Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00421/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 December 2018	**On 15 February 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR TOMASZ MATEUSZ SKIT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of the respondent made on 14 July 2017 to make a deportation order signed against him on that date. That decision was made pursuant to Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016. His appeal against that decision was allowed by the First-tier Tribunal for the reasons given a decision of 22 June 2018.

2. For the reasons given in my decision of 15 November 2018 that decision was set aside on the basis it involved the making of an error of law and directions were given for the appeal to be remade in the Upper Tribunal. A copy of my decision is set out in the annex to the decision.

3. The appellant is a citizen of Poland who entered the United Kingdom in 2004 and was employed after that date for a number of years ceasing to

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work in 2016 as a result of a workplace accident. The appellant has a child from a previous relationship, that child now being a British citizen. The appellant is in a relationship with another Polish national and who has a daughter from a previous relationship.

4. In 2004 the appellant was cautioned for shoplifting and since then, between 3 February 2009 and 22 May 2017 he has been convicted on twelve occasions of 22 offences including, assault, battery, theft, being drunk and disorderly, driving otherwise in accordance with the licence, three counts of using a vehicle while uninsured, resisting or obstructing a constable, two counts of driving a motor vehicle with excess alcohol, driving whilst disqualified and failing to surrender to custody at appropriate time. He was also convicted of failing to comply with the requirements of community orders.

5. The most recent conviction, on 22 May 2017, was a conviction for driving whilst disqualified, using a vehicle while insured and driving with excess of alcohol, of which he was sentenced to 28 days' imprisonment and disqualified from driving for three years. This is the only offence of which the appellant has been convicted which resulted in an immediate custodial sentence, previous convictions being dealt with by fines and community orders; a sentence to sixteen weeks' imprisonment imposed on 27 September 2011 was wholly suspended for eighteen months.

6. For the reasons set out in the letter of 14 July 2017 the respondent concluded that Schedule 1 of the EEA Regulations 2016 paragraphs F, H and J were engaged such that the appellant's behaviour was a threat to the fundamental interests of society. It was concluded also that a history of failure to comply with court orders indicated an antisocial or an attitude towards the public and community, but the appellant has shown no remorse in his behaviour or any recognition of the impact it may have on others. This concluded also that his convictions indicated an established pattern of repeat offending with an escalation in the seriousness of offences as indicated by the sentences imposed and, in the absence of any evidence of improvement in personal circumstances since the conviction there remains a risk of reoffending and him continuing to impose a risk on to the public. The respondent also concluded that even if the appellant had had permanent residence or a continuous period of ten years' residence the requirement for serious grounds of public policy or imperative grounds of public security respectively would be satisfied.

7. The respondent considered that deportation was proportionate submitting the appellant could go back to live in Poland, that he had provided no evidence of his relationship with his son or of his partner and stepdaughter. It was concluded that he had not integrated into United Kingdom society and his persistent offending was evidence that he had not integrated socially and culturally into life in the United Kingdom. He had provided little evidence to show he had contributed in a positive way to United Kingdom society or the economy and thus deportation would be proportionate. The respondent concluded also that his removal would be a

proportionate interference with his right to respect for family and private life pursuant to Article 8 of the Human Rights Convention.

8. I heard oral evidence from the appellant who was supported by his current partner. He provided a letter from HM Revenue & Customs dated 14 September 2017 which sets out his history of employment for the tax years 2004/5 to 2016/17.

9. I heard evidence from the appellant who confirmed that he still sees his son on a regular basis and that he stays with him at weekends. He said that three years earlier he had had a bad accident at work which had meant he was no longer able to work and that despite several operations to his arm it was still not functioning properly. He has an ongoing court case about this.

10. I asked why the appellant’s offending appeared to have a peak in 2011. He said that it was due to the people he had been socialising with at the time but he had stopped seeing them. He said that the second period of offending around 2013 was when he became depressed as a result of his accident which he accepted was not a good excuse and that he had also been drinking heavily, as much as seven to eight beers a day. He said he had stopped drinking as his current partner had made it clear that if he did not do so and did not sort himself out it was over between them. He said that now he had realised that he had too much to lose and he did not want his family to suffer as a result.

11. In cross-examination the appellant said that if his appeal was successful he would, he hoped, get compensation for his injury, that he and his partner would find a home and he hoped to find employment again. He said that he helped by translating between Polish and English for the local council and helping local people in that way. He said that despite the three operations it was still not possible to move the wrist properly. It was put to him that some of the offending indicated that he simply did not care. He said at the time he was depressed and really had not been thinking about what he was doing. He said that he realised now that he had too much to lose and would not go back to the previous forms of behaviour.

