Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01139/2012

THE IMMIGRATION ACTS

Heard at Field House
On 28 January 2014

Determination Promulgated
On 12 February 2014

Before

THE HONOURABLE MR JUSTICE FOSKETT SITTING AS JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE ESHUN

Between

MR JACEK STRASZWSKI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Kiai, Counsel
For the Respondent: Ms E Martin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Poland born on 24 February 1987 and so is now 26 years old. This is a rehearing of his appeal against the decision of the Secretary of State

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made on 13 November 2012 to make a deportation order against him. The rehearing is as a result of the finding by Upper Tribunal Judges Eshun and Perkins on 17 September 2013 that the First-tier Tribunal had made an error in law in allowing the appellant's appeal. The Upper Tribunal held as follows:

> "3. It is not disputed that the claimant arrived in the United Kingdom on 12 October 1998 or that he was sent to prison just over 12 years later on 19 November 2010. At paragraph 15 of the letter entitled 'reasons for deportation' dated 13 November 2012, the Secretary of State said:
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> > 'Whilst it is accepted that you arrived in the UK in 1998, for the purposes of determining permanent residence, only the period when you have resided lawfully in the UK is taken into account. You were a dependent on your mother's claim for asylum in October 1998, this was refused in September 2002, at which point you and your family were granted Exceptional Leave to Remain for one year. Your mother submitted an application for further ELR on 1 September 2003 and Poland joined the EEA in May 2004. You were remanded in custody on 6 August 2010; hence your period of lawful residence in the UK is approximately seven years and eight months.'
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> 4. The First-tier Tribunal said at paragraph 21 of its Determination:
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> > 'The Secretary of State in paragraph 15 of the reasons for decision letter considers that the appellant had lawful residence in the United Kingdom for approximately seven years and ten months as he was remanded in custody on 6 August 2010. The Secretary of State appears to have only considered the period from September 2002 until 6 August 2010. Irrespective of any area [error?] in the calculation made by the Secretary of State, it is hard to understand why the Secretary of State has not included the period from the time of the claim of asylum in October 1998 until refusal of the asylum claim in September 2002. Even if the [claimant] had arrived in the United Kingdom unlawfully, once he had made an application for asylum, through his mother, his residence in the United Kingdom would have been lawful.'
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> 5. The Tribunal then go on to say that the Presenting Officer was not able to criticise that reasoning and the claimant's representative (not Ms Kiai) said that it was correct.
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> 6. We are quite satisfied that it is not. The problem here seems to be based on a misreading of the decision of the European Court of Justice in **Ziolkowski (freedom of movement of persons) Joined Cases C-424/10 and C-425/10** dated 21 December 2012. This decision did determine authoritatively that, by reason of Directive 2004/38/EC, in determining if a person had accrued a right of residence in an EEA country, residence before that country was part of the EEA was to be taken into account. However, it was also plain from reading the judgement as a whole that mere residence was not enough to bring a person within the scope of the Directive. Neither was it relevant if the

residence was in accordance with the law of the country concerned. Paragraphs 46 and 47 of **Ziolkowski** are particularly pertinent and state:

> '46. It follows that the concept of legal residence implies that the terms 'have resided legally' in Article 16(1) of Directive 2004/38 should be construed as meaning a period of residence which complies with the conditions laid down in the Directive, in particular those set out in Article 7(1).
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> 47. Consequently, a period of residence which complies with the law of a member state but does not satisfy the conditions laid down in Article 7(1) of Directive 2004/38 cannot be regarded as a 'legal' period of residence within the meaning of Article 16(1).'

7. In its concluding remarks at paragraph 63 the European Court of Justice reiterates the importance of compliance with all the requirements of the Directive if a person is to reap its benefits and says:

> '63. In the light of the foregoing considerations, the answer to Question 2 is that periods of residence completed by a national of a non-Member State in the territory of a Member State before the accession of the non-Member State to the European Union must, in the absence of specific provisions in the Act of Session, be taken into account for the purpose of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38 provided those periods were complete and in compliance with the conditions laid down in Article 7(1) of the Directive.'

