Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02524/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 5th August 2014	**On 4th September 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

OLAF LUKASZ PIKUS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Winter, Counsel instructed on behalf of Bruce Short Solicitors
For the Respondent: Miss O'Brien, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant appeals, with permission, against the determination of the First-tier Tribunal panel (Judge Grant-Hutchison and Mrs E Morton)

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promulgated on 28th March 2014. By its decision, the Tribunal panel dismissed the Appellant's appeal against the Secretary of State's decision, dated 10th February 2013, to deport him from the United Kingdom. The Tribunal dismissed his appeal on the ground that deportation would not breach his rights as a European citizen under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") and would not be an infringement of his rights under Article 8 of the ECHR.

2. The Appellant is a citizen of Poland born on 10th April 1982. It was asserted by the Appellant that he first arrived in the United Kingdom in June 2006. He was not able to state the exact date of entry nor had he provided the Secretary of State with any evidence to confirm his date of entry. It was the Appellant's case that he had been working in the United Kingdom since his entry. However the Secretary of State in the reasons for deportation letter dated 10th December 2013 was not satisfied that there was evidence of residence in accordance with the Regulations for a continuous period of either five years of ten years continuous residence. During the time that he had resided in the United Kingdom he had lived with his partner and had a daughter of that relationship. The partnership had broken down and at the date of the decision had a relationship with another partner for two years.

3. The Appellant has an offending history. The Appellant first came to the attention of the police in Scotland on 27th October 2009 for minor road traffic offences. The Appellant continued to offend in 2011 again for minor road traffic offences but also carrying a knife, in 2012 was convicted of driving whilst disqualified and of a minor road traffic offence. In 2013 he was convicted of behaving in a threatening or abusive manner likely to cause a reasonable person to suffer harm for which he was admonished and was also found to be an aggravator in domestic abuse and on 16th February 2013 was convicted of two counts of theft by house breaking.

4. On 6th June 2013 he appeared before a Sheriff of Grampian Highland and Islands at Aberdeen and pleaded guilty to two charges of being concerned in the supply of a controlled drug under the Misuse of Drugs Act 1971 Section 4(3)(b). As a result of the Appellant's conviction, he was sentenced to a period of sixteen months' imprisonment. Following the Appellant's conviction, the Secretary of State on 27th June 2013 notified the Appellant that she was considering whether his deportation from the United Kingdom was justified on grounds of public policy and requested reasons why he should not be deported from the United Kingdom. The Appellant provided reasons making reference to his family life in the United Kingdom with his previous ex-partner and daughter and his present relationship with his girlfriend.

5. The decision to make a deportation order was made on 10th February 2013.

6. The Appellant appealed against the decision of the Respondent under Regulation 26 of the Regulations 2006. The appeal came before the First-

tier Tribunal panel (Judge Grant-Hutchison and Mrs E Morton) on 27th February 2014 at Glasgow. The panel heard oral evidence from the Appellant and from two witnesses Miss Migas and Miss Lesak. In the determination, the panel set out the relevant parts of the Immigration (EEA) Regulations 2006, namely Regulations 19 and 21. They noted the evidence before them at length and set out the findings of fact from the evidence that had been put before the panel.

7. In respect of the Appellant's length of residence, the Secretary of State had not accepted that there was evidence of residence in accordance with the Regulations for a continuous period of five years or that the Appellant had demonstrated ten years' continuous residence and thus had concluded in light of the information available that he had not acquired the right of permanent residence in the United Kingdom. The panel dealt with that issue at [18] but found that by the date of his conviction the Appellant had only resided in the UK for four years and four months. The panel considered there was a lack of evidence to support his claim that he had entered the United Kingdom in June 2006 and rejected the evidence of his ex-partner and present partner as to the length of time that he had been resident in the United Kingdom. The panel also considered that there was no documentary evidence in support of his length of residence from any employment noting that there were no pay slips nor did they hear oral evidence from fellow employees. Thus they placed weight on his conviction history and therefore the earliest date that they could rely upon was 2009. As he was convicted of offences from 16th April 2013 by using the date of 2009 they reached the conclusion that he had only demonstrated length of residence for four years and four months. Therefore they found that the Appellant was not entitled to the higher level of protection afforded by Regulation 21(3) to a person with a permanent right of residence.

