



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

Appeal Number: DA/00002/2020

THE IMMIGRATION ACTS

**Heard at Bradford (via Microsoft Decision & Reasons Promulgated
teams)
On 22 December 2021** **On 13 January 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADRIAN WISNIEWSKI
(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr Tufan a Senior Home Office Presenting Officer.

For the Respondent: Mr Haywood instructed by Duncan Lewis & Co Solicitors.

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Bulpitt ('the Judge') promulgated on 19 May 2021 in which the Judge allowed Mr Wisniewski's appeal against the order for his deportation from the United Kingdom.

Background

2. Mr Wisniewski is a Polish national born on 10 February 1998 who is the subject of an order for his deportation from the United Kingdom dated 6 December 2019 on the grounds that his presence is not conducive to public policy, public security, or public health, pursuant to the Immigration (EEA) Regulations 2016.
3. The Judge notes at [7] Mr Wisniewski's criminal convictions which are helpfully set out in tabular form.
4. The Judge had the benefit of considering not only the documentary but also the oral evidence given at the hearing by Mr Wisniewski and his aunt before setting out findings of fact [13] of the decision under challenge.
5. The factual findings set out between [13 – 23] with the Judge applying those findings to the law between [24 – 31] in the following terms:
 24. As was agreed by both parties and as is made clear by regulation 27 (5) (c) of the Regulations, before a decision can be taken to expel the appellant on the grounds of public policy and security he must be found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society set out in schedule 1 of the Regulations. On the facts as I have found them to be, it is quite clear that the respondent has not established this to be the case. Instead I find that the appellant represented a very limited threat to the interests of society and that that limited threat only existed during the time while he was homeless and without support.
 25. During the two-year period from October 2017 to September 2019 while the appellant's life was in turmoil I find that he was a persistent offender. His offending during this time was however limited to in their seriousness and their effect on the interests of society. Since his release the appellant has represented no threat to the interests of society and instead has shown every indication that with support, accommodation, determination and a greater maturity the appellant can be a positive part of society, rather than being a threat to the fundamental interests of that society.
 26. Even if the appellant had not shown the impressive rehabilitation which I find to have occurred I would not be satisfied that his level of offending can be properly described as "sufficiently serious" to justify expulsion from the United Kingdom. I reach that conclusion having had regard to the factors set out at regulation 27 (6) of the Regulations in particular the length of the appellant's residence in the United Kingdom, his social and cultural integration into the United Kingdom and a very limited extent of his links to his country of origin. The appellant is 23 years old and I have found that he spent all but 18 months of those 23 years in the United Kingdom. He grew up in and was educated in the United Kingdom, speaks English fluently, is familiar with the culture of the United Kingdom and is in my judgement fully integrated in the community in Sheffield. By comparison he has spent a very limited time in Poland and maintains a few links to that country.
 27. The respondent's case was that the appellant's offending shows that he is not integrated in the United Kingdom. It was also argued by Ms Sandel that the appellant has no work history, is unmarried and has no children and that these are further indications of his lack of integration. I find this rationale unrealistic and without merit. The appellant's age means it is unlikely that he would have formed long-term relationships while the appellant's period of offending is restricted to a relatively small part of his life. The reality is that the appellant has grown up with settled status in the United Kingdom the only place you can sensibly call home and his expulsion would amount to an exile from the only country of which he has any real experience.

