



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00178/2015

THE IMMIGRATION ACTS

Heard at Field House
On 13 May 2016
Extempore judgement

Decision & Reasons Promulgated
On 3 June 2016

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TOMASZ MARIUSZ JURKOWSKI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondent: No legal representative

DECISION AND REASONS

1. This is a challenge by the Secretary of State to a decision of First-tier Tribunal Judge Eames ('the Judge') promulgated on 7 March 2016 in which the Judge allowed the appellant's appeal against the order to deport him from the United Kingdom. Mr Jurkowski ('the appellant') is not present in court today as he has been removed to Poland in accordance with the Secretary of State's powers, which has been recently confirmed by the Court of Appeal in another case to be an entirely lawful action.

2. Permission to appeal was granted by Designated First-tier Tribunal Judge Manuell on 5 April 2016, the relevant part of the grant being paragraph 3 in which the Judge Manuell states:

“Allowing due recognition to the judge’s considerable experience, his conclusions might well be thought surprising given the serious nature of the appellant’s offence and the fact that it was committed within three years of entry. The judge appears (as complained) to have engaged in mitigation in the appellant’s absence. There was no evidence that the appellant had sought leave to enter for the purpose of attending his appeal hearing. All of the grounds are arguable.”

3. The appellant was represented in the early part of these proceedings. The Tribunal received a letter from Turpin & Miller LLP Solicitors on 5 May 2016 confirming they are no longer instructed by the appellant in relation to the appeal listed at Field House on 13 May 2016. I find there has been valid service of notice of the place, date and venue of this hearing prior to the solicitors coming off the record. The solicitors do make the observation that as the appellant was removed from the UK they do not have any forwarding address for him. There has been no attempt to update the Tribunal with any further correspondence address.
4. The determination notes that the appellant is a national of Poland born on 13 September 1984. No anonymity direction has been made. He is the subject of a deportation order as a result of a conviction on 28 February 2014 of attempted robbery for which he was sentenced on 11 April 2014 to 30 months’ imprisonment. The Judge set out the immigration and offending history at paragraphs 4 to 7 of the determination and the findings of fact at paragraphs 38 to 56.
5. At paragraph 43 are the sentencing judge’s remarks that arose in the Northampton Crown Court where the Judge refers to the fact that on 10 January 2014 at 10pm the appellant went into a newsagents, a small shop, with the complainant behind the counter on his own. The appellant, and I use that term in respect of the appellant before the First-tier Tribunal, entered the shop. The complainant turned to take a bottle from the shelf when the appellant jumped at him and pushed him into a storeroom, landed on top of him, produced a kitchen knife with a four-inch blade and threatened him claiming “you give me all your money if you don’t give me the money you’re dead”. The incident was only stopped, it is claimed, as a result of the fact that other people came into the shop, at which point the appellant left. The sentencing judge refers to the serious nature of the offence involving the use of an offensive weapon and the fact that it was so serious that it was necessary to impose a custodial sentence. In addition to that the Judge had available to him an OASys Report prepared by the National Probation Service which is to be found at the Secretary of State’s bundle, pages D4 and D7.
6. It is important in relation to this hearing that we remind ourselves of the relevant law relating to the deportation of an EU national. Deportation of EU nationals is covered

by Directive 2004/38/EC which is implemented by the Immigration (European Economic Area) Regulations 2006 ("the Regulations"). In relation to the Secretary of State's power to remove an EU national, by virtue of Regulation 19(3) 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:

- (a) he does not have or ceases to have a right to reside under these Regulations; or
- (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 in accordance with Regulation 21.

The relevant section in this appeal is Regulation 19(3)(b), the appellant being a worker exercising treaty rights in the United Kingdom but in relation to whom, as a result of the offence, the Secretary of State has decided that his removal is justified on grounds of public policy, public security or public health.

7. By virtue of Regulation 26 of the 2006 Regulations an EEA national may only be removed if his removal is justified on grounds of public policy, public health or public security. It is not suggested that public health is a live issue in relation to this matter. Public policy, and it is argued by the Secretary of State public security, are relevant issues. Regulation 21(5) to 21(6) provide guidance consistent with earlier EU law on the proper approach to making decisions on public policy and public security, Regulation 21(5) stating that 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 the 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 which relate to consideration of general prevention, do not justify the decision;
 - (e) a person's previous convictions do not in themselves justify the decision.

Regulation 21(6) states that:

"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 into account in consideration such as the age, state of health, family and economic situations 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."

