



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/50828/2014

THE IMMIGRATION ACTS

Heard at Field House
On 08 June 2016

Decision Promulgated
On 08 July 2016

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

LUKASZ ROSZKOWSKI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M. Sirikanda, on behalf of Ahmed Rahman Carr Solicitors
For the Respondent: Mr L. Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant's immigration history is summarised in the Upper Tribunal decision promulgated on 15 April 2016 [annexed]. The appeal was listed for a resumed hearing in order to remake the decision. The appellant appeals against the respondent's decision dated 09 December 2014 to 'deport' him from the UK. As an EEA national the relevant legal framework is contained in The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006").

2. The respondent may take a 'relevant decision' to remove an EEA national on the grounds of public policy, public security or public health (regulation 21(1)) as long as the decision also complies with the principles outlined in regulation 21(5)-(6). However, a relevant decision may not be taken in respect of the person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security (regulation 21(3)). Regulation 15 states that a person shall acquire a permanent right of residence if he has resided in the United Kingdom in accordance with the regulations for a continuous period of five years.
3. An EEA national may reside 'in accordance with the regulations' by way of several different provisions. Regulation 6 sets out a number of ways in which an EEA national can exercise treaty rights as a "qualified person" including as a jobseeker, a worker, a self-employed person, a self-sufficient person or as a student. Others may derive rights of residence through familial relationships. Regulation 7 provides for family members of qualified persons to reside in the UK. Family members include direct descendants of an EEA national who are under 21 or who are dependent.

Threshold for removal

4. The first issue I must determine is what the relevant threshold is for removal. It is not disputed that the appellant entered the UK with his mother and sister in June 2007. Nor does it appear to be disputed that he remained in the UK (without any significant periods away from the country) throughout the period up until his removal in February 2015.
5. Both the respondent's decision and the First-tier Tribunal decision concentrated on whether the appellant had acquired a permanent right of residence with sole reference to whether he produced sufficient evidence to show that he had been a qualified person for a continuous period of five years prior to his imprisonment. However, it is clear from the wording of regulation 15 that the appellant need only show that he was residing in the UK "in accordance with these regulations". Although a qualified person would be residing in accordance with the regulations, a person who was residing in the UK as a family member might also be residing in accordance with the regulations.
6. I have had the opportunity of hearing evidence from the appellant's mother and sister. His mother has produced a number of pieces of evidence relating to her employment, which shows on the balance of probabilities that she has been working in the UK since her arrival in 2007. The evidence includes a number of P60 certificates covering the period from 2007 to 2015. In light of this evidence I am satisfied that the appellant's mother has been a qualified person throughout her own period of residence in the UK.
7. The First-tier Tribunal Judge accepted his mother's evidence. She gave her evidence before me in an open and unhesitating way. Her evidence was broadly consistent

with the documentary evidence. I also found her to be a credible witness. She told me that the appellant lived in her household throughout his time in the UK. There were periods when he was able to find work but she accepted that his work history was patchy. Although he had struggled to find regular work, in part, because he failed to develop his English language skills sufficiently, she said that he contributed to the household finances when he could. However, it became clear that his contribution was fairly minimal. His mother was clearly the main breadwinner in the household. When the appellant was unemployed she was responsible for supporting him. At no point did the appellant live independently from his mother's household.

8. While there is evidence to show that the appellant was issued with a residence card in his own right when he first came to the UK the evidence of his work history is patchy and would not in itself be sufficient to show that he had acquired a permanent right of residence in the UK as a qualified person. When he arrived in the UK he was only 18 years old. Up until his 21st birthday on 8 November 2009 I am satisfied that he was residing "in accordance with these regulations" under regulation 7(1)(b)(i) as the family member of his mother who was exercising treaty rights in the UK. Thereafter, I am satisfied that he continued to reside in accordance with regulation 7(1)(b)(ii) as his mother's dependent albeit that there were also some periods when he was in work and was therefore residing as a qualified person in his own right.
9. I am satisfied that the evidence shows on the balance of probabilities that by June 2012 the appellant had been residing in the United Kingdom in accordance with the regulations for a continuous period of five years. As such, he had acquired a permanent right of residence prior to his conviction on 25 January 2013 for robbery and wounding with intent to cause grievous bodily harm. For these reasons I conclude that a 'relevant decision' could only be taken to remove him from the UK with reference to the higher threshold of serious grounds of public policy or public security.

