Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01421/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 25 February 2014	**On 21 March 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PIOTR TYLENDA

Respondent

Representation:

For the Appellant: Mr M Diwnycz, a Senior Home Office Presenting Officer
For the Respondent: In Person

DETERMINATION AND REASONS

1. The respondent, Piotr Tylenda, was born on 27 July 1988 and is a citizen of Poland. I shall refer hereafter to the respondent as the appellant and to the Secretary of State as the respondent (as they were before the First-tier Tribunal). On 1 July 2013, a

decision was made to deport the appellant from the United Kingdom under Regulation 19(3)(b) in accordance with Regulation 21 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). The appellant appealed to the First-tier Tribunal (Judge Reed; Mr D R Bremmer JP) which, in a determination promulgated on 4 December 2013, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. At the appeal hearing at Bradford on 25 February 2014, the respondent appeared in person and was assisted by his brother. He spoke in Polish with the assistance of an interpreter. Mr M Diwnycz, a Senior Home Office Presenting Officer, appeared for the appellant.

3. The relevant provisions of the 2006 Regulations are as follows:

> 6. (1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as—
>
> (a) a job seeker;
>
> (b) a worker;
>
> (c) a self employed person;
>
> (d) a self sufficient person; or
>
> (e) a student
>
> (2) A person who is no longer working shall not cease to be treated as a worker for the purpose
> of paragraph (1)(b) if—
>
> (a) he is temporarily unable to work as the result of an illness or accident;
>
> (b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and—
> (i) he was employed for one year or more before becoming unemployed;
> (ii) he has been unemployed for no more than six months; or
> (iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;
>
> (c) he is involuntarily unemployed and has embarked on vocational training; or
>
> (d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.
>
> (3) A person who is no longer in self-employment shall not cease to be treated as a self-employed person for the purpose of paragraph (1)(c) if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident.

(4) For the purpose of paragraph (1)(a), "jobseeker" means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged.

14. (1) A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person.

(5)But this regulation is subject to regulation 19(3)(b)

15. (1) The following persons shall acquire the right to reside in the United Kingdom permanently –

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

……

(3) But this regulation is subject to regulation 19(3)(b)

19. (3) Subject to paragraph (4) and (5), a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if –

(a) he does not have or ceases to have a right to reside under these Regulations; or

(b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

(4) A person must not be removed under paragraph (3) as the automatic consequence of having recourse to the social assistance system of the United Kingdom.

(5) a person must not be removed under paragraph (3) if he has a right to remain In United Kingdom by virtue of leave granted under the 1971 act unless his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

21. (1) In these 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 which a permanent right of residence under regulation 15 except on serious grounds of public policy or 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

(b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention of Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(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.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

4. The First-tier Tribunal found at [18] as follows:

Having carefully considered all of the evidence, we make the following findings in relation to this aspect of the appeal:

(1) There is no dispute that the appellant is a Polish National who was born on 27 July 1988. He is a single man with no children and is in good health.

(2) We accept what he says about having come to the UK in 2006 and again in 2007, because he gave his evidence about this in a straightforward manner, was supported by the other witnesses and had provided what we consider to be reliable documentary evidence of

employment, which included amongst other things payslips, P60s and P45s, HMRC documents and a Home Office Accession State Worker Registration Document dated 11 December 2007. Having considered all of this, we accept what the appellant said about having continuous employment in the United Kingdom for different employers from September 2007 when he started working for an agency called Prestige until the end of 2011 when he said his employment in the UK ceased.

(3) Although the appellant was in work in United Kingdom throughout this time, he was not even on his own account in work for a period of five years. The appellant said he had never registered as unemployed, and so could not have been treated as a "worker" after his employment stopped in late 2011. We have also considered whether or not the appellant could have been considered as a jobseeker after this, but the appellant himself said that there were no jobs available and in view of this, we consider that the appellant has not shown that he had a genuine chance of being engaged even though he may have been looking for work. The appellant has not therefore shown that he met the criteria set out in Regulation 6(4) and could not have been classed as a jobseeker after 2011. In view of this, the appellant has not acquired a permanent right of residence in the UK under the Regulations.

