Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01754/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 1 August 2016	**On 30 May 2017**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MACIEJ MATUSIAK
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr M Matthews, Senior Presenting Officer
For the Respondent: Mr S McTaggart, instructed by O'Neill Solicitors

DECISION AND REASONS

Introduction

1. The appellant in these proceedings is the Secretary of State for the Home Department. I shall refer herein to Mr Matusiak as the claimant.

2. The claimant is a citizen of Poland, born 14 February 1982, who arrived in the United Kingdom on 27 September 2007.

The claimant's criminal convictions

3. Since his arrival in the UK the claimant has been convicted of 51 offences, the first being on 28 February 2008 for possession of an article with a blade, for which he received a fine. The claimant's first sentence of imprisonment was as a consequence of a conviction on 13 October 2009 for assault occasioning actual bodily harm, which led to the imposition of a term of seven months' imprisonment. This was followed in August 2010 with a conviction on two counts of theft and one count of going equipped for theft, which led to sentences of three months' imprisonment and one-month imprisonment, respectively – each suspended for one year.

4. On 29 July 2011 the claimant was sentenced to a further three months' imprisonment for assault occasioning actual bodily harm, one-month imprisonment for assault on a police officer and a further one-month imprisonment for resisting arrest – each sentence being concurrent. On 12 August 2011 the claimant was sentenced to two months' imprisonment on two counts of breaching a probation order and one-month imprisonment, to be served concurrently, on two counts of theft. This was followed just seven days later by a sentence of a further one-month of imprisonment for disorderly behaviour and two months' imprisonment - to be served consecutively - for theft. Just three days thereafter the claimant was sentenced to four months' imprisonment for going equipped for theft, three months' imprisonment for theft, three months' imprisonment for breaching a suspended sentence, and one-month imprisonment for three further instances of breaching a suspended sentence. Just over two weeks later, on 9 September 2011, the claimant was sentenced to another two months' imprisonment for theft and on 4 November 2011 he was sentenced to three months' imprisonment for common assault, a further three months' imprisonment for a second charge of common assault and two months' imprisonment for a conviction for criminal damage, each of which were suspended for two years.

5. On 20 April 2012 the claimant was sentenced to six months' imprisonment for theft, again suspended for two years, and he was also on the same occasion convicted of attempted criminal damage and wrongly entering premises, which led to a community service sentence. This sentence was later breached, which led to the imposition of a fine in the alternative. On 7 September 2012 the claimant was sentenced to a further two months' imprisonment for theft, a sentence which was also suspended for two years. Thereafter the claimant was sentenced to four months' imprisonment for theft on 18 December 2012, which was once again suspended (on this occasion for one year and six months).

6. Moving on to 2013. In January the claimant was convicted for theft on two separate occasions, receiving a fine on each. On 3 May 2013 the claimant was fined for assaulting a police officer, as well as being sentenced to three months' imprisonment for resisting police, three months' imprisonment on each of two instances of breaching a suspended sentence, and a further two months' imprisonment for another breach of a suspended sentence. Just five days later he received fines and a driving disqualification for motoring offences.

7. The claimant's last conviction was for grievous bodily harm on 6 November 2011, for which he was sentenced to one year of imprisonment and one year and six months on licence.

8. The claimant has also disclosed that he had a conviction in Poland prior to coming to the United Kingdom, for drink driving.

SSHD's Decision

9. In a document headed "Decision to make a Deportation Order", dated 2 September 2014, the Secretary of State wrote to the claimant in the following terms:

> "On 6 November 2013 at Belfast Court, you were convicted of grievous bodily harm. The Secretary of State has considered the offence of which you have been convicted and your conduct, in accordance with regulation 21 of the Immigration (European Economic Area) Regulations 2006. She is satisfied that you would pose a genuine, present and sufficiently serious threat to the interests of public policy if you were to be allowed to remain in the United Kingdom and that your deportation is justified under regulation 21. She has therefore decided under regulation 19(3)(b) that you should be removed and an order made in accordance with regulation 24(3), requiring you to leave the United Kingdom and prohibiting you from re-entering while the order is in force. For the purpose of the order section 3(5)(a) of the Immigration Act 1971 will apply.
>
> The Secretary of State proposes to give directions for your removal to Poland, the country of which you are a national."

