



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA460122014

THE IMMIGRATION ACTS

Heard at Field House
On 28th April 2017

Decision & Reasons Promulgated
On 22nd May 2017

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**RADOSLAW ANDRZEJ KONWERSKI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Z Konwerski (father of the appellant)
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Polish national born on 20th June 1982 and he appealed against the decision of the Secretary of State dated 17th November 2014 to deport him to Poland

pursuant to paragraphs 19(3) and 21 of the Immigration (European Economic Area) Regulations 2006 (“the EEA Regulations”).

Background

2. The background litigation history is that the appellant’s appeal was initially heard and determined by First-tier Tribunal Judge Andonian on 19th June 2015 who dismissed the appeal on 29th June 2015. An application for permission to appeal was granted by Upper Tribunal Judge Sehba H Storey and Upper Tribunal Judge Craig and the matter was remitted to the First-tier Tribunal. The decision then came before First-tier Tribunal Judge Fitzgibbon QC who allowed the appellant’s appeal. That decision was appealed by the Secretary of State on the basis that although the First-tier Tribunal Judge found his re-offending was assessed as being low, this did not equate to no risk of re-offending, and that it was submitted that threatening members of the public with a handgun, whether false or not, placed them in fear of their lives and was a serious crime (**Jarusevicius (EEA Reg 21 - effect of imprisonment) Lithuania [2012] UKUT 00120 (IAC)**).
3. The matter came before me and I found a material error of law in the decision on the basis of inadequate findings by the First-tier Tribunal Judge in relation to the appellant’s risk of re-offending, and whether the serious grounds of public policy or public security on which to deport the appellant, (a finding which was not accepted by the Secretary of State) had been made out, given the very serious nature of the offence that the appellant had committed and the threat he had posed to society.
4. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (“TCE 2007”) and preserved none of the findings. Having issued directions the matter was resumed before me.

Secretary of State’s Decision to make Deportation Order

5. The Secretary of State recorded that the appellant was convicted of the possession of an imitation firearm and theft on 28th February 2014 and sentenced on 15th August 2014 at Harrow Crown Court to 2 years imprisonment. The appellant claimed to have entered the United Kingdom on 1st June 2007 as an EEA national exercising treaty rights. The Secretary of State disputed the date on which he entered the UK, but accepted that he had been lawfully working here and exercising treaty rights since 2011. Consideration was therefore given to whether his deportation was justified on the grounds of public policy or public security and whether he represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It was considered there was insufficient evidence he had addressed the reasons for his offending. The offences committed were serious, he had a propensity to re-offend and the decision was proportionate under the EEA Regulations. Consideration was given to rehabilitation but there was no evidence that he had undertaken such work in custody and he could work to rehabilitation in Poland.

6. In the light of the serious criminal offence and the risk he could re-offend it was considered that deporting him would not breach the obligations under the Immigration (European Economic Area) Regulations 2006. The Secretary of State considered the Immigration Rules as setting out the position of the Secretary of State in Article 8 cases. The appellant had not lived for most of his life in the UK and was not culturally and socially integrated and there would be no very significant obstacles to his integration in Poland. He spoke the language, could seek support from friends and was not estranged from the culture. He had committed a serious crime. There was significant public interest in deporting him and no very compelling circumstances in his favour. It was acknowledged that he had a father and a step mother with a British passport in the UK but these ties did not constitute ties over and above normal emotional ties. He had failed to establish that any dependency existed. With reference to Article 8 his deportation would not breach the UK's obligations under the ECHR.

The Law

7. At the outset I confirm that the Immigration (European Economic Area) (Amendment) Regulations 2017 apply in relation to the amendments to the Immigration (European Economic Area) Regulations 2016 to Schedule 4. As such, notwithstanding the revocation of the 2006 Regulations by paragraph 1(1), those Regulations continue to apply –
- (a) In respect of an appeal under those Regulations against an EEA decision which is pending (within the meaning of Regulation 25(2) of the 2006 Regulations) on 31st January 2017.
8. Thus, as Mr Clarke submitted, and I accept, the 'old' EEA Regulations continued to apply to the appellant.
9. I set out those Regulations in connection with deportation as follows. For the purposes of clarity I set out the Regulations in relation to decisions taken to remove EEA nationals from the United Kingdom under Regulation 19(3) and (5):-

“19(3) Subject to paragraphs (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.*

...

