IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006352

First-tier Tribunal No:
EA/01098/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 8th of December 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

P Z
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Fisher, Counsel instructed by Turpin and Miller
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on Monday 13 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant and/or any member of his family are granted anonymity.
No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant and/or any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

BACKGROUND

1. By a decision promulgated on 1 June 2023, I found there to be an error of law in the decision of First-tier Tribunal Judge F E Robinson itself promulgated on 14 October 2022 which had dismissed the Appellant's appeal against the Respondent's decision dated 18 January 2022 making a deportation order against the Appellant under the Immigration (European Economic Regulations) 2016 ("the EEA Regulations") and also refusing the Appellant's application to remain in the UK under the EU Settlement Scheme ("EUSS"). My error of law decision is appended hereto for ease of reference.

2. The facts of the case are briefly stated at [2] and [3] of my error of law decision and I do not repeat what is there said. I will come to the detail of the Appellant's case when dealing with the evidence below.

3. I had before me the Respondent's bundle before the First-tier Tribunal as well as the Appellant's initial and supplementary bundles before that Tribunal ([AB/xx] and [ABS/xx]). Pursuant to the directions given in my error of law decision, the Appellant also filed a bundle of additional documents ([AB2/xx]). I have read all the documents but refer below only to those which are relevant to the issues I have to determine. Ms Fisher also provided a very helpful skeleton argument.

4. Following some initial difficulties due to the lack of an interpreter which were resolved by the afternoon, I heard oral evidence from the Appellant and his partner (PK). They gave evidence via a Polish interpreter. There were no problems of interpretation and comprehension. Again, I have taken into account in what follows all the evidence I heard but refer only to that which is relevant for my determination of the issues.

5. Having then heard submissions from Ms Isherwood and Ms Fisher, I indicated that I would be reserving my decision and would provide that in writing which I now turn to do.

LEGAL FRAMEWORK

6. There was no dispute about the legal framework which applies and therefore the issues I have to determine. I can therefore deal with those relatively briefly.

7. The focus of the appeal is the EEA Regulations. Regulation 27 provides (in summary) that a decision taken on grounds of public policy or security must comply with the principle of proportionality and be based exclusively on the personal conduct of the individual.

Considerations of general deterrent do not justify the decision and previous criminal convictions cannot on their own justify the decision. A decision may however be taken on preventative grounds.

8. The personal conduct of the individual must represent "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". When considering that issue (which is the central one to determine), past conduct is relevant. The threat need not be imminent.

9. Even if I decide that the Appellant does represent such a threat, I must also take into account considerations based on his personal background. Those include his age, health, family and economic situation, length of residence, social and cultural integration in the UK and the extent of his links with Poland.

10. It is common ground that the Appellant has not acquired permanent residence. The issue of the threat he poses therefore has to be considered on the lowest level (serious grounds do not arise). However, it is also common ground that the burden of proving that the Appellant represents such a threat is on the Respondent and that the standard is the balance of probabilities.

11. I also have regard to the various factors set out in Schedule 1 to the EEA Regulations, including the weight to be given to integration and the factors which go to make up the fundamental interests of society.

12. In accordance with the guidance given in Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC), the prospects of rehabilitation are relevant in the proportionality exercise. Therefore, even if an individual remains a present threat but has "reasonable prospects of rehabilitation", those are relevant if he would not constitute a threat once rehabilitated and "is well-advanced in rehabilitation" in the UK "where there is a substantial degree of integration".

13. Ms Fisher referred in her skeleton argument to several other cases, but I do not consider it necessary to set those out since the test is agreed.

14. The Appellant also appeals on human rights grounds based on his private and family life in the UK. Ms Fisher relies on the factors set out by the ECtHR in Uner v Netherlands (2006) EHHR 873 ("Uner") (in broad terms, the nature and seriousness of the offence and time elapsed since the last offence, the length of the Appellant's residence in the UK, his family circumstances, and the nationalities of those involved). When considering the Appellant's family life, I

must also consider the best interests of the children affected by the decision to deport.

