Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00056/2018**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 31 August 2018	**On 01 October 2018**

Before

UPPER TRIBUNAL JUDGE LANE

Between

MARIUSZ TRELA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not present or represented
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Mariusz Trela, was born on 8 August 1979 and is a male citizen of Poland. By a decision promulgated on 1 July 2018, I found that the First-tier Tribunal had erred in law such that the decision fell to be set aside. My reasons for reaching that decision were as follows:-

> 1. The appellant claims to have entered the United Kingdom in January 2005 and began working here immediately. He was convicted of a series of driving offences beginning in 2011. On 21 October 2017, he was convicted of driving whilst disqualified without insurance, failing to surrender to custody and was later convicted of driving with a controlled drug above the specified limit and sentenced to a total of twelve weeks' imprisonment and

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further disqualified for 36 months. On 27 October 2017, the appellant was served with notice of intention to deport him. A decision to deport the appellant was taken on 10 January 2018. The Secretary of State accepted that, having produced evidence of continuous exercise of Treaty Rights for a period of five years, he was entitled to permanent residence. It was not accepted that he had been resident for a continuous period of ten years. In consequence, the respondent applied the “serious grounds of public policy and public security” provided for by Regulation 27(3) of the Immigration (European Economic Area) Regulations 2016.

2. The appellant appealed to the First-tier Tribunal (Judge Oxlade) which, in a decision promulgated on 19 February 2018, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

3. I find that the judge erred in law. At [37] he wrote:

Considering the totality of the evidence, both documentary and oral, I do find the appellant has lived in the UK continuously since January 2005 exercised Treaty Rights for six years and so is both a permanent resident and when it comes to deportation, the threshold test is imperative grounds of public security for the appellant to be deported.

4. Regulation 27(4) provides:

(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 in the best interests of the person concerned, 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. The calculation of the “continuous period of at least ten years prior to the relevant decision” has now been settled by the Court of Justice of the European Communities in the case of B EUECJ C-316/16 which was delivered on 17 April 2018. Paragraph [95] provides:

In the light of the foregoing, the answer to the fourth question in Case C-316 is that Article 28(3)(a) of the Directive 2004/38 must be interpreted as meaning that the question whether a person satisfies the condition of having “resided in the host Member State for the previous ten years” within the meaning of that provision must be assessed at the date on which the initial expulsion decision is adopted.

6. This decision coincides with jurisprudence in the courts of England and Wales including Warsame [2016] EWCA Civ 16. Judge Oxlade, instead of calculating backwards from the date of the deportation decision, has calculated the period of ten years forward from the appellant's arrival in the United Kingdom in 2005. By doing so, he erred in law.

7. Ms Khan, who appeared for the appellant before the Upper Tribunal, argued first that the judge had made a comprehensive decision which

considered both “serious” grounds as well as “imperative” grounds. At [2], the judge wrote:

For the following reasons, I find the appellant has continuously lived in the UK since January 2005; in accordance with Regulation 27(4) of the Immigration (European Economic Area) Regulations 2016 … he can only be removed on imperative grounds of public security and I am not satisfied that this threshold has been made out on the facts. Further, I am not satisfied the personal conduct of the appellant is a genuine present and sufficiently serious threat affecting one of the fundamental interests of society or that deportation would comply with the principle of proportionality.

8. Ms Khan submitted that, even if the judge were mistaken in finding that “imperative” grounds applied, he had, in the alternative, also found that “serious” grounds did not apply in the appellant's case.

9. Whilst initially appearing to be attractive, I do not agree with that submission. First, [2] is in the nature of a summary of the findings and analysis which will follow in the decision. The problem with Ms Khan’s submission is that, having referred to “serious” grounds at [2] Judge Oxlade did not thereafter refer to those grounds at all. Indeed, having found at [37] that imperative grounds applied, the remainder of his analysis [40] was not favourable to the appellant. In essence, the judge found that the appellant's conduct had been poor and was unlikely to change; the appellant seemed unable to understand the meaning of disqualification from driving. He had repeatedly driven whilst disqualified and indeed, it had not even “crossed his mind that he was banned”. The judge concluded [41] that the appellant did not “display any insight or understanding into his problem nor has developed any coping mechanisms, lacks honesty and candour about it and has not and will not seek help”. Further, in summarising the submissions made by Mr Clarke, Counsel on behalf of the appellant before the First-tier Tribunal at [19] the judge noted that “… it was conceded that if the test was ‘a genuine and present threat’ [Regulation 23(5)(c)] this could be made out, but this threshold was not applicable to a permanent resident”. That statement is somewhat puzzling given that Regulation 23(3) provides that a decision may not be taken “in respect of a person with permanent residence … except on serious grounds of public policy and public security”. I consider it likely that the judge is referring, at the end of [19], to “imperative” grounds. In any event, notwithstanding the judge’s “blanket” summary at [2], it is likely that he took the view (as, it would seem, did Mr Clarke also) that, had “serious” grounds been relevant, the provisions of Regulation 27(5)(c) at the very least had been met by appellant.

10. The Tribunal’s findings beg the question as to whether the judge’s summary at [2] is consistent with the remainder of the analysis. I consider that it is not. In my opinion the judge at [42] has only allowed the appeal, especially in light of what he has said regarding the appellant's conduct and character at [40], because the “imperative” grounds applied. In other words, there is no reasoning at all in the decision to support the judge’s finding at [2] as regards “serious” grounds.

