



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/07090/2017

THE IMMIGRATION ACTS

Heard at Field House
On 6 August 2018

Decision & Reasons Promulgated
On 22 August 2018

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

LUKASZ MALISZEWSKI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Sykwia Dabrowska (appellant's partner)

For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of the First-tier Tribunal on 16 May 2018 dismissing the appellant's appeal against the decision of the respondent on 1 August 2017 to refuse him admission to the United Kingdom under the Immigration (European Economic Area) Regulations 2016.
2. Few if any of the facts are in dispute. The appellant is a citizen of Poland. His partner is also a citizen of Poland but his partner and their child are normally resident in the United Kingdom. Their child was born in the United Kingdom on 2 July 2008. The appellant was

refused admission because the respondent was “satisfied that your refusal of admission is justified on serious grounds of public policy for your repeated criminal conduct.”

3. The appellant explained in the statement provided for the First-tier Tribunal that between the ages of about 15 and 20 he was “irresponsible and stupid”. He described himself as a “repeated criminal” and recognised that he had made life particularly difficult for himself by persistently committing offences whilst on probation. He was quite candid that a main reason for removing to London in 2006 was to flee the justice system in Poland. However the authorities caught up with him. He was extradited and sentenced to consecutive sentences in Poland amounting to six years in aggregate. He served the time required by the Polish authorities which was about four and a half years before being released on probation and almost immediately thereafter he applied for permission to come to the United Kingdom to be reunited with his family.
4. The First-tier Tribunal reflected on the established criminality, directed itself that the burden was on the Secretary of State to justify the decision to refuse admission and said at paragraph 17:

“Having considered the evidence before me, I find that the Respondent has established, on the balance of probabilities, that the Respondent’s exclusion from the United Kingdom was justified on the serious grounds of public policy due to his offending. I uphold the Respondent’s decision and dismiss the appeal in respect of the Regulations.”
5. I gloss over the rather obvious typographical error in that reasoning (the Secretary of State is *not* excluded from the United Kingdom) which is no worse than mistakes I have made. The intended point is clear enough.
6. Permission to appeal to the Upper Tribunal was given by a First-tier Tribunal Judge. Two arguable errors are identified in the grant of permission. The judge found that the First-tier Tribunal had “failed to consider whether the appellant posed a current risk to society, giving the appearance that the appeal was pre-determined” and also had made “no express reference in the decision and reasons to the need for proportionality or to the considerations in Schedule 1 to the EEA Regulations.”
7. It was said that the First-tier Tribunal Judge dismissing the appeal had “at least arguably made the decision on the basis of previous criminal convictions alone.”
8. I have considerable sympathy for the First-tier Tribunal Judge who was deciding a case on the papers without assistance from representatives for either party in Regulations that are still relatively new and, as far as I am aware, have not produced a great deal of jurisprudence. Nevertheless, I am quite satisfied that the First-tier Tribunal Judge erred in his approach. There may well be other mistakes but of particular concern is the clear failure to consider paragraph 27(5)(c) of the Immigration (European Economic Area) Regulations 2016 which states:

“The personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent.”
9. It is also plain that paragraph 27(5)(c) states: “A person’s previous criminal convictions do not in themselves justify the decision” and I can see nothing in the First-tier Tribunal’s decision that goes beyond consideration of the previous convictions themselves. Further

there is no consideration of “proportionality”. I will return to any apparent failure to consider Schedule 1 later but certainly there is no indication that it has been considered.