8. It follows therefore that the use of the word 'lawfully' in the refusal letter is misleading. Properly understood it was never the intention of the Reasons for Refusal Letter to say that time spent between claiming asylum on arrival in the United Kingdom and being given permission to remain was not time spent lawfully in the United Kingdom. However, it was not time to be considered in determining if the claimant satisfied the requirements of the Directive because it was not time spent in accordance with Article 7(1). The claimant was not exercising treaty rights. He was not a worker and although he was at school for part of that period he was not, or at least there is no evidence to suggest that he was, in possession of appropriate medical insurance. It is no answer to this to assert, as may be the case, we do not know, that the claimant was not a burden on public funds. As is made quite clear in **Ziolkowski** a person can only claim the benefit of the Qualification Directive if the person met its requirements, and that goes beyond residing in a particular country with permission. In the absence of an admission by the Secretary of State, a person who says that he is entitled to the protection of the Directive must prove his claim.

9. Paragraph 15 of the Reasons for Refusal Letter (where the respondent says: 'You were remanded in custody on 6 August 2010; hence your period of lawful residence in the UK is approximately 7 years and 8 months') is rather unfortunate because although it sets out accurately the time that elapsed between the claimant being granted exceptional leave to remain and his being remanded in custody, the Refusal letter goes on to make it plain that the Secretary of State does not accept that the claimant has shown even five years' continuous residence in accordance with the Directive.

10. The Tribunal said at paragraph 30 of the determination:

> 'Taking into account the evidence as a whole we conclude that the appellant has been exercising treaty rights throughout the time he has been living in the United Kingdom.'

11. However, the only reason for this finding is that the Tribunal was persuaded that the appellant had maintained himself without recourse to public funds. That is not enough to establish residence in accordance with the Directives. The claimant could (theoretically) have been a 'worker' for the necessary time, or he could have been the dependant of a worker for the necessary time, or he could have been a person with sufficient resources both to avoid being a burden on the social assistance scheme in the United Kingdom and to have had comprehensive sickness insurance cover but he could not establish any of these things on the evidence that was before the Tribunal.

12. We cannot be satisfied from the determination just how the Tribunal reached a conclusion that the appellant had achieved a continuous period of at least ten years' residence within the meaning of the Qualification Directive. Neither can we ascertain from the material before us if the claimant had in fact achieved five years relevant residence for the purpose of the qualification directive. It is just not clear and has to be decided again.

13. Although we have tried hard to avoid a further hearing we find that a further hearing is necessary to consider in the lights of the above the evidence concerning the claimant's status in the United Kingdom…:"

2. That, therefore, is the background to the matter coming before us. The Secretary of State's decision to make a deportation order against the appellant was taken with reference to Regulation 19(3)(b) and 21 of the Immigration (European Economic Area) Regulations 2006. The appellant had been convicted on 19 November 2010 at Blackfriars Crown Court of two counts of robbery and was sentenced to 42 months' imprisonment. On 9 June 2010 he was convicted of grievous bodily harm and at Kingston Crown Court was sentenced to fifteen months' imprisonment. The appellant was due to be released on 26 December 2012 but was then taken into

immigration detention where he has remained since. The Secretary of State expressed herself satisfied that the appellant would pose a genuine, present and sufficiently serious threat to the interests of public policy if he were allowed to remain in the United Kingdom.

3. The findings made by the First-tier Tribunal that have not been affected by the error of law, and which have been preserved, are that the appellant has been continually resident in the UK since October 1998. He attended school in the UK after his arrival in 1998. He attended full-time education until he was 16. He worked in the UK after leaving school, but this was sporadic as he was smoking cannabis and drinking heavily. He attended Southwark College and undertook some English language modules and a full-time electricians course when he was 16 years of age. This ceased when he was nearly 18 years of age. The appellant worked as a painter and decorator. The appellant confirmed this evidence at the hearing before us.

4. Ms Kiai confirmed that she would be relying on the argument that the appellant has obtained permanent rights of residence in the UK as an EEA national who has resided in the UK in accordance with the Regulations for a continuous period of 5 years. Her case was that between June 2004 and September 2009 he was a dependant of his mother who was a self-employed person in the UK. Consequently, the appellant is entitled to the second level of protection, that is, the appellant can only be deported if "*serious grounds of public policy or public security*" exist. She would be relying on Article 8 of the ECHR, i.e. family and private life, and Article 3 of the ECHR because of the psychiatric report that he may be at risk of committing suicide were he to be deported to Poland.