10. Accompanying this document was a lengthy letter of the same date (running to fourteen pages), setting out the reasons why the Secretary of State came to this conclusion. I have taken full account of everything said therein.

The Tribunal proceedings thus far

11. The claimant appealed the abovementioned decision to the First-tier Tribunal. That appeal came before First-tier Tribunal Judge Grimes on 2 December 2014 and was allowed under the EEA Regulations and on Article 8 ECHR grounds. The Secretary of State appealed this decision with the permission of First-tier Tribunal Judge McDade and the matter came before Upper Tribunal Judge Kopieczek on 12 June 2015.

12. In a decision of the same date (Appendix 1 hereto) Judge Kopieczek set aside the First-tier Tribunal's decision. In summary he concluded that the First-tier Tribunal had failed to take into account a number of relevant matters when determining that the claimant did not pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Judge Kopieczek directed that the re-making of the decision be by the Upper Tribunal, and thus the matter came before me.

The Immigration (EEA) Regulations 2006

13. Regulation 21, which is the provision of concern in the instant appeal, provides:

> **"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…"

Evidence

Claimant's evidence

14. It is the claimant's evidence that he first came to the United Kingdom on 29 September 2007 and that he has remained here ever since. He arrived with his ex-wife and their son (who was born in Poland in February 2003). In his written evidence (statement of 2 February 2015) the claimant asserts that he split up from his wife in 2009 as a consequence of being sent to prison. He and his ex-wife are still on amicable terms. He has had numerous jobs since his arrival in the United Kingdom, which have been made up of short term placements obtained through the assistance of an employment agency. He worked as a kitchen assistant during his most recent period of detention. He also completed ESOL classes in both HMP Maghaberry and HMP Magilligan.

15. In paragraphs 7 and 8 of his statement of 2 December 2014 the claimant asserts:

> "A lot of my offending has been alcohol related and I accept I have an ongoing issue in regards to this. I have been sober for over a year now and I wanted to do a course in prison called Adept but could not due to the lack of an interpreter. There is a strict proposed term of my licence of no alcohol and that I would have to attend AA meeting on a compulsory basis. I know that if I breached my licence I would be returned to prison. I know that if I did breach my licence and I was deported I would effectively lose my son.
>
> My time in prison on this occasion has been a very salutary experience for me and being separated from my son was particularly hard. I have been an enhanced prisoner on the PREPS scheme at the prison. This means that I have had positive reports from staff, not got into trouble, passed any drugs test as required and generally being well behaved during my time there. This long period of custody has allowed me to focus …"

16. The claimant continues by stating that he regrets his offending, that it has cost him his marriage and possibly his son. He maintains that there is a genuine bond between him, his son and his ex-wife and asserts that he wants to have a proper relationship with his son. His son and ex-wife visited him in prison.

17. In a later statement of 29 November 2015 the claimant expresses his apologies for his past offending, also stating that he wishes to make a better, sober, life for himself. He further asserts that he has been employed full-time as a kitchen porter since 21 January 2015, work he enjoys. He has been in regular contact with the PBNI, as required by his licence. The licence also required him to abstain from alcohol. His probation officer is very happy with his progress. He is a changed man and he finally realises that alcohol has cost him his wife and could cost him his son as well. He refers to the close nature of the relationship he has with his son.

18. The claimant also gave oral evidence before the Upper Tribunal, confirming that (i) his licence expired on 7 April 2016 (ii) his probation officer was happy with his

conduct during the course of the licence and (iii) he now has new employment, working for the Morning Star, which he started on 15 June 2016.

19. In cross-examination the claimant indicated that (i) he left his previous employment because it was too difficult and demanding physically; (ii) he has not drunk alcohol for over three years; (iii) he is not an alcoholic and has "got rid of that problem."

