Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00579/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Decision given orally immediately after hearing	**On 09 July 2019**
On 24 June 2019	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MICHAL [G]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No representation
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Poland who claims to have come to the UK in November 2007 to look for work. When he had found work and accommodation his wife and daughter joined him. The couple had another child in 2009.

2. Although there is an issue as to whether or not the appellant was working regularly since being in the UK it is common ground that his wife has been

working here because she has been employed by Burberrys since she has been in this country.

3. Regrettably the appellant having had an accident started committing offences to the extent that in a period of about eighteen months he was convicted of some fourteen or so offences, being one offence against the person, two thefts offences, one offence relating to police/courts/prisons, one drug offence, eight "miscellaneous offences" including various driving offences and one other offence described as a "nonrecording" offence. His offences included an offence of battery on a bailiff who was trying to do his job by taking possession of a vehicle which the appellant had driven when he had no insurance to do so.

4. Following these convictions the respondent made a decision to deport the appellant, having previously notified the appellant that it was intended to make a deportation order against him on grounds of public policy in accordance with Regulation 23(6)(b) and Regulation 27 of the Immigration (EEA) Regulations 2016, and having considered the appellant's representations received in response setting out the reasons why he should not be deported. The decision was dated 31 August 2018 and runs to some eighteen pages.

5. The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge Saffer sitting at Bradford on 12 November 2018, but in a decision and reasons promulgated sixteen days later on 28 November 2018 the appellant's appeal was dismissed.

6. Judge Saffer considered that the appellant had not established that he had lived in the UK exercising treaty rights for a period of over five years and also was not satisfied that he had established that he currently had a genuine and subsisting relationship with his wife or his children. One of the factors that influenced him in this decision (see paragraph 28) was that he had decided "to remove himself from them through the course of conduct and criminality he chose". He also noted that his wife had given evidence that she would stay in the UK without the appellant despite the fact that she had family support in Poland, could work there and that the children spoke some Polish. Judge Saffer considered this indicated that the relationship was not "as genuine or subsisting as they claim".

7. The appellant appealed against this decision and was granted permission to bring this appeal by First-tier Tribunal Judge I D Boyes.

8. When this appeal was first listed, there was no appearance either by the appellant or by any representative on his behalf and it was not clear that he had been served with notice of the hearing. Although the notice of hearing had been sent to the solicitors who were on the record, it was not clear whether or not they had in fact received it and so directions were given that those solicitors should inform the court whether or not they were still instructed and if not whether any other firm was instructed and that in either event the firm must give an address for the appellant. The

solicitors were also directed to notify the Tribunal as to whether or not they had received notification of the previous hearing and if they had why no one had been present.

9. The response of the solicitors is dated 24 May 2014 and they have asserted that the Tribunal had previously been notified of the appellant's Polish address as he had been moved to Poland and currently resided there. They also claimed that the firm had not been informed of the hearing date. The firm had relocated to a new address in Hanger Lane, which it was suggested was a reason why they had not received notification of the hearing. The firm apologised for failing to inform the Tribunal they were no longer instructed due to a lack of funds.

10. Subsequently the appellant was served with notification of this hearing, to his Polish address. He had indeed been removed pursuant to Regulation 33 of the 2016 EEA Regulations, and it does not appear that he has made any application to be allowed to re-enter the UK in order to be present at this hearing pursuant to Regulation 41; it would have been open to him to make such an application.

11. All the appellant has done is to write to the Tribunal a one page letter saying that his solicitors demanded more money from him which he could not afford which is why they were no longer representing him and that his family have suffered "disastrous consequences" as a result of his removal. However there is no further evidence adduced on his behalf and no member of his family has turned up to the hearing today either.

12. At the hearing at the outset Mr Kotas on behalf of the respondent accepted that the judge had made an error of law in deciding that the appellant had not had a right to permanent residence at the relevant time. In my judgment, Mr Kotas was correct so to concede.