5. The first issue we have to consider is the status of the appellant. Has he exercised treaty rights in the United Kingdom for five years and has acquired permanent residence from June 2004 to September 2009 as a result of his mother being self-employed during that period. In 2004 the appellant was 17 years old. Under Regulation 7 of the 2006 EEA Regulations and Article 2 of the Directive 2004/38/EC the appellant is classified as a family member of a Union citizen if he is under the age of 21 or if he is exercising treaty rights as a self-sufficient person. Miss Kiai did not pursue her argument at paragraph 56 of her skeleton argument where she submitted that the appellant has been exercising treaty rights as a self-sufficient person, but choose instead to rely on the argument that the appellant was dependent on his mother who was a self-employed person in the UK.

6. Ms Martin, in light of the documentary evidence, accepted that the appellant's mother was in business running a shop from June 2004. She did not, however, accept that it was established that the business continued until it was closed in September 2009, relying on the lack of supporting documentary evidence to that effect. She submitted that the documentary evidence suggested that the business closed in April 2009. Without evidence to corroborate the mother's claim that the business ended in September 2009, she submitted that the appellant fell short of the five years continuous residence. We accept, as did Ms Kiai, that there was no specific

documentary evidence beyond April 2009 to confirm the date the appellant's mother's business closed. However, there was evidence, however, that a bankruptcy order was made against Barbara Straszwski, the appellant's mother, on 4 February 2010 and that the order was discharged on 12 November 2010.

7. We saw and heard the appellant's mother give evidence and we accept that she was running the business alone, that it was not doing well and that she closed it in September 2009. On the advice of her accountant and the Citizens Advice Bureau, she filed for a bankruptcy order, documentary evidence of which is before us as we have indicated. The chronology of her bankruptcy suggests that it is a reasonable inference that her business closed in September 2009 as she stated. Consequently we accept that the appellant's mother was a self-employed person exercising Treaty rights from June 2004 until September 2009.

8. Ms Martin did not dispute the evidence of the appellant, his mother and brother that he has lived with his mother throughout his stay in the UK, which we accept. Indeed, Ms Martin did not dispute this evidence. She lives in rented council accommodation and was until September 2009 responsible for paying the rent. The appellant was reliant on her for everything, including food and clothing. The appellant has not held down meaningful employment for any reasonable duration. We accept that sometimes he helped his mother in the shop for which he was not paid. We find that the money he gained from the painting and decorating work he did, which was not much, would not have been sufficient to enable him to be self sufficient. In any event the money he earned was spent on drugs and drink. He did not contribute to his living expenses. On this evidence we find that the appellant was dependent on his mother, throughout the period from June 2004 until September 2009 when she was exercising Treaty rights.

9. We also accept that during the five years when the appellant's mother was a self-sufficient person, she was paying her taxes and national insurance. There was documentary evidence to that effect.

10. It follows that we find on the evidence before us that the appellant had acquired five years' continuous residence under the EEA Regulations prior to his convictions on 9 June 2010 and 19 November 2010. His period of imprisonment occurred after his acquisition of a right of permanent residence and did not interrupt the period during which that right was being acquired; cf. the cases decided by the European Court of Justice in **Onuekwere** (C-378/12) and **MG** (C-400/12)

11. Having found that the appellant has established five years of permanent residence in the UK as a family member of an EEA national exercising treaty rights in the UK, he can only be deported if "*serious grounds of public policy or public security*" exist. The burden of proof rests on the respondent to establish that the personal conduct of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

12. The appellant has committed two very serious offences. The first offence was committed on 9 June 2010. He attacked a friend of his, Mr Matthews, with a broken tea glass whilst under the influence of alcohol causing him serious injuries to his face, the lip, the neck and the back of the neck and Mr Matthews bled heavily as a result of those injuries. He pleaded guilty to unlawful wounding. According to the sentencing judge, after this offence and whilst on bail for this offence, he committed two very serious offences of robbery for which he received 42 months' imprisonment. He was sentenced to 15 months imprisonment for his attack on Mr Matthews. This sentence was consecutive to the sentence he was now serving. The sentences he received are indicative of the seriousness of the offences committed by the appellant.

