Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00679/2018**

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 11 March 2019	**On 14 March 2019**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

ANNA [M]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. T. Bahja of counsel, instructed by Solomon Solicitors

For the Respondent: Mr. N. Bramble, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Poland. It is her case that she first entered the United Kingdom on 4 July 2014 and started to live with a British partner in December 2014. It was also her case that she worked for his firm, as a painter and decorator, and that he subjected her to coercive control and domestic violence. The first record of her being here is the fact that she

was cautioned for assaulting a police officer on 24 February 2016. There is also a letter from Jobcentre Plus, dated 25 April 2016, which states that she had recently been issued with a National Insurance Number.

2. On 28 February 2018 she wounded her ex-partner and on 24 September 2018, she was convicted at Aylesbury Crown Court of wounding/inflicting grievous bodily harm and was sentenced to 12 months imprisonment and ordered to pay a victim surcharge of £140.00. On 22 October 2018, the Respondent decided to make a deportation order against her on the basis that this was justified on the grounds of public policy. On 26 October 2018 he also informed her that he had exercised his statutory powers and certified her human rights claim with the effect that she could be removed from the United Kingdom before her appeal had been finally determined.

3. On 29 October 2018 the Appellant appealed against the decision to deport her. Meanwhile, on 20 November 2018, her appeal was listed for a Pre-hearing review in Birmingham on 13 December 2018 and listed for a full hearing at Coventry Magistrates Court on 10 January 2019. The pre-hearing review and the full hearing were adjourned on 10 December 2018. On 12 December 2018 the Appellant was told that her pre-hearing review would be heard at Yarl's Wood Hearing Centre on 21 December 2018.

4. Meanwhile, on 12 December 2018 she was informed that her full appeal hearing had been set down for 10 January 2019 at Yarl's Wood Hearing Centre. After that hearing, First-tier Tribunal Judge Mitchell dismissed her appeal in a decision promulgated on 14 January 2019. First-tier Tribunal Judge Hodgkinson granted her permission to appeal on 30 January 2019.

ERROR OF LAW HEARING

5. At the start of the hearing I provided both representatives with a copy of the Appellant's Reply to an IAC Notice of Hearing and two statements by the Appellant, which were attached to it. Counsel for the Appellant addressed me on all three of the grounds of appeal. The Home Office Presenting Officer accepted that, in paragraph 55 of his decision, the conclusions made by First-tier Tribunal Judge Mitchell in relation to the Appellant's risk of re-offending and her risk to the community were both speculative

ERROR OF LAW DECISION

6. The Appellant is an EEA national and, therefore, The Immigration (European Economic Area) Regulations 2016 apply to her appeal. In particular, regulation 23(6) states that:

> "Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom may be removed if-
>
> …
>
> (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27".

7. Regulation 27 states that:

> "(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(17).
>
> (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.

…

(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.)".

8. Schedule 1 states:

"*Considerations of public policy and public security*

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own

standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

Application of paragraph 1 to the United Kingdom

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

(a) the commission of a criminal offence;

(b) an act otherwise affecting the fundamental interests of society;

(c) the EEA national or family member of an EEA national was in custody.

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including—

(a) entering, attempting to enter or assisting another person to enter or to attempt to enter, a marriage, civil partnership or durable partnership of convenience; or

(b) fraudulently obtaining or attempting to obtain, or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

The fundamental interests of society

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".

9. The Appellant's first ground of appeal was that First-tier Tribunal Judge Mitchell had erred in law when he refused to grant her an adjournment in order to obtain legal representation.

10. Rule 4(3)(h) of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the Procedure Rules") provides a First-tier Tribunal Judge with a discretionary power to grant a party an adjournment but does not specify the basis on which such an adjournment should be granted. Instead, the First-tier Tribunal Judge is required to take into account the overriding objectives contained in Rule 2 of the Procedure Rules. Rule 2(2) refers to the need to deal with cases fairly and justly. This includes "ensuring, so far as practicable, that the parties are able to fully participate in the proceedings" and "avoiding delay, so far as compatible with proper consideration of the issues"

11. First-tier Tribunal Judge Mitchell did not explicitly refer to the Procedure Rules, but this was not necessarily a procedural breach if he reminded himself that he had a discretionary power to adjourn and applied the overriding objectives. In paragraph 2 of his decision, First-tier Tribunal Judge Mitchell noted that an application for an adjournment was made and found that "the interests of justice and fairness do not require that this matter be adjourned merely on the possibility that the appellant may obtain emergency funding to pay for legal representation at some indeterminate time in the future".