8. In relation to the fundamental interests of society **GW (EEA Regulation 21: Fundamental interests) Netherlands [2009] UKIAT 50** is a case in which the Tribunal said that the fundamental interests of a society within the meaning of Regulation 21, a threat to which may justify the exclusion of an EEA national, is a question to be determined by reference to the legal rules governing society in question. It is unlikely that conduct that is subject to no prohibition can be regarded as threatening those interests.
9. In this case the evidence before the First-tier Judge was that a serious act of violence, including the threat of death and injury and the use of an offensive weapon, had occurred for personal gain which indicated a propensity to offend and violently offend. The fear for the future is said to be a repeat of such violent offending which is prohibited by the laws of the United Kingdom. Therefore there is a fundamental interest of society at stake in relation to this appeal.
10. The Judge makes comment about the nature of EEA law and the need to take care when interfering with fundamental rights arising under EU law. This position is legally correct for the public policy ground for removal is an exception to the fundamental principles of the free exercise of EU rights and as such has to be construed restrictively. In **R v Bouchereau [1978] QB 732** it was said that the presence or conduct of the individual should constitute a genuine and sufficiently serious threat to public policy. That was a matter the Judge was specifically asked to make findings upon and to which I shall return shortly.
11. The need for the Judge to consider the question of future offending is a key element of this appeal as recently confirmed by the Court of Appeal in the **Secretary of State v Arturus Dumliauskas and Lukasz Wozniak and ME (Netherlands) [2015] EWCA Civ 145** in which it was stated, at paragraphs 40 and 55 that if there was no risk of reoffending then the power to deport nationals of other Member States on the grounds of public policy or public security does not arise. Therefore, if the Judge's finding in the current appeal was that there was no risk of reoffending it is arguable there was no need to go on to consider the proportionality of the decision.
12. The Judge's findings in relation to the risk of reoffending are set out at paragraphs 46, 47 and 48 of the determination. At 46 the Judge finds:
 - "46. As I have noted in my findings of fact above, the appellant accepts that the offending was a shameful thing to have done. He expresses remorse and sorrow and empathy with the victim now. Whilst of course those comments may well be self-serving, on balance I accept them as accurate.

That is in part in light of the circumstances that produced the offending, and the fact the appellant has no history of offending.

47. The OASys assessment is that there is a low likelihood of reconviction. It is only if he did reoffend that the risk of serious harm to others would arise (a medium risk), so given the low likelihood of reoffending, that risk of harm to others is not a likely outcome.
 48. But I have taken into account Mrs Arnesen's argument that having him in the UK is not good for UK society, and that although he has had the opportunity to lead a good life in the UK he failed to stay within the law. I do not find that this translates into a future risk of failing to stay within the law however."
13. The Judge's findings in relation to the risk of reoffending are arguably based upon a misdirection of law as asserted in the grounds seeking permission to appeal and also are inadequately reasoned. If one turns to the OASys Report it is important to note the comments made by the author of that report in relation to the risk of reoffending. It is correct that the author of the report assesses the likelihood of reconviction as low, a 0 to 40 percentage chance based upon a maximum scale of 168 and, also, that were there to be reoffending the level of risk of serious harm is medium. What the Judge does not appear to have factored into account in assessing the risk of reoffending are the risk factors identified at page D4 of the OASys Report which are the use of alcohol, the use of weapons (a bladed knife), and anger management issues. It is clear that it was the combination of such factors that led the appellant to offend. What has not been presented, and was not available to the First-tier Tribunal, was sufficient evidence of any work being undertaken by the appellant to address those specific issues. Particularly in regard to anger management and alcohol, as there appeared to be a connection between such matters and the financial difficulties being experienced by the appellant within the United Kingdom. It cannot be said by the Judge that such matters had been addressed as clearly there was no relevant evidence of this. The misdirection of law arises as the Judge appears to have believed that as the OASys Report stated there was a low risk of harm this equates to there being no risk of reoffending or such a minimal risk that it could effectively be ignored. The grounds refer to the case of **Vasconcelos (Risk - rehabilitation [2013] UKUT 378 IAC**. The headnote of which in paragraph 1 states:

"In assessing whether an EEA national represents a current threat to public policy by reason of a risk of resumption of opportunistic offending, the Tribunal should consider any statistical assessment of reoffending provided by NOMS but is not bound by such data if the overall assessment of the evidence supports the conclusion of continued risk."

It was arguably irrational for the Judge, notwithstanding his experience, to focus solely upon the risk of reoffending being assessed at low without adequately

analysing what it is said by the author of the OASys Report was responsible for or led to the offence in question.

