IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01233/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 July 2015	**On 11 August 2015**

Before

UPPER TRIBUNAL JUDGE McWILLIAM
DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KRZYSTOF ZENON JAWORSKI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondent: unrepresented

DECISION AND REASONS

1. We shall refer to the respondent as the appellant as he was before the First-tier Tribunal. He is a citizen of Poland and his date of birth is 18 January 1987.

2. The parties are aware of the appellant's immigration history and there is no need for us to set it out in full. The appellant has been in the UK since March 1995, since the age of eight. He came here with his family. He has here legally since October 2003. Between 2004 and 2013 he committed a

number of criminal offences. On 19 November 2013 he was convicted of assault by beating and ABH at Blackfriars Crown Court and sentenced to fifteen months in total. On 24 June 2015 a decision was made to deport him. He appealed against this decision and his appeal was allowed under the Immigration (EEA) Regulations 2006 ("the 2006 Regulations") by a panel comprising Judge of the First-tier Tribunal Abebrese and Miss S E Singer

3. Permission to appeal against the decision was granted by First-tier Tribunal Judge Cheales. Thus the matter came before us.

The Law

Directive 2004/38

4. Recitals 23 and 24 in the preamble to Directive 2004/38 read as follows:-

> "23. Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.
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> 24. Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989."

5. Article 27(1) and (2) of the Directive provide:

> "(1) Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

(2) Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."

6. Under Article 28 of the Directive:

"(1) Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

(2) The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

(3) An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

The 2006 Regulations

7. "**Decisions taken on public policy, public security and public health grounds**:

21-(1) In this regulation a 'relevant decision' means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person’s previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person’s length of residence in the United Kingdom, the person’s social and cultural integration into the United Kingdom and the extent of the person’s links with his country of origin.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease (listed in Schedule 1 to the Health Protection (Notification Regulations 2010) shall not shall not constitute grounds for the decision; and

(b) if the person concerned is in the United Kingdom, diseases occurring after the three month period beginning on the date on which he arrived in the United Kingdom shall not constitute grounds for the decision."

8. The Court of Justice of the European Communities in the judgment of SSHD v MG [2014] EUECJ C-400/12 made the following ruling:

"(1) On a proper a proper construction of Article 28(3)(a) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, the 10-year period of residence referred to in that provision must, in principle, be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned.

(2) Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment. However, the fact that that person resided in the host Member State for the 10 years prior to 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."

The Background and the Decision of the First-tier Tribunal

9. Before the First-tier Tribunal there was a record of the appellant's previous convictions. Those noted on this record were agreed by the appellant. There are a number of offences committed by the appellant when he was a child and for which he was convicted by the Youth Court. On 10 January 2013 he was convicted of possession of a class A drug for which he was fined. On 28 October 2013 he was convicted of possession of a class B drug for which he was fined. (He was also convicted of failing to surrender on this occasion and fined). At the hearing before the First-tier Tribunal there was reference to a conviction for ABH in 2005 which was not

reflected in the record. It came to light because of reference to it in an OASys report. It appears that the victim died as a result of the injuries, but it is obvious that the appellant was not found to be legally responsible for this because of the nature of the conviction. It is not clear from the evidence what sentence the appellant received, but the Secretary of State was not relying on any term of imprisonment that may have resulted from this. The trigger offences are those which the appellant was convicted of on 13 November 2013 and it is this period of imprisonment that ensued that is relied on by the Secretary of State to maintain that the appellant is not entitled to enhanced protection under the 2006 Regulations.

10. At the hearing before the First-tier Tribunal the appellant and his wife gave evidence. The Tribunal found that, bearing in mind the appellant's length of residence and ties to the UK, it would be difficult for him to reintegrate should he return to Poland. The panel indicated that they accepted the appellant's submissions in relation to the seriousness of the offences committed by the appellant reflected in the sentence and at [15] the Tribunal stated as follows:

> "The Tribunal is of the view that the appellant does satisfy Regulation 21(4) in that the conviction was granted on 19 November 2013 and that he was given discretionary leave on 23 October 2003. Therefore, when one counts back he has on balance resided in the United Kingdom for a period of ten years and therefore it is suitable in this instance for this matter to be determined under level 3 imperative test. The panel based on the findings above do not find that the offences are so serious so as not to be determined under the level 3 imperative test."

11. At [16] the Tribunal went on to find as follows:

> "The Tribunal also finds that the appellant does have a family in this country and this is not only his wife and three children with whom he resides with but also his parents and his extended family in this country. He has resided in this country since the age of 8 and the Tribunal makes a finding that he does not have a relationship with his family who may remain in Poland. In any event the evidence on the family who are in Poland was rather vague. The Tribunal therefore accepts that the appellant has all his cultural and social links in the United Kingdom and that it would not be proportionate for this to be interrupted. The Tribunal also considered the personal conduct of the appellant and notes that he did plead guilty and has served his sentence in prison. He also has the support of his family and that he had called his wife to give evidence on his behalf and the panel found her to be a credible witness in respect of her evidence regarding her relationship with the appellant and their family life."

