IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00139/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 September 2015	**On 21 October 2015**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

MATEUSZ STELMACH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Poland. He was successful in obtaining a grant of permission to appeal against the decision of First-tier Tribunal (FtT) Judge Gibbs who, in a decision sent on 22 June 2015, dismissed his appeal which challenges a decision made by the respondent on 24 February 2015 to make deportation order against him under Regulations 19 and 21 of the Immigration (European Economic Area) Regulations 2006.

2. As he did before the FtT judge, the appellant has chosen to represent himself at this hearing and I took steps to ensure that he was able to put his case properly.

3. The appellant, who is aged 28, arrived in the UK on 28 March 2012. There is a European Arrest Warrant (EAW) outstanding against him in respect of convictions in Poland on 8 September 2006 and 28 October 2008 for possession and supply of cannabis for which he was sentenced to one year's imprisonment and ten months, ten days respectively. That warrant has not been activated but the appellant states that he is ready to comply with it if and when served.

4. The appellant first came to the adverse attention of the UK authorities in September 2012 when he was cautioned for battery. He was again cautioned by the police on 13 August 2014 for an offence against a person. In 2015 he was charged with assaulting a member of the public and a police officer. At the date when the judge heard the appellant's case these charges were still outstanding. Although (being a post-decision fact) it is not relevant to my decision on whether the judge erred in law, it is appropriate to note that on the 6 August 2015 Willesden Magistrates Court found him not guilty of common assault and assault on police.

5. The judge heard evidence from the appellant. At paragraphs 13 and 14 the judge stated:

> "13. The appellant did not dispute the facts relied on by the respondent. His evidence is that when he came to the UK. He explained that his prison sentence in Poland was suspended but he decided to leave Poland so that he could get away from the drugs (he was previously a drug addict) and that since he has been in the UK he has been clean. He accepts that he will have to return to Poland and has attended court regarding the European Arrest Warrant but he does not want to be deported because he hopes to be able to return to the UK in the future. He has always worked whilst he has been in the UK and has not claimed benefits. He has a Polish girlfriend in the UK.
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> 14. With regards to the caution in 2012 the appellant explained that people in his house had been plotting against him and he accepts that his behaviour was over the top. With regards to the caution in 2014 the appellant stated that he is trying to appeal against this. The charges against him brought in 2015 have not yet been resolved and he has pleaded not guilty to these charges."

6. At paragraph 15 the judge said he accepted that "the appellant was a credible witness".

He then set out his reasons for dismissing the appeal at paragraphs 16-19

> "16. The appellant has been in the UK for just over 3 years. I am satisfied that he has been self-supporting in this time and speaks a limited degree of English, which is evidence of some integration. However, his own evidence is that his girlfriend is Polish and he did require the interpreter for the appeal hearing. I place weight on the fact that neither his girlfriend nor any friends attended the appeal hearing to support him and that this is evidence of limited integration in the UK. In addition the appellant has only lived here for just over three years whilst he has spent the majority of his life in Poland. I am therefore satisfied that his deportation would

be proportionate when balanced against the private life that he has established in the UK, and when taken into account alongside his behaviour both in Poland and whilst here.

17. Despite being here for only three years he has found himself involved on 3 occasions with the police and although there is no conviction /caution for the events in 2015 I am satisfied that there is evidence that he has displayed violent conduct whilst in the UK on at least 2 occasions. Although on their own these incidents may not seem particularly serious, I am satisfied that taken together with the fact that the appellant was drunk on at least one of the occasions he has shown himself to be a violent person with a tendency to violence. I am satisfied that a person with this type of behaviour and history can be said to present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (i.e. a peaceful and safe society).

18. Further, I also place weight on the fact that the appellant knowingly left Poland when he should not have. This in itself does not display a positive view of the appellant and his attitude towards law and order.

19. I am therefore satisfied that in accordance with Regulation 19(3)(b) his removal is justified on grounds of public policy, public security or public health in accordance with Regulation 21."

7. The appellant's principal ground of appeal was that the judge had erred in finding that he was a genuine, present and sufficiently serious threat to fundamental interests of society as (i) he had never been convicted of a criminal offence in the UK; (ii) the two cautions were for relatively minor matters; and (iii) he had turned his life around (he now having a job and a steady girlfriend with whom he has been cohabiting since July 2014).

8. Mr Jarvis for the respondent submitted that Regulation 21 did not require a person to have been convicted of crimes: it referred to "personal conduct" that posed a genuine, present and sufficiently serious threat to fundamental interests of society and the judge had been entirely justified to find the appellant's conduct to cross that threshold. His personal conduct encompassed his offences in Poland. Although they had been committed in 2006 and 2008 the fact the Polish authorities had issued an EAW against him when he left Poland in early 2012 demonstrated that he was now a fugitive from justice. So far as concerns his personal conduct in the UK, he had demonstrated a pattern of violent behaviour. The appellant submitted that he had left Poland to get away from bad company; he no longer had anything to do with drugs; he had been given a suspended sentence and had not understood he should not have left Poland; he was young at the time of those offences; they only involved cannabis. In relation to the cautions he had received in 2012 and 2014 he accepted his behaviour was over the top but neither incident was serious as he understood what was meant by serious offences.

Error of law

9. I am satisfied that the FtT judge erred in law. The judge concluded at paragraph 76 that the incidents in 2012 and 2014 meant that "[the appellant] has shown himself to

be a volatile person, with a tendency for violence. I am satisfied that a person with this type of behaviour and history can be said to present a genuine, present and sufficiently serious threat to the fundamental interests of society (i.e. a peaceful and safe society").

