Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00083/2015

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On 24th November 2015	**On 4th December 2015**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Patryk Kotarba
(no anonymity direction made)

Respondent

Representation:
For the Appellant: Ms Savage, Senior Home Office Presenting Officer
For the Respondent: -

DETERMINATION AND REASONS

1. The Respondent is a national of Poland born on the 11th October 1991. On the 10th June 2015 the First-tier Tribunal (Judge Colyer) allowed his appeal against the Secretary of State's decision to deport him. The Secretary of State now has permission[1] to appeal against that decision.

[1] Permission granted on the 2nd July 2015 by First-tier Tribunal Judge Parkes

2. The matter was certified under Regulation 24AA of the European (Economic Area) Regulations 2006 ("the Regulations"). The Respondent was deported from the United Kingdom on the 20th April 2015 and was present at neither the First-tier Tribunal hearing, nor the hearing before me. Service of the Notice of Hearing had not been effective, since the Tribunal has no current address for the Respondent. The last known address was his place of detention in the United Kingdom prior to his removal. I therefore gave careful consideration as to whether I should proceed to hear the appeal in his absence. I note that the appeal forms which the Respondent completed when lodging his appeal in the First-tier Tribunal clearly advised him that he should inform the Tribunal if he changed his address. The letter served upon him by the Secretary of State (dated 19th February 2015) advised the Respondent that it is his responsibility to stay in touch with the Tribunal if he wishes to pursue his appeal; that letter further advises the Respondent of the procedure for applying to re-enter the United Kingdom in order to attend any hearing. In light of the information in these documents, which have both been served on the Respondent, I am satisfied that it would not be contrary to the interests of justice to proceed in his absence. There is nothing before me to indicate that an adjournment to a later date would result in his attendance or representation.

The Decision to Deport

3. The refusal letter dated 19th February 2015 notes that the Respondent arrived in the United Kingdom in 2013 and has not therefore accrued a sufficient period of residence in accordance with the Regulations to attract enhanced protection. The action to deport is therefore taken with reference to Regulation 21(5)(a). The Secretary of State must show that the Respondent's removal is justified on the grounds of public policy, public security or public health. In making that assessment the Secretary of State must have regard to the principles of proportionality. She must be satisfied that the Respondent's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The Respondent's previous criminal convictions cannot in themselves justify deportation.

4. The Secretary of State believes that the Respondent's deportation is justified because of the following convictions/sentences against him in Poland

- 4 months imprisonment for 'illegal destruction, concealment or damage of a document' (19th July 2010)
- 6 months for illicit consumption of drugs (25th October 2010)
- 10 months for theft (8th September 2011)

- 2 years imprisonment for the illicit acquisition and consumption of drugs and robbery (18th December 2013)
- 10 months for theft (3rd January 2014)

In addition the Secretary of State weighed in the balance the fact that the Respondent had twice been arrested in the United Kingdom, for suspected breach of the peace and on suspicion of assaulting his brother; no charges were brought. These facts led the Secretary of State to conclude [at 22] :

> "All of the available evidence indicates that you have a propensity to re-offend and that you represent a genuine, present and sufficiently threat to the public to justify your deportation on grounds of public security"

5. The letter goes on to consider the Immigration Rules in the context of deportation. It is found that the Respondent's circumstances do not engage Article 8 ECHR.

6. The matter is certified under regulation 24AA on the grounds that the Respondent would not face serious irreversible harm if removed.

The First-tier Tribunal's Determination

7. The first matter in issue before the First-tier Tribunal was the Respondent's nationality. The Secretary of State contends that the Respondent is a Polish national. In his grounds of appeal the Respondent has asserted that he was an American, born in New York. Another document suggested that he was a dual Polish–Canadian national. The First-tier Tribunal resolved this matter by finding on the balance of probability that the Respondent is American. This finding was based on his production of a "poor quality" faxed copy of his American passport, a birth certificate showing a Patryk Krystal born in Brooklyn, New York on the 11th October 1991 and the Respondent's own assertion. There was no documentary evidence to establish that he was Polish. The only documents relating to Poland were those relating to his criminal convictions. If the Respondent is American as claimed then the decision to deport him with reference to the EEA Regulations is not in accordance with the law and the appeal must be allowed.

8. In the alternative the Tribunal considered the position if the Respondent is Polish, or a dual national of Poland and the USA. The Tribunal examines the details of the offences committed in Poland. It is noted that no evidence has been provided as to the risk of re-offending, either in the UK or in Poland. The determination observes that the Secretary of State has described the Respondent's convictions in Poland as relating to "low level" offences. The determination then considers the details of the

two arrests in the UK, as well as his arrest by the immigration service. In respect of the breach of the peace the Tribunal finds this to be a "relatively minor matter". As to the alleged assault on his brother, there is little evidence. The Tribunal was not shown a charge sheet, summons or evidence of conviction.