Other considerations

10. 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): see *SSHD v Straszewski* [2015] EWCA Civ 1245 and *MC (Essa principles recast)* [2015] UKUT 520.
11. The appellant has a history of offending. The sentencing judge noted that he had a conviction for an offence of violence in Poland but very little evidence has been produced regarding the circumstances of that offence. In evidence at the hearing the appellant's mother was able to provide a little more detail. She told me that the appellant, along with an older friend, assaulted another boy and stole his mobile

phone. She said that he was around 17 years old at the time. He was taken to court and sentenced to probation.

12. On 8 September 2012 the appellant was cautioned for possession of an offensive weapon in a public place. Neither the PNC record nor the reasons for deportation letter give details of the offence. While it is of concern that the appellant was cautioned for an offence of that kind there is insufficient evidence to assess whether this forms a pattern of behaviour that might indicate a propensity to commit violent offences.
13. On 22 November 2012 the appellant was convicted of several offences in the UK including damage to property, possession of cannabis and failing to surrender to custody. These matters were dealt with by way of fines and forfeiture. The level of sentencing suggests that the offences were of a relatively minor nature and were of a different kind to the offences that prompted the removal decision.
14. On 30 April 2013 the appellant was sentenced to 4 years imprisonment in relation to two serious offences involving violence. The sentencing judge summarised the nature of the crimes as follows:

“...I have to sentence you for two extremely serious offences, a robbery in which you approached a man in the street in the evening, struck him in the face and then punched him several times and when he was knocked to the floor he was further assaulted, either by being punched or kicked. It matters not for these purposes. You then ran off, taking his wallet with [you]. He was physically hurt particularly a wound to his eye and unsurprisingly his confidence has been affected by what you did to him that night.

About an hour and a half later you got into an argument with a man over a taxi and ended up committing a very serious assault on him, Mr Lennard stop he was attacked after he told you both to fuck off, no doubt because of a question of who was going to use the taxi. He was assaulted. He managed to break free and try and run off but you both pursued him. One of you knocked him to the floor and then he was repeatedly kicked by both of you, kicked to the point where he was unconscious and he ended up with extensive bruising all over his body. He was still in pain three weeks later and unable to go back to work. The only explanation that you two can offer for this appalling behaviour is that you had both been drinking.

....

You; Mr Roszkowski, are 23 years old. You have been in trouble before including for an offence of violence in Poland but your record is not what I would regard as a really serious one.... Both of you it is right to say have never been to prison before. You have both pleaded guilty though it is clear that Mr Roszkowski is deserving of considerably more credit for his early guilty pleas than is Mr Ropelewski.

I have had to balance very carefully the gravity of these offences, the guidelines, as against in both your young ages, your relative lack of criminal experience in your case, Roszkowski.... I regard both of you is equally culpable for the offences but I think in view of your older age and the fact that you have some previous convictions, I think it is appropriate distinguish between you in terms of the sentences that would be passed in principle. However, I think that factor was balanced out by the additional credit that Roszkowski gets for pleading guilty. So in the end you both end up with the same sentence.

Roszkowski, in your case, had you pleaded not guilty to these offences, I would have passed a sentence of three years for the robbery, three years for the section 18, making a total of six years because they have to be consecutive but giving you full credit for your pleas of guilty, I reduce that sentenced to 4 years.”

15. This was the first time he had been imprisoned. In his witness statement the appellant says that he is not proud of the offences he committed. He expresses remorse for his actions. He explains that, at the time, he was in a tumultuous relationship with his girlfriend. They broke up and got back together several times. In 2012 the relationship was not going well. He said that he felt upset and angry and started to drink heavily. He now realises that this contributed to his increasingly erratic behaviour and led him to make bad decisions. During his time in prison he realised how serious the mistakes were that he made. He became depressed, attempted suicide and self-harmed on several occasions.
16. The appellant has produced evidence to show that he completed a number of courses during his time in prison including behavioural and awareness courses relating to alcohol and relapse prevention. He also undertook a course to improve his English language skills. The appellant says that he has now given up alcohol because he realises the effect that it had on his life. If he is able to return to the UK he says that he would seek employment as a warehouse operative and begin saving money to undertake an IT course, which has always been his ambition. He hopes that such training would give him a better chance of obtaining better employment.
17. There is no current risk assessment before the tribunal. The most recent OASys assessment is dated 27 November 2014. Unfortunately, the report does not contain a great deal of detail. However, the overall risk assessment concluded that he presented a medium risk of serious harm to the public and known adults. The assessment states that where an individual is assessed as being medium, high or very high risk of serious harm, this must be followed through with a risk management plan. Section R11.12 of the report stated that the risk of reoffending could be controlled through the probation service who would monitor his licence conditions and refer him to appropriate programs on release. It was noted that his family would be able to offer support and encouragement.
18. In a letter dated 27 February 2014 the RESOLVE treatment manager at the National Offender Management Service wrote to the appellant in the following terms:

