Upper Tribunal **Appeal number: DA/00497/2018 (V)**

(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC	**Decision & Reasons Promulgated**
On 14 December 2020	**On 6 January 2021**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JULIA SOLOWKO

(ANONYMITY ORDER NOT MADE)

Respondent

DECISION AND REASONS (V)

For the appellant: Ms R Pettersen, Senior Presenting Officer

For the Respondent: Mr Y Youssefian, instructed by Saba Solicitors LLP

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. Although the Secretary of State is the appellant, to avoid confusion I will refer below to the parties as they were at the First-tier Tribunal appeal hearing.

2. The appellant, who is a national of both Poland and the Ukraine with date of birth given as 12.9.83, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 14.2.20 (Judge Loke), dismissing her appeal against the decision of the Secretary of State, dated 5.4.18, to deport her from the UK pursuant to the Immigration (EEA) Regulations 2016.

3. The deportation decision was certified under Regulation 33 and the appellant was removed from the UK on 29.5.18, returning only for the purpose of her appeal hearing before the First-tier Tribunal.

4. Permission to appeal was refused by the First-tier Tribunal on 3.3.20, considering the grounds a mere disagreement. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Kamara granted permission on 29.4.20, considering it arguable that in finding that the appellant did not represent a genuine, present and sufficiently serious threat, the First-tier Tribunal "*provided inadequate reasoning for all the reasons set out in the grounds*."

5. In directions issued on 14.7.20, the Upper Tribunal proposed to determine the error of law decision on the papers without a hearing pursuant to Rule 34, providing for the lodging of any objection to that course of action and for further written submissions on the error of law issue. In its response dated 21.7.20, the respondent made further representations but did not object to the matter being dealt with on the papers. There was no response at all from the appellant or her legal representatives.

6. On 6.10.20, the Upper Tribunal issued further directions for the error of law issue to be decided in an oral hearing, proposing that it be held remotely, given the nature of the respondent's grounds and the recent decision of the Court of Appeal in HA (Iraq) v SSHD [2020] EWCA Civ 1176. The respondent's email of 8.10.20 indicated that there was no opposition to the matter being dealt with in a remote hearing. Again, there was no response from the appellant.

7. Very late, outside the time limits set by the directions, and only on the Friday before the hearing (11.12.20) was listed on for the following Monday (14.12.20), the appellant's representatives made written submissions and sought to adduce further evidence as to the appellant's ongoing alcohol treatment. Yet further evidence of almost identical nature, of more recent date, was submitted in an email sent only on the morning of the hearing. Although Mr Youssefian apologised for the serious delay in responding to directions, no explanation for that delay was proffered.

8. The appellant now challenges the respondent's further submissions on the basis that permission was only granted on grounds of inadequate reasoning and that the respondent should be precluded from arguing perversity. However, there was no restriction in the grant of permission which found that the grounds identified inadequate reasoning "*for all the reasons set out in the grounds*." Those grounds alleged inadequate reasoning bordering on perversity. In the premises, I

decline to limit the scope of the respondent's submissions as requested by the appellant in her belated written submissions and in Mr Youssefian's oral submissions. As this hearing is confined to whether there was an error of law in the decision of the First-tier Tribunal, I also decline to admit the new evidence relied on by the appellant and have disregarded it for the purpose of this decision.

9. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.

The Relevant Background

10. In the period between her arrival in the UK in 2014 and 2018, the appellant acquired three criminal convictions for offences of violence and public disorder. She was conditionally discharged in January 2016 for assaulting a police office and using threatening, abusive, or insulting words or behaviour, offences committed in November 2015. Within the period of conditional discharge, she committed a further offence of common assault in November 2016, receiving a community order with a rehabilitation requirement in December 2016. The offence leading to her deportation was committed a little over a year later on 19.1.18, resulting in a sentence of imprisonment of 16 weeks and the imposition of a restraining order. The antecedent record also reveals that she had a 2012 drugs conviction in California, and had been cautioned in September 2016 for common assault and criminal damage.

