Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00381/2017

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre
On: 8th October 2019

Decision and Reasons Promulgated
On: 18th October 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Brajan Drozd
(anonymity direction not made)

Respondent

For the Appellant: **Mr A. McVeety, Senior Home Office Presenting Officer**
For the Respondent: **-**

DECISION AND REASONS

1. The Respondent is a national of Poland born on the 9th February 1997. His case comes before the Upper Tribunal because the Secretary of State wishes to deport him, pursuant to Regulation 27 of the Immigration (European Economic Area) Regulations 2016.

2. My task in this decision is to determine whether the Secretary of State has made out his case for expulsion. Before I make my decision, and set out the reasons for it, it is appropriate that I set out the history of this matter so far.

Case History

3. Mr Drozd has, it is now established, lived in the United Kingdom since he was eight years old, having arrived in the care of his mother. He has lived here, with his mother, siblings and latterly stepfather, ever since.

4. He has been in trouble with the law on a number of occasions. In August 2011, when he was 14, he was cautioned for theft. In 2015 he received a conditional discharge upon conviction for criminal damage and battery. In February 2016 his criminality took a more serious turn, when he received a sentence of 24 months in a Young Offenders Institution for his part in a drunken group assault on a man who was robbed and kicked to the ground. In May of that year he received a further consecutive sentence for burglary. This is a sorry record given that Mr Drozd is still only 22 years old.

5. It was this string of convictions which led the Secretary of State, in June 2017, to the decision to deport him.

6. Mr Drozd appealed against that decision. On the 30th August 2017 the matter came before First-tier Tribunal Judge Thorne. By his written decision dated the 20th September 2017 Judge Thorne found as fact that Mr Drozd has lived in this country since he was 8 years old, and that he attended primary and secondary school here. Although there was limited documentary evidence to establish such long residence, there was a letter from his primary school and Judge Thorne noted that Mr Drozd speaks "English like a native with a strong regional accent". Judge Thorne was further satisfied that by the time that Mr Drozd was sent to prison, he had been living here for 10 years. He found that by virtue of Regulation 27(4) this meant that the Secretary of State had to demonstrate that there were "imperative grounds" before he could be deported. This he could not do, and the appeal was allowed.

7. The Secretary of State appealed to the Upper Tribunal. The grounds took issue with the factual finding that Mr Drozd had acquired ten years' residence. In particular it was alleged that Judge Thorne should have calculated backward from the date that he was sent to prison on the 15th February 2016. Since the letter from the primary school stated that he had enrolled in November 2006, the Secretary of State refused to accept that the full 10 years had been proven. By his calculations, Mr Drozd was short by 8 months. Reliance was placed on Onuekwere [2013] EUCJC C-378/12, with the submission made that Judge Thorne failed to consider whether Mr Drozd was in fact integrated. The grounds then say this:

> "The omission of such consideration of the Appellant's conduct in the 10 year period prior to conviction is a fundamental error, and the FTTJ should have considered the appeal on the basis that the Appellant only had a permanent right of residency. If the appeal had been considered on

that basis it is respectfully submitted that the FTTJ was bound to dismiss the appeal".

8. Permission was granted on those grounds, and the matter came before Upper Tribunal Judge Plimmer. By her decision of the 5th February 2018 Judge Plimmer found the decision of Judge Thorne to be flawed for error of law. Whilst the Secretary of State had not actually identified this, the correct position in law was that the 10 year period had to be calculated by counting backwards from the date of the decision to *deport*: see Regulation 27(4)(a). This Judge Thorne had not done. Nor had he investigated whether the prison term had undermined any level of integration that Mr Drozd may have achieved. Further Judge Plimmer had regard to what was then simply an Attorney-General's opinion in Vomero C-424/16, to the effect that the acquisition of permanent residence is a pre-requisite to achieving the '10 year' enhanced protection. She remitted the matter to Judge Thorne, preserving his other findings of fact and requiring him to make a fresh decision applying the correct legal framework.

9. Thus the matter came back before Judge Thorne. Having had regard to Judge Plimmer's decision, Judge Thorne found, in a detailed and cogent determination dated the 21st June 2019, as follows:

    - That the family entered the United Kingdom on the 7th February 2006
    - The decision to deport was made on the 28th June 2017
    - Counting backwards from the date of the deportation decision Mr Drozd had therefore lived in the United Kingdom for over ten years
    - Mr Drozd had however been sent to prison on the 24th May 2016, so his period of residence had been interrupted by a period in detention
    - In the decision of the Grand Chamber in Vomero[1] the CJEU had held that imprisonment can cast doubt on integrative links but periods in jail should not automatically be excluded from the calculation
    - On the facts, that period of detention did not interrupt or undermine Mr Drozd's degree of integration in the United Kingdom. He has lived here since he was a child, speaks English like a native and has little or no memory of life in Poland, where he retains no substantive connection. Mr Drozd engaged well with prison staff and the rehabilitative programme. He has established strong integrative links with British society
    - He has therefore maintained his 10 year continuous residence and it is for the Secretary of State to show that there are imperative grounds for his deportation
    - This he cannot do so the appeal must be allowed.