“As you will be aware, you have been referred for RESOLVE as per your sentence plan. The RESOLVE team have viewed your referral and you have been assessed as unsuitable for RESOLVE. This is because your OVP score indicates that you do not require a moderate intensity intervention such as RESOLVE to address your violence. Your offender supervisor will be informed of this so that they can consider alternative ways for you to address your risks.”
19. A pre-discharge report dated 28 October 2014 records a visit to his mother’s home, which was the proposed address for release. The supervising officer observed that his mother was very supportive of him. The supervising officer was satisfied that his mother, with the additional support of his sister and cousin, would be able to provide the support needed. The address was deemed suitable for release. No additional licence conditions appeared to be required.

20. The appellant has also produced a copy of a bail decision made by the First-tier Tribunal on 16 January 2015. In assessing whether the appellant was suitable for release from immigration detention the First-tier Tribunal Judge was not satisfied that there were substantial grounds to believe that the appellant was likely to reoffend. While it seems clear that the judge may not have had sight of the OASys assessment he took into account the fact that the previous convictions prior to the index offence were not serious and were of a different character. The index offence, although serious, was apparently fuelled by drink. The judge noted that the appellant had completed approved rehabilitation courses in drink and drugs. The judge was also satisfied that the fact he would be released on licence was a preventative factor. He noted that the probation service had not sought any additional conditions on the licence, which he considered "helps me to put into context the risk he poses." The judge was satisfied that there was no likelihood that the appellant would abscond or reoffend if released on bail.
21. It is difficult to assess the sincerity of the appellant's evidence when I have been unable to hear from him. However, I was able to hear from his mother and sister. While I take into account the fact that they are his relatives and would have every interest in the outcome of this appeal I found them both to be credible witnesses who were able to explain in some detail why, in their opinion, they felt that the appellant had changed his outlook and developed some maturity since he went to prison.
22. When asked what she thought the underlying causes of her son's violent behaviour were, his mother told me that she had been through a bitter divorce with the appellant's father. He was an alcoholic and domestic violence was involved. She observed that the appellant had become rebellious after the divorce. She thought that it may have contributed towards his behaviour. In relation to the index offence in the UK she also thought that the difficult relationship he had with his girlfriend may have contributed to the offence. He was drinking a lot at the time. She also recognised that his inability to find stable work had, in part, been as a result of the fact that he had not learnt English as well as she thought he would. As a result the appellant had taken steps to improve his English while he was in prison.
23. The appellant's sister told me that her brother was not very mature. She has noticed a marked change in him. She said that their relationship is much closer and he feels able to talk to them about his problems. As a family they have become closer. The overall picture drawn by the evidence of his family members is that, as a result of his imprisonment, the appellant has had cause to take stock of his life. He has had time to reflect on his actions and has developed a greater level of understanding and maturity. He has found it difficult to find work in Poland save for intermittent casual labour. He is currently living with his grandparents.
24. The appellant's criminal history prior to the index offence was described by the sentencing judge as one that he did not regard as really serious. While it is of some concern that he committed an assault in Poland before he came to the UK, I take into

account his young age at the time and the fact that the sentence of probation would appear to indicate that the offence was relatively minor. The other earlier offences in the UK would also appear to be relatively minor.