10. It may be that after proper analysis I will agree with the First-tier Tribunal Judge’s decision but I am entirely satisfied that the decision is defective in law and I set it aside.
11. I now remake the decision. There is no need for a further hearing. As indicated the salient facts do not appear to be controversial.
12. I am directed by Regulation 27(8) when considering whether the requirements of the regulations are met to have particular regard to the considerations set out in Schedule 1 of the Regulations. This has some curious features.
13. Schedule 1(2) says that “an EEA national with societal links with persons of the same nationality or language does not amount to integration in the United Kingdom.” This rather suggests that a person cannot establish integration by speaking English but I cannot accept that such a counter intuitive construction in fact is correct.
14. Schedule 1(3) requires that when considering public policy and public security I have to bear in mind that where an EEA national has received a custodial sentence or is a persistent offender the longer the sentence or the more numerous the convictions the greater the likelihood that the individual’s continued presence in the United Kingdom represents a genuine present and sufficiently serious threat affecting of the fundamental interests of society. However this is not the case of somebody remaining in the United Kingdom but wishing to return. He is not within the scope of paragraph 3 of Schedule 1 because this refers to the person’s “continuing presence” in the United Kingdom and the appellant is not in the United Kingdom.
15. Further, Schedule 1(4) requires little weight be attached to the integration of an EEA national or a family member if the alleged integrating links were formed at around the time of the commission of the offence but that is not the case. It is the very essence of his case that the integrative behaviour in the United Kingdom was after the offences had been committed as he was trying to avoid punishment.
16. Schedule 1(5) concerns removal which is the opposite of what is sought here and 1(6) concerns fraud which is not relevant.
17. Schedule 1 is an overarching consideration but it does not help me very much.
18. I now consider the Secretary of State’s decision.
19. There is a form IS.82A EEA described as a “Refusal of Admission under European Community law”. All this indicates, as set out above, is that the interviewer was “satisfied that your refusal of admission is justified on serious grounds of public policy for your repeated criminal conduct.” There is no explanation of or commentary on this decision. That is the way the Secretary of State presented the case.
20. The appellant was interviewed about his application on 1 August 2017. His answers appeared to be entirely straightforward.
21. He said that he last left the United Kingdom on 1 August 2013 for Poland and he was imprisoned immediately on return. He explained that it “was old cases, so I was taken straight to the prison.”

22. He was sentenced to a total of six years' imprisonment and the sentence would end on 15 September 2018. He was released prematurely "due to family in the UK".
23. Since his release he had been awaiting documentation in order to return to the United Kingdom.
24. He first came to the United Kingdom in October 2006. He confirmed that he had a fiancée and daughter in the United Kingdom. He named them. He also had a brother and a married older sister living in the United Kingdom. He denied being involved in any criminal activity in the United Kingdom.
25. He intended to return to the United Kingdom to resume his life with his daughter and fiancée and to marry. He had not considered his family removing to Poland.
26. There is a collection of papers that are sworn translations of various court documents relating to the appellant. I have not been assisted by anyone expert in Polish law and so I may not have considered them in the best order or explained them in the best way. Nevertheless, I am satisfied that the appellant was sentenced to consecutive terms of imprisonment amounting to six years for a variety of offences that have a common theme of quite serious violence. One of the offences is identified as a robbery. None of the offences appear to be of the most serious examples of their kind but they are not trivial matters. The aggravating feature is their persistence. They portray a man who repeatedly got into quite serious trouble and then, rather than facing up to his responsibilities, removed himself to the United Kingdom in the hope that he would not get caught.
27. One of the court decisions is dated 20 June 2017 and is in response to a request from the warden of a penal institution where the appellant was serving his sentence. I set out below the translation of the statement of reasons for approving the release. The court said:

"The application of the Warden of the Penal Institution for granting the convict the conditional release should be allowed. The convict has already served a considerable part of his sentence, thus fulfilling the formal condition for applying for condition of release, stipulated in Article 78 paragraph 1 of the Penal Code. The court finds that after analysing the circumstances described in Article 77 paragraph 1 of the Penal Code, it allows to come to justify conclusions that the convict is going to comply with the ordered penal or probation measures and he should respect the legal order, and especially that he would not commit another offence in the future. The convict's conduct during the stay at the penitentiary institution was positive. He complied with the requirements of the internal regulations and rules. He did not participate in any prison sub-culture. He was non-conflicting with the other inmates, he addressed the superiors in duly order. He has also maintained the appropriate relations with his close ones, which is an additional stimulation for his proper character.