10. The fundamental flaw with this assessment is that the appellant had given evidence to the judge that he had turned his life around and that since July 2012 when he started living with his girlfriend he was more stable and settled. The judge said that he found the appellant a credible witness. He was obliged, therefore, to explain why he did not accept that the appellant had rehabilitated. He could not base himself on the two assault charges brought against the appellant in 2015 as he himself specifically (and properly) ruled they were still outstanding and so he should confine himself to the two occasions in 2012 and 2014. He was entitled to treat as evidence of the appellant's poor personal conduct the separate fact that he knowingly left Poland when he should not have, but in the absence of any engagement with the appellant's explanations for his having done so, it cannot be said that the judge properly assessed the conditions set out in Regulation 21(5)(c).

Re-making of the decision

11. Having informed the parties that I had decided the judge had materially erred in law, I asked the appellant if he wished to proceed and whether he wished to give and/or call evidence. He then gave evidence. In summary he said that he accepted that if the EAW was activated he would return to Poland although he doubted that for the offences concerned the Polish authorities would still want to punish him. He had committed those offences when 18 and he had changed a lot since then. He believed that since he has been living with his (Polish) girlfriend he is more settled. In the 2014 incident he did not believe he was drunk although he had been for a drink. In the 2012 incident he accepted he had made a mistake. He recognised that he had been "naïve and immature" (his aunt's words) and that he had a problem with ABHD. He was not addicted to alcohol and just drank occasionally. He did not believe he had a tendency to violence.

12. I then heard from the appellant's girlfriend who confirmed that they had been living together since July 2014. She also knew the appellant's uncle and aunt who, like her, believed the appellant was more settled now. She confirmed that the appellant drank a little bit, but just normally. She had never been in fear of him. She had not been able to come to the hearing before the FtT judge because she was working and covering for her manager who was on holiday.

13. I then heard closing submissions from Mr Jarvis and the appellant. Mr Jarvis said he accepted the appellant was integrated into the UK in a number of respects, through work and his relationship with his girlfriend, but he was also someone with continuing close ties with Poland where his parents and sister lived. Although the appellant's case was outside the paradigm of someone with criminal convictions, his personal conduct did disclose a pattern of violence and the fact that the appellant

had triggered an EAW by leaving Poland showed a significant lack of respect for law and the interests of society.

14. In remaking this decision I take into account the record of evidence as recorded by the FtT judge who found the appellant a credible witness. The respondent has not challenged this finding and I also found the appellant to be credible and straightforward.

15. I also found the evidence of his girlfriend direct and convincing. I must also have regard to the witness statements from the appellant, his girlfriend and two character statements from JW and AP. I have no hesitation in allowing this appeal. This is not to diminish the poor conduct of the appellant who since he arrived in March 2012 has been the subject of two cautions and also the subject of an arrest in 2015. There is also the important matter of the EAW. This is evidence that he has come to the adverse attention of the Polish authorities for failing to abide by conditions that were attached to his suspended sentences for offences involving cannabis committed in 2006 – 2008. By coming to the UK he has rendered himself a fugitive from justice in Poland and there is a European public interest in fugitives being brought to justice.

16. The appellant accepts that he has behaved in unacceptable ways and that his behaviour in one incident 2012 and another in 2014 resulted in the police taking action against him in. Although he was acquitted in August 2015 of charges of assault, it remains that it was his behaviour that brought him to the adverse attention of the police.

17. However, the appellant is an EEA national. It is not disputed that he is in the UK exercising Treaty rights. Although he still retains strong links with family in Poland, he had succeeded in getting away from bad influences in Poland, in getting work in the UK and in entering into a durable relationship with his girlfriend who is a fellow Polish national also in the UK exercising Treaty rights. Being an EEA national exercising a right of residence a deportation decision can only be justified in his case if it fulfils the requirements of Regulation 21. In particular the respondent has to show his personal conduct represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society. His history of being cautioned in the UK does show him to have behaved in a violent way on one occasion and an unruly way on another, but on neither occasion was his behaviour seen by the police to justify a criminal prosecution. Although I concur with Mr Jarvis that Regulation 21(5)(c) is not restricted to personal conduct in the form of criminal acts, it cannot be overlooked that all of his actions, although involving some level of violence, were at the low end of the spectrum, below the level of criminality.

18. In addition, on the strength of the appellant's evidence, which has been accepted as credible, he has made objective changes to his pattern of living. He is no longer involved with drugs. He is not an alcoholic. He has a stable relationship. He has an aunt and uncle who watch out for him. He has a job. Although he still lacks full self awareness of his past behaviour, he is clearly making progress to settling down into a

normal life. In this context it is simply impossible to describe him as a present and "sufficiency serious" threat to the fundamental interests of society.

19. I have already weighed in the balance against him the fact that he is a fugitive from Polish justice. At the same time it is a matter of some importance that there is a separate mechanism from deportation that exists to achieve his removal from the UK, by activation of the European Arrest Warrant. It appears that consideration of its activation was deferred previously because of the charges brought against him in 2015 by UK police. Those charges have now lapsed, he having been acquitted in a UK court.

20. It is to the appellant's credit that he says he will not resist any execution of the EAW. On the limited evidence before me, it may not necessarily be the case that the Polish authorities will choose to execute the warrant, but in any event, if they do the appellant will be removed from the UK.

21. If that warrant is executed and the appellant then serves a sentence in Poland or receives punishment for having broken conditions imposed on him in Poland, then the matter of his return to the UK (should he desire to return), will be for the respondent to consider at a later date. I would record my own view that the appellant's conduct in the UK up to this point is not such as should cause the respondent to apply the provisions of public policy or security against him, but that must be a matter, in the first instance, for the respondent.

22. For the above reasons

    The FtT judge materially erred in law and his decision is set aside. The decision I remake it to allow the appellant's appeal.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Storey

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award

Signed Date

Upper Tribunal Judge Storey