EVIDENCE AND FINDINGS ON EVIDENCE

15. The Appellant's witness statements appear at [AB/6-9] (undated), [ABS/3-4] (29 September 2022) and [AB2/3-4] (dated 3 July 2023). PK's statements appear at [AB/12-14] (dated 14 July 2022), [ABS/5-7] (dated 28 September 2022) and [AB2/9-11] (dated 3 July 2023).

16. In addition to those statements, I had statements from two police officers, PC Thomas Reeves dated 16 March 2022 and DS Laura Mabbott also dated 16 March 2022. Those statements were made for the purposes of criminal proceedings against the Appellant in relation to an incident which occurred on that day. Those formed a large part of the focus of the error of law challenge to the First-tier Tribunal's decision. They and the background to the incident on 16 March 2022 are therefore dealt with in some detail at [11] to [21] of the error of law decision.

17. I gave directions in my error of law decision for the Appellant to indicate whether he wished to cross-examine the police officers at the hearing before me. He declined that invitation. Ms Isherwood relied on that as an acceptance of what was said by the police officers. However, as Ms Fisher pointed out, the Appellant has been prosecuted for the offence of an assault on an emergency worker. The jury could not reach a verdict and was discharged. The prosecution did not seek a re-trial. The prosecution for breach of notification requirement did not proceed due to evidential issues on the part of the Crown. That detail emerges from the statement of Ms Dana Bilan who was the barrister representing the Appellant at the criminal trials. Her statement dated 27 June 2003 is at [AB2/5-7]. I deal with those statements in more detail below.

18. For completeness, the Appellant also relies as part of his updated evidence on an e-mail from PC Kate Sherwood dated 3 July 2023 indicating that there are "no new safeguarding concerns flagged up" ([AB2/8]), and letters of support from LD (a neighbour and close family friend), HL DPhil (a casual employer of PK for whom the Appellant has carried out some casual labour), MK (an acute department registered nurse who is a friend of PK), and CC (who helped the couple prepare for their children's baptism) (letters at [AB2/12-19]). I have taken into account what is said in those letters. However, the writers of the letters did not give oral evidence and I can give less weight to this evidence as a result (save for the evidence of PC Sherwood which is a matter of record).

19. I deal first with the Appellant's background and offences in Poland.

20. The Appellant is now aged forty years. He grew up in Poland with his parents, one brother and two sisters. His mother has since passed away and his father lives with one of his sisters.

21. The Appellant went to school but did not progress to college. He worked in a number of different jobs in Poland.

22. The Appellant met and married [M] after he left school. They had a son (K) born in 2005 but the marriage broke down and they later divorced. The Appellant was encouraged by a relative to come to the UK which he did in 2006. He returned to Poland in 2007 after working in the UK for one year. Following a brief relationship with his current partner, the Appellant met [J]. They had a son together, born in 2010. They were in a relationship for four years.

23. The Appellant says that it was after this relationship broke down that his life "went downhill". He had nowhere to live.

24. The Appellant does not deal in his evidence with his first offence of burglary for which he was convicted and sentenced to one year in prison in July 2014.

25. The more serious offence, however, is that of rape of which he was convicted in August 2015 and sentenced to three years in prison from October 2014.

26. Dealing with this in his statement, the Appellant says that he became reacquainted with a man who he had met whilst in the UK. He says this about that man and the offence ([10-12] at [AB/7]):

> "10. He was a violent and brutal person and I felt intimidated by him. I realise now that he manipulated me. Sometimes he spiked my drinks so that I would be more compliant to him. To his day I am fearful of meeting him again.
> 11. On the night of the offence, he told me he needed me to drive him and a friend. That's when he initiated the kidnap and rape. It was awful. I was not physically involved in the sexual assault, but I was implicated in the whole incident that was of course really horrible. I am truly sorry that I was involved. I regret ever meeting this man who got me involved. I deeply regret the impact on the woman involved. Neither before nor after have I ever been involved in any kind of such activity.
> 12. I spent three years in prison for my involvement. It was very hard. In the first New Year's Eve I tried to commit suicide. I never want to go back to prison and being detained in the UK was a horrible reminder of this."