25. The serious nature of the index offences committed by the appellant at the end of 2012 cannot be denied. The sentencing judge's remarks outline the apparently random and repeated violent offending over the course of one evening. The risk factors leading up to this offence appeared to be the appellant's use of alcohol and a certain level of anger and emotional instability as a result of the breakup with his girlfriend. While none of this provides an excuse for his appalling behaviour there is evidence to show that he has sought to address some of the issues that may have contributed to those offences.
26. Although the OASys report assessed the risk of serious harm that he posed in November 2014 as "medium" it seems clear from other evidence that the probation service did not consider the risk of reoffending sufficiently serious to impose additional licence conditions. The probation service was satisfied that his family would be able to provide him with support. As a result of his sentence plan the appellant was referred to RESOLVE (a group work programme to reduce violent behaviour) but it seems clear that the risk he posed was not sufficiently serious to require "moderate intensity intervention". If he returned to the UK he would remain under the supervision of the probation service until the end of his sentence. There is no evidence to suggest that he has committed any further offences since he was released from prison. The appellant has produced evidence to show that he has taken steps to address some of the issues that may have contributed to the offence. He has completed rehabilitation courses in prison and has sought to improve his English language skills. While it has not been possible to assess the appellant's resolve to continue on this path by way of oral evidence I am satisfied that his mother and sister are committed to supporting him in any way that they can. Their evidence suggests that the appellant has reflected on his past behaviour and has matured.
27. While the index offences undoubtedly were serious they were not dissimilar to the circumstances considered by the Court of Appeal in Mr Straszewski's case (see paragraph 10 above). In that case the appellant had initially been assessed as presenting a high risk of serious harm but this was later assessed to be a medium risk. Mr Straszewski had committed offences of robbery and unlawful wounding leading to a sentence of imprisonment totalling four years and nine months. Despite the serious nature of the offences the court concluded that it was open to the tribunal to conclude that he did not represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society to justify deportation. Lord Justice Moore-Bick concluded that: "*although the offences committed by Mr Straszewski were serious, they were not so serious, and the risk that he would cause serious harm to members of the public through reoffending was not so great, that they justified his deportation.*"

28. After having weighed all the circumstances in this case I find that, despite the serious nature of the offence, there is insufficient evidence to show that there are serious grounds of public policy or public security to justify the appellant's removal. The evidence does not show that the appellant currently poses a genuine, present or sufficiently serious threat affecting one of the fundamental interests of society. There is evidence to show that the appellant has taken steps to rehabilitate to the extent that few conditions were imposed on his licence. It is likely that he has matured and has had time to reflect on his behaviour while in prison. If he returns to the UK he would still be under supervision and would benefit from the support of his family members. Although he didn't make the most of the opportunities that living in the UK presented him before he was removed to Poland he now expresses a desire to gain further qualifications in order to increase his employment prospects. He has close family connections in the UK where he lived for a period of eight years. Although he continues to have some connections to Poland through his grandparents it seems clear that his closest connections are now in the UK. For these reasons I conclude that the 'relevant decision' was not justified on serious grounds of public policy or public security and did not satisfy the principles of proportionality.
29. I conclude that the decision was not in accordance with the EEA regulations 2006.

DECISION

I re-make the decision and ALLOW the appeal

Signed  Date 07 July 2016

Upper Tribunal Judge Canavan

ANNEX



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

THE IMMIGRATION ACTS

**Heard at Field House
On 13 April 2016**

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

LUKASZ ROSZKOWSKI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M. Sirikanda, on behalf of Imran Khan & Partners
For the Respondent: Mr T. Wilding, Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a Polish citizen who came to the UK with his mother and sister in June 2007 when he was 18 years old. In a decision dated 09 December 2014 the respondent decided to remove him from the UK following his conviction for robbery and wounding with intent to cause grievous bodily harm. He was sentenced to four

years imprisonment. The EEA removal decision was certified under regulation 24AA of The Immigration (European Economic Area) Regulations 2006 (“the EEA Regulations 2006”). The effect of certification was that the respondent was able to remove the appellant while his appeal was pending.

2. First-tier Tribunal Judge Scott (“the judge”) dismissed the appeal in a decision promulgated on 14 August 2015. The judge heard and noted the evidence given by the appellant’s mother. She told him that she was a single mother who came to the UK in 2007 with her two children. She works as a warehouse operative [10]. She told the judge that her son had worked in 2008 and 2009 as well as other years during his time in the UK. They moved house several times so some of the documents were lost or had been thrown out. He had worked through several different agencies [16]. The judge noted that during cross-examination the appellant’s mother said that she supports her son when he is not working [17].
3. The first legal issue that the judge was required to consider was whether the appellant had acquired a right of permanent residence before he was sentenced to a period of imprisonment in 2013. The judge’s findings on this issue were as follows:

“21. Although it is accepted that the appellant came to the United Kingdom in 2007 and that he had resided here for over five years before his prison sentence in 2013, I find that I am not satisfied that it has been shown that he resided “in accordance with” the 2006 Regulations throughout that period, as required by regulation 15(1)(a). There is evidence that he worked in 2007, 2010, 2011 and 2012 but there are no documents to show that he did so in 2008 or 2009. His mother’s assertion to that effect is insufficient for this purpose. Even the evidence relating to the other years does not show that he was working continuously, merely that there were episodes of employment in those years.