8. They then turned to the issue of the matters set out in Regulation 21(5) and (6). In this respect they considered his conviction and recited the sentencing remarks of the judge at [21]. In this respect the Tribunal noted that they "whole heartedly endorsed the judge's sentence remarks. There is not much more we can add. The Appellant would have been sentenced for twenty months had he not plead before that." At [23] they turned to the consideration as to whether the Appellant's personal conduct represented a "genuine, present and sufficiently serious threat" to public policy or public security in the UK." At [24] the panel took into account that the Appellant had a conviction in Poland for robbery using violence or weapons, or using threats of violence as weapons against a person for which he was convicted with a sentence of six years. They took the view that his conduct in the United Kingdom indicated "an escalating seriousness of criminality". They also found that he had "displayed a cavalier approach to the laws of the country by driving whilst disqualified and by not cooperating with the community payback order" (at [24]). At paragraph [25] the panel considered his attitude to the offences of which he had been convicted. They found that he had not taken responsibility for his own actions and reached a finding that he had not given a consistent version of events

concerning his criminality. For those reasons at [26] they found the Appellant's removal to be justified on the grounds of public policy and security and thus found at [26] that it was proportionate that he should be deported.

9. They then went on to consider Article 8 of the ECHR and considered the well-established five stage test in **Razgar** at [31] and that [32] reached the conclusion that the answer to each of the separate questions were in favour of the Appellant and therefore the issue before the panel at [33 – 38] dealt with the issue of proportionality. The panel at [33] considered the best interests of the Appellant's child as a primary consideration and found, contrary to the Secretary of State's decision, that he was the father of the child although his name was not on the birth certificate. They found his contact with the child had been "transitory" and that the birth of the child in 2008 had not prevented him from committing the crimes for which he went to prison. They found the child was not a British citizen and had "barely engaged with the educational process in the UK" and that her mother could return with him to Poland as she had done before where she had relatives and the Appellant. The panel also considered that if the mother of the child chose not to return there would be an interference with her Article 8 rights and that the question of her best interests would require to be considered. However, the panel found

> "Her mother who may be considered to have a view as to what was in the best interests of the child chose to remove herself and the child to Poland and separate from the Appellant albeit she eventually returned. We are not persuaded by the contents of the expert report regarding the best developmental interest of the child. Many children do live separately from one of their parents. Given the Appellant's criminal record we are far from persuaded that he would be supportive of the child or a good role model for her. Given the interests of the state and deportation we did not find that when the best interests of the child or any Article 8 rights weigh decisively against the said deportation."

10. Thus the panel dismissed the appeal.

11. The Appellant sought permission to appeal on three grounds and on 15th April 2014 First-tier Tribunal Judge De Haney granted permission to appeal.

12. Thus the appeal came before the Upper Tribunal. Mr Winter on behalf of the Appellant relied upon the grounds as drafted. The first ground related to the panel's failure to address the correct test at paragraph [18] of the determination. He submitted that the panel had incorrectly found that the Appellant had resided in the United Kingdom for four years and four months. The assessment had been made from a letter in the Appellant's bundle exhibited at G1 but that the panel had misconstrued the contents of that letter. Whilst the panel in the determination at [18] referred to the letter and stated "this was a letter from an employment agency which stated that he was 'on their books'", the letter itself said no such thing but in fact clearly stated that the Appellant had worked from 30th October 2007 until

19th December 2007. Thus he submitted it was unclear from the evidence where the panel had obtained that view that the Appellant was "on the books" as it was not reflected in the evidence at G1. He further submitted that in that respect, having found erroneously that there was no evidence to support his length of residence before 2009 wrongly assessed his length of residence and therefore the wrong test had been applied and that this was an error of law. In respect of the second ground, it was submitted that the panel failed to take into account or to give any proper account to an expert report from Dr McCormack who had carried out an independent risk assessment. He submitted that there had been no OASys Report in this case to deal with risk of reoffending although the panel had made reference to a social enquiry report which had found him to be a medium risk. At the hearing the panel had been provided with an up-to-date risk assessment from Dr McCormack which had assessed the Appellant as a low risk of reoffending. He submitted that there had been no assessment of risk in the light of this report. He further submitted that it was a material part of the evidence because if he did not present a risk it would be difficult to see how the panel could have reached the conclusion that he would represent a "genuine, present and sufficiently serious threat" to public policy or public security in the United Kingdom. Thus he submitted there were errors of law in the determination.

13. Miss O'Brien on behalf of the Secretary of State submitted in relation to Ground 1 that the question for the Tribunal was not how long the Appellant had been in the United Kingdom but whether there was evidence to demonstrate that he fulfilled the Regulations. She conceded that the letter referred to by the panel at [18] was more likely than not to be the employer's letter set out at G1 and that the inference drawn from the panel that he was "on the books" could not be drawn from that. However she submitted there was no other evidence to support his length of residence and it was open to the panel to find that there was insufficient evidence to demonstrate a five year period. She submitted the Tribunal were entitled to be entirely dissatisfied that the period had been met. The panel found that there was no alternative evidence in the form of pay slips and therefore the first ground could not succeed. As to Ground 2, she submitted that whilst the Tribunal did not reference the report the reasoning at paragraph 25 demonstrated that the Tribunal were dissatisfied with the Appellant's changing story and what had caused his offending behaviour. Therefore his differing accounts and the most recent account to the psychologist was very much different in terms of guilt. At [25] of the determination the Tribunal was not satisfied that the Appellant was being honest about his offending history. Thus she submitted even if the report had been considered they could have come to any different conclusion on those findings of fact [25]. This was a report that was self-serving and thus they could not place any weight on it and therefore the outcome would be the same.