- (5) *A person must not be removed under paragraph (3) if he has a right to remain in the 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."*

10. In relation to decisions taken on public policy, public security and public health grounds, Regulation 21 also applies:-

"21. – (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 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; or

(b) is under the age of 18, unless the relevant decision is necessary in his best interests, 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.

(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."*

11. Under the EEA Regulations, there are three levels of protection in relation to removal. A decision may not be taken except on imperative grounds for those who have resided in the United Kingdom for a continuous period of at least ten years. Secondly, a relevant decision may not be taken in respect of a person with permanent right of residence under Regulation 15 except on serious grounds of public policy or public security; and thirdly, for EEA nationals who have resided in the UK for less than five years in accordance with the Regulations, a relevant decision can only be taken on the grounds of public policy or public security and in accordance with the principles set out at paragraph 21(5) set out above and taking into account the considerations set out in paragraph 21(6) set out above.

12. The first question to determine is whether the appellant has permanent right of residence, and which level of protection applies to any removal. Further to Regulation 15 of the EEA Regulations:-

"15. – (1) The following persons 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;

(b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

(c) a worker or self-employed person who has ceased activity;

(d) the family member of a worker or self-employed person who has ceased activity, provided –

(i) the person was the family member of the worker or self-employed person at the point the worker or self-employed person ceased activity; and

- (ii) *at that point, the family member enjoyed a right to reside on the basis of being the family member of that worker or self-employed person;*
- (e) *a person who was the family member of a worker or self-employed person where –*
 - (i) *the worker or self-employed person has died;*
 - (ii) *the family member resided with the worker or self-employed person immediately before the death; and*
 - (iii) *the worker or self-employed person had resided continuously in the United Kingdom for at least two years immediately before dying or the death was the result of an accident at work or an occupational disease;*
- (f) *a person who –*
 - (i) *has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and*
 - (ii) *was, at the end of the period, a family member who has retained the right of residence.”*

Level of Protection

13. The deportation order was signed on 17th November 2014 but the appellant was imprisoned on 15th August 2014. It was Mr Clarke’s submission that there was no evidence from 2009 to 2011 that the appellant was exercising treaty rights. Clearly, the appellant was not exercising treaty rights in accordance with the EEA Regulations following the signing of the deportation order and therefore needed to demonstrate that he had exercised treaty rights from 17th November 2009 at the latest. It was the father’s evidence that he had submitted relevant tax and employment documentation in relation to the appellant and I note an undated letter from seven signatories at Copenhagen Gardens including the appellant’s stepmother stating that the appellant had worked with his father for the last seven years.
14. I considered the independent documentary evidence. There was located on the file a national insurance contributions certificate in the appellant’s name for the years 2010-2011, 2011-2012, 2012-2013, 2013-2014 and 2014-2015, but the schedule of an NIC contributions at page 35 of the bundle did not indicate any payments had been made for national insurance contributions Class 1 and 39 ‘self-employed’ class 2 NICs for 2012-2013 and only 41 for 2011-2012. There were no payments for 2010-2011 and no credits for 2011-2012. For 2013-14, there was a confirmation of a Jobseeker’s Allowance claim dated 7th March 2014. I sighted a tax calculation summary for 2012-2013 showing an overpayment of tax for £1,092, clearly for the year ending 2013, and an acknowledgement of an application for a budgeting loan from the Department of Work and Pensions dated 11th December 2013. There was a further letter from the

Jobseeker's Allowance dated 19th November 2013 confirming alterations in the jobseeker's allowance payment.