14. The second issue is that having found that the risk of harm was not a likely outcome, the Judge went on to consider the proportionality of the decision at paragraphs 50 to 55 of the determination. The criticism relied upon by Mr Tarlow before me today, is that at paragraph 50 the Judge sets out the matters in the appellant's favour, in 51 the matters in the Secretary of State's favour, and then makes a statement that the Judge did not find the decision to be a proportionate response to the legitimate imperatives of public policy and public security. This ground raises an arguably justified criticism by the Secretary of State as one is required to do more than just set out factors A and factors B. Had the Judge analysed how these factors integrate with each other and looked at the question of rehabilitation, it may have been a finding that was within a range of those available to the Judge. The fact of the matter is the Judge did not undertake a properly balanced proportionality assessment, if in fact one was required in light of the findings at paragraphs 46 to 48.
15. I find Mr Tarlow has made out the grounds of challenge as set out in the pleadings and referred to in the grant of permission to appeal and for that reason I find the Judge has erred in law in a manner that is material to the decision to allow the appeal.
16. In light of the fact there is no fresh evidence being relied upon, or any reason why the Tribunal should not proceed to remake the decision on the basis of the material that was before the First-tier Tribunal, I proceed to do so.
17. The Judge's findings of fact at paragraph 38 (a) to (k) are not challenged by the Secretary of State. These are in the following terms:
 - “(a) The appellant is a citizen of Poland who arrived in the UK in 2012. He has the family he says he has – a wife and three children.
 - (b) Aside from his imprisonment, he has been a qualified person, working as an employee in the UK or going through gaps in his work when he was looking for other work. As he arrived after 2011 he did not need to be registered as an A8 worker. He is relatively employable, as a person with construction skills and a propensity for hard work; an employer has offered him a job.
 - (c) The index offence was as described by the sentencing judge and at page D5 of the OASys Report. He has no previous history of offending of any kind.
 - (d) The likelihood of the appellant being reconvicted is low. If he did reoffend, the risk of serious harm to others would be medium. It would affect the general public and shop assistants. The risk factors as to the

possibility of reoffending would be alcohol, use of a knife, and anger. Financial stress is also a potential factor.

- (e) The appellant has not appealed against his conviction or sentence. The appellant has not completed any rehabilitative courses since offending. He expresses remorse and a desire to apologise to the victim and to seek his forgiveness.
- (f) I find that he does accept his responsibility for what happened, and has re-evaluated his attitude to offending. I also find that the efforts made by his partner would now be rewarded by positive change than in the past because of his realisation of the shame of what he did. I accept that he has an understanding of the factors that led to the offending.
- (g) I find that the appellant would live together with his wife and children were he allowed to remain in the United Kingdom.
- (h) The appellant has been in the UK for three years and is familiar with UK culture and the way of life, and speaks English. He has worked in the UK. Prior to that he was in Poland all his life; it is where he was educated and grew up as a child and younger adult. I find it very likely that he has not lost touch with the Polish way of life or the Polish language. But overall I find that he has integrated with UK society and the British way of life. The offending undermines that integration but not entirely.
- (i) The appellant has a job offer. Whether that remains open now he has been deported is another matter. But it shows he is employable.
- (j) The appellant is not alcoholic. He drinks though. This can be to excess but is not an illness or addiction. It interferes with his judgment.
- (k) The appellant and his family have undergone financial hardship. He now understands the effect of that on his drinking and the combined effect that drinking and financial anxiety had on his behaviour. I accept that understanding is very likely to reduce the risk of reoffending in line with the OASys assessment of propensity."

18. Considering that, and for the reasons I referred to above, the offence committed by the appellant is a very serious offence and illustrates a propensity, or something within the appellant's personality, that leads him to commit violent offences using a bladed instrument for his own personal gain. I referred earlier to the fact that elements that were considered as part of the understanding of offending and the risk factors as to the possibility of reoffending, include alcohol, the use of a knife and anger management issues, as well as financial stress. There is no evidence before this court that the appellant has a job offer open to him that is still a genuine and valid offer if allowed back into the United Kingdom. There is no evidence,

notwithstanding a claim to appreciate and understand the effect of offending, of any work being done by the appellant to deal with alcohol. Indeed it appears that the evidence to the Judge was that the appellant claimed not to be alcoholic or addicted although he admits that he drinks. Whether a person who drinks is an alcoholic or considers themselves to be an alcoholic when they are in fact an alcoholic, but they are in denial, is a very complex area, but the fact of the matter is that the appellant has admitted that he does drink and there is no evidence he has taken any steps to seek professional help to avoid drinking in the future or limit his drinking. There are clearly concerns that an identified risk factor still exists.