28. The respondent also suggested that the appellant has maintained significant links with Poland and that if removed to that country he would be able to live with family members, including potentially his mother, even though all agreed that the appellant has not lived with her since he was a baby. I find this to be a speculative and unrealistic suggestion which was not supported by evidence. On the facts as I find them to be the appellant has had very little contact with his family other than his aunt in London and a brief unsuccessful stay with his uncle in Germany. His links to his family in Poland amount to little more than attending the funeral of his grandmother with them nearly nine years ago.
 29. I have not so far mentioned the evidence of Dr Nikhil Khisty a Consultant Psychologist who has provided a report on the appellant following a telephone assessment of him which took place on 21 April 2021. Dr Khisty's assessment is that the appellant has suffered episodes of depression in the past, particularly when he was homeless and when he was detained. She states that this depression has improved following his release and that *"supported accommodation and income are likely to be significant factors related to his improvement."* Dr Khisty recommends that the appellant receive *" low intensity psychosocial interventions"* to treat his depression. Clearly such treatment would be more effective in English which is the appellant's first language than in Polish which the appellant says he speaks, but not fluently *"like a Polish person"*.
 30. Bringing this together, I find on the balance of probabilities that the appellant does not represent a genuine, present and sufficiently serious threat to a fundamental interest of society and that the decision to issue a deportation order was disproportionate. As such the decision to make a deportation order is not in accordance with the Regulations.
 31. It will be apparent that I have not considered whether the appellant is entitled to a higher level of protection from expulsion by virtue of regulation 27 (3) or (4) of the Regulations. The respondent's position was that he is not entitled to higher protection because he does not have a right of permanent residence and had not resided in the United Kingdom for a continuous period of 10 years prior to the relevant decision. When I asked him Mr Hayward said he did not dispute this conclusion on the evidence but instead rather pragmatically asserted that even applying the lowest level of protection the respondent failed to establish that the requirements of the Regulations have been met. As the preceding paragraphs demonstrate this is a conclusion with which I agree and therefore it is not necessary to determine whether the appellant would have been entitled to greater protection from expulsion. I should note however that I find the conclusion that the appellant does not have a permanent right of residence surprising given he was granted indefinite leave to remain in 2004 and especially in view of my finding that apart from a period of seven months, he has resided in the United Kingdom, for the last 22 years.
- 6.** The Secretary of State sought permission to appeal which was refused by another judge of the First-tier Tribunal and renewed to the Upper Tribunal on the single ground that the Judge had made a material misdirection and/or given lack of adequate reasoning, a ground supported by the following submissions:
1. The Appellant is found not to benefit from any enhanced protection as he has not acquired a permanent right of residence and is also found to be a persistent offender.
 2. At [25] it is respectfully submitted that the FTT] fails to consider that the appellant has only recently been released in March 2020. It is submitted that this

- gap is insufficient to demonstrate that he no longer poses a threat to the fundamental interests of society.
3. At [19] the FTTJ finds that the majority of offending took place whilst the appellant was homeless and living a chaotic life. It is respectfully submitted that there is no finding on the earlier offence which the FTTJ finds was committed whilst the appellant was living with his aunt [18].
 4. It is respectfully submitted that the FTTJ refers to Schedule 1 of the 2016 Regulations at [24] but fails to have adequate regard to the following which it is submitted are of particular relevance to the FTTJ. It is submitted that they have failed to have adequate regard to Schedule 1 (3) *where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.* Further, they also failed to have regard to Sch. 1 7(f) concerned with removing and EEA national with a conviction and maintaining public confidence in the ability of the relevant authorities to take such action.
 5. It is submitted that the SSHD's decision was proportionate. There are no reasons connected with the Appellant's age or state of health preventing his removal. It is submitted that treatment for depression is available in Poland. The appellant speaks the language and has work experience such that he will be able to find work and accommodation. Reliance is placed on *Dumliauskas* [46], [52] - [53] and [59], *'in respect of rehabilitation, it is not to be assumed that the Appellant's prospects are materially different in that other Member State in the absence of evidence.'*
 6. It is submitted that the FTTJ has erred in law, such that the decision should be set aside.
- 7.** Permission to appeal was granted by the Upper Tribunal on the basis it is said to be arguable that the Judge failed to make adequate findings as to the threat posed by Mr Wisniewski given that his most serious convictions, of robbery, took place at a time when he was not homeless and that it is further arguable that there was a failure to engage with Schedule 1(3) of the 2016 Regulations, relevant in this case because Mr Wisniewski has been convicted of 19 offences over a four-year period.
- 8.** Mr Wisniewski has filed a rule 24 response in the following terms:

RULE 24 NOTICE

1. This is a notice, pursuant to the provisions of Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, submitted on behalf of the Appellant1.
2. As per Rule 24 (3) of the procedure rules :
 - (a) The Appellant (also 'A') is Adrian Wisniewski. His address is on the Tribunal's file;
 - (b) A is represented by Stefan Vnuk of Duncan Lewis LLP, to whom documents should be served (via email: stefanv@duncanlewis.com);
 - (c) A opposes SSHD's appeal;
 - (d) A relies on the ground that his deportation to Poland is contrary to the requirements to be shown by SSHD, per the requirements of Immigration (European Economic Area) Regulations 2016. He is not a genuine, present and sufficiently serious threat and his deportation to Poland would be disproportionate;
 - (e) An oral hearing of SSHD's appeal is requested.