13. Although it was open to the judge to find that he the appellant had not acquired a right of permanent residence by himself working for a continuous period of five years while in the UK, the judge failed to have regard to the derivative right of residence which the appellant had acquired by reason of his marriage to his wife, also a Polish national who it is accepted on behalf of the respondent had been exercising treaty rights in this country.

14. By Regulation 14(2) (which provision is in similar albeit slightly differently worded terms in both the 2006 EEA Regulations and the 2016 EEA Regulations),

> "A person … who is a family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a right of permanent residence under Regulation 15 is entitled to remain in the United Kingdom for so long as [he or she] remains a family member of that person or EEA national".

15. Accordingly, as the appellant's wife was residing in the UK as a qualified person (under paragraph 14(1)) the appellant while he was married to her (and regardless of whether or not the marriage was towards its latter end even subsisting) had a right of residence under the EEA Regulations. By Regulation 15(1)(a) the appellant would then be entitled to a right of permanent residence because he was "an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years".

16. Accordingly the appellant had on any view acquired the right of permanent residence through his wife.

17. It follows that insofar as the judge's decision was founded upon a mistaken belief that he was not entitled to permanent residence, the judge was wrong and that was an error of law.

18. The issue at this stage however is whether this was a material error. The judge having made his findings and in particular (at paragraph 30) that he had "failed to establish that he has integrated socially or culturally in society here given his failure to establish how long he has been here and his lifestyle criminality choice" also went on to consider what the position would be if he had acquired the right of permanent residence. As to this, the judge's findings are set out at paragraph 31 as follows:

> "31. I want to make it clear that had he been able to establish he had five years' lawful residence, I would still have dismissed the appeal for the following reasons. There are serious grounds of public policy and public security in this case due to the range of his criminality and his deliberate breach of court orders and attack on a bailiff (which was the conviction for battery). He presents a genuine, present and sufficiently serious threat to society given his lifestyle choice of criminality and continued dishonesty shown to me. The decision is proportionate and based exclusively on his personal conduct".

19. The relevance of whether or not the appellant has established permanent residence is that if he has, then pursuant to Regulation 21(3) of the 2006 Regulations (again identical in all material respect to what is now repeated under Regulation 27(3) of the 2016 Regulations) a decision to deport this appellant on public policy or public security grounds can only be taken "on serious grounds of public policy and public security".

20. It is clear that the judge had regard to this test when giving his reasons for finding that there were "serious grounds of public policy and public security in this case". Accordingly, although I have found that the judge was wrong in finding that the appellant had not established a right of permanent residence in this country, this was immaterial as the judge gave sustainable reasons why he would still have found that the decision to deport was justified.

21. Insofar as in line with the decision in *FV (Italy)* it is open in certain circumstances for a person with ten years' continuous residence before

being imprisoned to claim that a "relevant decision" could only be taken on imperative grounds of public security, (see now Reg 27(4) of the 2016 Regulations), given the judge's finding that the appellant had failed to establish that he had integrated socially or culturally into society here for the reasons given at paragraph 30 of his decision, there is no basis upon which on the facts of this case such an argument could succeed.

22. This appellant is a person whose criminal record is sufficiently serious that the judge's decision that there were serious grounds of public policy and public security justifying his deportation because he presented a genuine, present and sufficiently serious threat to society was sustainable.

23. The judge in his final paragraph considered the impact of the appellant's deportation on the lives of his wife and their children but considered that they could maintain contact if they so chose, both through modern means of communication and/or by visiting him in Poland and noted that that had apparently been the case since about April 2010. This decision on proportionality was also a decision open to him.

24. Accordingly, it follows that although there was an error in the judge's decision as indicated above, this was not a material error and accordingly the judge's decision does not need to be remade.

Decision

There being no material error of law in Judge Saffer's decision, this appeal is dismissed and Judge Saffer's decision is affirmed.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 4 July 2019