Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00388/2016

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision and Reasons Promulgated**
On 15 August 2017	**On 17th August 2017**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

PIOTR SKRZNSKI
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant:
For the respondent:

DECISION AND REASONS

Decision and reasons

1. The appellant appeals with permission against the decision of the First-tier Tribunal to refuse to revoke a deportation order made on 26 March 2015 pursuant to Regulations 19(3)(b) and Regulation 21 of the Immigration (European Economic Area) Regulations 2006 (as amended). The appellant is a citizen of Poland.

2. The reason for the deportation order is set out in a decision letter on 26 March 2015, following a stage 1 deportation letter sent to an address in Linnet Street, Preston on 8 November 2014, to which the appellant had not responded.

3. In her deportation decision, the respondent stated that she was satisfied, pursuant to Regulation 21, that the appellant posed a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The deportation order was certified under Regulation 24AA(2) on the basis that the appellant's removal to Poland pending the outcome of any appeal against the deportation order, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

4. Two convictions were relied upon:

   (a) The appellant committed two offences of robbery and attempted robbery on different dates in November 2003, for which he was convicted at the Regional Court in Warsaw, Poland, on 19 October 2005. He was sentenced to 42 months' imprisonment and a fine of 500 Polish zloty (about £107).

   (b) On 30 June 2014, soon after arriving in the United Kingdom, and before his wife joined him here, the appellant was involved in a drunken altercation, and the police were called. On 22 October 2014, he was convicted of battery at Preston Magistrates Court, sentenced to 18 weeks' imprisonment wholly suspended for 12 months, and ordered to undertake an unpaid work requirement, and pay compensation of £250, a victim surcharge of £80, and costs.

5. The respondent served the deportation order to the file, having been unable to serve it on the appellant at his last known address in the immigration proceedings. The respondent made only one attempt at postal service at an address in Linnet Street, Preston. However, in the criminal proceedings, the appellant had given a later address in Raikes Road, Preston. The Raikes Road address also appears on the appellant's housing benefit claim and the notification of his National Insurance number. No attempt was made to serve at that address.

6. The effect of service to file was that the appellant had no opportunity to challenge the deportation decision by appeal or judicial review, or to apply under Regulation 24AA(4) for an interim order suspending enforcement of the deportation decision pending such a challenge.

7. The appellant only became aware of the deportation order when returning from Poland with his wife and young child on 9 January 2016, following a two-day visit to his widowed mother in Poland. By that date, he was living at an address in Chestnut Grove, Preston. He was not allowed to board the plane and is now working in Belgium.

First-tier Tribunal decision

8. The appellant appealed against the respondent's decision to the First-tier Tribunal, arguing that it was not lawfully made in accordance with the Regulations and her own policy. First-tier Tribunal Judge Lever dismissed the appeal both under the Regulations and on Article 8 ECHR grounds. The appellant appealed again to the Upper Tribunal.

Permission to appeal

9. The appellant's grounds of appeal were, first, a challenge to the adequacy of the First-tier Tribunal's reasoning on how the respondent discharged the burden of showing that the appellant posed a genuine, present and sufficiently serious threat' at the date of decision; second, the failure to consider material evidence regarding the appellant's Article 8 ECHR rights; and thirdly, failure to assess whether the respondent had complied with her own policy in relation to serving the decision on file.

10. Permission to appeal was granted for two main reasons, that the respondent had arguably not discharged the burden of showing a genuine present and sufficiently serious threat in the United Kingdom from the appellant; and whether the Polish offence was a proper basis for the making of, and refusal to revoke a deportation order for an EEA national, given that past convictions alone do not justify such a decision.

11. The grant of permission imposes no limitation on the grounds of appeal and all grounds may be argued.

Rule 24 Reply

12. The respondent filed a Rule 24 Reply, arguing that the First-tier Tribunal had taken account of both the conviction in Poland and the United Kingdom conviction. The Reply continues:

> "2. …Whilst it is stated that the appellant did not offend subsequently and no consideration has been taken of this, this fails to give regard to the fact that the appellant was in prison for approximately 3½ years following his sentence in 2004, and his departure from the United Kingdom in 2016.
>
> 3. The Judge was entitled to consider the appellant's actions since arriving in the United Kingdom and it is noted that the appellant's offences were committed in a relatively short period of time after his arrival."

13. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

14. It is accepted on the appellant's behalf that due to the brevity of his time in the United Kingdom (less than 2 years), he has not acquired a permanent right of residence and is entitled only to the basic level of protection under Regulation 21. Regulations 21(3) and 21(4) do not apply here.

