Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00422/2016**

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision and Reasons Promulgated**
On 26th March 2018	**On 11th April 2018**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

DARIUSZ WASILUK
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Ms C Fletcher, counsel, instructed by JS Solicitors

DETERMINATION AND REASONS

1. For the reasons set out in his decision, First-tier Tribunal Judge Cameron allowed Mr Wasiluk's appeal under the EEA Regulations against the deportation order signed on 25th August 2016. The SSHD applied for and was granted permission on the grounds that it was arguable that the judge had failed to correctly assess the level of threat posed by the appellant to the fundamental interests of society; although the OASys report assessed the appellant as a low risk of offending, he is assessed as a medium risk of harm to children; the First-tier Tribunal judge incorrectly focussed on the low risk of re-offending and overlooked the assessment of harm.

Background and relevant findings of the First-tier Tribunal judge

2. Although arrangements had been made for Mr Wasiluk to give evidence to the First-tier Tribunal by Skype – he was in Ireland having been refused leave to enter the UK to give evidence – the Skype link failed. His counsel agreed that the hearing before the First-tier Tribunal judge could go ahead in his absence.

3. Mr Wasiluk is a Polish national. The First-tier Tribunal found that he had entered the UK in 2009 and had remained in the UK since then until his deportation. The First-tier Tribunal judge found, a conclusion that has not been challenged by the SSHD, that Mr Wasiluk had been resident in the UK in accordance with the 2006 regulations for a continuous period of five years and therefore the relevant test to be applied in the assessment of his deportation was whether there are serious grounds of public policy or public security which require his deportation.

4. Mr Wasiluk has a daughter (who is not a British Citizen) who was born in the UK on 18 September 2009. Her mother is also a Polish national; she and Mr Wasiluk do not live together; the child lives with her mother, who is not his current partner, in the UK. He has a genuine and subsisting relationship with his current partner, with whom he was living prior to his deportation. The First-tier Tribunal judge made no findings on the relationship with his daughter, whether there were obstacles to their family life continuing if he were not in the UK or the nature of his relationship with his daughter. The judge made no findings on whether there were obstacles to his family life with his partner continuing if he were not in the UK.

5. On 21 March 2016 Mr Wasiluk was convicted, on a plea of guilty at the plea and case management hearing, to two counts of taking a child without lawful authority to remove the child from lawful custody. He was sentenced to 16 months' imprisonment for each offence to run concurrently and was required to pay a victim surcharge of £100.

6. The sentencing judge's remarks included as follows:

> "…The facts may be summarised as follows; on Christmas Day of last year, members of the Turkish community in Tottenham were holding a party in a community centre; there were families and children in attendance. Shortly after midnight, so in the very, very early minutes really, of Boxing Day, you entered that community centre uninvited and in what was plainly a drunken state. You had spent the earlier part of Christmas Day with friends, I am told, eating and drinking.
> You were to tell the police in the interview following your arrest that you simply had no idea as to how or why you went into that community centre at that time. You were living in North London but it appears, at least, that the community centre was not on your way home, so that remains a mystery as to why you were in that area at all.
> CCTV recorded what actually happened inside the centre. You were seen, initially, in a brief exchange with a small group of adults, and then moments later seemed to speak to the first of the two young girls on the indictment…..along the lines of, as she recalled, "Come and clean the toilet", and you led her, gently, it must be said in fairness to you, along the corridor for a short distance in the direction of the lavatories. The second girl…is the same age, six years of age, then came into view; you plainly said something to her, it would seem of a similar nature, but she almost immediately turned away from you as then did *Child A,* both girls plainly being bright and alert youngsters and able to appreciate something was not right.
> One of the adults present actually spotted what was going on and approached you….he intervened, he told you to leave – other adults became involved – and you did. So the incident itself lasted, it seems common ground, somewhere in the region of forty seconds or so, very short.
> …..
> In the interview, you said you had been drinking all day and that you simply had no recollection of what had happened. When you pleaded guilty you submitted a basis of plea central to that basis. Central to that basis is the assertion made on your behalf that you had no intention to do anything with the two young girls.
> …
> You have no criminal record of any sort in this country, neither have you any record in Poland; records have confirmed that. Whilst it seems that no record has been

> provided from South Africa…I accept…that you have not been in trouble in that country either.
> …
> Police have researched your background with great care…Nothing has been found to suggest any inappropriate interest in children, or for that matter, inappropriate interest in matters sexual. I am satisfied, therefore, in the light of all the material presented to me that this behaviour is totally out of character for you.
> …

7. The sentencing judge concluded that Mr Wasiluk was not dangerous within the language of the Criminal Justice system. He endorsed the Pre-Sentence Report as thoughtful and well-reasoned and that it could not be concluded that there was a sexual or violent motive in the encounter.