27. In his oral evidence, the Appellant said that he was under the influence of drugs given to him "by one of the guilty parties". He repeated that he had been intimidated and threatened. The Appellant accepted that he had not tried to stop the offence. He said

he was not in a position to do so as the perpetrator was "very aggressive". He also admitted that he had not testified against the perpetrator at trial. He said that "in [his] opinion [he] was forced". I accept the inference which Ms Isherwood sought to draw from that evidence that the Appellant's remorse about what happened may not be as genuine as he has sought to express it in his statement. His concern appeared to be for his own safety and not for the victim. That said, the offence was over nine years ago, the Appellant was not directly involved in the rape, and it is not suggested that the Appellant has committed any sexual offences directly or been linked to any since then.

28. This offence does though have some relevance to why the Respondent now seeks to deport the Appellant. The incident which occurred on 16 March 2022 in the UK arose because of the claimed failure of the Appellant to notify a change of address on the sex offenders' register. It is therefore appropriate to deal with that incident at this stage.

29. The Appellant deals with this incident in his third witness statement. He explains that, in February 2022, he was released from immigration detention having been given a deportation decision (following the imposition of a community order for cannabis possession and a caution for criminal damage). He admits that he "was angry and frustrated and [he] was behaving in a stupid way, drinking and going out a lot". He said that PK was angry with him and did not want him in the house. He said that he had no fixed address after that but remained in touch with the police and gave them his number and the address of his friend where he was staying.

30. In his oral evidence, the Appellant insisted that he did not think that he had done anything wrong in relation to the notification requirements. He said that the police knew where he was. He said he had not changed his address.

31. That evidence stands in contrast to that of PC Reeves and DS Mabbott. PC Reeves explains in his statement that the Appellant had been told after his release from immigration detention that he needed to go to the police station to register his current address but had refused to do so. PC Reeves also explains that this was particularly important because the Appellant had previously been registered at PK's address but, following the incident of criminal damage (to which I come below), she did not want him living at home (which is consistent with what the Appellant himself says albeit his explanation is slightly different).

32. PC Reeves says that the Appellant texted an address to the civilian investigator who had contacted him but had been told that he had three days to register at the police station. When contacted again

by the investigator, it is said that the Appellant swore at her. When contacted by DS Mabbott, the Appellant also swore at her so the police officers decided to speak to the Appellant in person. That is corroborated by DS Mabbott.

33. PC Reeves says that when they arrived at the address which the Appellant had given them, he was not there. The friend whose address this was told the police officers that the Appellant had been staying there but was not there at that time. That is consistent with the Appellant's evidence that he was staying with friends at that time.

34. I accept based on Ms Bilan's statement that the Appellant was not convicted of the offence of breach of notification requirement. She says that this was because "[t]he main witness who had made a withdrawal statement on 4 July 2022 casting doubt on the accuracy of her first statement to the police, did not attend court". That witness must have been the civilian investigator as both PC Reeves and DS Mabbott were present in court and testified in relation to the assault offence.

35. There are of course different standards of proof which apply in the criminal context. In any event, the Appellant did not deny in his evidence that he had been spoken to by the police officers. He merely said that he did not think that he had needed to notify the police and that he did not remember being phoned or swearing at them. That is contrary to the very clear contemporaneous evidence of the police officers.

36. Irrespective of the evidence of the civilian investigator (which I do not have and do not need to rely upon), and despite the Appellant's insistence in oral evidence that he had not understood that he needed to register his address following release from immigration detention, I do not accept that he did not understand that he was required to do so. The Appellant said that he did not do anything wrong. I disagree. His inaction faced with those requests may not have constituted the criminal offence for which he was charged but it discloses a certain disregard for the law.

37. I turn then to what happened when the police attended PK's property. The Appellant was there at PK's request to look after their daughter [Z] who was sick. The Appellant's written evidence is silent about what occurred. He was not therefore asked much about the actual events.

38. Whilst I accept that the Appellant has been acquitted of the criminal offence, as I say, the standard of proof is different and, in any event, as appears from Ms Bilan's statement, the acquittal arose from an inability of a jury to reach a verdict even a majority one. I have to

consider the evidence based on a different (lower) standard. I accept that this is slightly difficult as neither the police officers nor Ms Bilan were called to give oral evidence.