14. By way of reply, Mr Winter submitted that despite the submission that the expert report was "self-serving" expert evidence should not be marginalised in that way. It made an assessment of risk which was of

relevance and thus it could not be said that the Tribunal would have reached the same result. In this context I asked Mr White for his submissions on the report in the context of the submission the Tribunal would have not come to the same conclusion. In this respect he made reference to the risk of reoffending in the light of his present circumstances which were relevant factors in the assessment of risk as referred to in the expert evidence as he in employment. In respect of his stability, he had been in a stable relationship for two years and had a good employment history and therefore would not engage in any criminal activity and had adopted a strategy if ever approached again by those men with whom he had had contact with during his offending history. The various factors, he submitted would not inevitably lead to him being a "genuine risk". He further submitted that in respect of Ground 2 it was a material error and the Tribunal could not be satisfied that it would have reached the same conclusion had it been considered. Thus he invited the Tribunal, even if errors of law were found, for a fresh hearing to determine all issues.

15. At the conclusion of the hearing I reserved my determination.

16. The first Ground of Appeal relates to the calculation of the length of time the Appellant had resided in the United Kingdom. The scheme of the 2006 Regulations in respect of those falling within their scope and who face removal as a consequent of a relevant decision, as defined, it to provide three levels of protection for removal. The lowest level of protection afforded is provided by Regulation 21(1) which requires that a relevant decision, which includes a decision to remove, is to be taken on the grounds of public policy, public security or public health. Turning to the intermediate level of protection, which applies to a person who has acquired a permanent right of residence under Regulation 15, such a decision can be taken only on serious grounds of public policy or public security (per Regulation 21(3)). The third and highest level of protection applies to a person who has accumulated at least ten years' continuous residence prior to the date of the relevant decision. In this case, such a decision cannot be taken except on the imperative grounds of public security (see Regulation 21(4)).

17. Thus the calculation of the length of time is of importance in deciding the relevant level of protection and tests to apply. It is submitted on behalf of the Appellant that the panel failed to calculate the period correctly or in accordance with the evidence by reaching a finding that the Appellant had resided in the UK for four years and four months (see [18]). The panel erroneously reached the finding by basing their assessment on a letter from the Appellant's employment agency (set out at G1), the contents of which they misconstrued. It is further submitted that the letter exhibited at G1 made it clear that the Appellant had been employed on a service contract from 30th October 2007 until 19th December 2007 and therefore the panel were wrong to find that he had only had four years and four months residence.

18. To consider this ground it is important to look at the decision of the panel and the findings of fact reached on the evidence before them. The Appellant's claim was that he had entered the UK in June 2006. The panel heard oral evidence from two witnesses in support of this namely his ex-partner and his present partner. The panel found the evidence of his ex-partner to be "uncertain and contradictory" and that the evidence of his present partner was in effect what she had been told by the Appellant (see [18]). The panel also considered that there was no evidence to support his claim of residence from 2006.

19. The panel considered if there was any other evidence to support the length of residence and it was in this context that they considered the evidence of employment. They said as follows:-

> "The Appellant claimed to be in continuous employment from 2006. There was simply a lack of such evidence. In addition the Appellant claimed to be in continuous employment from 2006 and yet the only documentary evidence of this was a letter from an employment agency which stated that he was on 'their books'. The Appellant sought to explain this by stating that some of the companies had gone bankrupt. He referred to the difficulties of obtaining documentary evidence while in prison. We rejected these arguments. There is no documentary evidence before us that any particular employer had gone into liquidation. There were no pay slips. We did not hear any oral evidence from fellow employees. By contrast we know that he was in the UK in 2009 when he was convicted for minor offences."

20. Thus the panel took the date to calculate his residence as being 2009.

21. It is plain from reading the determination at [18] that the "letter from the employment agency" referred to by the panel could only have been the letter exhibited at G1. There is no reference in this letter to support their finding that the Appellant was "on their books" as the panel found but simply states that he worked on a service contract between the dates of 30th October 2007 and 19th December 2007 inclusive. In this sense, there was evidence before the panel to demonstrate that his period of residence should have been calculated from October 2007 rather than 2009 and in that respect the panel were clearly wrong. However, it is not simply a matter of demonstrating continuous residence of five years. The Regulations are clear, permanent residence within the meaning of the Regulations require the Appellant to be continually lawfully resident under EU law, that is to say, is residing in the host state as a qualified person or family member of a qualified person or to demonstrate that he is residing in the EU state in accordance with the Regulations.