8. The Pre-Sentence Report records, inter alia, the following:

> …When pressed on a possible motive for his actions Mr Wasiluk said he was very popular at children's parties, that he was often the most popular parent and got on very well with children. Mr Wasiluk highlighted his intoxication that day but accepted that alcohol disinhibits emotions and thinking rather than being a motivating factor. Mr Wasiluk is at a loss to explain his behaviour but acknowledged the seriousness of his offences.
> ….his intoxication was a feature of his behaviour but does not actually explain his motivation

9. The First-tier Tribunal judge noted the appellant had no previous convictions, and that Mr Wasiluk was unlikely to cause serious harm unless there was a change in circumstances for example drug or alcohol misuse. The judge notes that Mr Wasiluk "was intoxicated at the time [of the offences] and that this disinhibited his thinking". The judge also notes Mr Wasiluk's denial of the offences and his assertions that he was advised to plead guilty in order to face a lesser sentence but the judge states that despite this he is required to consider the offences as he pleaded to. Having considered the evidence the judge effectively adopts the conclusion of the OASys report that Mr Wasiluk is at medium risk of harm to the public but at low risk of re-offending.

10. The significant difficulty with the judge's conclusion in allowing the appeal is that he fails to take into account the fact that Mr Wasiluk had failed to engage in any programmes in relation to alcohol misuse, failed to take account of the conclusions both in the OASYs report and the pre-sentence report that the risk of serious harm increased if there were alcohol misuse and that the offences had occurred during a period of alcohol misuse which had disinhibited his thinking. There was simply no evidence before the judge to indicate that Mr Wasiluk did not continue to misuse alcohol in the manner which had led to the offence or that he had addressed that misuse. It is simply inadequate to draw the conclusion that because there had been no further offences, then he had no propensity to offend. That is a failure to examine and draw conclusions from the nature and cause of the offences. It may be that the offences were totally out of character. But they were very serious offences, brought about by the inhibiting effect of alcohol, for which there was no evidence that such behaviour was no longer prevalent. This combined with his evidence at the time of the hearing before the First-tier Tribunal that he had not committed the offences indicate a failure by the First-tier Tribunal judge to address the task before him; namely is there a genuine, present and serious threat affecting one of the fundamental interest of society. On the basis of the evidence before the First-tier Tribunal at that time it is perverse that the First-tier Tribunal judge did not find that there was a genuine, present and serious threat: the offences had been committed whilst disinhibited through the misuse of alcohol, there was no evidence that he had undertaken any alcohol rehabilitation

programmes, there was no evidence that he no longer abused alcohol (in particular 'binge drinking') and he now denied he had committed the offences to which he had earlier pleaded guilty.

11. The First-tier Tribunal judge erred in law in allowing the appeal of Mr Wasiluk.

Remaking

12. At the hearing before me I discussed with the parties the question of remaking the decision if I were to set aside the First-tier Tribunal decision. Mr Jarvis was of the opinion that the decision should be remitted to the First-tier Tribunal judge to enable findings of fact to be made. I expressed the view that there did not seem any reason why I could not go on to re-make the decision based on the evidence before me. Ms Fletcher concurred that this was possible and that she had no objection to such a course of action. Although I indicated at the hearing that that was the course of action I would pursue, on reflection I have decided that this appeal should be remitted to the First-tier Tribunal for further evidence to enable facts to be found on the nature of his relationship with his daughter, obstacles to family life continuing with his daughter and/or his current partner and, of course, whether he is a genuine and present and sufficiently serious threat to society affecting one of the fundamental interest of society. Mr Wasiluk has never given oral evidence to the Tribunal and several months have passed since his deportation.

13. Given the nature and extent of the fact finding required I therefore remit this appeal to the First-tier Tribunal, the findings set out in paragraphs 3, 4 and 5 above retained (unless of course his relationship with his current partner has ceased to exist).

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision to be remade and remit the appeal to the First-tier Tribunal

Date 9th April 2018

Upper Tribunal Judge Coker