20. The claimant continued by stating that he believes that all of his previous convictions had some relationship to this alcohol problem. He did drink alcohol before the split with his wife, but he began drinking heavily after the split. The claimant further disclosed that he had been convicted of driving a car under the influence of alcohol while living in Poland.

21. The claimant finally stated that he is aware that drinking alcohol would cause significant problems in his life and it is his intention never to drink alcohol again. He was afraid that if he did, he would lose contact with his child. He recognises that his son needs a father, and that drinking alcohol had caused him many problems in the past.

Other Witness Evidence

22. I also have before me an undated written statement from the claimant's ex-wife, broadly concurring with the claimant's evidence as to the circumstances of their relationship. She confirms that their son lives with her and that he has been affected by the claimant drinking alcohol. The claimant saw his son once per week, or every few weeks, prior to his most recent term of imprisonment. She took their son to visit the claimant in prison, and he could not wait for the visits. He loves talking to his father on the phone, and often says that he misses his father.

23. The claimant is now involved in their son's upbringing and has a good influence on him. He takes care of their son at the weekends, and on occasion during the week. She does not travel to Poland because her whole family is now living in Belfast. She believes that the claimant and their son have created a special bond.

24. The claimant's son also wrote a short letter for the assistance of the court, which is once again undated. In it he states that he really loves his father, that he goes to his father's home when he is not working, his father gives him advice and plays with him. He cannot wait to visit his father. He is aware that his father used to drink alcohol and did bad things and that he went to prison because of it. He is also aware of the possibility of his father moving to Poland and not coming back. He wants his father here. He believes his father to be good. When his father was in prison he promised him that if he got out he would stop drinking and would start working.

Other relevant evidence

25. The claimant's bundle also contains a copy of an educational psychology report authored by Carmel Rodgers, a qualified psychologist, relating to the claimant's child. An interview in this regard took place on 21 November 2014.

26. Miss Rodgers observes in relation to the claimant's child:

    (i) There is a documented history of his cognitive ability. He does well in class and shows no concern of social behaviour after contact with his father;

    (ii) He presents as an interesting and initially reticent boy who needs to be encouraged to give his opinions verbally;

    (iii) He has no personality defects or psychological disorder. He is securely attached to his mother and father and his maternal family. His psychological needs are met within this family structure;

    (iv) There are problems with slight emotional confusion which are primarily due to contact issues with his father and how they are being handled. He speaks to his father by telephone most days. He seems to have a strong, genuine, connections to his father;

    (v) He may be experiencing some underlying anxiety, which is not uncommon in children with separation anxiety.

27. I have also been provided two documents authored by The Probation Board for Northern Ireland ("PBNI"). The first is authored by a probation officer based at HMB Magilligan and is dated 21 July 2014. It reads as follows:

> "A risk management meeting was convened in November 2013 in relation to the index offence ... He was assessed as not meeting the threshold for significant risk of serious harm to others as defined by the Criminal Justice (NI) Order 2008. The ... Order 2008 defines serious harm to be either 'death or serious personal injury, whether physical or psychological'. However, it was noted that if alcohol is involved in further offending following his release, a risk management meeting should be called as a matter of urgency. ... Regarding his ACE assessment the likelihood of reoffending is currently assessed as being high within the next two years. ...
>
> PBNI records highlight the concern in relation to Mr Matusiak's abuse of alcohol, which was a factor in the index offence. During interview for the court report he stated that he was confident he could avoid future consumption of alcohol. In support of this he advised that he cannot develops his personal relationships should he return to drinking, and he aspires to settle with his girlfriend and start a family. Mr Matusiak remains confident that he can achieve this goal. However this would need to be evidence when he returns to the community.
>
> In custody Mr Matusiak presents as willing to engage with his sentence plan and has attended multiple ESOL classes and attends the gym. He has been on an enhanced regime since 21/08/13, has no adjudications, and all residential staff reports have been positive. To date he has passed two drug tests; the most recent test was on 23/06/14. Whilst in HMB Maghaberry Mr Matusiak signed a disclaimer with AD-EPT on 21/2/14 due to the language barrier. ... "

28. In the more recent report of 12 May 2016 it is observed that during the period of supervision the claimant attended weekly appointments with the PBNI for the first

sixteen weeks, and fortnightly appointments thereafter. His attendance was punctual. He was breathalysed intermittently at unannounced dates and never tested positive for alcohol. He has employment at a city centre hotel, and has been given increased responsibility there. He has regular ongoing contact with his son and appears to take his role as a parent seriously. A reasonable relationship has been established between the claimant and his ex-wife for the purpose of securing their son's happiness and stability.