15. There was a tax calculation for 2011 to 2012 showing a profit from self-employment of £3,682, and a further letter from Jobseeker's Allowance dated 14th December 2012 advising that the appellant could not be paid Jobseeker's allowance from 8th November 2012 because he had not paid enough Class 1 national insurance contributions. I did note despite the schedule showing NICs paid that there was a payment of £68.90 on 6th October 2012 and a payment of £65 on 31st March 2012, but this documentation alone does not persuade me that he was in employment or self-employment between 2009 and 2011, and indeed, the tax documentation for self-employment for the appellant in relation to 6th April 2011 to 5th April 2012 showed that his business started on 5th July 2011. There was a further NIC payment of £37.50.
16. Indeed the documentation in relation to the years 2009 to 2011 was sparse. I noted of a letter dated 6th January 2012 from M-Team PC Ltd identifying that he was an employee at M-Team Property Care from May 2011 being paid a weekly £400 after tax. Between 24th April 2008 and 25th November 2010, there were various invoices paid to 'Radoslaw', in the total sum of £659.50 but mostly the invoices did not identify whether they were payable to the father or the son,. Included in this amount, however, were invoices in the minimal sum of £224 in the name of R Konwerski. There were no tax declarations in relation to the period prior to 2009-2010.
17. Overall on a review of the financial evidence, I do not accept that the appellant was residing in the United Kingdom in accordance with the EEA Regulations prior to 2011, and therefore that he was entitled to the 'higher' level of protection from deportation under the EEA Regulations on the basis of permanent residence.
18. The Secretary of State had stated in the decision letter of 17th November 2014 the appellant claims to have entered in 2007 and worked as a security guard, and he had provided various documentary evidence for periods in 2011, 2012, 2013 and 2014, but provided no evidence of his continuous residence or of exercising treaty rights in accordance with the 2006 EEA Regulations for a continuous period of five years. The appellant had the opportunity but failed to provide evidence that he had acquired a permanent right to reside by virtue of residing in the UK under Regulation 15 of the 2006 Regulations.
19. I have therefore considered whether the respondent was justified in removing the appellant on the grounds of public security with relation to paragraph 19(3) and 21 of the EEA Regulations.

Regulation 21 Immigration (European Economic Area) Regulations 2006

20. I thus considered whether the decision of the Secretary of State complied with the principle of proportionality in view of the seriousness of the offence, whether it is clearly based exclusively on the personal conduct of the appellant and whether he remained a genuine present and sufficiently serious threat to one of the fundamental

interests of society. I also take into account the prospects of rehabilitation and the various factors in relation to Regulation 21(6).

Circumstances of Offending

21. On 9th February 2014 whilst in the William Hill betting shop the appellant was in possession of a carbon dioxide powered pistol and threatened two men with it. On 28th February 2013 the appellant was caught shoplifting at Morrisons and found in possession of another carbon dioxide powered pistol. As set out by the Secretary of State, the existence of such guns in a community puts the public at risk of serious harm, and indeed in fear of their lives, and indeed, should the gun have been used the impact could have been catastrophic. The sentencing judge in his case at Harrow Crown Court made the following statements about the risk of harm:-

“You appear before the court having pleaded guilty to offences on two indictments, the first concerning an offence that occurred on 9th February 2014 of possession of an imitation firearm with intent to cause fear of violence.

The second indictment relates to an episode on 28th February 2014, an offence of possession of an imitation firearm at the time of committing an offence and also the theft of a bottle of liqueur and a quantity of cheese. ...

These are serious offences. Possession of any firearm in public will nearly always attract a substantial custodial sentence. Sight of such weapons strikes fear into the heart of others and certainly in relation to the first offence where deployed by you for that purpose.

It is also a severely aggravating feature that the second offence only occurred nineteen days after the first with a weapon purchased after the earlier offence and while you were on bail.

I also note that in respect of at least one of the offences, you were under the influence of alcohol which is also an aggravating feature, it appears that you have had a very serious drink problem.”

22. The question must also be asked is he a present threat? The question of the appellant’s propensity to re-offend must be taken into account in relation to the threat to the public. It is noted that he undertook two offences of possession of imitation firearms, albeit in quick succession and following an apparently hitherto unblemished record. There were, however, according to the judge aggravating circumstances. The Secretary of State considered that the appellant continued to pose a threat and took the view that

“... there is insufficient evidence that you have adequately addressed the reasons for your offending behaviour ...”

and:-

"... it is reasonable to conclude that there is a risk of reoffending and continuing to pose a risk of harm to the public ... All the available evidence indicates that you have a propensity to reoffend and that you represent a genuine, present and sufficiently serious threat to the public to justify your deportation on grounds of public policy."