15. For the appellant, Mr Medley-Daley reminded me that with the exception of his widowed mother, who had returned to Poland after her late husband's death, all of the appellant's extended family live in the United Kingdom, including his 2 children aged 8 and 2 years old, and his wife. The Regulations require more than a past conviction to justify removal (see 21(5)(e)) and there was, he argued, no evidence of a present risk from this appellant at the date of making the deportation order in March 2015, or indeed now. The appellant's wife is herself a qualified person, since she has been both a worker and a student while in the United Kingdom. His primary submission was that the decision was disproportionate and the high test in Regulation 21 was not met, on the facts.

16. Mr Medley-Daley also argued that the deportation order was not lawfully made. The respondent's policy required her to have made 'all reasonable attempts' to serve at the appellant's last known address, but in fact, only one letter was sent. There were plenty of other reasonable attempts which could have been made, but were not. The police had the right address and so did several other government bodies. The appellant had not been given the opportunity to make representations at the first stage of the deportation process, due to the respondent's error in this respect.

17. The respondent's own internal emails showed concern about the lawfulness of the deportation order and whether it had ever been signed. The respondent's decision to refuse to revoke the deportation order was perverse and irrational, taking no account of the facts or her own policy. If the deportation order was not validly made, the appellant's continued exclusion from the United Kingdom was unlawful and a plain breach of his Article 8 rights, and the section 55 best interests of his children.

18. He relied on the provisions of Regulation 24A, which required the respondent to revoke a deportation or exclusion order where there had been a material change in the circumstances which justified the making of the order, if she considered that the criteria for making such an order were no longer satisfied. Such an application could only be made while the appellant was outside the United Kingdom.

19. The appellant also relied on the lack of opportunity for the appellant to provide information which could be taken into account under Regulation 24AA(2) and (3), or to make an application under Regulation 24AA(4).

20. For the respondent, Mr Bates observed that the question whether the deportation order had ever been signed did not appear in the grounds of appeal. The Upper Tribunal should limit its consideration to the matters set out in the grant of permission to appeal. The decision to deport the appellant took into account both his Polish conviction and his United Kingdom conviction, which had occurred just 6 weeks after his entry to the United Kingdom community. That was not evidence that he had been rehabilitated from the Polish offence.

21. On the question of rehabilitation, Mr Bates relied on *MC* (Essa principles recast) [2015] UKUT 520 (IAC). The appellant had complied with the unpaid work requirements, paid his fines, and not re-offended since his United Kingdom conviction. However,

neither the statement of the appellant, nor that of his wife, explained the motive for his offences, or how the appellant had addressed his offending behaviour. The wife's evidence was that the appellant never drank alcohol, save on this one occasion, when she was not with him. The appellant's statement did not make the same assertion.

22. As regards the validity of the deportation order, Mr Bates had not prepared to argue this point but did not wish for further time to submit his argument on this point. Whether or not the appellant was rehabilitated, there were cogent reasons for upholding the deportation decision, since the appellant had demonstrated a propensity for violence.

23. The appellant's partner was in the United Kingdom exercising her own Treaty rights here, but she could equally take the children and join him in Belgium, or anywhere else in the European Union.

24. Mr Bates accepted that the case was not straightforward, but argued that the First-tier Tribunal Judge's decision was properly reasoned, open to him on the evidence, and contained no material error of law.

Error of law finding

25. There were before the First-tier Tribunal documents which cast significant doubt on the legality, and compliance with policy, of the respondent's decisions to make the deportation order and to serve it to file. The First-tier Tribunal Judge omitted to consider those documents at [21]-[26] of the decision. He also treats knowledge by the police as separate from knowledge by the Home Office, but of course, the police form part of the Home Secretary's responsibilities and that distinction cannot properly be made.

26. The stage 1 deportation notice was sent to the appellant's address on 8 November 2014. On 17 November 2014, the Justices Clerk at Preston Magistrates Court wrote to the appellant at Raikes Road. On 6 February 2015, Preston City Council wrote to the appellant about his housing benefit at Raikes Road. On 26 March 2015 the deportation order was served to file on the basis that the Home Office did not know where the appellant could be found and that he was an absconder. It was an error of fact amounting to an error of law for the First-tier Tribunal Judge to conclude that the respondent was justified in serving the deportation decision directly to file, without first attempting to serve it at either Linnett Road or, by making straightforward enquiries, to the Raikes Road address.