29. The report then significantly says as follows:

> "Throughout the licence Mr Matusiak has been challenged to address his alcohol dependency problem honestly. He now accepts that he must maintain sobriety if he is to continue to enjoy his current lifestyle. He states that he has abstained from alcohol for three years and has no wish to put his relationship with his son at risk.
>
> At the commencement of his sentence in November 2013 Mr Matusiak was assessed as posing a high likelihood of reoffending. ...
>
> A risk management meeting held at PBNI headquarters on 5 November 2013 discussed the nature of the index offence and other violent convictions Mr Matusiak has accrued. In the absence of a pattern of deliberate intent to cause harm to another person, Mr Matusiak is assessed as not presenting a significant risk of serious harm.
>
> At the expiry of his licence in April 2016 Mr Matusiak has been assessed using a PBNI approved tool as posing a low likelihood of reoffending. This score reflects his continued abstinence from alcohol, full-time employment, stable accommodation, a desire to be an active parent to his son and no further offending to date.
>
> Mr Matusiak has had time to reflect on the changes required to secure a lifestyle free from further offending. He appears to be addressing the areas initially targeted with substantial focus and reflected successful completion of his determinate custodial sentence."

Discussion and Decision

30. It is not in dispute that the burden lies on the Secretary of State to justify her decision to deport the claimant, and to show that it is in accordance with the law (Straszewski v Home Secretary [2016] 1 WLR 1173: CA). It is also not in dispute that the claimant is entitled to only lowest level of protection afforded to EEA nationals i.e. the SSHD need only justify her decision on the grounds of public policy.

31. Save in exceptional circumstances the question of whether an individual represents a genuine, present and sufficiently serious threat to some aspect public policy is to be determined solely by reference to the conduct of the offender and the likelihood of re-offending. It is not said in this case that such exceptional circumstances exist such that considerations of public revulsion and deterrence are to be factored in.

32. It is clear that if there is no real risk of reoffending then there is no power to deport a national of another Member States on the grounds of public policy: SSHD v

Dumliauskas, Wozniak and ME (Netherlands) [2015] EWCA Civ 145 at [40]. It is to this aspect of the appeal that I now turn.

33. The starting point in determining the level of the risk of the claimant re-offending is most recent assessment of such risk by the PBNI. The operative parts of the two reports drawn up by PBNI in relation to the instant claimant are set out above. I do not repeat them here, save to re-iterate the key conclusions. The 2014 report identified there to be a high likelihood of the claimant re-offending within the following two years. It also stated that the claimant did not meet the statutory threshold for there being a significant risk of serious harm to others.

34. By May 2016 the PBNI's outlook for the claimant had significantly changed, for the reasons identified in its report. At this time, it was concluded that the claimant posed a low risk of re-offending and did not present 'a significant risk of serious harm'.

35. Probation Officers are employed by the public sector to undertake assessments of the type identified above, and reports by the Probation Service/PBNI are used throughout the criminal justice system. They are specialists in their field and it is right that their assessments are to be accorded considerable weight. This is how I have approached such evidence in my deliberations. Nevertheless, I must analyse for myself the level of risk of the claimant re-offending and the level of harm if he does so.

36. As disclosed above, the claimant has an unenviable criminal history, with 51 convictions being accumulated in the nine years since his arrival in the United Kingdom. He has also disclosed a conviction in Poland. The seriousness of these offences is reflected in the sentences handed down, a large number attracting a non-custodial sentence, but a not insignificant number leading to sentences of imprisonment, albeit generally of short duration. The most recent of the claimant's offences is clearly the most serious – again reflected in the sentence handed to him.