9. Applying these facts to the Regulations the First-tier Tribunal finds that this action is taken purely on the basis of the Respondent's previous convictions in Poland. The Tribunal emphasises that the Respondent has no convictions in the United Kingdom and deprecates the Secretary of State's repeated reference to the incidents which led to the Respondent's arrests as being "offences". The determination points out that it is not for the Secretary of State to usurp the function of the police or the criminal courts and to treat these matters as offences where no conviction was secured, nor indeed pursued. The Tribunal sets out relevant legal authorities and directs itself that deportation under regulation 21(5) can only be justified where it can be shown that there is a genuine and sufficiently serious threat; crucial to that assessment would be establishing a propensity to reoffend. Even if this were to be established, the decision must still be proportionate. Having considered all of these matters the Tribunal concludes, at 65, that the Secretary of State has not shown this deportation to be justified under the Regulations.

10. The determination goes on, under a separate heading, to make findings on human rights under the ECHR. The Tribunal finds there to have been a breach of Article 6 because the Respondent was deprived of a fair hearing when he was deported, and the decision to be a disproportionate interference with his Article 8 private life.

11. The appeal is allowed on all grounds.

The Grounds of Appeal

12. The Secretary of State submits that the determination contains material errors of law for the following reasons:

i) <u>Article 6.</u>

The Tribunal was wrong as a matter of fact to find that the Respondent was prevented from returning to take part in his appeal. There was a mechanism whereby he could apply to return to the UK in order to attend his hearing, and there was therefore no breach of Article 6. The Directive itself provides for member states to be able to exclude individuals pending any redress procedure.

ii) <u>The Regulations</u>

The Tribunal erred in law in referring to the offences as "low

level" but not giving any consideration to whether they might still be "serious".

The arrests in the UK were relevant to a holistic assessment of all of the evidence.

iii) Nationality

There was insufficient evidence before the Tribunal to warrant a finding that the Respondent is an American national.

iv) Article 8

The Article 8 assessment is flawed for failure to have regard to the public interest, in particular those considerations set out at s117B of the Nationality, Immigration and Asylum Act 2002.

My Findings

13. I address the grounds in the order of arguable merit.

14. The Article 8 assessment contains no reference at all to the mandatory public interest considerations set out at s117B. Nor is it clear to what extent the Respondent might have established a private life in the short time he has spent in the UK such that Article 8 might be engaged. I am satisfied, for those reasons, that the Tribunal erred in its approach to Article 8.

15. The Tribunal has nowhere addressed the Secretary of State's contention that it was always open to the Respondent to apply to return to the country in order to attend his appeal. The findings on Article 6 appear to have been made without regard to that process and as such are flawed.

16. The finding that the Respondent is an American national would appear to have been made on the basis of a poorly copied page of an American passport and a birth certificate concerning an individual with a name different to that of the Respondent. I would agree that such evidence would, in isolation, be insufficient to establish nationality to the relevant standard of a 'balance of probabilities'.

17. Those three grounds have identified errors in approach. None of that matters. That is because this appeal was also allowed with reference to the EEA Regulations on the basis that the Respondent is a Polish national. I am not satisfied that in this matter, the Secretary of State has identified any error of law such that the decision should be set aside. The First-tier Tribunal was entitled, indeed obliged, to take into account the fact that the Respondent had not been convicted of any offence in the United Kingdom. It was wrong for the Secretary of State to treat the incidents leading to the Respondent's arrest as convictions capable of illustrating his propensity to reoffend. It would appear

that the Presenting Officer on the day recognised as much since it is expressly recorded at paragraph 12 that she accepted the decision to be based on the convictions in Poland. The Tribunal examined the evidence in respect of those convictions. It was entitled to take into account the Secretary of State's description of those matters as amounting to a "series of low level offences" and to contrast this conclusion with the suggestion that the offending was so serious so as to justify deportation. I am satisfied that the Tribunal properly directed itself to the relevant law and tests and applied these to the facts. It was not satisfied that it had been shown that there was a propensity to reoffend or that the Respondent posed a genuine, present and sufficiently serious threat to justify his deportation. It was entitled to reach those conclusions for the reasons that it gives.

18. There was no error of law in this part of the determination and it must be upheld.

Decisions

19. The determination of the First-tier Tribunal contains no material error of law and it is upheld.

20. I make no direction for anonymity.

Upper Tribunal Judge Bruce
28th November 2015