(4) We accept what the appellant said about his relationship with Ms. Kasprzak. They were not cohabiting, but having heard her evidence, we accept that it is their intention to live together if the appellant is released and allowed to remain in the UK. We see no reason to doubt she has a son aged 10 living with her. We accept what was said about the relationship, because it would have been easy for the appellant and Ms. Kasprzak to embellish their evidence by claiming to have cohabited prior to the appellant's prison sentence.

(5) Having heard the evidence of the appellant and his brother, we accept what the appellant said about his mother being in the USA and there having been no contact between the appellant and his father since the appellant was about eight years old. He did refer to a maternal aunt in Poland, but the core of his family circle, comprising his brother, nephews and nieces and his intended partner/fiancee is in the UK.

(6) As is usual in deportation hearings, the respondent has not however provided any detailed account of what actually happened and there is for example no victim impact statement before us. Albeit that we have little information as to what took place in the affray, we are satisfied that the offence committed by the appellant was serious. We say this because according to the sentencing judge, the appellant was part of a group who went round to the victim's house seeking him out as a target. Some (not including the appellant) had weapons and all new that there was an intention of using violence. The appellant committed the offence in breach of a suspended sentence of imprisonment. Albeit that the offence was committed only days before the operational period of the suspended sentence came to an end, we see this as an aggravating feature of the most recent conviction. We have also considered that the appellant had an earlier (albeit spent) conviction for battery dated from 9 March 2009 for which he was conditionally discharged. We consider that it is relevant to take this into account notwithstanding that it was a spent conviction because it presents a full picture of the escalating nature of the appellant's offending conduct.

(7) We were impressed with the evidence given by the three witnesses and we are satisfied from this that the appellant has a strong network of family support here in the UK. The appellant’s partner and his brother did not appear to be naive. We say this because Ms.

Kasprzak expressed her disappointment with what the appellant had done and it was clear that she considered that he had let down. We were also particularly impressed with the evidence from the appellant's brother. He had no obligation to tell us that he had been in trouble in the past, but was open about this and we accept that he has managed to put this past behind him. In view of our assessment of the witnesses, we accept that they were sincere in saying that they considered the appellant had changed whilst in prison. This may of course not necessarily mean that their assessment of the appellant is correct. However, we bear in mind that in better economic times, the appellant had a good work record here in the UK and he has now experienced his first taste of custody. We are also drawn to the conclusion that the appellant has better prospects of rehabilitation here in the UK with the support of his brother and Ms. Kasprzak than if he were to return to Poland.

(8) There is no evidence that the appellant has undertaken any offender related work during his period in prison. On the other hand, there is no evidence to gainsay what he said about having asked his offender manager about this and having been told that such work was not required. We say this because the respondent has not taken the opportunity to provide us with the usual NOMS report from the National Probation Service dealing with any future risks posed by the appellant. Such evidence is particularly important in appeals under the 2006 Regulations, because we are exclusively concerned with the risks posed by the appellant not the need to deter others. We have borne in mind that the appellant was only serving the custodial part of his sentence for a relatively short period of time, having only been sentenced in May 2013. The fact that the appellant has not undertaken any offender related courses whilst in custody does not necessarily mean that he has not taken the opportunity to reflect upon his behaviour.

(9) Having considered all of the evidence, including the appellant's written submissions, we find that the appellant has shown to the required standard that he does intend to rehabilitate himself and stay out of trouble. We say this because we consider that he has expressed sincere contrition and remorse for what he has done and we also consider that he has not sought to avoid responsibility for his past offending behaviour. His previous work history shows that he has the ability to be someone who contributes to society and he can benefit from the close support from his brother and partner.