[1] B v Land Badem-Wurtemburg and Secretary of State for the Home Department v Vomero (Directive 2004/38/EC) Joined cases C-316/16 and C-424/16

10. Despite directing himself to the decision in Vomero to this effect, Judge Thorne made no explicit finding on whether, during that ten year period, Mr Drozd had acquired permanent residence, that is to say whether Mr Drozd had spent a continuous five year period 'living here in accordance with the Regulations'. There appears to be good reason for that omission. I have read the record of proceedings and it is clear that Ms Molomo, who appeared on behalf of the Secretary of State, made no submissions on the point. Further it seemed, from the Secretary of State's previous grounds to the Upper Tribunal, that the matter was regarded as settled (see my §7 above):

> "the FTTJ should have considered the appeal on the basis that the Appellant only had a permanent right of residency".

11. Judge Thorne will no doubt therefore be extremely surprised to learn that the Secretary of State subsequently sought, and obtained, permission to appeal against his decision on this very point. The single ground in this second appeal to the Upper Tribunal wass that it was not open to Judge Thorne to assume that permanent residency was acquired when Mr Drozd was a school student, because there was no evidence before him to show that he had taken out comprehensive sickness insurance.

12. By Regulation 4(1)(d)(ii) & (iii) a 'student' is defined as a person who:

> (d) "student" means a person who—
>
> (i) is enrolled, for the principal purpose of following a course of study (including vocational training), at a public or private establishment which is—
>
> (aa) financed from public funds; or
>
> (bb) otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located;
>
> **(ii) has comprehensive sickness insurance cover in the United Kingdom; and**
>
> **(iii) has assured the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that the person has sufficient resources not to become a burden on the social assistance system of the United Kingdom during the person's intended period of residence.**

13. At a hearing before me in June Mr Drozd readily admitted that he had never heard of comprehensive sickness insurance. Mr McVeety, who appeared for the Secretary of State, was able to tell from the Home Office records that Mr Drozd had not been issued with a registration certificate prior to 2011 which would

exempt him from the insurance requirement[2]. Nor was there any indication that a declaration of self-sufficiency had been made. It would therefore follow that on the evidence, Mr Drozd could not have qualified for permanent residence as 'qualified person' in his own right as a school student.

14. Applying Vomero, I was bound to find an error of law. In my written decision of the 21st June 2017 I said this:

> "As I think I have made plain, the Secretary of State's conduct in this matter has been less than satisfactory. At no time in either of the appeals before Judge Thorne has the issue of comprehensive sickness insurance been raised. Nor, as far as I can see, was it raised before Judge Plimmer. In his second decision Judge Thorne was quite entitled to proceed on the basis that it was agreed that Mr Drozd had acquired permanent residence, since that was the basis upon which the Secretary of State had hitherto put his case. That said, it is clear from Regulation 4, and Mr Drozd's own evidence, that he could not have acquired a permanent right of residence as a student. It would follow, applying Vomero, that he could not, on that basis at least, claim to have acquired the highest '10 year' level of protection against expulsion".

15. Having found error, I was not however prepared to simply remake the decision. That is because it was acknowledged by the Secretary of State that the error would be entirely immaterial if Mr Drozd had in fact acquired permanent residence in another capacity, i.e. as the family member of his mother, an EEA national exercising treaty rights. The Secretary of State accepted that it would be in the interests of justice to adjourn to give Mr Drozd the opportunity to demonstrate that his mother (or stepfather) had been economically active for a continuous five year period during his minority. I adjourned with directions for such evidence to be produced.

16. Unfortunately for Mr Drozd, it wasn't. Mr Drozd managed to obtain the HMRC records relating to his mother's work in the United Kingdom. These demonstrated that she has been continuously working since 2014 to date, but in the years preceding that her declared income was zero. The decision to deport was taken on the 28th June 2017. It followed that Mr Drozd could not demonstrate that he had acquired permanent residence as the family member of a qualified person; nor could be then rely on his ten years+ long residence to claim any enhanced protection against expulsion. It is on that basis then, that I proceed to remake the decision in this appeal.

[2] By the terms of the Secretary of State's published policy: *EEA Nationals Requiring Comprehensive Sickness Insurance (including transitional arrangements for students)* 7/2011

The Re-Made Decision

The Legal Framework

17. The Secretary of State seeks to deport Mr Drozd under the powers in Regulation 27:

> '**27.-** (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 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.
>
> **(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;**
>
> **(b) the decision must be based exclusively on the personal conduct of the person concerned;**
>
> **(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;**
>
> **(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.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010; or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).'