11. Ms Khan’s further submission was that the appellant's conduct had not been addressed in the decision letter but only his past offending, an analysis which offended Regulation 27(5)(e). There was no OASys Report in this case whilst there was significant evidence that the appellant had established integration in the United Kingdom and appeared prior to his

conviction. Further, his offences were not serious when considered objectively and consisted only of road traffic offences. Ms Khan submitted that, even if Judge Oxlade had addressed the correct “serious” level of protection, he would have concluded that the threshold had not been crossed.

12. I disagree with that submission. I refer again to what the judge has said at [40]. The judge has clearly taken a very dim view of the appellant's conduct and he found that there was no evidence of the appellant’ having any insight into his offending or any serious intention by him to behave differently in the future. I find that it is simply not possible to read what the judge has said at [40–42] as indicating that neither Regulation 27 threshold had been crossed.

13. In the circumstances, I set aside the judge’s decision. The decision will be re-made in the Upper Tribunal by Upper Tribunal Judge Lane at or following a resumed hearing in Bradford on a date to be fixed. For the avoidance of doubt, the provisions of Regulation 27(3) apply in the case of this appellant. Accordingly, the considerations at sub-paragraph (5) of the Regulation will need to be considered by the Tribunal. I see no reason to interfere with the findings of fact made by Judge Oxlade. The findings contained in his decision at [28] et seq shall stand accordingly. Both parties may adduce fresh evidence to bring the circumstances of the appellant and his family up-to-date as at the resumed hearing. Any fresh written evidence must be sent to the Tribunal and to the other party no later than 10 days before the resumed hearing.

Notice of Decision

14. The decision of the First-tier Tribunal which was promulgated on 19 February 2018 is set aside. All the findings of fact shall stand. The Upper Tribunal (Upper Tribunal Judge Lane) shall re-make the decision at a resumed hearing on a date to be fixed (two hours allowed).

15. No anonymity direction is made.

2. At the resumed hearing at Bradford on 31 August 2018, Mrs Pettersen, a Senior Home Office Presenting Officer, appeared for the respondent. I am satisfied that notices of hearing were sent to the appellant and to his representatives (All Nations Legal Services) by second class post on 25 July 2018. No explanation or excuse has been received for the failure of either the appellant or the representatives to attend. In the circumstances, I proceeded with the hearing in the absence of the appellant/his representatives.

3. The appellant was served with notice of a liability to be deported on 27 October 2017. In the light of the findings which I made in my error of law decision (see above) it was for the appellant to demonstrate that he had been living in the United Kingdom for 10 years prior to October 2017 in order for him to attract a higher level of protection under the 2016 Regulations. The appellant claims to have arrived in the United Kingdom in 2006 but, as Mrs Pettersen pointed out, the evidence was not clear. There was no evidence at all from the Probation Services or, indeed, any evidence at all updating the circumstances of appellant himself following

the error of law decision. In particular, there is no evidence that the appellant has been rehabilitated within the society of the United Kingdom. I am reminded also of the preserved findings of Judge Oxlade (see error of law decision – [13]) he had set out in his own decision at [28] *et seq.* The judge found that the appellant had no insight or understanding into his own problems and no coping mechanisms and that he lacked honesty and candour about his persistent offending. In the circumstances, I agree with Mrs Pettersen that the appellant's case falls to be considered under Regulation 27(3) of the 2016 Regulations:-

> (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and 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 in the best interests of the person concerned, 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(17).

4. Subparagraph (5) provides as follows:

> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—
>
> (a) the decision must comply with the principle of proportionality;
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> (b) the decision must be based exclusively on the personal conduct of the person concerned;
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> (c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
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> (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;
>
> (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.
>
> (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

5. I am reminded that Judge Oxlade found (and I have preserved his findings) that the appellant remains at a high risk of re-offending [40]. I am aware that the appellant's previous criminal convictions do not in themselves justify a decision to deport him but his past conduct and Judge Oxlade's finding as regards his propensity to re-offend are important considerations. I am aware also of the length of time which the appellant claims to have been in the United Kingdom but I find that he has failed to prove any particular length of residence which might afford him a level of protection beyond that offered by Regulation 27(3). Further, again in the light of the findings of Judge Oxlade, I find that the appellant has failed to integrate socially and culturally into the United Kingdom. I have no evidence that the appellant has poor health and there is very little evidence as regards his family and economic situation (and no evidence at all as at the date of the resumed hearing). Considering these findings and observations collectively, I find that the appeal of the appellant against the decision to deport him should be dismissed. I accept that there exist serious grounds of public policy and public security which require the appellant's deportation. I observe also that, although I have set aside Judge Oxlade's decision, I have preserved his findings; it is my opinion that had Judge Oxlade correctly considered that he was dealing with "serious" as opposed to "imperative" grounds for the deportation, he too would have dismissed this appeal.

Notice of Decision

6. The appeal of the appellant against the decision of the Secretary of State to deport him to Poland which is dated 27 October 2017 is dismissed.

7. No anonymity direction is made.

Signed Date 26 September 2018

Upper Tribunal Judge Lane

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 26 September 2018

Upper Tribunal Judge Lane