Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00132/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 February 2019	**On 09 April 2019**

Before

THE HONOURABLE MR JUSTICE WAKSMAN
(sitting as a judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SEBASTIAN [J]
(ANONYMITY DIRECTION NOT MADE)

Respondent

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

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal to allow the appeal of the respondent (hereinafter "the claimant") against a decision of the Secretary of State to deport him. This is a "public policy" decision under Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016.

2. The claimant has not exercised treaty rights for a continuous period of five years and so the Regulations give only the lowest level of protection against removal. Nevertheless he cannot be deported unless his personal conduct represents "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". This is set out at Regulation 27(5)(c).

3. This claimant has one conviction for an offence of dishonesty in 2016 for which he was fined, and, much more seriously, he was sent to prison for a total of nine months in March 2017 for possessing an imitation firearm in a public place and possessing a knife in a public place and possessing a Class B drug (amphetamine). The offences were committed on 10 January 2017.

4. The First-tier Tribunal has allowed the appeal and the main reason for allowing the appeal is that the judge did not accept that the requirements of 27(5)(c) were met.

5. We must reflect on the judge's position and remember that he had the advantage of hearing from the claimant and the claimant's witnesses. They made a favourable impression and we must give that proper weight. We note that it was their evidence, which the judge accepted, that the process of being taken before the court and sent to prison has had a shocking and salutary effect, which may well be the case.

6. The problem we have in considering whether the claimant presents a present risk is the seriousness of the offence. The appellant armed himself and went with a friend who considered himself under threat. He may well have intended to use the weapons only in his defence but they were taken to be used. This was a serious threat to the peace. Further the offence was committed recently and the claimant has a history of some kind of mental disturbance. We mention this respectfully. People cannot help being ill, but there has been an attempt at suicide which his wife had to deal with, and we are concerned about this man's inherent stability.

7. This is not a case where there has been a prolonged period of industrious good behaviour showing that the criminality can be seen in isolation. It is not a case where there is any objective evidence of the person taking advantage of the opportunities that are sometimes available in prison to reflect on his life and reorganise his behaviour. That evidence is just not there.

8. The OASys Report found the risk of harm to the public to be "medium" even though the risk of reconviction was "low". In other words the probation officers preparing the OASys Report did not expect the claimant to get into trouble, but if he did it was expected to be quite serious trouble. The claimant said that he had been consuming a mixture of alcohol and amphetamine when he committed the offence. That was clearly going to affect his behaviour. We have not seen any independent

evidence that indicates that any intention that the claimant has formed to put such behaviour behind him really has been put behind him. The evidence is just not there.

9. We do not accept that the judge was entitled to accept as accurate the evidence of the family members in the terms that they gave it without something objective to give it weight and context. This is not to say that family members are necessarily dishonest but they are likely to be biased and their evidence needs to be taken with a degree of circumspection unless it could be put in context and we found there is nothing here that puts the evidence in a context which would make it more likely to be right. It is simply evidence of an aspiration.

10. The short point is that although we understand where the judge came from, we cannot accept he was entitled to reach the conclusion that he did about the appellant's future behaviour when there is no independent evidence to give reasons to find the optimism to be well-founded. This means that the reason advanced by the judge for allowing the appeal was wrong in law and we set aside the decision.

11. We then have to decide what to do now. There is no-one here before us to represent the claimant. We have had the advantage of reading the papers. The stay in the United Kingdom is not particularly prolonged; it is not long enough to give even the basic level of particular protection to which EEA nationals can be entitled. The appellant is a family man. He has three minor children but they have only been in the United Kingdom since 2013 and there is nothing to suggest it would be unduly harsh for the family to return to Poland or manage without him if that is what they chose to do. No doubt it is in the children's best interests that the family stays together but that is not determinative. We do not suggest that removing the claimant is a trivial matter. His family members clearly want to live in the United Kingdom which is why they have established themselves there, but they cannot do that with the claimant because of the claimant's behaviour. It is not unduly harsh or unlawful in the sense of it being a disproportionate interference with their private and family lives to require them to manage without him or to require them to move.

12. There is one other point we feel we ought to make because we are concerned that it is not misrepresented. There was an observation in the OASys Report about the claimant being a risk to children. This is not for the disgusting reasons that sometimes occur. It is simply a reflection of the extreme caution that is shown to children these days that caused the officer to suggest there was a need to be alert to the possibility of problems if the claimant returned to the family home. That is as far as it goes, but to the extent that it is relevant to our deliberations it is in favour of dismissing rather than allowing the appeal against the Secretary of State's decision. It is a further indication that there is not a proper reason yet to be confident that the professed declarations of new behaviour are well-founded.

13. In short we find that this is a case of a man whose criminality is sufficient to warrant deportation and who has not been able to show that his or his family's circumstances come within the exceptions and he is not somebody who is entitled under EEA law with its different regime to be allowed to remain for the reasons we have already outlined.

14. The only thing to say before concluding is that this decision was made without the benefit of the claimant being here. We put the case back in the list to 11.30 a.m. to give him time to arrive; at 12.30 p.m. he has not appeared. No explanation has been offered and the papers show that proper service was effected on his address for service. It follows therefore that as far as we can ascertain he had proper notice of the hearing and failed to attend without explanation, which is why we continued in his absence.

Notice of Decision

15. This is our decision. The Secretary of State's appeal succeeds. We set aside the decision of the First-tier Tribunal and substitute the decision dismissing the claimant's appeal against the Secretary of State's decision to deport him.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 4 April 2019