37. The sheer number of offences is obviously a weighty consideration in the assessment of the level of risk of the claimant re-offending. He has not, though, committed a criminal offence since that for which he was convicted for in November 2013. Whilst this is a distinctive a break in the trend created by the claimant's relentless previous criminal behaviour, its relevance is tempered greatly by the fact that he was in detention (either criminal or immigration) until January 2015 and on licence until April 2016. He has also been under the spectre of deportation since September 2014. There is no doubt that each of these features is capable of operating on the claimant's mind and behaviour and therefore capable of distorting the true picture of his likely behaviour absent such features. It is prudent to observe, though, that the PBNI plainly had such matters in mind when it reached its assessment on the level of the claimant's risk of re-offending.

38. It is not in dispute that since shortly after his release in January 2015 the claimant has been in full time employment, that employment having recently changed in June

2016. His employers identify that he has been reliable and hard-working. Such steady employment was not a feature of the claimant's circumstances prior to his imprisonment in November 2013.

39. A further and significant shift in the claimant's circumstances, as between those in existence in November 2013 and those that currently present themselves, is found in the claimant's evidence that he has not drunk alcohol since his detention in 2013. This evidence was not discredited by Mr Matthews in cross-examination and it is supported in part by the disclosure by the PBNI that it undertook unannounced breath tests on the claimant during the period of his licence, none of which showed a positive result. I accept the claimant's evidence in this regard, reminding myself once again though that this period includes his time detention, his time on licence and the period is he has been subject to deportation proceedings.

40. Whilst the claimant's assertion that he no longer has a problem with alcohol does little to inspire confidence that he fully understands the addictive features of such, looking at the evidence as a whole I am persuaded that it is his genuine intention to maintain sobriety. His key motivation in doing so is the potential loss of contact with his son if he does not, whether as a consequence of being deported or through the actions of his ex-wife in preventing such contact. The claimant's relationship with his son has deepened and I accept that he fully understands that his criminal actions have not only impacted upon his immediate victims but also on his immediate family members, including his son. Thus far this driver has provided sufficient motivation to the claimant to prevent him reacquainting himself with alcohol.

41. I also accept that the claimant has a desire to continue in his attempts to improve his relationship with his son, and to take an active role in his son's upbringing. Furthermore, I accept that he fully understands that further criminal actions on his part will in all likelihood severe that relationship and, importantly, that there is a link between his alcohol consumption and his criminal behaviour - a link highlighted by the PBNI in both of the reports and also reflected in the terms of the Determinate Custodial Sentence Licence.

42. Given the factual findings made above, in particular in relation to the claimant's circumstances since his release from detention in January 2015 and his intentions for future, and despite his extraordinary criminal history (including the numerous breaches of Court orders and sentencing requirements, and the escalation in the seriousness of his offending) as well as the existence of a number of features (also identified above) which clearly will only operate in the short term to reduce the prospect of him re-offending, I find that there is no reason for me to go behind the conclusions of the PBNI, as Mr Matthews advocated I should do. Indeed, on an independent analysis of the evidence I concur entirely with the conclusions found in the PBNI's report of May 2016 i.e. that the claimant presents a low risk of re-offending and does not present a 'significant risk of serious harm'.

43. Looked at within the framework of regulation 21 of the 2006 EEA Regulations I find, looking at the evidence as a whole, that the claimant does not represent a genuine,

present and sufficiently serious threat affecting one of the fundamental interests of society. Consequently, his deportation is not justified.

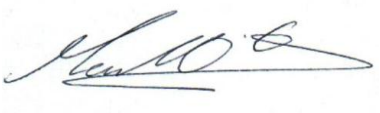
44. For these reasons the claimant's appeal is allowed. However, the claimant should be in no doubt that if he offends again his claims to be reformed will have been shown to be untruthful. In such circumstances it is difficult to see how he could successfully defend further attempts to deport him to Poland.