23. There were three reports produced in relation to the appellant's offending and the threat he posed. The NOMS pre-sentence report dated 13th August 2014, the OASys Assessment Report dated 23rd March 2015 and the NOMS National Probation Service letter dated 27th March 2015. I have considered them carefully. The appellant was effectively incarcerated between February 2014 and April 2015 when he was removed to Poland.
24. The whole premise of the reports in relation to the appellant's offending relied on his reduction in alcohol and its abuse and 'emotional management' and save for an assurance from the father in relation to the son's activity in Poland, there was limited evidence of any such reduction. The evidential basis for concluding that the appellant had taken steps to address his drinking and his alcohol abuse was extremely sparse and relating to when he was in custody.
25. The NOMS Pre-sentencing Report dated 13th August 2014 was undertaken when the appellant was in custody and referred to his alcoholism and his experiencing withdrawal symptoms when in custody and his intention to join Alcoholics Anonymous on release. This report found him of low risk of re-offending but although the risk was indicated as being low, that does not mean that there is no risk. Indeed, it is noted that should the appellant re-offend there was a "medium risk of serious harm".
26. The pre-sentence report dated 13th August 2014 concludes that:-

"My assessment of Mr Konwerski informs the court's decision and to this end, I propose that he does not pose a significant risk to members of the public of serious harm by the commission of further specified offences."

In terms of risk reduction, it is recommended Mr Konwerski undertakes work in custody to address his alcohol misuse issues and explores relapse prevention techniques that will enable him to remain abstinent upon release."

However, this report did contain internal inconsistencies, particularly the text, in that although acknowledging that the appellant was mild-mannered and courteous, he did not quite appear to have fully comprehended the seriousness of the offences, anticipating an early return to his former life and routine, and also that the report stated:-

"It is my assessment that Mr Konwerski poses a medium risk of harm to the public. This means that there are identifiable indicators of risk of harm, in terms of Mr Konwerski's possession and use of weapons, and therefore, although he has the potential to cause harm, he is unlikely to do so unless there is a change of circumstances".

27. The report goes on to identify the use of the risk assessment tool called “The Offender Group Reconviction Scale (OGRS)” and the “Offender Assessment System” (OASys respectively). Mr Konwerski’s OGRS score, “probability of proven re-offending”, is 6% within twelve months but increases to 11% within 24 months and although placing him in the low risk category, bearing in mind the dynamic factors that also contributed to his offending, I am not persuaded in the light of the sentencing remarks of the judge which post-dated this pre-sentence report that the risk of re-offending and harm is sufficiently low as to show very limited risk of re-offending. I have identified the relevant reports, particularly the OASys Assessment Report which appeared to be heavily dependent on the pre-sentence report. Nonetheless, the OASys Assessment was clear in its conclusion when assessing the risk of serious harm the offender posed on the basis that if released immediately back into the community, albeit a low risk in custody, he was considered to be a medium risk in the community and that there were current concerns about breach of trust.
28. I note that the OASys Assessment Report of 23rd March 2015 was also undertaken while the appellant was in prison and it records in relation to the first offence that the appellant intended to take the gun which is legal in Poland to the park to “shoot” on the day of the offence. On the day of the second offence he was in Morrisons when he decided to steal a bottle of vodka, and having been stopped by the security officers he was found to be in possession of yet another imitation firearm. The OASys Report advises:-
- “**Currently [my emphasis]** this risk is not immediate due to Mr Konwerski’s incarceration. In a community the risk is likely to be greater if – Mr Konwerski is misusing alcohol, poor emotional management, fails to consider the consequences of his behaviour and thus repeats the same mistakes”.*
29. The OASys Report described the circumstances likely to increase risk as misusing alcohol, associating with an alcoholic anti-social peer group, poor emotional management, failing to consider the consequences of his behaviour, repeating the same mistakes and unemployment or lack of structure to the appellant’s days.
30. I could find no specific reference to alcohol reform in the OASys Report dated 23rd March 2015.
31. The National Offender Management Service Report, the later assessment made on 27th March 2015, was drafted by a probation officer who had not actually met the appellant. She based her brief report and conclusions substantially on the OASys Report composed when the appellant was in prison. She described him to be at low risk of re-offending, but bearing in mind the limitations on her report as just identified, I place limited weight on her report. She identified that:-