18. The relevant part of Schedule 1 is paragraph 7:

'**7.** For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;

(j) protecting the public;

> (k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);
>
> (l) countering terrorism and extremism and protecting shared values.

The Evidence

19. The bare facts relied upon by the Secretary of State are set out at my paragraph 4 above. In his submissions Mc McVeety indicated that the Secretary of State did not ask me to place any significant weight on either the 2011 caution or the 2015 conditional discharge, both of which arose from offences committed when Mr Drozd was a minor. The offences giving rise to the decision to deport were those for which Mr Drozd was convicted in May 2016. These were the robbery, burglary and assault, for which Mr Drozd received a sentence of 24 months concurrent in a Young Offenders Institution (at the date of conviction he was 19; he was 18 at the date of the offence). I have been provided with a copy of the sentencing remarks of HHJ Badley. As these remarks make clear, the central offences of the robbery and assault arose from a particularly nasty incident when Mr Drozd was drunk and apparently out of control:

> "The circumstances of that robbery were that you Brajan Drozd, for reasons of becoming embroiled in alcohol use, you and the young man that you were with took exception to [the first victim]; whether in fact there was some name calling between you really doesn't bear delving into, because you had taken alcohol. The other young man who was the victim had also taken alcohol and it was a potent mix of young people not able to handle the alcohol, finding slights and moving on from there towards offending.
>
> The situation became ugly; I note that Jake Manning, the companion that you at the time had with you, punched Mr Brown and started it off. Thereafter you joined in. [The victim] went to the ground. You punched [the second victim]. He tried to get away and noticed that you were hitting [the first victim] as he was on the ground and also going through his clothing as he lay unconscious stealing from him".

20. In June 2017, just over a year into sentence, the Probation Service prepared a report on Mr Drozd. This gives further background detail about the circumstances of the offence. Mr Drozd and two friends had already consumed a bottle of vodka when they went into Blackburn town centre on a Saturday night. They were refused entry to a bar because they were inappropriately dressed. They hung around outside. The two victims came out of that bar and words were exchanged between the two groups. From there it escalated in the manner described by HHJ Badley. At that time the probation service assessed Mr Drozd as having a 20% chance of reoffending within one year of discharge, and a 33% chance of reoffending within a two year period; this was classed as a 'medium' risk. The information used by the officer to make that assessment included the offences itself, the motivation and circumstances (i.e. the drinking and peer group) and the attitude displayed by Mr Drozd post-conviction.

21. In respect of that attitude Mr McVeety asked me to give particular weight to the attempts by Mr Drozd to minimise the seriousness of that offence. In the OASys report the probation officer made the following notes:

> "Initially he attempted to minimise the offences but after discussion pleaded guilty to the offences. He did state that the victim deserved what he got but later retracted this and stated that he did not deserve to be assaulted and expressed regret for his actions although the victim should not have threatened him and his friends"

Having drawn my attention to that passage Mr McVeety further pointed out that Mr Drozd had interrupted Mr McVeety's submission on the offence by saying "it wasn't as bad as its being made out". As I made clear to Mr Drozd at the hearing, attacking a man who is unconscious is an extremely serious assault and it was not to his credit that he attempted to minimise the severity of that assault. In fairness to Mr Drozd I do however acknowledge that at the hearing both myself and Mr McVeety were proceeding on the basis that this had been a group assault on a single victim: this does appear to have been at odds with the evidence I refer to above, which suggests that it was in fact a dispute between two groups.

22. There was some evidence of remorse and rehabilitation. The author of the June 2017 OASys report records Mr Drozd as having reflected that the victim could have been him or his brother, and that the man did not deserve what happened to him. He felt really bad about the assault then, and had developed insight into his violent offending, recognising that it was fuelled by cannabis, excessive alcohol consumption and "going along" with friends. Mr Drozd and the probation service consistently report that he has not drunk to excess since his offence was committed. Mr Drozd told me that since his release from prison he has not touched cannabis. He has had vodka on one occasion, and sometimes had a beer watching sport with his stepfather. He does not get drunk anymore. Since the day of the offence he has not seen the friends he was with that day. One of them had been a particularly close friend and Mr Drozd regrets that they are no longer in contact, but recognizes that it is not in his interest to renew that friendship. The Secretary of State accepts that Mr Drozd has complied with the terms of his licence, apart from one recent occasion where Mr Drozd was found to be in Blackburn town centre in contravention of a curfew (both Mr Drozd and Mr McVeety were uncertain about who might have imposed such a 'curfew' or what the terms of it might be).