27. Secondly, the appellant alleges that the Judge failed to refer to the evidence from the appellant's spouse, who is exercising Treaty rights in the United Kingdom. The appellant contends that the Judge does not appear to have addressed his mind to the Regulation 21(5) factors or to Regulation 21(6) in deciding that his exclusion from the United Kingdom would be proportionate. Both Regulations are mentioned in the decision at [27] but at [30]-[31], the Judge did not directly address the factors set out in those Regulations, proceeding by analogy under paragraph 339(a) of the Immigration Rules, which was deleted some time ago. There is a detailed discussion of the section

55 best interests of the appellant's children, which the Judge accepts lie in their being with both parents.

28. The reasoning in the decision on Regulation 21(5) is at [28] and is plainly inadequate. The Judge does not engage with the question whether the appellant presents a genuine, present and sufficiently serious threat to the United Kingdom; nor is there any detailed assessment of the proportionality of the deportation decision.

29. I am satisfied that the First-tier Tribunal decision contains material errors of law as set out above and I proceed to remake the decision.

Remaking the decision

EEA Regulations

30. The standard to which the deportation decision must be made where an EEA national is to be removed is set out at Regulation 21(5) and 21(6) of the 2006 Regulations:

> "(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. "

31. Regulation 24A is entitled 'Revocation of deportation and exclusion orders' and is as follows, so far as relevant to this appeal:

> "24A.—(1) A deportation or exclusion order shall remain in force unless it is revoked by the Secretary of State under this regulation.
>
> (2) A person who is subject to a deportation or exclusion order may apply to the Secretary of State to have it revoked if the person considers that there has been a material change in the circumstances that justified the making of the order.

(3) An application under paragraph (2) shall set out the material change in circumstances relied upon by the applicant and may only be made whilst the applicant is outside the United Kingdom.

(4) On receipt of an application under paragraph (2), the Secretary of State shall revoke the order if the Secretary of State considers that the criteria for making such an order are no longer satisfied."

32. Regulation 24AA is entitled 'Human rights considerations and interim orders to suspend removal' and so far as relevant, says this:

"24AA.—(1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom regulation 24(3) applies, in circumstances where—

(a) P has not appealed against the EEA decision to which regulation 24(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); …

(2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(3) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.

(4) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except—

The exceptions in Regulation 24AA(4) are not applicable here.

Respondent's policy guidance

33. The guidance to caseworkers which was in force at the time of the decision to deport was contained in version 4.0 of the respondent's European Economic Area (EEA) Foreign National Offender Cases guidance, as follows:

"**Lengths of sentence and UK residence**
You must assess the available evidence to support a FNO's [foreign national offender's] claim of how long they have lived in the United Kingdom, and if they were exercising EEA Treaty rights for that period. *You may need to get additional evidence by getting National Insurance records and other relevant sources.*

Factors for consideration
Although considering Article 8 for most criminal cases was brought within the scope of the Immigration Rules (at paragraphs 396 to 400_ from 9 July 2012, the UK Immigration Rules do not apply to EEA nationals.

You must consider any rights specified in the European Convention on Human Rights (ECHR) for the FNO and their family members, as well as the following individual factors:

- Severity of offence
- Length of sentence
- Age
- State of health
- Length of United Kingdom residence
- Strength of ties in the United Kingdom
- Extent of links with the country of origin.

Considering FNO cases in respect of Articles 3 and 8 (and relevant case law) in particular, requires detailed analysis of the evidence available about their circumstances."

34. It is for this reason, no doubt, that the respondent has a procedure whereby she seeks a response to the stage 1 deportation notice before proceeding to make a deportation order.

35. The respondent's process for service on file is before me. The version provided was published on 20 January 2016: Mr Bates did not suggest that the information therein was different in any relevant way from that which applied when the decision to serve to file was taken in this appeal:

"**Serving on file: process**
…If you have conducted sufficient checks to try and establish the foreign national offender's whereabouts and these have failed to locate them, it will be appropriate to propose that the relevant decision notices be served on file. Initial and subsequent stage deportation proposals must be agreed by the local team leader or senior caseworker (deportation orders (DOs) must be signed by the director). …

Serving on file: conditions
This section explains what must be done before deciding to serve a decision on file, how such decisions will be validated, and the effect of serving to file on non-suspensive appeal certification.

Checks
You must not serve deportation decisions on file unless all reasonable attempts you have made to trace the individual and serve to the last known address have failed. These attempts might include:

- Writing to the person's last known address at least twice
- Telephoning their last contact number at least twice
- Contacting their previous representative for a current address

You must ensure these attempts are properly documented on both CID and the Home Office file.

Validity
The relevant decision notices will be deemed to have been given when

- A note is entered onto CID
- A note is entered onto the Home Office file
- The notices are signed

Certification for non-suspensive appeal rights
Where a decision is being served to file, you must not certify the case under …Regulation 24AA of the Immigration (EEA) Regulations 2006 in EEA cases, so that there is a non-suspensive right of appeal …"

GCID records

36. Copies of the GCID record sheets are provided, following a Subject Access Request, but not those from the date of the deportation order. The notes before me begin on 10 January 2016, after the appellant had been refused boarding in Warsaw to return to Liverpool with his wife and child.