19. In relation to anger management, the Judge makes no observation in his determination of any steps that have been taken to address anger management issues and indeed there is nothing before me that satisfactorily shows that the anger management issues have been resolved. It is therefore a case in which although the assessment is of low risk of offending, when looking at the evidence in the round, the appellant has failed to adequately address the factors that may lead to reoffending. I find the Secretary of State has established on the facts of this matter that there is a genuine and serious risk of reoffending, based upon the appellant's personal conduct, that gives rise to concerns regarding the public security and public policy aspects relied upon by the Secretary of State vis-à-vis the safety of members of society.
20. Having found that there is therefore a proven real risk to the required standard of reoffending, it is now necessary for me, pursuant to Regulation 21(6), to assess the proportionality of the decision, that being proportionality in relation to EU law, i.e. is it a proportionate decision required to achieve the aims sought by the Secretary of State when weighed against the rights the appellant has as an EU national of free movement within the European Union. It is my finding on that point that it is a proportionate response. I have taken into account the age of the appellant, born 13 September 1984 aged approximately 31, his state of health as an individual in good health, family and economic situation which I have referred to by reference to paragraph 38(g) and (h) of the original determination, length of residence in the United Kingdom, the appellant entered claim to have entered on the 7 December 2012 and was only here for a short period of time prior to his offending and appeal. He has not been in the United Kingdom for a period of five years, does not have a right of permanent residence and it is therefore only the lower stage of protection that this court is looking at. Issues of social and cultural integration into the UK referred to at paragraphs 38(g) and (h) I have mentioned above, and the extents of the appellants links to Poland. This is a case of an individual who was not fully integrated into the United Kingdom, who retains ties to his home state, and for whom it has not been shown that any unnecessary or undue hardship would be suffered if returned to Poland.
21. In relation to the question of rehabilitation, there have been a number of recent decisions with regard to rehabilitation, the case of **Wozniak and Others** which I referred to earlier, having been heard by the Court of Appeal in 2015, then led to a

further decision by this Tribunal in the case of **MC (Essa principles recast) Poland [2015] UKUT 520 IAC** in which it was held by the Upper Tribunal as follows:

- “1. Essa rehabilitation principles are specific to decisions taken on public policy, public security and public health grounds under Regulation 21 of the 2006 EEA Regulations.
2. It is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (Regulation 21(5)(c)) that it becomes relevant to consider whether the decision is proportionate taking into account all the considerations identified in Regulation 21(5)-(6).
3. There is no specific reference in the expulsion provisions of either Directive 2004/38/EC or the 2006 EEA Regulations to rehabilitation, but it has been seen by the Court of Justice as an aspect of integration, which is one of the factors referred to in Article 28(1) and Regulation 21(6) (Essa [2013] at paragraph [23]).
4. Rehabilitation is not an issue to be addressed in every EEA deportation or removal decision taken under Regulation 21; it will not be relevant, for example, if rehabilitation has already been completed (Essa [2013] at paragraphs [32]-[33]).
5. Reference to prospects of rehabilitation concerns reasonable prospects of a person ceasing to commit crime (Essa [2013] at paragraph [35]), not the mere possibility of rehabilitation. Mere capability of rehabilitation is not to be equated with reasonable prospect of rehabilitation.
6. Where relevant (see (4) above) such prospects are a factor to be taken into account in the proportionality assessment required by Regulation 21(5) and (6) (Dumliauskas at [41]).
7. Such prospects are to be taken into account even if not raised by the offender (Dumliauskas [52]).
8. Gauging such prospects requires assessing the relative prospects of rehabilitation in the host Member State as compared with those in the Member State of origin, but, in the absence of evidence, it is not to be assumed that prospects are materially different in that other Member State (Dumliauskas [46], paragraphs [52]-[53] and [59]).
9. Matters that are relevant when examining the prospects of the rehabilitation of offenders include family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like (Essa [2013] at paragraph [34]). However, lack of

access to a probation officer or equivalent in the other Member State should not, in general, preclude deportation (Dumliauskas at [55])

10. In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (Dumliauskas at [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide-ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (Dumliauskas at [46] and [54]).”
22. In relation to this matter, the appellant does not have a permanent right of residence. He has only been in the United Kingdom for three years. Although there is no evidence provided in relation to facilities available in Poland, it is reasonable to assume that they are similar to those in the United Kingdom. The finding that I make in relation to the rehabilitation issue, which forms part of the proportionality assessment, is that there are equal prospects in Poland and the United Kingdom. It has not been shown that suitable facilities are not available that may be required to meet the needs of the appellant vis-à-vis rehabilitation in Poland if he bothered to seek the same. There is however no evidence that he has taken any action to seek the assistance of professional organisations to address the risk factors since his return to Poland or in the UK.
23. For that reason I find that the decision is proportionate.

Decision

I dismiss Mr Jurkowski’s appeal against the decision to deport him from the United Kingdom.

No anonymity direction is made.

Signed

Date 2 June 2016

Upper Tribunal Judge Hanson