11. As the appellant did not have permanent residence status under the EEA Regulations, she qualifies only for the lowest level of protection against removal.

12. In allowing the appeal, Judge Loke made the following findings:

    a. The appellant has a propensity to commit violent offences, particularly under the influence of alcohol;

    b. The fundamental interests of society are engaged, in that there is an element of persistency of offending and the violent nature of her offending presents a danger to the public;

    c. The repeated nature of the offending presents a genuine threat;

    d. However, for the reasons set out between [22] and [24] of the decision, including that she has stopped drinking and undergone alcohol abuse treatment, the appellant does not represent a 'present' threat;

    e. Whilst her last offence involved the use of a knife, this was not a sufficiently serious offence in itself to justify deportation;

f. The repetitive nature of her offences indicate a threat of reoffending but this threat is not sufficiently serious "both in terms of the likelihood of reoffending and the seriousness of the consequences if it does;

g. Having had regard to the mandatory considerations outlined in Regulation 27(6), and for the reasons set out between [29] and [31] of the decision, deportation of the appellant is not proportionate.

The Grounds

13. The grounds of application for permission to appeal to the Upper Tribunal argue that the assessment of the First-tier Tribunal as to whether the appellant representatives a genuine, present and sufficiently serious threat was inadequately reasoned and bordered on being irrational.

14. Complaint is made by the respondent that the judge linked the commission of the last and most serious offence and her propensity to violence solely to the misuse of alcohol when the appellant herself was unsure whether or not she was sober when using a knife to injure her then partner. Despite her willingness to undergo treatment for alcohol misuse, the appellant had lapsed in the use of Crystal Meth and in alcohol use. The judge gave no reason why, in the context of ongoing treatment and proven lapses, further lapses with concurrent risk was unlikely to occur on the balance of probabilities.

15. The respondent has also argued that the assessment of seriousness is flawed given that the judge accepted that the use of a knife was serious. The judge appeared to rely on the relatively minor injuries without consideration of the appellant's intent when using a knife to attack her partner. The judge appears to have considered that the use of alcohol and the appellant being in a 'difficult relationship' mitigated the seriousness of the offence. The respondent points out that the appellant was subject to a restraint order. Further, the judge considered that the gaps in time between the commission of offences reduced the serious nature of the threat when the same factor is also indicative of a long-standing recurring risk. In relation to the prospect of rehabilitation, the respondent points out that the appellant has no family in the UK and no friends attended to support her appeal. There is no evidence of community involvement or that she would have any settled address to return to.

Preliminary Matters

16. Not raised in the grounds but which I drew to the attention of the two representatives at the outset of the hearing is that at [21] of the decision is an apparent misdirection in law. There, the judge stated, "*Thirdly I consider whether there are serious grounds to believe that the Appellant presents a genuine, present and sufficiently serious threat*." That is not the correct test. As the appellant does not have permanent residence status under the Regulations, 'serious grounds' do not need to be shown.

17. I also indicated concern to the representatives as to what is set out at [27] of the decision, where the judge considered whether there was "a sufficiently serious threat of reoffending, bearing in mind the guidance given in Schedule 1 para 3 of the 2016 Regulations." That provision of the Regulations does not require a "sufficiently serious threat of reoffending" but provides, "*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*." The judge's recasting of this provision and the considerations between [27] and [28] of the decision, which followed the earlier findings as to whether the appellant presents a sufficiently serious threat, appeared to me to indicate an approach that lies beyond the considerations required by the Regulations, rather than considering whether, overall, pursuant to Regulation 27(5)(c), "*the appellant's personal conduct 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*."

18. Mr Youssefian stated that he was taken by surprise by the two concerns with the decision I raised and sought an adjournment to take instructions. I refused that application, on the basis that whilst the appellant is not expected to address a ground not raised by the respondent, the reference to 'serious grounds' was plain on the face of the decision, and he should have been prepared to address it. However, in the light of his concerns, at the conclusion of the hearing I deferred reaching a conclusion on the issues and reserved my decision, allowing for further written submissions to be lodged by 4pm on 15.12.20. The Tribunal has now received those further written submissions, which I have carefully considered and taken into account.