39. I begin with the evidence of the police officers. PC Reeves recounts that he and DS Mabbott attended PK's house. They were in plain clothes. The door was answered by [Z] who was very young, so the officers asked for her mother who was not there. The Appellant is said to have refused the officers entry, swearing at them but they entered and cautioned and arrested him.

40. At this point, the Appellant is said to have gone into the kitchen and PC Reeves followed leaving [Z] in the care of DS Mabbott. PC Reeves is said to have been concerned because he could see knives and screwdrivers within reach. At this point it is appropriate to take up the evidence of Ms Bilan who says this:

> "9. DC Reeves gave evidence outlining the circumstances of the arrest and his physical interaction with [the Appellant]. DC Reeves stated he resorted to physical restraint, referred to in evidence as 'pain compliance', as he had seen knives in the kitchen and feared that [the Appellant] would pick them up and use them. This was contested by the defence. [The Appellant] was never asked in interview about the presence of knives or any intentions he might have had with regards to any knives or weapons.
> 10. In cross-examination, DC Reeves accepted that [the Appellant] never touched any knives and never grabbed any weapons. It was accepted that no knives were used in the physical interaction between the two men. No photographs of the knives were taken, no knives were seized by the police and there was no body worn footage available to corroborate the officer's account, other than the evidence given by DS Mabbott, who purported to see part of the interaction between the two men.
> 11. The defence raised the issue of self-defence. It was contended on behalf of the defendant, that the police officers used excessive force in his home address in an attempt to arrest him. Further, [the Appellant] also contended that he did not know the witnesses were police officers, due to a language barrier and the fact that they were wearing civilian clothes (it was agreed between the defence and the prosecution that both officers attended [the Appellant's] address to effect an arrest and that they were wearing civilian clothes)."

41. Ms Bilan says that DS Mabbott "purported to see" the interaction between the Appellant and PC Reeves. She does not however say that DS Mabbott's evidence was shaken on this point. It is hardly surprising that there would be knives in a kitchen.

42. I accept based on this evidence that the Appellant did not pick up a knife or threaten PC Reeves with one. I am not of course concerned as were the jury with what were the Appellant's intentions or whether his actions constituted the criminal offence with which he was charged.

43. I accept that the Appellant's English language ability is not strong. He had initially attempted to give his evidence to the Tribunal in English but was unable to answer the most basic questions (leading to the need for an interpreter). I also accept that as the police officers were in civilian clothes, it might not have been immediately apparent to him that they were police officers.

44. On the other hand, I would expect that the officers would have shown the Appellant some identification. The Appellant has also been cautioned and arrested in the past and I anticipate that he would be aware that these people were officials and probably that they were police officers.

45. The description of the Appellant's behaviour as aggressive in nature is also consistent with other evidence. I myself observed the Appellant's increasing irritation under cross-examination by Ms Isherwood. The Appellant himself has described his behaviour on release from immigration detention as angry and frustrated. This incident occurred only a month after that release. The Appellant admits that he had arguments with PK and that she did not want him in the home due to his behaviour.

46. Whilst I accept therefore that the Appellant might not fully have understood what was happening and that there might have been an element of self-defence involved in the incident, I also consider it likely that the Appellant behaved in an aggressive manner towards the police officers.

47. This brings me back to the offence of criminal damage for which the Appellant was cautioned. This was an offence which occurred in December 2021. Again, beyond referring in his first statement to a second suicide attempt when he was in prison "around Christmas time in 2021", the Appellant does not deal with this offence in his written evidence. Instead, it emerged from oral evidence given by the Appellant and PK.

48. The Appellant says that he "broke a window here in the UK. It was an accident". PK gave a little more detail but her evidence in this regard was confusing. She sought to downplay the incident. She said that when the professionals came to fix the window, it was discovered that the windows were fractured in any event due to heavy frost so that it would not take much force to break them (as I understood it, frost had built up between double glazed panes). She said that the Appellant had "possibly" broken the window when he was knocking loudly in order to gain her attention.

49. PK suggested that she "did not know precisely" whether the Appellant was angry. She "wasn't keen to open the door" as it was

late. However, she went on to say that when the Appellant was released, she had told the Appellant to "cool down and get off alcohol" before returning home. That is consistent with her written evidence (first statement) that when released from detention the Appellant "would get carried away with friends and come home drunk".