13. The root cause of the appellant's criminality stems from his use of drugs and alcohol. In the NOMS report prepared in January 2012, the appellant was assessed at high risk of re-offending, the risk being of physical violence, robbery and theft from a person. The risk was most likely to occur and escalate when the appellant is under the influence of alcohol and drugs. In respect of the likelihood of reconviction he was assessed at low risk according to an OASys report.

14. There were before us two reports from Dr Joanna Dow, an independent Psychiatrist. The first is dated 28 April 2013 and was put before the First-tier Tribunal. The First-tier Tribunal accepted Dr Dow's conclusion that the appellant's risk of reoffending in the next year if returned to the community in the UK was medium. "Medium" is defined as: there being identifiable indicators of risk of harm, the offender has the potential to cause harm but is unlikely to do so unless there is a change in circumstances, e.g. loss of accommodation, a lapse back to drug or alcohol misuse. Dr Dow was of the opinion that if the appellant obtained gainful employment to provide him with structured activity and a boost to his sense of purpose and self-esteem, gains appropriate accommodation away from his antisocial peer group, was able to benefit from the support of family and, most importantly, if he remained abstinent from illicit drugs and excess alcohol, his risk of re-offending would be significantly decreased.

15. Dr Dow assessed the risk of serious harm to others (where serious harm is defined as death or serious personal injury whether that is physical or psychological) as medium. Again, she was of the opinion that the risk of serious harm to others would arise mainly if he were to return to illicit drug and alcohol misuse. She noted that the appellant had completed programmes related to substance misuse while in custody. He showed a reasonable degree of insight into his past substance misuse and demonstrated an apparent determination to remain abstinent. This determination was reinforced in the appellant's oral evidence to us. He said that he did not want to go back to drink and drugs. At the time he said he thought he was the cleverest and ignored advice from his mother and friends to desist from his behaviour. He is now approaching his 27th birthday and he would want to settle down, get a job and marry. He did not want to end up in prison again.

16. A second report prepared by Dr Dow is dated 21 December 2013. She said at paragraph 59 that her opinion with regard to the appellant's risk of reoffending had not changed and that in the next year, if returned to the community in the UK, it was medium. She remained of the same opinion with regard to the factors that are likely to lower this risk, namely gainful employment, appropriate accommodation, abstinence from illicit drugs and excess alcohol and the continued support of the family. She continued to assess his risk of serious harm to others as medium. Again she was of the opinion that the risk of serious harm to others would be mainly if he were to return to illicit drug and alcohol misuse. She said that undergoing counselling to help him to understand and process his past in relation to his problems with anger, was in her opinion, likely to reduce this risk. Adherence to risperidone is also likely to reduce the risk but she stressed that there was no indication to continue to prescribe it in the long term and that dealing with the underlying issues would be the key.

17. The appellant said in evidence that in order to address his misuse of drugs and alcohol, he has undertaken a huge number of courses in prison and is now clean from drugs and alcohol. He submitted documentary evidence of the courses.

18. We accept that whilst his mother had not been very supportive in the past due to her own problems in relation to her business and the violent treatment she received at the hands of her husband, the children's father, she is now in a position to give the appellant much fuller attention and support. The business is closed and she is currently on jobseekers allowance. Her evidence suggests that she is willing to play a supportive role in the appellant's rehabilitation. The appellant's brother, Sebastian, was also imprisoned in the past as a result of a crime committed under the influence of drugs. He has now turned his life around and is in gainful employment. From his evidence we gathered that he is willing to support the appellant to turn his life around as he has done. To that extent he has arranged for his employer, Mr. Andrzej Citko, to employ the appellant when he is released.

19. Mr Citko runs a business called Brixtonian Builders Limited. We have received a Certificate of Incorporation of the business issued by Companies House, Cardiff on 21 November 2011. The Company Number is 7854130. Mr Citko gave credible oral evidence and confirmed his written evidence that he was willing to offer the appellant a basic job within the building and construction industry when he is released from prison. His business is involved in small to medium size projects ranging from painting and decorating to bathroom and kitchen installation. He said the appellant would, at the beginning, start as a labour resource and could choose to specialise in a specific trade within his company. We accept that this is a credible offer of employment and not, as suggested by Ms Martin, just an offer as a favour to the appellant's brother, Sebastian and a means of meeting an important requirement for stability identified by Dr. Dow.