23. Mr Drozd has attended all of his fortnightly probation service meetings and has committed no further offences. In a letter dated the 14th December 2018 Mrs Toni Routh, an offender manager, wrote of Mr Drozd that he had engaged well with the prison regime. He demonstrated positive behaviour throughout his programme and feedback from programme facilitators about him was very positive. Prison staff reported no adjudications and said that he was polite and well-mannered. Mrs Routh found Mr Drozd to be very open and honest during

the year that she spent working with him. He demonstrated good reflection about his offence, especially in relation to the victim and the consequences for society generally.

24. As to his personal circumstances Mr Drozd confirmed that he is back living with his mother and stepmother (he had initially been released on licence to his sister's address). His mother had – perhaps understandably – been furious with him about the conviction but now she was supporting him. His mother has submitted a signed witness statement in which she explains that Mr Drozd had a difficult childhood. His father was abusive and she left him when Mr Drozd was only a baby. She had struggled as a single mother to provide for her three children. When they moved to the United Kingdom in 2006 Mr Drozd had struggled at school but now he spoke more English than he does Polish. In 2012 he had been attacked by an unknown assailant – his jaw had been broken. She believes that this led to her son being anxious and seeking reassurance from being in a group of friends. That he was "easily influenced" by this group led him to substance abuse and to breaking the law. She believes that now her son has changed. She has remarried, and he has a strong relationship with her new husband. The family have had no problems with Mr Drozd since he was released from prison. She and his stepfather engage with him frequently about his life and past offending and are confident that they can keep him on the right path. The whole family life here apart from Mr Drozd's maternal grandmother, who remains in her village in Poland. His mother visits her at least every year; his sister has also been back to Poland to see her but he himself has not been back to Poland since he was in the early years of secondary school.

25. Mr Drozd told me, and I have no reason to doubt, that he has been employed full time since his release from prison last year. He is employed by a car valet company in Blackburn and he earns about £300 per week. He works 9-6 every day, 5 days per week. His employer is aware that he was in prison and gives him time off to attend his probation meetings – he lets him go early those days. Mr Drozd says that he gives his mother some money towards bills and housekeeping, and he is trying to save the rest to set up his own car valet business.

My Findings

26. Having regard to the factors set out at Regulation 27(5) I find as follows.

27. The Secretary of State seeks by her decision to protect one of the fundamental interests of society, namely protecting the public from violent crime. I find that the decision to deport arises exclusively from the conduct of Mr Drozd.

28. I am not satisfied, that as of todays date, Mr Drozd does represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

29. Although I have had, at the forefront of my mind, that Mr Drozd exhibited a horrible and frightening propensity to use violence exemplified in that assault in 2015, I am satisfied on balance that he has taken meaningful steps to address that issue. Although it is true that he has not been able to complete any 'thinking skills' courses in custody (these were not made available to him) these are not the only ways in which a prisoner can demonstrate rehabilitation.

30. I am satisfied that the risk of reoffending today is low. I so find for the following reasons. First, Mr Drozd has committed no further offences since November 2015. Although I accept that he has been in custody and/or licence for much of that time, it is of course the case the people can continue to offend even in those circumstances – particularly hot-headed young men prone to fighting. It is in that regard of note that Mr Drozd had an impeccable record as a prisoner. Second, he has complied well with the terms of his licence, attending all of his appointments with his probation officer save two, which were authorised absences. Third, he has satisfied me (and indeed Judge Thorne) that he is truly remorseful for his actions, and that he has taken personal action to prevent himself getting into trouble again: he has stopped smoking cannabis, he has cut off the friends that he was with that night and he has markedly reduced his alcohol intake to the extent that he now drinks only socially and very occasionally. He has, in short, grown up. Fourth, he has demonstrated his intentions and attitude by working full time.

31. I have had the opportunity to hear directly from Mr Drozd over the course of two hearings. Like Judge Thorne I am entirely satisfied that his imprisonment notwithstanding, Mr Drozd is integrated into British society. Although he does speak Polish, and does not shy away from his nationality, that heritage would not be readily apparent to a casual observer. As Judge Thorne found, he speaks with a "strong regional accent"; everything he has known since he was a young child – music, football, friends, surroundings – has been English. He has strong links with this country in terms of his immediate family – his sister, brother and their families, his mother and stepfather – are all resident here and have been for many years. Conversely his links with Poland are minimal. He has spent no more than a week in that country since he left aged 8, and has little contact with his grandmother who remains there. Having considered all of those matters, and having had particular regard to the offences committed, I am satisfied that his deportation, away from everything he knows, would not be a proportionate response to a series of offences committed as a youth.

32. It follows that the appeal must be allowed.

Decisions

33. The decision of the First-tier Tribunal is set aside.

34. The decision in the appeal is remade as follows: "the appeal is allowed under the Regulations".

35. I make no order for anonymity.

Upper Tribunal Judge Bruce
Dated 16th October 2019