3. SSHD has been granted leave to appeal (determination of Upper Tribunal Judge Kamara; 27 September 2021) to challenge the determination of First-tier Tribunal Judge Bulpitt (the FTT determination) who, in a determination promulgated on 19 May 2021, allowed the appellant's appeal challenging SSHD's decision that he should be deported.

A: The judge's findings of fact

4. The judge's findings include the following
 - (a) The judge took full account of SSHD's case: ie that the appellant represented a genuine, present and sufficiently serious threat because he has convictions which 'indicate an established pattern of repeated offending' and that 'the evidence indicates a propensity to reoffend' [§6];
 - (b) He then set out in great detail a full chronology of the appellant's offending [§7];
 - (c) The judge heard oral evidence from the appellant and his aunt [§11]. He found the appellant's evidence to be credible [§21] (a finding that is not challenged in the grounds of appeal). He makes it clear that his findings were based on all of the evidence before him, whether directly referred to in his findings in the determination or not [§12];
 - (d) That the appellant had first arrived in the UK at the age of one was not in dispute [§13]. The appellant had held indefinite leave to remain since 2004. The evidence was that the appellant had been living in the UK between 1999 and 2012 continuously (and as the evidence showed, had gone to school here). That evidence had not been seriously challenged by the presenting officer [§14]. The judge found it 'hard to see why the respondent reached a contrary conclusion when making the decision which is the subject of this appeal' [§14]. The appellant had only spent a short period in Poland (approximately a month), following the death of his grandmother in 2012 [§15]. He had then returned to the UK, before spending some time in Germany with relatives. It accordingly followed that the appellant had come to the UK at the age of one and had spent little time outside of the country since.
 - (e) He had lived with his aunt in the UK from 2013 to 2015 [§16-18] (so that he had been living with his aunt at the time of his offence in 2015) [§18]. It was common ground that the appellant became homeless after leaving his aunt's house, and this was the period during which the vast majority of the appellant's criminal offending took place (The two year period between October 2017 and September 2019) [§19];
 - (f) On the basis of the information before him, the best indication of the seriousness of the offending was provided by the sentences imposed. It was only on the last occasion that his offending was considered so serious by the Court that a custodial sentence was imposed [§20];
 - (g) On the evidence taken as a whole [§21]:

'Overall, I find that the evidence, including the appellant's oral evidence which I found to be credible and cogent, establishes that the appellant's offending was linked to his homeless and chaotic lifestyle during that particular two year period. The nature of the offending, whilst it was persistent and ignored attempts to provide some of the support the appellant was craving, was not at a high level of seriousness as the sentences imposed reflect. It is significant for example that none of the shoplifting offences were accompanied by violence and that there is nothing to suggest that high value items were targeted or taken' (Emphasis added)

- (h) After being released from immigration detention, the appellant had gone to live with his aunt and then in supported accommodation, provided by an organisation called the Sheffield Foyer.

The judge found a letter from Sheffield Foyer (and his finding or reliance on this evidence is not challenged in the grounds) to be 'impressive', and found that he was entitled to attach significant weight to it. The letter confirmed that the appellant had not been involved in any offending for the last 14 months. The letter (as quoted by the judge) indicated that the appellant had 'continuously expressed an eagerness to successfully move out and to find permanent full time employment'; he had undergone training and work experience and had had no warnings or reprimands in relation to his behaviour; and would seek out help (and maintained his benefit accounts successfully) when he required it [§22];

- (i) The judge made a finding - again unchallenged in the grounds of appeal - that the appellant was 'in a settled and secure situation where he is receiving support and working hard to gain employment and long term security. I found the appellant's determination and progress in the last year to be impressive and fully consistent with the fact he has not been in any trouble' [§23].

5. The judge then directed himself that he was required to consider requirements contained in regulation 27 of the 2016 regulations, and to consider whether the appellant constituted a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of Society' as set out in schedule 1 of the regulations [§24].

