Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00727/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 10th June 2019	**On 13th June 2019**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ZBIGNIEW [W]

Respondent

Representation:
For the Appellant: Ms S Jones, Senior Home Office Presenting Officer
For the Respondent: No appearance either in person or through legal representatives

DETERMINATION AND REASONS

1. The appellant, a Polish citizen, appealed a decision to deport him in accordance with the Immigration (European Economic Area) Regulations 2016. His appeal was heard by the First-tier Tribunal and, for reasons set out in a decision promulgated on 14th June 2018, First-tier Tribunal Judge Sills allowed his appeal. The Secretary of State was granted permission to appeal by Upper Tribunal Judge Kebede on the grounds it was arguable the First-tier Tribunal judge had 'downplayed' the seriousness of the appellant's offence, the risk he posed and had erred in the weight given to his family in assessing the proportionality of the decision.

2. The First-tier Tribunal judge found that the appellant had not acquired permanent residence. There was no challenge to that finding.

3. Mr [W] was convicted on 5 September 2017 at Leicester and Rutland Magistrates Court of engaging in controlling/coercive behaviour in an intimate family relationship between 1 January 2016 and 26 July 2017. He was sentenced to 18 weeks imprisonment and made the subject of a restraining order until 4 September 2018. The appellant had also come to the attention of Social Service in 2015 following a referral from the police regarding a call out to a domestic violence incident – threatening his wife with a knife. The report from the police refers to the wife having a 2" cut on her hand caused by a knife thrown at her by the appellant.

4. The First-tier Tribunal judge found:

> 15. I take into account that the appellant has been convicted of a serious offence. However, he has only a single criminal conviction. There is also a spectrum of seriousness. The appellant's 18-week sentence is at the lower end of the spectrum. … The fact that the offence was tried in the Magistrates Courts is in itself an indication of seriousness. Whilst the description of the offence is reasonably detailed, as the appellant was convicted in the Magistrates Court there are no sentencing remarks that can provide useful information about the offending.
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> 16. … The Magistrates Court was clearly concerned about the appellant's willingness to comply with any community sentence, hence the custodial sentence. While the appellant pleaded guilty, his oral evidence was to the effect that he did not accept his guilt. He stated that he had argued with his wife. The appellant's failure to accept his guilty is an adverse factor. That said, I take into account that this was also his first experience of custody and so he has not demonstrated a propensity to re-offend.
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> 17. I place little weight on the domestic incident in 2015 for the principle reason that the appellant was not prosecuted and convicted in relation to this. … In oral evidence the appellant denied inflicting any wound upon his wife. … I do not attach significant weight to the allegations made against the appellant …
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> 18. … while the appellant had only been released from detention around 13 days ago, there was no suggestion that he had breached the terms of this [restraining] order. The victim of the crime was the appellant's wife and the respondent did not put forward evidence other than the conviction itself and the incident in 2015 to suggest that she would still be at risk from the appellant …
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> 19. Taking the above into account I am not satisfied that the respondent has shown that the appellant's personal conduct represents a genuine present and sufficiently serious threat affecting one of the fundamental interests of society. The appellant's offence was at the lower end of seriousness for convictions leading to a custodial sentence. As the appellant has only been convicted of a single offence, it has not been shown that he has a propensity to re-offend. The main potential risk would be to his wife and family, however the main evidence of this is the conviction itself. I am not satisfied on the evidence before me that the appellant poses a risk to his family in view of the seriousness of his offence and the fact that it was his first offence. I do not consider that this single conviction for an offence of this nature is sufficient to show that the

> appellant represents a sufficiently serious threat to a fundamental interest of society. Hence, I allow the appeal.

The judge went on to consider the proportionality of the decision to remove him in case he was incorrect in his finding that there were not serious grounds of public policy for his removal. The judge took into account the appellant's age, that he had worked previously, that he was in good health and would be able to return to Poland and find work. He found:

> 20. … he does have 9 children aged between 1 and 21 and there is no court order preventing him from having contact with these children. There was no documentary evidence concerning the children, but on the basis of the appellant's oral evidence and the information provided about the children I accept that he was living with his children before he was imprisoned. He stated that he was in phone contact with his two oldest children, but had not yet done anything to arrange seeing his children. I take into account that the appellant has just been released from immigration detention and so has not had chance to make arrangements to see his children. I take into account that such arrangements may be complex in view of the breakdown of his relationship with his wife. While the appellant has not had direct contact with his children since his release, on the information available to me, I do not consider that his conviction would prevent him from seeing his children, though contact may be supervised initially depending on the position taken by his wife. Hence I consider the appellant's removal would amount to a significant interference with his relationship with his children. I consider it would be in the best interests of the children to maintain a parental relationship with their father and that this would not be possible if he were to be removed to Poland…
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> 21. … I find that the appellant's family ties in the UK with his children outweighs the risk the appellant may cause to the public on account of his offending.

Error of law

5. The appellant did not appear and was not legally represented. The notice of hearing was sent to him at his last known address and has not been returned to the Tribunal undelivered. I am satisfied the appellant was notified of the hearing date and has chosen, for an unknown reason not to attend or instruct a legal representative to attend on his behalf.