The above detailed circumstances allow to formulate a positive criminological and social prognosis for the convict. Considering the above, with the noticeable changes in the convict's personality, to which the penitentiary prognosis points out and on which the criminological prognosis is based, it is justified to conclude that at the current stage of the convict's social re-adaptation process, the more effective social rehabilitation influence with regards to the convict should take place under non-custodial conditions during the ordered probation period. It should be assisted with the opposed obligations; abiding by the obligations should guarantee the proper course of the probation period together with the supervision of the Probation Officer."
28. It then finishes with an order for the conditional release of the appellant.

29. Even without specific assistance about the nature of this document and status of the court I am entirely satisfied that this is a genuine court document from an appropriately competent court in Poland that has formed the view that it is time to release the appellant because of his positive response to custody and changes in his character that had been noted. No doubt this is only an opinion which, like most well intended and considered opinions, could prove to be wrong but it is an opinion by people who could be expected to have experience and a desire to get the right answer and is something which assists the appellant. It does not seem to do very much to assist the Secretary of State.
30. There is a broadly similar document confirming the willingness of the Polish authorities to permit the appellant to reside at an address in the United Kingdom. This is the address of his fiancée and child.
31. The papers include an unsigned document from the appellant which I take to be a statement. It may be described as grounds of appeal.
32. The appellant takes issue with the contention that he is not a suitable character to live in the United Kingdom.
33. He emphasises that he has never broken the law in the United Kingdom. He registered for national insurance and paid his taxes as required.
34. He said that he was spoken to by a police officer in December 2012 because he was drinking beer in the street. The officer took his details and he believes that inquiry precipitated his coming to the attention of the authorities in Poland. There is no suggestion that the appellant committed any kind of offence by drinking beer in the street. It is not normally an offence although there are places where it is contrary to local bylaws. It is however conduct which might very well cause a police officer to ask some questions. I do not see this encounter with the police as criminal or even particularly disreputable behaviour. I do not regard it as something that should be held against the appellant.
35. The appellant explains his offences and I set out the answer he gave:
- “I spent four years and five months in jail in Poland. I’ve been breaking the law in Poland in the years 2000 to 2005 at my age of 15-20 then. Today I am 32. I was irresponsible and stupid. At my age of 7 my parents died so me, and two other of my siblings were looked after by our grandma. I was the youngest so I often been forgiven. I repeated criminal because all of my sentences were on probation so I didn’t take it seriously. I didn’t care too much. After the fifth of the conviction court released all of them and I had to go to jail for all I’ve done. I was scared, I understand what I’ve done but it was too late. I didn’t want to spend so much time in prison. So then I escaped to London in 2006 to avoid punishment but I’ve always remembered about my situation in Poland. I could start my life from the beginning. I’ve never done anything what I’ve been convicted, anymore, anywhere else. I regret what I’ve done, especially harmed other people. I wouldn’t do anything like that anymore but I cannot turn back time. But I’ve paid my debt, I’ve served the sentence. I deserve for an early release. I’m a free man and I’ve got the right to re-enter into society and for a normal life without discrimination. I respected law in the UK for all of my stay in 2006-2013, I respect law now in Poland I respected the law for all my stay in prison in Poland in 2013-2017. I will be respecting law whichever country I’ll stay. I don’t want to return to prison anymore. I know that I can live without crime because I did, I do and I know that I will. I’ve lost so much time away from my daughter and fiancée but I’m happy that we’ve got this finally over.”

