Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00440/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 December 2017	**On 20 February 2018**

Before

THE HONOURABLE MR JUSTICE MORRIS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE SOUTHERN

Between

MARIUSZ JACEK WISNIEWSKI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought with permission by Mariusz Jacek Wisniewski, the appellant, against a decision of the First-tier Tribunal, Judge Smith, promulgated on 21 September 2017 ("the FtT decision"). By the FtT decision the judge dismissed the appellant's appeal against the decision of the Secretary of State dated 20 June 2017 to deport the appellant from the United Kingdom in accordance with Regulations 23(6)(b) and 27 of the Immigration (EEA) Regulations 2016 ("the 2016 Regulations").

2. The appellant was to be deported on the basis that as a result of a conviction for battery he represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society within the meaning of Regulation 27(5)(c) of the 2016 Regulations. The appellant appeals essentially on the grounds that the Home Office decision was contrary to the evidence. As regards error of law he contends that the FtT Judge erred in law in relation to the burden of proof.

3. The appellant has not appeared at the hearing today. He has, we are informed, been removed from the country in October 2017. We have been reminded of the fact that in these circumstances the appellant would have or does have a right to attend this hearing under the Regulations but no application to return to the country to attend the hearing has been made. Accordingly we proceeded to hear the appeal.

The Factual Background

4. The appellant is aged 35 and a Polish national. He claims to have been resident in the UK since 2008, doing a variety of jobs. However, the Secretary of State did not accept that he had been resident for at least five years (so that he did not qualify for an enhanced level of protection from removal). He had a relationship with a Ms N from 2008 onwards and together they have a son born in January 2010. In 2014 the appellant was convicted at North Lincolnshire Magistrates' Court of an offence of common assault and placed under a supervision requirement under a community order. That order was revoked on 28 January 2015. More significantly, on 17 May 2017 he pleaded guilty to two offences of battery at Humber Magistrates' Court. The victim was Ms N. He was sentenced to sixteen weeks' imprisonment and additionally a restraining order and a protection from harassment order were imposed, both directed towards contact with Ms N.

5. Notice of Intention to Deport was served on the appellant on 26 May 2017. From the end of his custodial sentence until his removal he was detained in immigration detention. In the Home Office decision the Secretary of State stated that the appellant had failed to provide any evidence to support continuous residence in the UK for ten years nor to support his claim that he had been exercising treaty rights. The Home Office decision then went on to set out the reason for the finding under Regulation 27.

6. The appellant appealed to the First-tier Tribunal and that appeal was dismissed. On 17 October 2017 First-tier Tribunal Judge Nightingale granted permission, stating at paragraph 3 of that grant of permission that it is arguable that the FtT Judge fell into error in directing himself on the burden of proof. The relevant provisions of the 2016 Regulations and certain case law are set out in the FtT judgment.

The FtT Judgment

7. The appellant had been in detention and was unrepresented throughout. He declined to attend the hearing before the FtT. He sent two letters enclosing some material in support of his position, both in relation to past employment and in relation to his son.

8. The FtT Judge dismissed the appeal. In summary, he held, first, the evidence provided by the appellant at that stage did not support the appellant's claim that he had been exercising his treaty rights for longer than five years (paragraph 21). There was no evidence that the appellant had learnt to control his violent temper and that he is capable of again being violent (paragraph 25) and on that basis the appellant represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society, see paragraph 31.

9. As regards his son there was no sufficient evidence of recent contact and he had provided no evidence that he was still part of his son's life: "It was reasonable to assume that it has been some time since he has seen his son" (see paragraph 32). Of particular note in the FtT judgment is paragraph 9 of the decision where FtT Judge Smith stated: "In deportation appeals and appeals under the Immigration Rules the burden of proof is on the appellant and the standard of proof required is the balance of probabilities."