22. I find, therefore, that the appellant has not established a permanent right of residence in the United Kingdom.”

4. Amongst other evidence the judge considered the “medium” risk assessment contained in the OASys report and concluded that the appellant presented a genuine, present and sufficiently serious threat to public safety to justify his removal on grounds of public policy or public security [25]. In considering the proportionality of removal the judge took into account the fact that the appellant was 26 years old. He lived with his mother and sister until his removal to Poland in early 2015. The judge took into account the fact that there was some evidence to show he had worked in the UK. He came to the UK aged 18 years old and had spent a period of approximately 7 ½ years in the UK during which time there had been a degree of social and cultural integration [28]. He concluded that the appellant’s removal was justified and proportionate.
5. The appellant seeks to appeal the First-tier Tribunal decision on the grounds that (i) the First-tier Tribunal erred in concluding that the appellant had not acquired a right of permanent residence on the facts and evidence before the tribunal; and (ii) the judge failed to attach weight to material evidence in his assessment of rehabilitation. The appellant’s representatives accept that there were alternative arguments that

could and should have been put forward at the hearing relating to permanent residence but offer no explanation as to why their representative did not do so. Nevertheless they argue that the judge should have considered obvious points of law.

Decision and reasons

6. After having considered the grounds of appeal and oral arguments I satisfied that the First-tier Tribunal decision involved the making of an error on a point of law.
7. The judge proceeded to determine the issue of permanent residence on the basis on which it was put i.e. that the appellant was a qualified person in his own right. However, even if the judge proceeded on that basis his findings were inadequate. The judge noted that there was evidence to show that the appellant worked periodically. Even if there was insufficient evidence to show continuous work the judge failed to make any findings in relation to matters that were material to a proper assessment of whether the appellant was a “qualified person” for the purpose of regulation 6 for a continuous period of five years. If the appellant was not working the judge needed to consider whether he was a “jobseeker” in the interim periods and therefore continued to reside in accordance with the regulations. Although the appeal was inadequately prepared in this respect it was still incumbent on the judge to consider whether there was sufficient evidence in respect of other aspects of the regulations before concluding that the appellant failed to show that he had acquired a right of permanent residence.
8. Most of the submissions put forward by Ms Sirikanda related to substantive arguments as to why the appellant was likely to have acquired a right of permanent residence prior to imprisonment. It seems quite clear that the arguments relating to whether the appellant was a family member for the purpose of regulation 7(1) of the EAA Regulations 2006 during his initial five year period of residence in the UK were not put to the judge at the hearing, nor was the case prepared with those arguments in mind. Nevertheless, the factual circumstances as set out by the judge indicated that the appellant lived with his mother throughout his time in the UK. Prior to November 2009 he was under 21 years old. It seems that his mother also indicated that she provided the appellant with financial support when he was not working.
9. Although I heard argument on whether the regulation 7 issues were so obvious that the judge erred in failing to consider them (despite the fact that they were not argued) I find that it is sufficient for the purpose of this decision to conclude that the judge failed to make adequate findings on issues that were material to a proper assessment of the question that he did seek to determine i.e. whether the appellant had acquired a permanent right of residence as a qualified person in his own right.
10. Mr Wilding argued that, even if the judge erred in his assessment, any error was not material because the nature of the crimes was so serious that removal was justified even on the higher threshold. Without doubt the appellant committed particularly

serious assaults. This was reflected in the length of his sentence. Nevertheless, the thresholds of “grounds of public policy” and “serious grounds of public policy” are sufficiently different to require a full assessment of the circumstances of the case. It cannot be said that the judge was bound to come to the same conclusion even if he had found that the appellant had acquired a right of permanent residence. For this reason I conclude that the error identified above was material.

11. I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The First-tier Tribunal decision is set aside.
12. I have taken into account the submissions made by both parties as to the appropriate venue if a further hearing was required. I bear in mind that the normal approach will be for the Upper Tribunal to remake the decision. In this case the nature and extent of judicial fact finding is not such that it would be appropriate to remit the appeal for a fresh hearing before First-tier Tribunal. The nature of the fact finding exercise is such that it could be remade in the Upper Tribunal.

DIRECTIONS

13. The following directions are made in relation to this appeal:
 - (i) The appeal will be listed for a resumed hearing in the Upper Tribunal before Upper Tribunal Judge Canavan.
 - (ii) The appellant’s representatives are to notify the tribunal no later than **05 May 2016** whether witnesses will be called, and if so, whether an interpreter is required.
 - (iii) Any further evidence relied upon by either party is to be served at least **10 days** before the next hearing.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

I set aside the decision and direct that the case be listed for a resumed hearing

Signed  Date 14 April 2016

Upper Tribunal Judge Canavan