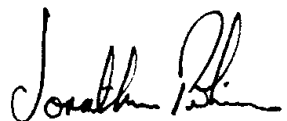
36. He then continued explaining how he matured when he was in the United Kingdom and built a new life. He drew attention to the fact he could speak English although he worked with people of many different nationalities.
37. He had explained his circumstances in Poland. He is living with his fiancée's parents. He said his fiancée works part-time in the United Kingdom and looks after their daughter. He wanted to marry his fiancée and have another child. He said their daughter was settled at school and happy there.
38. There is independent evidence tending to confirm these claims. There is a printout indicating he has no criminal convictions for offences committed in the United Kingdom. There is communication from HM Revenue & Customs confirming that he has a national insurance number and that he has paid tax.
39. There is also a letter from his former employers signed by the "office and HR manager" one Barbara Fitzgerald who speaks of him in glowing terms. The writer commends the appellant for his industry and punctuality and trustworthiness as well as his demeanour. The letter concludes: "We were sorry to see him leave our company and would not hesitate to reinstate Mr Maliszewski should the opportunity arise."
40. In many ways I am more concerned about the repetition of offences and the irresponsibility when offered non-custodial alternatives than I am about the actual severity of the offences. Even very severe offences can be of a kind that are highly unlikely to be repeated but persistent offending, even quite minor offending (and his is not minor offending) does threaten society and a person who is going to behave in that kind of way again most certainly exhibits a present, if not imminent, threat. However, although the 2016 Regulations have added the qualification that the "threat does not need to be imminent" the personal conduct must constitute a present threat. I do not see how misconduct more than 10 years ago presents a present threat to one of the fundamental interests of society when it is not accompanied by at least some evidence of a propensity to recidivism. Neither is it conduct so shocking that it will continue to be a threat for a prolonged period.
41. When considering if there is a present threat I bear in mind firstly the decision of the Polish court which, although not definitive, is entitled to respect. I also bear in mind the reference from his former employers, the fact that the appellant was in the United Kingdom for some time without getting into trouble as well as his own protestations and explanations. Clearly the appellant's own say-so cannot be given much weight. Words are cheap but the fact is they are said and nothing in his recent conduct undermines them. It is a feature of the case that the appellant has clearly been frank with the authorities in the United Kingdom and with the authorities in Poland. It is also a fact that a man in his early 30s who has been released from quite a long time in prison may very well be much less likely to misbehave than a young person in their late teenage or very early 20s who have never had to do as he was told. I can only say that the evidence before me does not support a finding that there is any present threat presented by this man's past and therefore I cannot say that the conditions necessary for refusing him entry are made out.
42. I do not see anything that justifies a conclusion that the appellant is someone whose personal conduct represents a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society. His past conduct does not justify a conclusion that he is a present threat. The evidence of his maturing personality and attitudes shown whilst in

prison point to his not being a present threat. Further they point to someone who has put his past behind him rather than to someone who can be expected to revert to further misbehaviour albeit not imminently.

43. I do accept the appellant speaks English and I regard that as something that is favourable rather than adverse to his case. I regard his ability to hold down a job and be praised by his employer as more revealing and more helpful.
44. This is where it is important to remember that the appellant has the rights of an EEA national. He is not to be considered simply as a foreign criminal. If he was from outside the EU I think he would find it difficult to make out a case to be allowed into the United Kingdom but as an EEA national he has a right, albeit a qualified right, to work in the United Kingdom. My consideration of what is proportionate is influenced by the appellant's qualified right to enter the United Kingdom.
45. Clearly the appellant wants to come to the United Kingdom to be with his family and that is a desirable thing. His wife is exercising treaty rights and his child if not already a British national is she probably eligible to become. Removing them to Poland would be an upheaval they do not desire and do not deserve. My assessment of what is proportionate is guided by the of the appellant's wife and daughter to live in the United Kingdom and my belief that social policy favours the promotion of the nuclear family such as the appellant, his fiancée want to develop.
46. I find that refusing the appellant entry is disproportionate.
47. In short, I find that the Secretary of State's reasons do not justify the decision.
48. I am satisfied that it is for the Secretary of State to justify the interference with the fundamental treaty right of free movement but even if I am wrong about the burden of proof and it is for the appellant to show compliance with the Rules I would come to exactly the same conclusion. This is a man who has a very discreditable past but there is no good evidence to show that he is a present threat. Neither is it a case where the offences are so severe that his presence will always constitute a threat as may be case. The appellant is not that kind of criminal.

Notice of Decision

For the reasons given I set aside the decision of the First-tier Tribunal and I substitute a decision allowing the appellant's appeal against the decision of the Secretary of State.



Signed

Jonathan Perkins, Upper Tribunal Judge

Dated: 14 August 2018