- On 10 January 2016, the notes record concern about where and how to serve the deportation order on the appellant, since he had left the United Kingdom.

- Also on 10 January 2016, an immigration officer in the Criminal Casework Prison Operations and Enforcement Team noted as follows:

> "CID notes indicate that subject has a deportation order signed against him based on his foreign leg [sic] 42 month robbery conviction. My concern is that the subject has never been aware of any adverse decision as the Stage 1 was returned 'not called for and the Deportation Order was served on file (30/03/2015). He was then treated as an absconder on 28/05/2015. Because subject is an EEA national we need to know when he left the United Kingdom and returned to Poland in order to know if the DO is even valid. It would appear that he was living at the address where the Stage 1 was sent but just didn't pick it up.
>
> We spoke briefly. I understand that it is a waste of resources to let subject come to the United Kingdom, serve the DO, and then return him to Poland, but nor does it make any sense that the Home Office would be allowed to serve a Deportation Order electronically to another country, it has always been my understanding that the DO should be served in person but obviously this could have changed.
>
> Hopefully one of my senior managers have their Blackberry on and can assist further."

- On 12 January 2016, the notes record that the appellant 'is currently under a deportation order from March 2016 but this was NEVER entered onto the PNC (police national computer) system. So I have entered a note onto PNC stating that he is currently subject to the March 2016 deportation order and that his whereabouts are believed to be in Poland'.

- Also on 12 January 2016, the following note to the case worker on the appellant's case, from Admin Support Manager EEA Command at the Home Office, was recorded at 10:44 hours:

> "Your case …was refused on a flight on 09/01/2016 to LPL (Liverpool) because you have a DO signed in June [2015] in printed docs, this FNO has effectively deported himself and we will now need to do post deport, however I notice that not all the deportation events have been updated as no DO signed is updated. Could you please update these urgently and then let Admin have the file please. Thanks."

Discussion

37. The validity of the deportation decision is fundamental to this application for revocation. I begin, therefore, by considering whether the respondent has followed the correct procedure and whether her decision is in line with the EEA Regulations and her own policy. If it is not, then she has no defence to the appellant's application for the revocation of that decision.

38. The respondent did not make proper attempts to serve the deportation order before serving to file. She made only one postal attempt in relation to the Stage 1 letter, and none for the deportation decision itself. The caseworker did not check with his solicitor to see whether any other address was known, nor did she note the conviction on the Police National Computer. Had she accessed that computer, the Raikes Road address, where the appellant was living at almost all of the material times, would immediately have come to light and service there would have given the appellant the opportunity to respond to the Stage 1 notice, or to appeal or challenge the deportation order by judicial review.

39. It would also have brought to light the appellant's compliance with the terms of his sentence, and any assessment made by OASys of the future risk he posed to the United Kingdom population. None of this was taken into account.

40. The respondent's decision carries a Regulation 24AA certificate, although the service to file policy states expressly that this must not be done. The reason why the policy so states is obvious: in order for the respondent to meet her international obligations under the ECHR, she needs information about the appellant's private and family life in the United Kingdom, and his personal conduct, including any change in those circumstances which makes commission of a further offence less likely. In the present appeal, because the stage 1 notice received no reply, the respondent had no information at all about the appellant's circumstances in the United Kingdom or the circumstances underlying the battery offence.

41. My primary finding, therefore, is that the deportation order was not validly made and that the decision to serve to file was not made in accordance with the respondent's published policy.

42. It is not necessary to consider in detail what decision the respondent might have made, had she given the appellant an opportunity to argue his human rights case. It remains open to her, once he has been permitted to re-enter the United Kingdom, to serve him with the deportation order and give him the opportunity of challenging it by appeal, making further submissions, or seeking judicial review. The appellant would then have available to him the opportunity of seeking to suspend the execution of the deportation order under Regulation 24AA until such challenges were complete.

43. It may be, as the GCID notes observe, that this process of readmission, service and an opportunity to challenge the decision is expensive and takes time. That is a consequence of the respondent's failure to make her decision properly in the first place and is not a good reason to uphold the deportation order, which was neither validly made nor served.

DECISION

44. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision.

I remake the decision by allowing the appellant's appeal against the respondent's decision to refuse to revoke a deportation order against him.

Signed: *Judith AJC Gleeson* Date: 17 August 2017

Upper Tribunal Judge Gleeson