6. The decision by the First-tier Tribunal judge that the appellant was convicted of a single offence and thus not of sufficient seriousness borders on the perverse. The appellant was convicted of a serious offence of a continuing nature over a period of time in excess of 18 months which he denied having committed and for which the court considered he had to be imprisoned. That is not a single offence at the less serious end of the spectrum. Furthermore, the court imposed a restraining order, an order that would only be imposed if he was thought to be a continuing risk. In addition, the judge describes the main victim as being his wife; controlling coercive behaviour has an effect not only the victim but the family and society as a whole. The judge has minimised this effect of the appellant's behaviour. The judge failed to placed weight on a physical attack that was corroborated by police and also involved abusive and aggressive behaviour in the police van. These actions may not have led to charge and/or conviction but that does not mean that minimal weight should be attached to the

incident when considered in the context of the evidence as a whole. The appellant produced no evidence of rehabilitation – that he had not committed any further offences since his release 10 days earlier when he was subject to a restraining order is not evidence of rehabilitation.

7. The finding by the judge that the appellant did not represent a sufficiently serious threat to society was founded upon a lack of proper consideration and assessment of the evidence before him.

8. In so far as the finding on proportionality is concerned it is difficult to comprehend, on the evidence that was before the judge, how the judge could have reached the finding that the appellant's removal would amount to a significant interference in his relationship with his children or that it would be in the best interests of the children for them to maintain a relationship with the appellant or that any relationship could not be maintained if he were removed to Poland.

9. The appellant was in detention (in prison serving his sentence and immigration detention) for just over a year. There was no evidence that his children had suffered at all during his incarceration or what efforts, if any, had been made for contact to be maintained. That he is incarcerated does not prevent arrangements being made for him to have face-to-face contact with his children. At least 2 of his children are adults and there was no indication that they sought contact with him. There was no evidence that telephone contact could not continue when he was in Poland. There was no evidence why a relationship could not continue when he was in Poland – 7 of the children were born in Poland and he had other family and owned property there. The appellant did not lead evidence that his controlling and coercive behaviour had not had an adverse impact on the children or that they would wish to see him face-to-face or re-introduce contact in any other way.

10. The appellant had said to the judge that he wished to return to Poland. There was no indication the appellant had any consideration of the effect on his children, adverse or otherwise of such a decision on his part.

11. The First-tier Tribunal judge's decision that removal would be disproportionate was founded upon a lack of assessment of the evidence and lack of evidence before him.

12. I set aside the decision of the First-tier Tribunal to be remade.

Remaking of the decision

13. The appellant has received a sentence of imprisonment for a serious offence involving controlling and coercive behaviour over a number of months. His behaviour was directed at his wife. He denied he had committed the offence and referred in his evidence only to there being an argument. His evidence shows a lack of understanding and appreciation of the nature of his conviction and the serious impact such behaviour has not only on his wife but also society as a whole and also the psychological damage that could be caused to his children. The imposition of a restraining order, to continue for a year after his conviction adds weight to a conclusion that the appellant was a continuing danger to his family.

14. The issue is not simply whether he has committed the offence for which he was charged but the effect of that behaviour on the victim and society. The period over which he committed the offence, the nature and extent of the offence, the restraining order and the previous violent assault are all matters which taken together show a propensity towards criminal behaviour that cannot be tolerated.

15. It is a fundamental interest of society that individuals are not subjected to controlling and coercive behaviour. The failure of the appellant to acknowledge his guilt (other than as a plea to reduce his sentence), address his behaviour and seek to prevent repetition is indicative of a continuing threat to the fundamental interests of society; such behaviour should not continue.

16. It is not and cannot be disproportionate to remove the appellant given the nature of his criminal offending and the lack of evidenced ties with his children which could be said to adversely impact on his removal. At most he has telephone contact with his two oldest children. he has made no efforts to initiate other contact and said in court he wished to leave the UK, thereby showing a disregard to possible contact, such as it might be. Given the lack of interest shown by the appellant in his children and his previous behaviour, it is possible that it may not even be in their best interest to have contact with him. Nevertheless, I have reached my conclusion on the basis that despite a lack of evidence, the best interests of the children lies with continuing contact with their father albeit I do not accept that such contact cannot take place in Poland.

17. The continuation of his behaviour during the period leading up to his arrest was within the family. Although no evidence was before the First-tier Tribunal or before me, it is well known that observation of such behaviour by children can have an adverse effect on their psychological wellbeing. Despite having been previously arrested a year earlier, there was no evidence that that arrest had led to a moderation in his behaviour or a self-recognition that such behaviour was not only unacceptable but criminal.

18. Taking all the evidence into account, there is no doubt but that there is a continuing sufficiently serious threat to a fundamental interest of society and that his removal from the UK is not disproportionate.

19. I dismiss the appeal by the appellant against the decision to deport him.

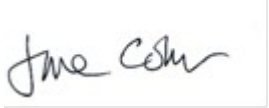
Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal by the appellant's appeal against the deportation decision.

Date 12th June 2019



Upper Tribunal Judge Coker