19. In essence, the appellant submits that it is not open to the Tribunal to raise of its own motion an altogether new point. Reliance is made on AZ (error of law: jurisdiction; PTA practice) [2018] UKUT 24, where Upper Tribunal held that it did have jurisdiction to revisit an error of law decision, but under the Practice Direction 3.7 only in very exceptional cases would it depart from the reasons given for granting permission. The Practice Direction does not address the issue whether the Upper Tribunal is entitled to find an error of law on grounds not raised by the party seeking permission to appeal, whether at the permission stage, or as here, in the substantive hearing of the appeal. However, the Upper Tribunal in AZ went on to consider the grant of permission on a ground not advanced by the applicant. After referring to the Court of Appeal's finding in Bulale v SSHD [2008] EWCA Civ 806 to the effect that Robinson-obvious points not raised in the grounds are only available in the appellant's favour, the Upper Tribunal stated at [69] to [70]:

> "*In conclusion, we consider that any judge who is considering whether to grant permission to appeal to the Upper Tribunal must not grant permission on a ground which does not feature in the grounds accompanying the application, unless the judge*

> *is satisfied that the ground he or she has identified is one which has a strong prospect of success for the original appellant; or for the Secretary of State, where the ground relates to a decision which, if undisturbed, would breach the United Kingdom's international treaty obligations; or (possibly) if the ground relates to an issue of general importance, which the Upper Tribunal needs to address. The basic point to be borne in mind is that there must be an extremely sound reason for, in effect, compelling the parties to an appeal to engage with a matter that neither of them has identified."*

20. In the premises, I am persuaded that Mr Youssefian's submissions as to the concerns I raised are well-made. Although the Upper Tribunal has jurisdiction to grant permission on a ground not raised by the Secretary of State, I am satisfied that as the point does not assist the appellant and does not identify an issue of general importance, I should not address the two potential errors identified above and confine my considerations to the grounds as drafted and advanced in oral submissions by Ms Pettersen.

Consideration of the Grounds

21. I bear in mind that it is for the respondent to demonstrate that the appellant's conduct represents a genuine, present and sufficiently serious threat affecting one (or more) of the fundamental interests of society. Mr Youssefian submitted that there was a "dearth of evidence" from the respondent in support and reminded the Tribunal the line of case law to the effect that the Tribunal should be slow to interfere with findings of fact made by a specialist Tribunal unless the findings are perverse. I bear in mind that a mere disagreement or because a different judge may have reached a different conclusion is insufficient to set aside the decision of the First-tier Tribunal. Mr Youssefian also warned against submissions now raised by the respondent that were not previously relied on. On the other hand, the antecedent history largely speaks for itself, culminating in the serious offence of using a knife to wound her partner, although prosecuted only as a s47 Assault Occasioning Actual Bodily Harm. In my view, the difficulty with the decision lies in the limited evidence of rehabilitation and the judge's linking of the finding of a propensity to violence and the risk presented mainly, if not solely, to alcohol intoxication.

22. I note that permission was initially refused by the First-tier Tribunal on the basis that the grounds were a mere disagreement. The appellant's written submissions are also to some extent a disagreement with the grounds and in part an attempt to reargue the issues, including whether the appellant's last offence was alcohol-related. Whilst arguing that the respondent's grounds are disingenuous, the appellant's grounds themselves indulge in selective citation of the findings of the First-tier Tribunal. For example, reliance is placed on [12(c)] of the decision that the appellant said that she had been drinking heavily the night before (the last offence) but did not include the rest of the sentence that she "didn't know whether she was sober in the morning of the offence." The submissions also assert that the evidence was that the appellant was intoxicated, referring to the police report, and submits that the fact that the appellant was unsure whether she was intoxicated is irrelevant if in fact she was intoxicated. However, whilst

the police report stated that "The defendant's consumption of alcohol was a component that appeared to contribute to the offence"; it does not state that she was in fact intoxicated, although she admitted to the police that she was an alcoholic. She was not tested and there is no definitive statement that she was intoxicated at the time of the offence. She was interviewed the same morning but declined to answer questions.