6. The judge did not find these requirements to be made out: and his findings [at §25-31] are not explicitly challenged in the grounds of appeal. When considering whether the appellant was a genuine, present and sufficiently serious threat (it being incumbent on SSHD to show that all three requirements were made out):

- During the period, from October 2017 to September 2019, when the appellant's life was 'In turmoil' he was a persistent offender: but the offences were limited in their seriousness and effects on the interests of society. Since being released, the appellant has represented no threat to the interests of society 'and instead has shown every indication that with support, accommodation [which he had via the Sheffield Foyer], determination and a greater maturity the appellant can be a positive part of society' [§25];

- Even if the appellant had not shown 'the impressive rehabilitation' which he found to have occurred, his offending could not be described as being sufficiently serious so as to justify expulsion from the UK, and taking full account of the factors set out in regulation 27 (6): such as the length of his residence in the UK; his social and cultural integration; and very limited links with Poland. The appellant had lived in the UK since the age of 1 (he was now 23); He had been educated here and spoke English fluently and was integrated into the community. By comparison, he had spent very limited time in Poland and had few links with the country [§26];

- The only place that he could sensibly call home (contrary to the presenting officer's submissions at the hearing) was the UK, a country in which he had grown up while holding settled status [§27]. It was wholly speculative to suggest that he had links with Poland [§28]: 'The reality is that the

appellant has grown up with settled status in the United Kingdom the only place he can sensibly call home and his expulsion would amount to an exile from the only country of which he has any real experience' [§27] (Emphasis added).

B: Relevant framework

Under Regulation 27 (5) and (6):

'... where a relevant decision is taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
 - (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;
 - (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.
- (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

(Emphasis added)

7. It is clear that all of the requirements of Rule 27 must be met so as to justify a decision to deport.
8. Schedule 1 (to which the Judge referred) includes a requirement at (3) (as referred to in SSHD's grounds) to take account of the following:

Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

C: The appellant's response to SSHD's grounds of appeal

9. The Judge found, taking full account of all of the facts, that the appellant did not represent a genuine, present and sufficiently serious threats to a fundamental interest of society and that the decision to deport was disproportionate [§30].
10. SSHD's grounds (below) address the Judge's assessment that the appellant did not constitute a threat, as defined in the regulations, so as to justify his deportation.

They do not apparently challenge the second of the Judge's findings: that the appellant's deportation would be disproportionate. That with respect means, even if SSHD can establish a material error on her grounds (which is not accepted), that the appeal cannot succeed, given that the Judge's findings on proportionality are unchallenged.

11. So far as SSHD's individual grounds of appeal are concerned (each of SSHD's grounds is summarised in bold, below), the appellant submits:

(a) According to the grounds [grounds at §2], The judge had failed to consider that the appellant had only recently been released in March 2020. The ground submits that this was 'insufficient' to demonstrate that the appellant no longer poses a threat to the fundamental interests of society.

What the evidence showed about the appellant's current circumstances, and whether he posed a current and sufficiently serious threat was a matter of factual evaluation for the judge. There is no irrationality or arguable error in his approach.

There is, with respect, no tariff or 'sufficient' period to demonstrate that the appellant did not constitute a risk. The absence of a 'sufficient' period is evidently the view of the drafter of the grounds, and does not articulate an argument about error of law.

Furthermore, the Judge's finding was not based solely on the passage of time. He took the view that the appellant's circumstances were now different. He relied on evidence from the Sheffield Foyer (and his reliance on that evidence is not challenged in the grounds of appeal), and the appellant's own evidence which he found credible (again, a finding that is not challenged). The evidence was accordingly that the appellant (in contrast to his earlier situation) was 'in a settled and secure situation where he is receiving support and working hard to gain employment...'.

In the light of those evidential findings, which are unchallenged in the grounds of appeal, the judge was entitled to reach his conclusion.

Furthermore, the ground mischaracterises what the judge found by suggesting the evidence went to show that the 'appellant no longer poses a threat to the fundamental interests of society'. On the basis of his earlier offending, the judge had not accepted that the appellant met all three requirements in terms of risk: ie that he constituted a genuine, present and sufficiently serious threat;

(b) The judge found that the majority of offending took place whilst the appellant was homeless and living a chaotic life. There was, according to the decision maker, 'no finding' on an earlier offence on 30 September 2015, which the judge found was committed whilst the appellant was living with his aunt [§18].

The difficulty, it is submitted, with this ground is that the judge took full account of all of the offending: indeed (and see determination at paragraph 7), he provides a full chronology of all of the offences and the sentences imposed. He was not suggesting that all of the offences were committed when the appellant was homeless. His point was precisely that the majority of offending took place when the appellant was homeless, in the period 2017–19, (which was coupled with a finding that the appellant's circumstances had now changed, given the support

that he was receiving and that the appellant was motivated (again, findings of fact that are unchallenged in the grounds of appeal). The ground does not disclose material error;

- (c) The judge had failed to have adequate regard to provisions in schedule 1 (3) of the EEA regulations, to the effect that where an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's presence in the United Kingdom will represent a genuine, present and sufficiently serious threat affecting a fundamental interest of society.