“I have sighted (sic) of a letter dated the 2/12/2014 from ‘The Rehabilitation for Addicted Prisoners Trust (RAPT) is (sic) relation to Mr Konwerski’s engagement in their services whilst in custody. The letter confirms that Mr Konwerski has been working with the substance misuse team since his arrival at HMP Maidstone. It also notes that Mr Konwerski acknowledges his personal alcohol problems and accepts

responsibility. Mr Konwerski had volunteered himself to undertake a programme to address his alcohol misuse and completed this programme on 23/01/2015."

32. The letter from RAPT, however, was not produced and there was no report following his programme. Although there were indications from the RAPT service that the appellant would engage there was no final report. The only letter was 2nd December 2014 admitting him to the programme. The prison medical records indicate that he has a limited understanding and use of the English language. The medical report dated 20th November 2014 also indicated that he "does not want to engage with a carat despite being given information about its benefit". It was noted that he had no previous convictions prior to his last conviction. The medical reports also indicated that this is an appellant who had been drinking since he was 16 years old and that his drinking was 'exacerbated' by his break up with his girlfriend. Although the OASys Report was undertaken on the basis that he was not drinking in prison and that he had admitted himself to the RAPT programme, he maintained he successfully completed there was no indication of a final report from RAPT
33. There was nothing from Alcoholics Anonymous in Poland. There was little firm evidence of the appellant addressing his substance misuse save for whilst he was in prison.
34. At the resumed hearing before me Zdzislaw Konwerski attended and gave evidence as the father of the appellant. I had specifically given a direction in the error of law decision following the hearing at which the father was present, whereupon I had set aside the decision of the First-tier Tribunal, instructing that any further evidence in relation to the appellant's alcohol reform and recovery, but no documentary evidence was received.
35. The father confirmed that he himself had been an alcoholic and that he was in contact with the appellant twice a week, but he had not visited him. He confirmed that he had been involved in setting up an Alcoholics Anonymous group in Poland 26 years ago and someone had told him that his son had been attending. He gave evidence that there was no letter from the group confirming his son's attendance because the group was anonymous, but he had received information that he had been with the group three times a week. He confirmed that his son was living in a hostel and that previously when in the UK his son had been living with him. For some time he had continued to see his friends, with whom his son socialised, a few times a week on his way to and from work, but he no longer saw them. He confirmed that if his son returned he would live with him.
36. He was asked under cross-examination whether he had undergone any other therapeutic work and confirmed that, in fact, he did not know whether had attended any other coursers. He confirmed that the appellant had a grandmother in Poland living in the same town and at one point he stated that he would see his grandmother and towards the end of the hearing he stated that he did not see her. Altogether the father was persuaded that the son had attended the Alcoholics Anonymous meeting, but when questioned closely he said that he only had been told

by his friends that he had done so. The father confirmed that he could not know for certain that the appellant attended an Alcoholics Anonymous group in Poland and it was only what he was being told by a member of that group who remained unidentified. There was no statement to that effect, no statement from any official in the organisation.