23. It remains the fact that whilst the appellant's last offence may have been committed whilst she was intoxicated, that is not at all clear from the evidence. The difficulty with the First-tier Tribunal decision is that not only that the judge links the commission of the offence to alcohol misuse but finds her proclaimed abstinence, with one relapse for alcohol and one for drugs use, and willingness to access rehabilitatory treatment, is sufficient to conclude that she is not a present threat. EffectivIely, the judge has assumed that if she does not drink again, there is no present risk of further offending. Alcohol use may be a factor increasing the risk of reoffending and is therefore a relevant consideration, together with any evidence of rehabilitation, but is not determinative of present risk. Further and obviously, if the appellant has a propensity to violence, as the judge found, such propensity may manifest itself even without resort to alcohol intoxication. That prospect does not appear to have been considered by the judge.

24. Even with the involvement of alcohol intoxication in offending behaviour, there was limited evidence of actual rehabilitation for the propensity to violence, rather than a willingness to continue to "access treatment" for alcohol misuse. MC (Essa principles recast) Portugal [2015] UKUT 00520 (IAC), held that reference to prospects of rehabilitation concern reasonable prospects of a person ceasing to commit crime, not the mere possibility of rehabilitation. "*Mere capability of rehabilitation is not to be equated with reasonable prospect of rehabilitation*." In reality, the evidence of rehabilitation put before the First-tier Tribunal was limited and insubstantial. I also bear in mind that Regulation 27(5)(c) provides that the threat does not need to be imminent and that the appellant admits that she has twice lapsed. However, the judge had the advantage of hearing from the appellant and concluded at [28 that she had "*taken steps to address her alcohol issues, and whilst they are plainly not finally resolved, her continued engagement with rehabilitative services is a relevant factor in the reduction of risk and the proportionality exercise*," with the judge citing Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC).

25. In the premises, whilst a different judge may have reached a different conclusion as to whether the appellant represented a present threat, limiting myself to the grounds as drafted, I am satisfied that the judge did consider the correct issues and made a careful assessment, reaching a conclusion open on the evidence. No error of law is identified in this ground.

26. In relation to the assessment whether the appellant poses a sufficiently serious threat, the judge accepted that the use of a knife was a serious matter. However, the judge referenced the relatively short custodial sentence and that "*the offence*

was committed in the context of the appellant having alcohol issues, and in a difficult relationship." Again, the judge links the offending behaviour to alcohol intoxication. The judge also relied on the gaps between her offending behaviour but was in error to state at [19] of the decision that the third offence was committed just over two years after her second offence. The gap was in fact 1 year 2 months. However, I am not satisfied that this error, not relied on by the respondent, is material.

27. I accept the submission that there was no indication that the wounding of her partner was provoked or committed in self-defence, or that there were any other significant mitigating features. It is difficult to see how being intoxicated and/or in a difficult relationship reduces the seriousness of using a knife to attack another individual. The respondent suggests it would be all the more concerning if the appellant were sober when committing the offence and that gaps in offending is equally suggestive of a propensity to violence as a "long-standing, recurring risk." However, once again, the judge made a careful assessment of seriousness and reached findings justified by cogent reasoning. Whilst a different judge may have concluded that the risk presented was genuine, present and sufficiently serious, it was open to the First-tier Tribunal Judge on the evidence and for the reasons given to conclude that whilst the risk was genuine, it was neither a present risk nor one that was sufficiently serious to justify deportation. It was open in the premises for the judge to find the removal decision disproportionate.

28. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal so that it must be set aside.

Decision

The appeal of the respondent to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the appeal remains allowed.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 16 December 2020