Decision

For the reasons given by UTJ Kopieczek in his decision of 12 June 2015 the First-tier Tribunal's decision is set aside.

Upon the decision on appeal being re-made by the Upper Tribunal, it is allowed.

Signed:



Upper Tribunal Judge O'Connor

Date 1st August 2016

APPENDIX 1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01754/2014

THE IMMIGRATION ACTS

Heard at Belfast	**Decision & Directions Promulgated**
On 12 June 2015	
Ex tempore judgment	……

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MACIEJ MATUSIAK

Respondent

Representation:

For the Appellant: Mr M Diwnyez, Home Office Presenting Officer
For the Respondent: Mr S McTaggart, O'Neill Solicitors

DECISION AND DIRECTIONS

1. The appellant in these proceedings is the Secretary of State but for convenience I refer to the parties as they were before the First-tier Tribunal. Thus, the appellant is a citizen of Poland born on 14 February 1982. He is said to have arrived in the UK on 27 September 2007.

2. The basis upon which he finds himself before this Tribunal today is a decision made by the respondent on 2 September 2014 to make a deportation order against him,

under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). That decision was made following his having committed an offence of grievous bodily harm on 6 November 2013, resulting in a sentence of one year's imprisonment, with one year and six months on licence. His appeal against that decision came before First-tier Judge Grimes on 2 December 2014 whereby she allowed the appeal under the EEA Regulations and under Article 8 of the ECHR.

3. The respondent challenges that decision on two grounds. To summarise, the first ground relates to the question of rehabilitation, relying on the decision in Essa (EEA: rehabilitation/ integration) [2013] UKUT 00316 (IAC). The second grounds raises the question of whether the First-tier judge was correct in her assessment of whether the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society as set out in regulation 21 of the EEA Regulations.

4. The following is only a summary of the submissions made by the parties. Mr Diwnyez relied on the grounds, developed further in oral submissions. Mr McTaggart relied on his very helpful skeleton argument and again supplemented by his oral submissions. Mr Diwnyez did not advance any further argument on the question of rehabilitation, beyond relying on the grounds.

5. In terms of the second ground it is argued that first, the judge had failed to provide adequate reasons for her conclusions in relation to the risk or threat that the appellant poses. In particular, the fact that he may have avoided alcohol up until the time of the hearing was in a sense not particularly relevant given that he had been in a controlled environment in detention and therefore had not had access to alcohol. It should be noted that in this context that although Mr McTaggart did at one stage submit that the appellant had been on home leave, on further enquiry he accepted that that was not the case and I accept from him that that was just a simple error on his part. He did however, rely on an assessment which apparently said that the appellant was suitable for home leave.

6. Returning then to the arguments advanced on behalf of the respondent, it is submitted that the appellant had not sought to address his offending and simply being prohibited from consuming alcohol whilst on licence does not detract from what is said to be a high likelihood of reoffending. That high likelihood of reoffending is an assessment made in a letter dated 21 July 2014 from the Probation Board for Northern Ireland ("PBNI"), to be found at Annex F in the respondent's bundle. It states as follows: "Regarding his ACE Assessment the likelihood of reoffending is currently assessed as being high within the next two years." The reasons for that assessment are given.

7. It is said on behalf of the respondent that the appellant has an escalating pattern of reoffending and previous conditions placed on him have not proved any deterrent. It is said also that the fact that he remains on licence with various conditions is indicative of a risk, rather than the contrary as suggested by the First-tier judge. The

number of convictions is relied on. It is also said that he had breached two court orders.

8. Arguments are also advanced in the grounds as to proportionality, although those arguments were not a particular feature of the submissions relied on behalf of the respondent, but not expressly resiled from.

9. Mr McTaggart referred in detail to the determination. It is submitted that the judge did recognise that the appellant had a number of previous convictions and she was careful to balance all relevant factors. There was a reference to the letter to which I have referred from the PBNI and it was submitted that the judge was cognisant of that assessment. She referred at [18] of the determination to what it said on the appellant's behalf to have been a very significant factor, namely that he will be on licence until April 2016 and liable to be recalled to prison if he breaches the terms of that licence. The First-tier Judge also referred to the fact that the supervising officer would be able to test him for alcohol and that this should alert the PBNI to any increased risk which could, if appropriate, lead to recall to prison.