12. In submissions, Ms Holmes submitted that there were few integrating links in this case. Whether they existed depended entirely on the credibility of the appellant’s evidence. It was accepted that the key issue here was integration but that ultimately this was a matter for me. She accepted that she may be in difficulty in suggesting that fourteen days in prison was capable of interrupting integrative links.

<u>The Law</u>

13. **Decisions taken on grounds of public policy, public security and public health**

27. (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 right of permanent residence under regulation 15 except on serious grounds of public policy and 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 in the best interests of the person concerned, 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(17).

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 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;

(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;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

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

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010(18); or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

14. It is clear from **B [2018] EUECJ C-316/16** that in order to obtain the highest level of protection the person concerned must have acquired the right of permanent residence within the meaning of Article 8 in the Regulations.

15. It is also clear that the requirement to have resided in the United Kingdom for the previous ten years may be satisfied for an overall assessment of the person's situation, taking into account all the relevant aspects, leaves the conclusion that notwithstanding the contention the integrative links between the person concerned and the host member may not have been broken. These aspects include inter alia, the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which the offence was committed and the conduct of the person concerned throughout the period of detention.

16. In reaching my conclusions, I have applied Schedule 1 of the 2016 Regulations which provides as follows, so far as is relevant:

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider

cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

3. 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.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

(a) the commission of a criminal offence;

(b) an act otherwise affecting the fundamental interests of society;

(c) the EEA national or family member of an EEA national was in custody.

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

…

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a)preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b)maintaining public order;

(c)preventing social harm;

(d)preventing the evasion of taxes and duties;

(e)protecting public services;

(f)excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

(g)tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);

(h)combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

…

(j)protecting the public;

17. I was not addressed on any of these factors specifically.

18. I found the appellant to be a candid witness. Although he did initially give evidence in Polish, it rapidly became clear that he was in fact perfectly comfortable to speak in English which he was able to do without any real difficulty. The appellant's account of his employment history is supported by the letter from HM Revenue & Customs. This indicates, and it was not suggested to the contrary, that he was in full-time employment from 2004 until 2016 when, as a result of an industrial injury, he had to cease work. I have considered carefully the appellant's evidence including that set out in his statements provided previously. There is a consistent threat that the appellant spontaneously accepted that his previous misbehaviour was not acceptable and that he has now realised what he can lose, particularly the relationship with his partner and children and that he has put at risk the relationship he has with his son. It does appear also that the service on him of the deportation order came as somewhat of a shock.

19. I have no reason to doubt the appellant's account of having played football for a work's related team, whilst he was working for the Ford Motor Company but beyond this and assisting fellow Polish speakers as a translator for the local council, there is little evidence of his integration into the United Kingdom beyond the fact that he has a family here and a relationship with a son born here who is now a British citizen. He also has, until the injury caused him to cease work, a good work history. It appears that he was in full-time employment for a period of thirteen years. I am satisfied that he has in reality moved the centre of his life to the United Kingdom and that objectively at least he has integrated into the United Kingdom.

20. As against that, there is a long history of offending. Aside from the isolated caution for shoplifting, the offending appears to fall into a pattern related to drink both in terms of being convicted of being drunk and disorderly and also drink driving with excess alcohol in 2009 and then a period of newer offences in 2011. Much of the offending involves the failure to comply with community orders which extended into 2012. There is then an offence committed in 2013, again driving without a licence, but then no offending again until 2017.

21. Three aspects of this offending behaviour cause me concern: first, there is the involvement of alcohol, second there is the disregard for community punishments imposed on him and third there is the driving of a vehicle when uninsured and disqualified from driving. All of these demonstrate antisocial attitudes which he sought to explain as being within the wrong crowd. Both that and to an extent what must be an undiagnosed

depression after the accident, may go some way to explaining behaviour but equally although the appellant was aware of what he did and it is clear that he acted consciously, he did nothing about it.

22. The appellant did, however, spontaneously accept that a lot of his problems had been due to alcohol and that he had given up drinking. He candidly admitted having drunk seven to eight beers a day and that his partner had made it clear that if he did not cease then she was going to ask him to leave.

23. By nature of the appellant's offending and the very short sentences such that he would not have been offered any enhanced thinking courses nor would any presentencing report have been prepared. In addition, as all his sentences were in the Magistrates' Court, there will have been no sentencing remarks available.