5. First, the Secretary of State takes issue with the Tribunal's alleged failure to consider whether the appellant was "genuinely integrated" into United Kingdom society. (See paragraph 21(6) of the 2006 Regulations above). The grounds note that the appellant's primary ties in the United Kingdom are with his own co-nationals (his brother and his girlfriend) and that the appellant had spent his formative years in Poland and still has family members living there. I understand from what the appellant told me at the hearing that he only has one aunt living in Poland with whom he has no contact whatever. The fact that the appellant had to tell me that information highlights one of the difficulties which faced the Tribunal in the First-tier. The Tribunal had to consider the evidence that it had available and reach a decision. It may, perhaps, have been hampered to some extent by the fact that the appellant needs to give his evidence through an interpreter and was not represented at the hearing. The Tribunal was also, however, hampered by the fact that the respondent had failed to file with the Tribunal the usual documents which one

would expect to see in such an appeal as this, namely the NOMS Report and similar documents. In the circumstances, I consider that the Tribunal has carried out a very thorough assessment and analysis of the evidence which it did have before it. The Tribunal did record [11(3)] that the appellant had limited contacts with family members and others in Poland. It was aware that the appellant had first come to the United Kingdom in 2006 and, although he had returned to Poland in the meantime, he had returned in 2011 to seek work. At [18(7)], the Tribunal noted that "the appellant had a good work record here in the UK …" and concluded that the appellant "has better prospects of rehabilitation here in the UK with the support of his brother and Ms Kasprzak [his girlfriend] than if he were returned to Poland." The Tribunal did not make that finding explicitly in the context of the appellant's integration in United Kingdom society but it correctly drew attention to the fact that the appellant had lived and worked in the United Kingdom intermittently since he was 18 years old and that his work record here had been "good". The Tribunal was well aware that the appellant's "primary ties" were with his brother and his girlfriend and it was aware also the appellant had chosen to give his evidence in Polish and that there was no evidence to indicate that the appellant was completely unable to speak English.

6. The grounds of appeal also take issue with the Tribunal's findings that the appellant had the continuing support of his brother and girlfriend in the United Kingdom (that support had not prevented the appellant from offending) but, once again, those were facts known to and taken account of by the Tribunal. The question is whether, in the light of the matters raised in the grounds of appeal, it can properly be said that the Tribunal has failed to take into account those factors described in paragraph 21(6) of the 2006 Regulations. Obviously, a different and more negative view of the appellant's integration into United Kingdom society and the availability of rehabilitation here in the United Kingdom as opposed to in Poland, could have been adopted by a Tribunal but that is not the point. The point is whether this Tribunal erred in law such that its determination should be set aside by failing in its duty to apply the 2006 Regulations. I find that it did not fail in that duty in its clearly expressed, detailed and well reasoned determination. It is the task of the Tribunal to weigh the various items of evidence (I have already noted that the evidence before the Tribunal was limited) and to reach a reasoned conclusion. I find that the Tribunal did exactly that. The Tribunal could, of course, have given greater weight to those matters referred to in the grounds of appeal but I find that its failure or refusal to do so does not undermine its reasoning to the extent suggested by the Secretary of State. I note that paragraph 21(6) of the 2006 Regulations speaks in the same sentence of the "person's social and cultural integration into the United Kingdom" and "the extent of the person's links with his country of origin." Those latter links were found by the Tribunal to be very limited whilst the appellant's primary relationships with his brother and girlfriend are with individuals who, but notwithstanding the fact that they are also Polish, have to all intents and purposes settled down and found work in this country. I note that the appellant's brother has been living in the United Kingdom since 2005.

7. In the circumstances, I do not find that the Tribunal has erred in law such that its determination falls to be set aside. The Tribunal has taken into account all relevant evidence and has considered that evidence in the light of the relevant parts of the 2006 Regulations.

DECISION

8. This appeal is dismissed.

Signed Date 15 March 2014

Upper Tribunal Judge Clive Lane