It is clear, however, that the judge took full account of the appellant's history. He took account of the views of the sentencing court, in terms of sentences imposed; the appellant's offending history; and noted that it was only on the last occasion that the appellant was sentenced to a custodial sentence (totalling 14 weeks) by the Court. He explicitly found, during the period 2017-19, that the appellant was a persistent offender, but that his circumstances had now changed (once again, factual findings that are not challenged in the grounds of appeal).

It is accordingly clear, as the regulations require, that the Judge had taken full account of the appellant's history of offending and that there is no material error in his approach;

- (d) Finally, the grounds argue that 'SSHD's decision was proportionate'. The ground then 'Submits' that treatment for depression is available in Poland; that the appellant speaks Polish; that he had work experience; and would be able to find work and accommodation in Poland.

This submission, with respect, does not constitute a ground of appeal. It is simply an attempt to re-argue the merits, on the basis of arguments that run counter to factual findings made by the judge, but which are not challenged in the grounds. The ground clearly has no arguable merit.

12. The grounds of appeal do not, with respect, demonstrate material error in the FTT's determination. In the premises, it is submitted that Judge Bulpitt's determination should be upheld and SSHD's appeal dismissed.
13. The appellant also relies on and incorporates his submissions and analysis of the evidence as set out in the skeleton argument that he submitted to the FTT (also attached, for ease of reference, to this notice).

Phil Haywood
Doughty Street Chambers
LONDON WC1N 2LS
15 December 2021

Error of law

- 9.** Appellate judges have been reminded by the Court of Appeal that they should not interfere with the decision of a court or tribunal below unless a genuine legal error material to the decision has been established.
- 10.** A reading of the determination shows the Judge considered the evidence with the required degree of anxious scrutiny, including the

provisions of Regulation 27. The Judge was not required to set out each and every aspect of the law relevant to this appeal provided it is clear that such matters were considered with the required degree of anxious scrutiny. In *AA (Nigeria) v Secretary of State* [2020] EWCA Civ 1296 the Court of Appeal find in the final sentence of [9] "... Judges who are experienced in these specialised courts should be assumed by any appellate court or tribunal to be well familiar with the principles, and to be applying them, without the need for extensive citation, unless it is clear from what they say that they have not done so". A reading of the determination as a whole does not establish the Judge has not applied the correct and relevant legal principles.

- 11.** As noted by Mr Haywood, the challenge in the grounds appears to be to the finding of the Judge that Mr Wisniewski no longer represents a genuine, present and sufficiently serious threat to a fundamental interest of society without specifically challenging the conclusion that the decision is not proportionate.
- 12.** The Judge notes the time Mr Wisniewski has been in the United Kingdom, since the age of one and his being granted indefinite leave to remain in 2004. The Judge rejected the Secretary of State's submission to the effect Mr Wisniewski had not been continuously residing in the United Kingdom following the grant of leave by finding that he had lived in the UK until 2012 when he returned to Poland where he lived before living in Germany but returning to the UK in 2013. The Judge carefully noted Mr Wisniewski's offending history and the period of only 14 months since he had been released from custody, which was clearly a matter in the mind of the Judge. The Judges core finding that the causation of Mr Wisniewski's offending was his homelessness has not been shown to be irrational. The fact one offence was committed whilst Mr Wisniewski was with his aunt was noted by the Judge who also noted that the majority of the offences were committed when he was not. The Judge clearly put weight upon the fact that Mr Wisniewski's persistent offending between October 2017 and September 2019 was attributable to a specific period in terms of both its chronology and Mr Wisniewski's personal circumstances. The Judge's findings that now he is in secure accommodation with better prospects which meant he no longer presented the risk he had previously has not been shown to be finding outside the range of those available to the Judge on the evidence.
- 13.** The Judge was required to consider the issue of rehabilitation and clearly did so by taking a holistic view of the evidence.
- 14.** It is not a question of whether every judge would have made this decision as some may not, but that is not the required test. The question is whether the Secretary of State has established legal error material to the decision to allow the appeal. I find having considered the pleadings, submissions, and the material as a whole, that the Secretary of State has failed to establish that this decision is outside the range of those reasonably available to the Judge on the basis of the findings made.

Decision

15. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.

Anonymity.

16. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 22 December 2021