37. I place very little weight on the father's evidence on the basis that it was essentially hearsay and there was no confirmation by way of any documentary evidence to support the contention that the son had undergone alcohol reform. The father had not visited the appellant in Poland although I accept he may have contact with him. Mr Clarke made the pertinent point that should he return it may well be that he would associated with his previous friends again. Bearing in mind the importance on the evidence of recovery and which the appellant had every opportunity to produce evidence that his alcoholism has been addressed and which remains the source of his offending behaviour, I am not satisfied that the appellant does not continue to represent a genuine and present threat. I state this with the reports I have cited in mind.
38. I took into account the father's evidence and I can understand that the father is concerned for the welfare of his son, particularly as he explained that he himself was an alcoholic and had assisted in setting up the Alcoholics Anonymous group in Poland. The appellant had explained in his witness statement that his mother died in 2006 and this must have had an impact on him. Subsequently he asserts that he worked assisting his father as a gardener cum builder but I also note that he was claiming Jobseeker's Allowance. His time in the UK was as an adult and he committed offences as an older adult.
39. I can accept that a risk of serious harm is discrete from a risk of re-offending, but as I have explained, as indicated in the pre-sentence report dated 13th August 2014 there was no evidence that he had explored relapse prevention techniques.
40. The Probation Service identified his prospects of rehabilitation would be served by him receiving ongoing support from his father, but as identified, his father was unable to prevent his descent into alcoholism and to prevent his commission of the offences in question. I am not persuaded that his rehabilitation prospects are stronger in the UK than they are in Poland in the light of all the circumstances.
41. Of significance is that the son, according to the father, has been living in Poland now for at least two years and he was, I note, removed to Poland on 16th April 2015 and he appears to have work.
42. In terms of rehabilitation I take note of the principles in **MC (Essa principles recast) Portugal** [2015] UKUT 00520 (IAC) which sets out that

'Where relevant (see (4) above) such prospects are a factor to be taken into account in the proportionality assessment required by regulation 21(5) and (6) ((Dumliauskas [41]).

...

Gauging such prospects requires assessing the relative prospects of rehabilitation in the host Member State as compared with those in the Member State of origin, but, in the absence of evidence, it is not to be assumed that prospects are materially different in that other Member State (Dumliauskas [46], [52]-[53] and [59]).

Matters that are relevant when examining the prospects of the rehabilitation of offenders include family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like (Essa (2013) at [34]). However, lack of access to a Probation Officer or equivalent in the other Member State should not, in general, preclude deportation (Dumliauskas [55])

In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (Dumliauskas [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide-ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (Dumliauskas at [46] and [54]).

43. In relation to his rehabilitation I note that the appellant has family in the UK and I take into account the father's desire to have his son with him, but they were unable to prevent him from committing the offences for which he has been convicted and are unlikely to provide with the necessary support to aid his rehabilitation and reduce his risk of offending. It is open to the father to visit the son which he has not done since he left in April 2015. He has not always lived with his father and step mother and there was no indication save for close emotional bonds that the ties were beyond normal emotional ties or that there was any real dependency. There is no evidence to suggest that he would be unable to work towards rehabilitation in Poland, although there would appear to be no evidence to that effect, equally there was no evidence that there were any courses or avenues for rehabilitation available in the UK. I am not satisfied on the evidence that his deportation to Poland prejudices the prospect of his rehabilitation and the interference in his rehabilitation would indeed be proportionate and justified when balanced against the continuing risk he posed to the public.
44. The appellant had friends in the UK with whom he was associating when offending and there was no evidence that they had departed. As the appellant would appear to have casual work in Poland and there is the availability of AA meetings in Poland, I find that his prospects of rehabilitation are likely to be greater abroad particularly as his level of Polish appears to be more advanced than English. That said, limited weight needs to be attached to his rehabilitation in view of the level of protection that the appellant is entitled to owing to his length of residence (in accordance with the EEA Regulations) in the UK.
45. I have considered the principles in relation to paragraph 21(5) and for convenience I repeat the sentencing remarks the judge made in this case about the risk of harm:-

“You appear before the court having pleaded guilty to offences on two indictments, the first concerning an offence that occurred on 9th February 2014 of possession of an imitation firearm with intent to cause fear of violence.

The second indictment relates to an episode on 28th February 2014, an offence of possession of an imitation firearm at the time of committing an offence and also the theft of a bottle of liqueur and a quantity of cheese. Briefly stated, the offence committed on 9th February was as follows or in the following circumstances.

You were at the William Hill betting shop in Acton with some friends. Two men paid you and your friends some attention because of the noise you were making. You asked them what they were looking at, approached them and lifted your top to reveal a gun concealed in your waistband. It was a carbon dioxide powered pistol.