24. Returning then to what was said in **B** there is nothing to suggest that the appellant's conduct, whilst in detention, albeit of a very short period, indicated a lack of integration. Further, the offence which resulted in detention is at the lower end of seriousness. The offences are summary only and the sentence imposed of 28 days indicates also that it is at the lower end of the scale. That said, it is probably only because of good luck and good fortune than anything else that the appellant did not cause serious injury or damage through driving whilst under the influence of alcohol. I view this offending as serious in the light of the previous offending.

25. Taking all of these factors into account I am persuaded that, the offending notwithstanding, the appellant has established integrative links here in the form of connections through work and social connections outwith the family. I do not consider that in the circumstances of this case imprisonment for 14 days (the appellant was released mid-way through his sentence) or even 28 days is such as to break those links, given the short duration. On that basis I conclude that the appellant is entitled to benefit from the highest level of protection, that is that the Secretary of State would need to show that the imperative meets public security. The appellant does not, for the reasons set out below present a threat reaching even the next lowest level.

26. If, however, I am wrong to conclude that the appellant has developed integrative links such that he is entitled to the higher level of protection, I am nonetheless satisfied that the appellant is entitled to the middle level of protection, that is that the Secretary of State has to show that there are serious reasons of public policy or security such that he should be deported.

27. Having heard and observed the appellant give evidence, and having read the submissions he made in July 2017, I conclude that in this case the shock of a relatively short period of imprisonment has had the desired effect. It has, I consider brought the appellant to his senses and he has, in his own words, realised how much he has to lose which is his relationship

with his partner, son and his stepdaughter. Ordinarily, given the history of offending in this case, even though it is related on the appellant's evidence to firstly becoming involved with the wrong people and again following depression in 2017, it would be difficult not to accept that there was a propensity to reoffend. Viewing the evidence as a whole, in this case, I am satisfied that there is little risk now that this appellant will, as a result of the effectiveness of the imprisonment and separation from his family reach the position that he has given up drinking and has decided that he will not reoffend. Accordingly, I am not satisfied that he does present a sufficiently serious threat such that Regulation 27 is engaged.

28. In reaching my conclusion I have had full regard to Schedule 1 of the 2016 Regulations. The Secretary of State has not introduced any specific evidence to show that the offences committed here caused public offence nor did Ms Holmes submit that the public maintenance of public confidence in taking action was undermined in this case. Thus, I accept that there has been persistent offending in the past, for the reasons set out above I consider that this is no longer likely to occur and that there is, given the findings with regard to propensity to offend, that the public is adequately protected.

29. Further, I am satisfied that the appellant has a relationship with his partner and her child. I am also satisfied that he has a close genuine parental relationship with his son. None of this was challenged in cross-examination and I conclude that there would be significant interference with these rights were he to be deported to Poland.

30. I note that the appellant has not reoffended since 2017 a period of some eighteen months. That, in the context of his previous history, is a significant period.

31. Taking all of these factors into account I am satisfied that removal would be disproportionate.

32. Accordingly, for these reasons, I conclude that the Secretary of State has not shown the decision made to deport in this case was not in accordance with the United Kingdom's obligations pursuant to the EU Treaties and I allow the appeal on that basis.

Summary of Conclusions

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the appeal by allowing the appeal on EU grounds.

Signed Date 22 January 2019.

Upper Tribunal Judge Rintoul

Annex – Error of law decision

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00421/2017

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**

On 8 November 2018
Extempore ....

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

TOMASZ MATEUSZ SKIT
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:

For the Appellant: Ms A Holmes, Senior Home Office Presenting Officer
For the Respondent: in person

DECISION AND REASONS

33. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Morgan promulgated on 22 June 2018 in which he allowed the appeal of Mr Skit (the respondent) against the decision to deport him that decision being made on 14th July 2017.

34. Mr Skit arrived in the United Kingdom in 2004 and has been convicted in the period since then for a number of offences. The most serious of that

were offences committed in 2017 for which he received 28 days' imprisonment those being offences of driving with excess alcohol and associated offences.

35. In light of these offences, the Secretary of State considered that Mr Skit posed a genuine, present and sufficiently serious threat to the interests of public policy and public security if allowed to remain in the United Kingdom and decided that his deportation was justified under the Regulations.

36. Neither the respondent nor his partner attending the hearing; the respondent had in fact returned to Poland. The judge considered the evidence on file, and concluded that the respondent had resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision, that is, the decision to expel him and on that basis it was necessary for the Secretary of State to establish that his deportation was warranted on imperative grounds of public policy or public security.