12. In reaching this decision the First-tier Tribunal Judge took into account the fact that the lawyers that the Appellant proposed to instruct had not attended the hearing or written to the Tribunal to explain whether her application for funding was likely to be successful. However, this was in keeping with the fact that the Appellant had explained that they were seeking funding so that they could represent her in the future. The First-tier Tribunal Judge also found that the Appellant had left it to the last minute to obtain legal representation.

13. In her Reply to an IAC Notice of Hearing, the Appellant had said that she had been in a relationship with Shaun Nobles for three years and three months and engaged to him for three years. She also said that they planned to marry each other in 2019. Furthermore, at the Case

Management Review Hearing, the Appellant informed First-tier Tribunal Judge Kaler that she would be legally represented at the full appeal hearing and that her partner had changed solicitors for her. This hearing took place the Friday before Christmas 2018 and the Appellant remained and remains in detention. She was directed to inform the Tribunal of the name and address of her new solicitors as soon as possible.

14. However, in the written statement that the Appellant prepared for her full appeal hearing and submitted on the morning of that hearing, she explained that, although she had reconciled with her partner whilst in detention and he had visited her every week, he then started to subject her to coercive control again, as the hearing date approached. As a consequence, she decided that she could not continue with the relationship. Then as she explained in her statement, "my ex-partner left [her] deliberately without [legal] help just before the appeal".

15. First-tier Tribunal Judge Mitchell did not take this evidence into account but merely found in paragraph 2 of his decision that "the appellant has seemingly made little effort to obtain legal representation".

16. Furthermore, it was not clear that the First-tier Tribunal Judge fully understood the funding regime as it now applies to deportation appeals. He referred to the possibility of the Appellant obtaining emergency funding when the correct terminology was that used by the Appellant when she explained that she had found a lawyer's office, which was able to help her and had submitted an application for Exceptional Case Funding".

17. In paragraph 2 of his decision the First-tier Tribunal Judge also noted that "the appellant had indicated that she would call three male witnesses at this appeal hearing but there were no witnesses at the hearing". In the Reply to an IAC Notice of Hearing she had explained that one of these three witnesses was her partner and in her later statement she had explained that he was no longer prepared to assist her.

18. I have also reminded myself of the case of *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC) where the Upper Tribunal found that:

> "If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived

> the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284".

19. In *Nwaigwe,* the Upper Tribunal also found that "as a general rule, good reason will have to be demonstrated in order to secure an adjournment". It appears to me that good reasons were given by the Appellant. She was in detention and had relied on her ex-partner to instruct a solicitor on her behalf. He had not done so when she decided not to submit to his coercive behaviour.

20. In her second ground of appeal it was submitted that the First-tier Tribunal Judge had failed to adequate reasons to show that she did constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society taking into account her past conduct. The nature of her offence potentially made her a threat to others. However, the Appellant's one offence and the circumstances which led to her one caution arose in the context of the relationship that she had with her ex-partner. In paragraph 43 of his decision First-tier Tribunal Judge Mitchell referred to the Appellant's violent behaviour and need to curb her drinking and the fact that she had not attended any courses about drinking whilst in prison.

21. In paragraph 46 of his decision First-tier Tribunal Judge Mitchell mentioned in passing that the sentencing judge described her as someone who had been subjected to domestic violence. However, he makes no mention of the Appellant's own evidence which clearly identifies the coercive behaviour she was subjected to and which was the context for her criminal behaviour. In addition, the criminal judge's sentencing remarks noted that it was his view that she had over a period of time been subjected to domestic violence which was quite unspeakable and wrong. This was clearly relevant to her "past conduct" and should have been taken into account.

22. I also agree with the Home Office Presenting Officer that the First-tier Tribunal Judge's finding that there was a medium risk that the Appellant would re-offend in the future and a medium risk that she would pose a risk to the community was merely speculative. In addition, I agree with counsel that the finding in paragraph 62 of his decision that "in this case there is

cogent evidence that the appellant does constitute a genuine threat to public policy" was insufficiently reasoned.

23. In paragraph 52 of this decision, the First-tier Tribunal Judge had noted that he had not been provided with any probation reports or any assessment by independent experts as regards the risk of the appellant offending in the future. The sentencing remarks also advised her to curb her drinking but acknowledged that whilst in detention she had obtained certificates and was making efforts to address her behaviour.

24. In all the circumstances I find that First-tier Tribunal Judge Mitchell did err in law in his decision.

DECISION

(1) The Appellant's appeal is allowed.

(2) The appeal is remitted to the First-tier Tribunal to be heard *de novo* by a First-tier Tribunal Judge other than First-tier Tribunal Judge Mitchell, Hodgkinson or Kaler.

Nadine Finch

Signed Date 11 March 2019
Upper Tribunal Judge Finch