The Grounds of Appeal and Oral Submissions

12. The first ground of appeal maintains that the First-tier Tribunal did not engage with the acquisition of imperative protection in accordance with SSHD v MG [2014] EUECJ C-400/12. The second ground maintains that the overall proportionality assessment is flawed because the Judge adopted the incorrect threshold and the fact that the appellant has been assessed at medium risk of re-offending and medium risk of harm is a significant factor in the overall proportionality assessment. The third ground maintains that the position in relation to family ties in Poland is inconsistent with Balogun v UK [2012] ECHR 614. In oral submissions Mr Clarke accepted that the second and third grounds overlap.

13. Mr Clarke conceded that the appellant has accumulated ten years' residence in the UK prior to the imposition of a custodial sentence in 2013 and that he has permanent residence here in the UK. Mr Clarke maintained that integration was broken as a result of the custodial sentence in 2013 and the appellant is not entitled to enhanced protection under reg 21 (4). He is entitled to protection under reg 21 (3). He conceded that if we were not with him in relation to the first ground of appeal, it would be difficult for him to persuade us that the second and third were made out.

14. Mr Jaworski was not represented. We gave him the opportunity to address us. The appeal had been adjourned on two occasions to enable him to obtain legal representation and he did not make an application to adjourn the hearing before us.

Conclusions

15. It is clear from the case of SSHD v MG that grant of enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of the decision ordering the person's expulsion and that the fact that the appellant has resided in the UK during the ten year period to imprisonment may be taken into consideration as part of the overall assessment which is required for determining whether the integrating links previously forged with the host Member State, in this case the UK, have been broken and thus for determining whether the enhanced protection provided for Article 28(3) and Regulation 21(4) of the 2006 Regulations will be granted.

16. The panel proceeded on the basis that the appellant had resided in the UK for a period of ten years, having counted back from the date of conviction. However, this is an error because they should have considered the period of residence during the ten years preceding the decision to expel the appellant as opposed to when he was imprisoned. Had they done this they would have concluded that there was an interruption in continuity. Imprisonment is capable of interrupting the continuity of the period of residence and therefore affecting the decision regarding the grant of the enhanced protection even where the person concerned, as the appellant, has resided in the host member state for ten years prior to imprisonment.

17. The issue that the Tribunal should have considered was the degree of integration established prior to the custodial sentence and whether or not this had been broken as a result of the imprisonment. If so this would prevent the appellant from enjoying enhanced protection.

18. The findings of the panel in relation to the appellant's family life here and the lack of ties with Poland are in our view entirely sustainable. The appellant has a wife and three young children here in the UK and notwithstanding his criminal convictions prior to the date of imprisonment in 2013, it is clear that the appellant was fully integrated into life here in the UK at the date of imprisonment. He had been here for eighteen years (since the age of eight) and had a wife and children here. The period of imprisonment of fifteen months must be considered in the context of the fact that the appellant has been here since 1995 and in our view it is an untenable argument that the integrating links were broken as a result of this relatively short term of imprisonment. The panel inadequately reasoned their decision that the appellant benefited from enhanced protection and fell into error when calculating the relevant period; however, they arrived at the correct conclusion.

19. Under all three levels of protection the decision must be taken in accordance with the principles set out in reg 21 (5), and account taken of reg 21 (6). The panel did not make specific reference to the regulations, but it assessed proportionality in the context of the appellant's family life and integration here and considered the appellant's links with Poland. The grounds do not make specific reference to reg 21 (5) or (6) and Mr Clarke did not refer specifically to them. Grounds two and three challenge the proportionality assessment. We take on board Mr Clarke's concession that if the appellant benefits from enhanced protection grounds two and three have limited force. We agree with this and briefly deal with them. Both grounds maintain that the proportionality assessment is flawed primarily because the panel erroneously found that the appellant was entitled to enhanced protection. However, it is our view that the appellant is entitled to enhanced protection and any proportionality assessment must be considered in the light of this.

20. Ground two maintains that as the appellant has been assessed as medium risk of re-offending and harm, deportation is proportionate. The ground does not identify an error of law, but simply amounts to a disagreement with the findings of the panel and an attempt to re-argue the case. In any event, the panel took into account the risk of re-offending (see [14]) and weighed it into the balance. There is no specific reference in the determination to reg 21 (5) (c), but the evidence does not establish that the appellant's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Ground three maintains that the appellant's lack of engagement with family members in Poland does not disclose a basis to resist deportation and his family life here is not determinative. The ground does not disclose an error of law, but as ground two, it amounts to a disagreement with the findings of the panel and an attempt to re-argue the case. In any event,

the appellant's family life here and his lack of family life in Poland were not determinative factors in the proportionality assessment conducted by the panel, but they were factors weighed into the balance in accordance with reg 21 (6). (The facts in Balogun v UK are not analogous to the facts in this case. The appellant was subject to a deportation under the 1971 Act and the proportionality assessment was under Article 8. The appellant's mother lived in the country of origin and the court did not accept that the appellant had family life here which would engage Article 8).

21. The appeal of the Secretary of State is dismissed. There is no material error of law and the decision of the First-tier Tribunal to allow the appeal under the 2006 Regulations is maintained.

No anonymity direction is made.

Signed Joanna McWilliam Date 4 August 2015

Upper Tribunal Judge McWilliam