37. The judge then noted that the respondent had entered the United Kingdom in 2004 and had been in a long-term relationship of over six years with his partner who is a Polish citizen and that they have a British citizen child. He found that the respondent has been looking after his son and his stepdaughter from the partner's previous relationship whilst the partner is at work and that he had previously worked himself at some point in the past.

38. The judge found that the respondent was a persistent offender but concluded that the sentence of 28 days' imprisonment and the cumulative severity of his offences came nowhere near reaching the imperative grounds threshold. On that basis the judge found that it was not necessary to go on to make a proportionality assessment but that he would in any event have found that it was not proportionate and found at paragraph 15 that the appellant did not present a genuine, present and sufficiently serious threat to the public to justify deportation.

39. The Secretary of State sought permission to appeal on the grounds that the judge erred:

    (i) in his approach to assessing whether the respondent was entitled to the benefit of the protection of the respondent having to justify deportation on the imperative grounds of national security;

    (ii) in assuming that the respondent had shown that he had achieved permanent right of residence;

    (iii) in failing to have regard to Schedule 1 of the 2016 Regulations and the factors to be taken into account in assessing proportionality, the judge having directed himself to the 2006 Regulations; and,

    (iv) in failing properly to explain his findings of fact and in accepting all the evidence to be credible despite the fact that neither the respondent nor his partner had given evidence.

40. I deal with each of the grounds in turn.

41. In **B** [2018] EUECJ C-316/16**,** the Court of Justice of the European Union ruled that the assessment of the ten year period must be calculated from the date on which the expulsion decision was made, in this case May 2017. It also ruled that it is necessary to assess whether the person in question had obtained permanent residence as a starting point before reaching the imperative grounds test; and, that having concluded that the ten year period is met, a judge must consider whether the individual has established integrating lasts which may have been broken by the period of imprisonment. It is clear from the decision that the judge did not apply the correct test

42. First the judge did not identify the correct date. Second the judge did not consider whether the appellant had achieved permanent right of residence. Third he failed to whether integrative links had in fact been established; and finally, he did not consider whether the 28 days broke any integrative links. It follows from that that the judge erred in concluding that the respondent was entitled to the highest level of protection.

43. Dealing with the second ground it is unclear from a decision whether the judge accepted that the respondent had acquired the right of permanent residence. It may well be he had done so but there are sustainable findings on this issue. It is implicit in the decision that the judge concluded that the respondent was entitled to be treated as residing lawfully as his partner with whom he has a subsisting relationship, is a Polish citizen exercising Treaty rights. That however does not assist him. That is because following **Macastena v Secretary of State** [2018] EWCA Civ 1558 and on the basis of the Regulations it is only after a successful application for a residence card as the extended family member of an EEA national (in this case a durable partner) that time spent in that capacity is time spent in accordance with the Regulations. It is only time which is spent in the United Kingdom in accordance with the Regulations or the Directive which counts towards the acquisition of permanent right of residence. For that reason I consider that the second ground of appeal is made out.

44. The judge does misdirect himself as to the relevant Regulations referring to the 2006 Regulations not the 2016 Regulation which require a judge to consider factors set out in Schedule 1 of the 2016 Regulations when assessing the proportionality of a deportation decision. The judge did not do so and that taken with the misdirection as to the Regulations demonstrates that the judge did not take into account the Regulations or the relevant. That error is perhaps explained because the judge had already wrongly concluded that the appellant was entitled to the highest level of protection.

45. Finally, I consider that the Secretary of State is entitled to submit that the findings are not properly reasoned in that the judge has failed to explain why he believed everything that was said to him when neither of the

witnesses attended to give evidence. That is the appellant or his partner and for these reasons I consider that the decision of Judge Morgan did involve the making of an error of law and I set it aside.

46. It will, in the circumstances be necessary to remake the decision and this will take place in the Upper Tribunal

47. As discussed at the hearing, it will be necessary for Mr Skit to provide evidence of all of his work and National Insurance Contributions history which he said had been obtained. It will also be necessary to hear evidence from him and his partner. The Upper Tribunal will also need to see and hear evidence about the links that Mr Skit has developed with the community in general over the time he has spent here. Any documents must be placed in a numbered, paginated bundle and sent to the Presenting Officers' Unit and to the Upper Tribunal at least 1 week before the next hearing. The NI contributions records are very important.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and it is set aside.

2. The decision will be remade at a hearing in the Upper Tribunal on 20 December 2018

Signed Date: 15 November 2018

Upper Tribunal Judge Rintoul