On 28th February, you were caught shoplifting at Morrisons. Whilst being searched by the security staff, they found another carbon dioxide powered pistol. You pleaded guilty to these offences following a Goodyear indication on the day fixed for trial, you previously having entered pleas of not guilty.

...

In relation to the offence on 9th February, you said, ‘I accept I said to a man, ‘What the fuck are you looking at?’ and showed him the gun. I accept this was to scare him but I did not intend to threaten him further. I did not say I would kill him.’

...

These are serious offences. Possession of any firearm in public will nearly always attract a substantial custodial sentence. Sight of such weapons strikes fear into the heart of others and certainly in relation to the first offence where deployed by you for that purpose.

It is also a severely aggravating feature that the second offence only occurred nineteen days after the first with a weapon purchased after the earlier offence and while you were on bail.

I also note that in respect of at least one of the offences, you were under the influence of alcohol which is also an aggravating feature, it appears that you have had a very serious drink problem.”

46. As indicated in the reasons for refusal, shoplifting is not a victimless crime and if the appellant failed to recognise the implications of his offence he would act in this way again in the same circumstances.
47. Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the UK, a decision maker must take into account considerations such as age, state of health, family and economic situation of a person and length of residence in the UK and the person’s social and cultural integration into the UK and the extent of the person’s links with his country of origin.

48. The appellant is now nearly 34 years of age and has alcohol-related epilepsy. His father and mother live in the UK, but I note there was indication in the papers that the appellant has cousins in Poland and his grandmother lives in the same town as him in Poland. The appellant does not live with his grandmother and the father gave me contradictory evidence as to whether he was in contact with his grandmother or not. Initially the father confirmed that he saw his grandmother on a regular basis and then stated that he had nothing to do with his grandmother. This undermined the credibility of the appellant's father's evidence and which I did not find to be reliable because of the contradictions.
49. With reference to the appellant's integration, the father stated that the appellant had worked as a security guard in the UK but there was no evidence that the appellant had lived in the UK on a continuous basis in accordance with the EEA Regulations prior to 2011 and these circumstances I have analysed above. The appellant was imprisoned in 2014 and removed from the United Kingdom in April 2015. His period of imprisonment undermines the notion of integration into the UK, as indeed do his offences. He had produced only limited evidence of ties to the United Kingdom and it would appear that he was associating with an anti-social group of friends whilst in the UK. The father confirmed during his evidence that he did continue to see the appellant's friends, albeit he had not seen them lately and indicated that the appellant would live with his father and stepmother should he return to the United Kingdom, but then move to his own place.
50. I have taken into account the statement of the appellant and noted his remorse and contrition and the closeness of the relationship that he has with his father and his stepmother. I note that he identified that he had lived in the UK for 14 years but told the medical services that he had lived in the UK for just five years. I have also taken into account the statement of his step mother. I am aware that they are fond of each other but conclude ultimately that she and his father are free to visit the appellant in Poland. I have also considered the evidence of Dr Sarnicki dated 12th April 2015 and appreciate the impact on the father's health and difficulty in which that this has placed the father but this does not outweigh the protection that should be afforded to the public.
51. There is no evidence to suggest the appellant was in a position of being estranged from Poland because of his integration or private life in this country, and such that any reintegration in Poland would have the effect of undue hardship. Indeed, the appellant, according to the father, now lives in a hostel in Poland and is working where because of the language he is able to make a different group of friends.
52. Overall, given the threat of serious harm that he posed to the public, his personal circumstances do not outweigh the requirement for his deportation and the decision to remove him is justified, proportionate and in accordance with the principles under Regulation 21(5).
53. In sum, the appellant was sentenced on 15th August 2014 and as indicated in the decision letter of the Secretary of State of 17th November 2014 the appellant had not

produced evidence that he had adequately addressed the reasons for his offending or successfully completed any such programme or addressed the issues that led him to commit the offences in question whilst in custody. He still has not. In the light of the nature of the offences, in the light of the reports as drafted which make specific reference to the need for control of his alcoholism and his peer group, and in the light of the lack of specific evidence in relation to his reformation of alcohol misuse post-incarceration, and in the light of the continuing absence of any firm documentary evidence in relation to his addressing his problems, I find that the appellant remains a risk of posing serious harm to the public and if it occurred that it would be serious harm would be of medium risk.

