particularly required by the Regulations.
- 13 Paragraph 20 of the Upper Tribunal’s determination was particularly troublesome. There the Upper Tribunal found that the appellant was a present threat to public policy but there were reasonable prospects of rehabilitation. The Court of Appeal found it “impossible to reconcile” the finding that the appellant was a genuine and serious threat to the fundamental interests of society with the finding that there was a durable solution to his alcohol problem and his offending. The court also said that it was concerned that excessive weight had been given to the “advantage of his remaining in this country, if there was a real risk of serious re-offending”.
- 14 The case was remitted to the Upper Tribunal for a fresh hearing.
- 15 The Upper Tribunal was criticised for its conclusions when it re-decided the case but not for its decision to set aside the decision of the First-tier Tribunal. It was not clear to me if the Court of Appeal had indicated if it was satisfied with the finding that the First-tier Tribunal had erred in law.
- 16 Mr Parkinson argued that there was an error in the First-tier Tribunal’s decision. I think he was entitled to do that but I disagree with his submission. There was no proper analysis of the requirements of paragraph 21(6).
- 17 For the avoidance of doubt I find that the First-tier Tribunal erred in law and I set aside the decision of the First-tier Tribunal.
- 18 I must remake the decision. The Secretary of State must prove, on the balance of probability, the facts necessary to support her decision. I must decide for myself whether or not to allow the appeal by applying the facts to the requirements of the rules.

- 19 I have noted the evidence last given to the Upper Tribunal. The Upper Tribunal Judge accepted that the appellant had undertaken work in relation to alcohol awareness and that he claimed to have benefitted from a course entitled “Adapt to Live More Responsibly in the Community” and that he made attempts to rehabilitate himself by abstaining from alcohol. I see no reason to go behind these findings.
- 20 The appellant gave evidence before me. He said that he was in full-time work and he lived ordinarily with his brother who had supported him by attending the hearing before me. He was not registered with a general medical practitioner in the United Kingdom. He said he was no longer required to be in contact with the probation officer but he had reflected on his life when he was in prison. He had given up drink and got a job and kept out of trouble. He had no strong ties in the community except his brother but he had nothing in Poland. He had a married sister in Scotland.
- 21 Arguably unnecessarily, given that he gave his evidence through an interpreter, but to put the point beyond all possible doubt, he confirmed that he could still speak Polish.
- 22 He said that he was not an alcoholic. He was someone who used to drink too much. He did not need to be on a programme suitable for alcoholics because alcoholism was not his problem. He had addressed the reasons for drinking alcohol excessively and his family had helped him not to drink. He said that going to the gym was doing him more good.
- 23 Significantly, Mr Parkinson said that he was not aware of the appellant having committed any further offences. He had checked and there was no record of any further criminality. I remind myself that the Secretary of State is uniquely placed to find out about people’s criminal records and, in the absence of contrary evidence from the respondent, I find that the appellant has kept out of trouble.
- 24 I also find that the appellant has not established a permanent right of residence in the United Kingdom. There is evidence that he has worked on occasions during his stay in the United Kingdom but there is no evidence that he has worked continuously or been looking for work or otherwise acting in accordance with treaty rights for a period of five years. He is therefore entitled only to the lowest level of protection allowed by the Regulations.
- 25 I set out below the parts of Regulation 21 that are relevant:
21. (1) In this regulation a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.
 - (2) A relevant decision may not be taken to serve economic ends.
 - (3) [not relevant].
 - (4) [not relevant].
 - (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.

(7) [not relevant].

26 When the Secretary of State made her decision in July 2012 she noted that the NOMS1 assessment of the offender found that he posed a "low to medium risk of re-offending". The Secretary of State said that although she acknowledged that was the finding of the appropriate officer "the serious harm which would be caused as a result [of the appellant re-offending] is such that it is not considered reasonable to leave the public vulnerable to the effects of your re-offending." I do not understand how that approach relates to the obligations imposed by the Immigration (EEA) Regulations 2006. It appears to me that the Secretary of State was not willing to decide the application in accordance with the regulations which she is obliged to follow.

27 The Secretary of State considered it reasonable to have regard to the absence of evidence that the appellant had separated himself from his co-offender or had addressed alcohol problems and found that "you have a propensity to re-offend and that you represent a genuine, present and sufficiently serious threat to the public to justify your deportation."

28 I am very aware of the seriousness of the appellant's offending. The incidents that took him to prison involved attacks on members of the public. The victims were beaten and items were stolen. They were punched and kicked and the Recorder dealing with the offence described it as "completely terrifying experience for these two innocent men".

29 The Recorder also referred to the need to protect the public and warned the appellant that he would be "looking at a very substantial period if you

commit similar offences". However he also said: "I do not think the issue of dangerousness arises in this case in the light of his record". It is quite clear that the Recorder was considering his obligation under the Criminal Justice Act 2003 to consider the Dangerous Offenders Provisions but he was not satisfied that there was a significant risk of the offender committing further specified offences and that there was a significant risk of serious harm to members of the public being caused. This is of minimal relevance to the decision that I have to make. The Recorder was applying a different legal test in a different legal context but it does not hinder the appellant's case that the Recorder did not impose an extended sentence.

30 I have to decide the case on the evidence before me when I make my decision. I have the advantage of knowing how the appellant behaved after his release from prison. I am not told the release date. I expect it to have been in January 2013. The appellant has had two years in the community and has not got into trouble. In the case of someone who was thought to be a risk to the public because he could not or would not control his drinking I find this period of good behaviour to be very illuminating.

31 I am very doubtful that the appellant did represent a "genuine, present and sufficiently serious threat" when the case was decided by the Secretary of State. I consider it much more likely that the disgust evoked by the offence of robbery has infected the approach to the case. It should not have done. The Regulations do not permit that.

32 I cannot conclude now that the appellant's conduct does "represent a genuine, present and sufficiently serious threat". I remind myself that his convictions do not in themselves justify the decision. Removal of an EEA national is only permissible under the Regulations where the threat comes from him and the evidence does not support such a finding in this case. This clearly affects the whole approach to the case.

33 Nevertheless I remind myself also of the requirements of Regulation 21(6). The appellant has no particularly telling health or economic characteristics. He is a man who will work when he can. He has support from his family in the United Kingdom. Although he has lived in the United Kingdom for some years his cultural integration is modest. He has not mastered the English language. That is not to his discredit but it is a fact in the case and is not a sign of integration.

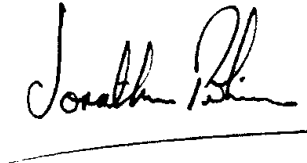
34 I have no reason to doubt the evidence that he has minimal links with Poland. His relatives seem to have removed to the United Kingdom. This is not something that takes matters very far. Clearly a man of his age and experience of life in Poland could be removed there and I do not think there is any serious argument to the contrary before me.

35 However when I take all these things into account I cannot agree that his conduct qualifies him for removal and therefore I must and do allow the appeal.

Notice of Decision

The First-tier Tribunal erred in law. I set aside its decision and substitute a decision allowing the appeal under the European Economic Area Regulations.

Signed
Jonathan Perkins

A handwritten signature in black ink, appearing to read 'Jonathan Perkins', is written over a horizontal line.

Judge of the Upper Tribunal
Dated 4 June 2014