10. In his handwritten grounds of appeal the appellant contends that he has been resident in the UK for more than five years and now produces HMRC documents showing him working and paying taxes since 2008. He says he was advised not to attend the hearing before the FtT Judge. He accepts that the first offence did relate to Ms N but it was not serious, that he has no record of violence since February 2017, he has shown real remorse and is keen to control his anger and that he was taking steps to address that issue. He further said that he was still very much part of his son's life. He had a very strong relationship with him and he attached letters and the photographs of his son were recent. In advancing those grounds the appellant has put before the Upper Tribunal new and different evidence that was not before the FtT Judge.

11. The Secretary of State's submissions in the letter of 8 November 2017 were that paragraph 9 of the FtT decision is merely a general paragraph inserted into the decision and it is right that the burden is on the appellant to show he meets different criteria. The FtT Judge found that the appellant had not displaced the Secretary of State's claim that the appellant fell to be considered under Regulation 23(6)(b). The FtT Judge went on to apply Regulation 27 correctly and made a finding that the appellant represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society. The FtT Judge directed himself appropriately and the grounds failed to identify error of law.

12. In oral submissions today the Secretary of State has added that when looked at holistically it is clear that the FtT Judge did apply the correct burden of proof.

13. In this appeal two issues arise, first whether the FtT Judge erred in law in relation to the burden of proof and secondly the position of new evidence presented by the appellant to this Tribunal on his appeal.

14. Dealing with the second point first, the position is that in considering whether or not the FtT Judge erred in law we address matters on the state of the evidence before the FtT Judge at that time. Thus it follows that the new evidence now submitted is not relevant in considering the first stage of whether there is an error of law in the FtT decision. Whether or not such new evidence would be admissible would only be relevant if we conclude that there had been an error of law in the FtT decision.

15. Turning then to the first issue, the burden of proof, it is common ground that in a case arising under the 2016 Regulations and in particular in relation to the question under Regulation 27(5)(c) of those Regulations the burden of proving that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society rests on the Secretary of State, see the case of **Arranz [2017] UKUT 00294 (IAC)**.

16. Secondly, in our judgment, at the very least it is not clear on its face that the FtT Judge directed himself correctly in law. No reference is made to the burden of proof in relation to Regulation 27(5)(c) and moreover paragraph 9 of the judgment, which itself refers to the 2016 Regulations, positively states that the burden of proof was upon the appellant. In our judgment, that certainly has the appearance of a misdirection in law.

17. Thirdly, however, it is clear on the facts that the FtT Judge made positive findings of fact that the appellant "is capable of again being violent", see paragraph 25, and that there is "the very real potential of further violent conduct", see paragraph 31. That finding was based on material placed before the FtT Judge by the Secretary of State. Whilst in paragraph 25 of the FtT decision the judge refers to an absence of evidence to the contrary we consider that on the evidence which was before him at the time he was entitled to conclude that the Secretary of State had discharged the burden of proof upon her.

18. Whilst we are well aware of the fact that pursuant to Regulation 27(5)(e) of the 2016 Regulations a person's previous criminal convictions do not in themselves justify a decision of deportation the FtT Judge expressly refers in the FtT decision to facts going beyond those criminal convictions which support his conclusion of a very real potential of further violent conduct, in particular as pointed out at paragraph 23 of the FtT decision: "The offences in 2017 were serious enough to attract an immediate prison sentence coupled with restraining and harassment orders. The court on that occasion were clearly concerned that this appellant may well repeat violent acts to Ms N."

19. For these reasons we consider that the FtT Judge did not in fact apply the wrong burden of proof and thus did not commit any error of law in this case. Accordingly this appeal falls to be dismissed.

20. We make two further observations, first that whilst we recognise that the appellant has now been removed it was or might still be open to him to place before the Secretary of State the further evidence which he raised in this appeal about both his history of residence and working, his relationship with his son and his efforts towards rehabilitation, and secondly we refer to Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008, which gives this Tribunal the power to set aside a decision which disposes of proceedings and to remake it in circumstances where a party was not present at a hearing relating to the proceedings. So the appellant does have the right, if he so wishes, to apply under Rule 43.

Notice of Decision

1. The First-tier-Tribunal Judge made no material error of law and her decision to dismiss the appeal is to stand.

2. The appeal is dismissed.

No anonymity direction is made.

Signed 

Mr Justice Morris

Dated 12 February 2018