10. She concluded that "the licence will *for now* reduce the risk of the appellant reoffending." It was also submitted that the judge took account of the appellant's good prison record and the fact of his not having consumed alcohol as at the point of the determination. She also took into account his evidence and his assertions of his genuine commitment to refrain from both alcohol and offending.

11. As I indicated to the parties, I am satisfied that the First-tier Tribunal Judge did err in law. It is not necessary for me to determine the issue in respect of ground 1 because of my conclusions in relation to ground 2. However, ground 1 may have to be revisited in due course on another occasion.

12. So far as ground 2 is concerned, it is correct to say that the judge recognised at [15] that there had to be an assessment of whether the appellant's personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. However, it does seem to me that the judge failed to take into account the sheer scale of the appellant's offending. His offending is evident from the decision letter and indeed from the summary of his offending in the refusal letter.

13. In the decision letter his convictions are summarised at page 5. The offences start in October 2009 and continue until November 2013. There are a large number of convictions for a variety of offences and it does appear that there are at least two occasions on which he has failed to comply with court orders.

14. Returning then to [15], although the judge recognised that whether the appellant represented a genuine, present and sufficiently serious threat etc, was an issue that needed to be determined, she divorced that issue from the fact of the number of his convictions, because she went on to say that she must also be satisfied that he represents such a threat, and there was then the later assessment of that issue.

15. At [18] it seems to me that she did not actually assess the risk of reoffending. What she regarded as a significant matter in relation to his licence does not assess the risk. Indeed, I consider that there is some force in the submission made on behalf of the respondent to the effect that the fact of his being on licence to some degree indicates that there is such a risk.

16. I return to the PBNI report which states that the appellant is assessed as being a high risk of reoffending within the next two years. It is precisely for that reason that the conditions are put in place during his release. At the time of the hearing before the First-tier Tribunal he had not in fact been released and that is significant, in my judgement, because on page 2 of the PBNI letter it states that the appellant remains confident that he can achieve the goal (of abstinence from alcohol) but this would need to be evidenced when he returns to the community.

17. At the time of the hearing before the First-tier Tribunal he had not in fact returned to the community and at [18] of the determination there is no assessment of risk, only an assessment of what happens if he does return to alcohol. There is then a reference to what could be said to be a reduction of risk but that reduction starts from a high base, being the risk as set out in the PBNI letter. There is in the determination no assessment of what the actual present risk was on the evidence before the First-tier Tribunal.

18. In those circumstances, I am satisfied that where at [19] it is determined that the appellant does not currently pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, the judge erred in law. There was a failure to take into account factors to which I have referred and her assessment is incomplete. It is incomplete because, amongst other things, it fails to take into account the breaches of court orders, the scale of his offending and the other issues I have identified. It also fails to take into account the period of time over which the appellant has been offending.

19. The error of law is such as to require the decision of the First-tier Tribunal to be set aside, and I do so. It is not appropriate for the matter to be remitted to the First-tier Tribunal for further hearing, in the light of paragraph 7.2 of the Practice Statement of 10 February 2010.The re-making of the decision will take place in the Upper Tribunal.

20. The Directions below reflect those given orally at the hearing, with the addition of a direction as to preserved findings.

DIRECTIONS

1. Any further evidence to be relied on by either party must be filed and served no later than 14 days before the next date of hearing.

2. In respect of any witness whom it is proposed to call to give oral evidence, there must be a witness statement drawn in sufficient detail to stand as evidence-in-chief such that there will be no need for further examination-in-chief.

3. Evidence must be filed and served on behalf of the appellant within the above timescale of the appellant's progress in the community on licence.

4. The parties must be in a position on the next date of hearing to make submissions on the question of integration.

5. The findings of fact made by the First-tier Tribunal are to be preserved, except as infected by the error of law.

Upper Tribunal Judge Kopieczek 8/07/15