Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07471/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 November 2015	**On 16 December 2015**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

ALC
~~**(No anonymity order made)**~~

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. C. Howells, of counsel, instructed by N. C. Brothers & Co Solicitors
For the Respondent: Mr. T. Wilding, Home Office Presenting Officer

DECISION AND REASONS

History of Appeal

1. The Appellant, who was born on 6 March 1986, is a national of Poland. She entered the United Kingdom in August 2005 and her son was born here on 7 September 2005.

2. On 5 September 2013 she drove to her son's school, whilst she was five times over the alcohol limit permitting her to drive. She reversed at full speed into other cars and a woman ended up pinned against her front door by the Appellant's car. This woman

suffered what were said to be life changing injuries resulting in the need for around ten operations. The Appellant was charged with causing serious injury by dangerous driving and pleaded guilty to this charge.

3. She was convicted on 2 April 2014 and on 24 April 2014 she was sentenced to three years imprisonment and disqualified from driving for three years. On 23 July 2014 the Respondent informed her that she was minded to deport her from the United Kingdom and on 13 February 2015 she made a substantive decision to deport her.

4. The Appellant appealed on 26 February 2015 and First-tier Tribunal Judge Perry dismissed her appeal in a decision, promulgated on 7 August 2015. The Appellant appealed against this decision on 24 August 2015 and First-tier Tribunal Judge Cox granted her permission to appeal on 4 September 2015. The Respondent subsequently filed and served a Rule 24 response, dated 14 September 2015.

Error of Law Hearing

5. In the first ground of appeal it was argued that there had been a prejudicial delay between the hearing on 10 April 2015 and the promulgation of the decision on 7 August 2015. I have noted that rule 29(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 states that the Tribunal must provide each party with a notice of decision as soon as reasonably practicable. I also note that in *Sanbasivam v Secretary of State for the Home Department* [2000] Imm AR 85 Potter LJ found that "substantial delay between hearing and preparation of the determination renders the assessment of credibility issues unsafe and that such delay tends to undermine the loser's confidence in the correctness of the decision once delivered".

6. However, the record of proceedings contained a typed record of the evidence given at the appeal hearing and the Appellant did not assert that this record had not been compiled at the time of the hearing or that it included any inaccuracies. Neither did she point out any findings of adverse credibility which had been caused by this delay. Therefore, I do not find that any error of law arose from this delay.

7. In her third ground of appeal the Appellant submitted that the First-tier Tribunal Judge had failed to apply regulation 21(3) of the Immigration (European Economic Area) 2006 ("the EEA Regulations") in so far as she had failed to consider whether there were serious grounds of public policy which justified the Appellant's removal from the United Kingdom under regulation 19(3)(b) of the EEA Regulations. It was not disputed that the Appellant had been continuously resident in the United Kingdom and exercising a Treaty right between 2005 and 2012. As a consequence, she had acquired a permanent right of residence for the purposes of regulation 15 of the EEA Regulations.

8. Regulation 21(3) of the EEA Regulations clearly states that a decision to remove a person from the United Kingdom "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". In *LG and CC (EEA Regs: residence, imprisonment; removal) Italy* [2009] UKAIT 00024 the Upper Tribunal found that "a clear distinction is required to be drawn between the three levels of protection against removal introduced in the 2006 Regulations, each level being intended to be more stringent

and narrower than the immediately lower test". At paragraph 4 of the judgment the Tribunal relied on the finding by Carnwath LJ in *LG (Italy) v Secretary of State* [2008] EWCA Civ 190 where he referred to their being "a new hierarchy of levels of protection, based on criteria of increasing stringency". The first level was a general one which meant that the test was whether "removal may be justified 'on the grounds of public policy, public security or public health".

9. However, where a person had a right of permanent residence there was a "more specific criterion" which was that a person "may not be removed 'except on serious grounds of public policy or public security". The First-tier Tribunal Judge referred to this test in paragraph 58 of his decision but he did not then apply this enhanced test to the facts of the Appellant's case in relation to whether there were serious grounds of public policy or public security. At most he asserted in paragraph 70 of his decision that "the appellant does pose a significant threat to the safety and security of the public". He provided no reasoning for this particular finding.

10. In ground 2 the Appellant also submitted that the First-tier Tribunal Judge's decision that the Appellant posed a significant threat to public policy and public security was also unreasonable. I find that the correct test was whether she posed a "serious" as opposed to a "significant" threat. It is accepted that the First-tier Tribunal Judge did base his findings on the Appellant's personal conduct as required by regulation 21(5)(b). However, he did fail to properly apply regulation 21(5)(c) as he was required to consider whether she represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".

11. The factors relied upon by the First-tier Tribunal Judge in paragraphs 60 66 and 67 related to the offence of which she had been convicted in 2013, her alcoholism prior to the offence and her assertion shortly after the incident that she felt normal before driving her car on the day of the incident. He did not sufficiently address the question of whether the Appellant now posed a genuine, present and sufficiently serious threat.

12. The Judge did refer to the NOMS report in paragraphs 66 and 67 of his decision but only mentioned in passing that her offending manager concluded that there was a low risk of her re-offending. He also failed to take into account that the OASys assessment, dated 3 December 2014, said that the Appellant fully accepted responsibility for the offence and that she was very motivated to address her history of offending and was very capable of changing and reducing her offending and that there was a letter from Solent NHS Trust, dated 9 May 2014, which confirmed that she was no longer drinking.

13. The First-tier Tribunal Judge asserted that there were significant unresolved issues relating to her relationship with her father, which undermined the conclusion in the report that she was committed to and is evidencing an ability to develop a strong alcohol relapse prevention strategy. However, there was no evidence from the NHS or probation service to support this assertion. I accept that the First-tier Tribunal Judge was not bound to adopt the opinions of relevant professionals but it was necessary for him to provide reasons if he chose not to.

14. The First-tier Tribunal Judge also placed very great weight on the Appellant's past conviction; as did the Respondent at the hearing, and did not appear to remind

himself that regulation 21(5)(e) states that "a person's previous criminal convictions do not in themselves justify" removal.

15. For all these reasons I find that the First-tier Tribunal Judge erred in his approach to regulations 19 and 21 of the EEA Regulations. I also find that the First-tier Tribunal Judge's findings on Article 8 of the ECHR were fatally flawed by his approach to the Appellant's conviction and that this also amounted to an error of law.

16. I also find that for this reason, there was no basis upon which I could retain any factual findings from the First-tier Tribunal Judge's assessment of the Appellant's Article 8 rights.

17. For all these reasons I am satisfied that there were material errors of law in the First-tier Tribunal Judge's decision and reasons and that it should be set aside in its entirety. I am also satisfied that, as there will need to be a complete re-hearing, this is a proper case for remission to the First-tier Tribunal.

Directions

1. The appeal is remitted to the First-tier Tribunal for a *de novo* hearing.
2. The appeal should listed before a First-tier Tribunal Judge other than First-tier Tribunal Judge Perry.

Nadine Finch
Upper Tribunal Judge Finch

Date: 2 December 2015