20. The appellant intends to live with his mother when he is released from prison and our assessment, having seen the mother, the appellant and Sebastian give evidence, is that the family are united in their support of the appellant.

21. Given that the risk of re-offending was originally assessed as high in the NOMS report and it is now assessed as medium by Dr Dow, it follows that, whilst a risk undoubtedly remains, the re-offending has diminished somewhat. With the factors identified by Dr Dow being in place, the likelihood of reoffending could diminish even further.

22. The appellant said he was taking medication which has calmed him down. Although he has never undertaken an anger management course, we accept his evidence that the different courses he has undertaken in the past have taught him how to deal with his anger and cope with life.

23. Whilst, of course, there is no absolute guarantee that the appellant will not offend again, on the totality of the evidence we find that the respondent has failed to establish that he poses a serious threat of harm to the public.

24. We now consider the appellant's appeal under Article 8 of the ECHR. Ms Martin sought to argue that the appellant is an adult as are members of his family and therefore the family ties do not go beyond the normal emotional ties between adults. Whilst the family life between the appellant, his mother and siblings is between adults, we find that there are emotional family ties that bind them together. The family suffered significant trauma when they were in Poland as a result of their mother and father being perceived to be part of the Roma community. The appellant's father was violent towards all of them and in Poland they had no relief or protection from the authorities. In the UK his father continued to be violent and was finally deported to Poland. The family together has been scarred from these experiences. The appellant has since his arrival in the UK lived with his mother, and as we have indicated, has been dependent on her for his financial and accommodation needs. It is to his mother's home that he will return and begin the process of rehabilitation. We find therefore that there is family life between the appellant, his mother and siblings and the appellant has established private life by his presence in the UK since 1988. Plainly, the removal of the appellant will interfere with his established family and private life and the interference would be of sufficient gravity as to engage Article 8. It would, of course, be for the legitimate purpose of the prevention of crime but the question is whether it would be disproportionate to the achievement of that legitimate aim.

25. The offence he committed have given us pause for thought, but nonetheless on the evidence as a whole we are of the view that the appellant's removal would be disproportionate to the legitimate aim intended by the respondent. He has been in the UK since 1998 when he was 11 years old. He has studied in the UK. He has not in the past held down any meaningful employment but we have accepted the evidence that Mr Citko is prepared to offer him a job and give him a fresh start. The

appellant has integrated into British society and now speaks good English. We accept his evidence that he is unable to read or write Polish. We accept that he is clean from drugs and alcohol and has a desire to build a new life for himself in the UK.

26. In both **MG** and **Onuekwere** the European Court of Justice, albeit in the context of those cases, held that periods of imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host member state have been broken. We accept that the imposition of a custodial sentence shows that the appellant has not respected the values of the British society. The appellant has been in custody since June 2010, but he has had time to reflect on his previous lifestyle and from his evidence we can detect a determination to change his lifestyle, to which we have already referred. In the circumstances we find that the integrating links forged by the appellant in the UK remain despite his offending behaviour.

27. As we have indicated in light of the evidence before us we find that it would be disproportionate to remove the appellant from the UK.

28. We were not persuaded by Ms Kiai's argument that the removal of the appellant would breach Article 3 of the ECHR because he was likely to commit suicide as a result of his mental health issues, horrific memories and the lack of family support in Poland. The appellant has not attempted suicide. Dr Dow remains of the opinion that the appellant does not suffer from a severe and enduring mental illness such as psychotic or affective (mood) disorder. She said that the voices which the appellant describes hearing are best understood in her opinion, in the context of his personality disorder. They do not have the nature or quality of true hallucinations that one might experience in a psychotic disorder. She said that the appellant is prescribed risperidone, which is a medication usually used to treat psychotic disorders such as schizophrenia. However, it also has a role as a major tranquilliser and is clearly beneficial to the appellant in helping to calm him and to control his anger. It is also effective in eliminating his pseudo-hallucinations. This evidence does not support the claim that the appellant, if returned to Poland, would likely commit suicide and certainly comes nowhere near the threshold for considering this a relevant factor.

29. Accordingly, we allow the appellant's appeal under the 2006 Regulations and under Article 8 of the ECHR.

Signed Date

Upper Tribunal Judge Eshun on her behalf and on behalf of Mr. Justice Foskett