54. He therefore continues to pose and represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society. The offence itself was a serious offence, is reflected in the sentencing remarks of the judge and the length of the prison sentence (2 years) which was given to the appellant. It is not reasonable to leave the public vulnerable to the potential for the appellant to re-offend. Brandishing a gun in public, particularly in the current climate, and placing people in fear of their lives can only be construed as serious. It is a fundamental interest of society that the law, an integral part of the democratic constitutional system, should be complied with and upheld and that citizens are not placed in fear of their lives from someone threatening them with an imitation firearm. The deportation order was proportionate in all the circumstances.

The Immigration Rules and Article 8

55. I turn to a consideration of Article 8 and apply the Immigration Rules at paragraphs A362 and paragraphs 398 to 399D. As set out in **Hesham Ali v SSHD [2016] UKSC 60**, the question is sterile as to whether the Rules are a complete code or not and what is important is that Parliament's view is taken into account as expressed in the Immigration Rules and set out at Section 117A to D in Part 5A of the Nationality, Immigration and Asylum Act 2002. Although the Immigration Rules and Part 5A of the 2002 Act do not apply directly to EEA nationals, Article 8 applies to all and the Immigration Rules and the statute gives expression to Parliament's view of the public interest.
56. The appellant claims that his father and his stepmother and two stepsisters live in the United Kingdom and that he is single and has no children. Although the appellant had stated that his father was unwell, his father was able to attend court and indeed was married to his stepmother and has access to the NHS system.
57. The appellant's deportation is conducive to the public good and in the public interest as he has been convicted of an offence for which he has been sentenced to a period of imprisonment of less than four years but at least twelve months.
58. When considering the appellant's Article 8 claim paragraph 399A of the Immigration Rules is relevant and sets out the exceptions to deportation, specifically:-

- (a) the foreign criminal has been lawfully resident in the United Kingdom for most of his life, and
- (b) the foreign criminal is socially and culturally integrated in the United Kingdom, and
- (c) there would be very significant obstacles to the foreign criminal's integration into the country to which he is proposed to be deported.

59. The appellant has not lived lawfully in the UK for most of his life, bearing in mind that he had committed a serious offence against the interests of British society and had provided no evidence he had made any positive contribution to society. I am not satisfied that he was socially and culturally integrated.
60. There are no very significant obstacles to his integration into Poland. He has lived there for most of his life, has been living there since 2015, has no language barriers, has family there and has been able to find accommodation, and according to the father, work in Poland. There is nothing to suggest he was estranged from the culture of Poland or that he cannot resettle. Indeed he must have been educated there.
61. I then must turn to whether there are very compelling circumstances, (by virtue of the Immigration Rules and Section 117D of the Section 117 of the Nationality Immigration and Asylum Act 2002), such that the appellant should not be deported. There is a significant public interest in deporting the appellant because he was convicted for possession of an imitation firearm, theft and possessing an imitation firearm with intent to cause fear or violence. He would need to provide a very strong Article 8 claim over and above the circumstances described in the exceptions, but has provided no such evidence.
62. The appellant has a father, stepmother and siblings in the UK, but these are relationships with adults and do not constitute family life without further elements of dependency beyond normal emotional ties and he had failed to establish that any such dependency existed. Indeed, the appellant has now been living abroad since the offences and I must consider the appeal as at the date of the hearing before me.
63. I note that he has alcohol-related epilepsy, but there is no indication that he would be unable to access medical care in Poland and there is no indication that he has reached the threshold required under Article 3 of the ECHR.
64. In view of the offences that have been committed I am not persuaded that any compelling circumstances on human rights grounds are put forward which outweigh the public interest. I therefore dismiss the appeal.

ORDER

Appeal dismissed.

No Anonymity direction.

Signed *Helen Rimmington*

Date 15th May 2017

Upper Tribunal Judge Rimmington

FEE AWARD

As I have dismissed the appeal there can be no fee award.