22. The finding of the panel make it clear that they considered from the evidence before them there was no evidence to demonstrate that he was residing in accordance with the Regulations. The panel at [18] say that there was "no evidence of employment" and they say that there were "no pay slips" or witnesses or evidence from fellow employees. However, here was evidence before the panel at D1, E1, F1 and G1 that related to the Appellant's employment. It can be summarised to show his work history

as follows October 2007 to December 2007, no evidence for 2008, 12th January 2009 to 28th August 2009 (F1) 13th November 2009 to 20th November 2009 (E1), 18th February 2010 – 24th February 2010, 1st March 2010 – 2nd March 2010, 6th March 2010 – 10th March 2010, 30th March 2010, to April 2010. There were no records for 2011 and 2012 and records for 15th January 2013 to March 2013.

23. There is no reference to these documents in the findings of fact made or the decision at [18] relating to calculation of length of time in the United Kingdom or whether this was evidence to support his claim that he had been resident and residing in accordance with the Regulations. It seems to me that the panel fell into error by calculating the relevant period from 2009 as being four years and four months rather than 2007 of which there was evidence at G1. As a result of this the panel did not consider the evidence I have referred to above that sets out his periods of employment and in effect did not take into account the period of employment that he had in 2007. The panel also made no findings as they were required to do as to whether or not he had demonstrated from 2007 that he had been living in the UK in accordance with the Regulations from that time which would have necessitated a careful evaluation of the evidence of employment and the gaps that there were. From the dates set out above it can be seen that there were gaps in the evidence of 2008, 2011 and 2012. However, as the panel began the calculation from the wrong date in 2009 and that they had reached the view erroneously that there was no evidence as to his employment prior to 2009 as there clearly was, it is not known whether they would have accepted the Appellant's oral evidence as to his employment history and the reasons for any such gaps and whether he could have qualified under the Regulations as a "jobseeker" or any other way. Thus I have concluded that the panel fell into error in this regard.

24. The second ground relates to the failing of the panel to have regard to the expert report of Dr McCormack who had conducted a risk assessment which determined the Appellant's risk of reoffending to be low. As Miss O'Brien conceded there was no reference to that report in the findings or assessment at [25]. when considering what might be termed as his propensity to offend. However she submits that notwithstanding that failure, that the panel would have reached no other outcome.

25. I am satisfied that the panel did err in law by not taking into account the expert report of Dr McCormack. The report was commissioned expressly to consider and asses the risks of reoffending of the Appellant (see page 3 of the report). The source of the information in the report came from the documentation provided and two meetings of the Appellant on 30th December 2013 and 24th February 2014. The conclusion reached by the author of the report was that the Appellant presented a low risk of reoffending. Thus the panel were required to have regard to the expert report in reaching the conclusion on the assessment of risk. Whilst the panel at [25] considered the social enquiry report and the Appellant's later evidence, they made no reference to the assessment and the contents of the report of Dr McCormack and thus their conclusions were not reached

in the context of the findings of the expert at all. It would have been open to the panel to have reached a different conclusion from that of the expert but in reaching such a conclusion upon the assessment of risk it required them to analyse the report in the context of the evidence and to give their reasons for doing so. They did not do so.

26. The panel had determine whether the Appellant's conduct satisfied the applicable "public policy" criteria and was required to consider whether his personal conduct represented a "genuine and presently sufficiently serious threat" and this, in my judgment required them to carefully consider all of the evidence including that of the expert report. It is not possible in the context of the findings to reach the conclusion that the panel, had they considered that report would have reached the same conclusions. They did not take into account that report and as I have said in doing so the conclusions that they did reach were not considered in the context of the contents of the report and its assessment of the report. Thus I am satisfied that the panel erred in law and that the decision should be set aside.

27. In the event that the Tribunal found an error of law, Mr Winter indicated that there would be some fresh evidence. There are a number of issues from which factual findings are required to that end oral evidence will be required from the relevant parties and thus I have reached the conclusion that the appropriate course is to remit the case to the First-tier Tribunal to a different judge or panel to consider the evidence further and to make factual findings necessary.

28. Therefore the decision of the First-tier Tribunal is set aside, and the case is to be remitted to the First-tier Tribunal for a hearing in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act at paragraph 7.2 of the Practice Statement of 10th February 2010 (as amended).

Decision

29. The decision of the First-tier Tribunal panel involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal as set out in the preceding paragraph.

Signed Dated

Upper Tribunal Judge Reeds