50. PK may regret having called the police and getting the Appellant into trouble as she sees it. She also says in her first statement that her decision to bar the Appellant from the home was "very impulsive". However, her evidence supports other evidence that the Appellant has difficulty controlling his anger and problems with alcohol (and some problems with drugs).

51. When PK was asked whether the Appellant had been drunk and used drugs since his child was born, PK said only that he was "never alone with the children whilst under the influence". When asked whether the Appellant had sought help for his problems with drink and drugs, PK said only that the Appellant had language problems, that it was not so easy to access help and that outside help "was not as good as help of his own family". When it was pointed out that having children had not proved a deterrent, PK said that it was "well known that addiction does not go away like that". The Appellant "used substances only when he was out of the house". She repeated that the Appellant had no contact with the children when under the influence. This gave me no reassurance that the Appellant is attempting to overcome his problems with alcohol. The Appellant said in oral evidence that he no longer uses cannabis.

52. PK suggests in her evidence that the Appellant has changed. She says in her most recent statement that the Appellant has been living in the family home since his release in August 2022. She says that she "can see a real change in him". She says that he no longer drinks or smokes cannabis. That statement however has to be considered in the context of her evidence about the Appellant's behaviour in the months leading up to August 2022 (as set out above) and her answer (which I accept) that problems with addiction are not always that easy to resolve.

53. The Appellant's main offence was in Poland. I reiterate that there is no suggestion that the Appellant has committed a crime of this magnitude since or in the UK. As such, I have no formal risk assessment.

54. The only direct, official evidence I have in this regard is an email from PC Kate Sherwood dated 28 September 2022 in the form of an email ([ABS/8]). PC Sherwood was at that time the Appellant's police notification officer. Having noted that she had only just taken over the Appellant's case, she goes on to say the following:

> "[The Appellant] in terms of his sexual risk is LOW, however [the Appellant] was arrested in March '22 for assault on an emergency worker after colleagues from our office attended his address to arrest him for breach of his notification after failing to tell his PPO that he was staying at a new address. On arrest at the address, [the Appellant] assaulted PC Tom REEVES. I must stress that [the Appellant] was found not guilty for this in court.
>
> I have only met [the Appellant] once and our team have only visited him 3 times, but there were no concerns around him during these visits and he appeared to be doing well in the community…."

As I have previously noted, PC Sherwood has also provided an updated email which says only that there are no further safeguarding concerns. As his police notification officer, of course, PC Sherwood is likely to be more concerned with the Appellant's propensity to commit sexual offences rather than other offences.

55. I turn then to evidence about the Appellant's personal and family circumstances both in the UK and in Poland.

56. The Appellant says that he has "very little" to go back to in Poland ([AB/8]). He does not provide evidence about his family members in Poland. He did say however that PK's family are not in the UK. PK herself came to the UK in 2011. She has indefinite leave under the EUSS. According to Judge Robinson's decision, PK gave evidence that she still has family in Poland (mother and siblings) who she has visited quite recently.

57. The two children involved are the Appellant's own child ([Z] – now aged four years) and PK's daughter from a previous relationship ([H] – now aged eleven years). PK says in her first statement that H does not read and write in Polish much and that her spoken Polish "shows gaps and problems in finding words". Whilst I accept that the first language of both children (who would now be at school) is likely to be English, both the Appellant and PK speak Polish. Indeed, the Appellant's English language ability is quite limited. For that reason, it is likely that both children with whom the Appellant lives speak some Polish.

58. It is clear from the evidence that the Appellant and PK have had problems in their relationship and have not lived together for periods including following his release from detention in February 2022. Whilst I accept that PK has now reconciled with the Appellant and they are now living together with the children as a family, the reconciliation is relatively recent and, on the evidence as recorded above, I do not regard the relationship as a stable one.

59. The Appellant does not currently work in the UK. He pointed out that he is not able to do so because his passport has been taken away.

There is evidence in the letters of support in the most recent bundle that the Appellant has carried out odd jobs, for example for PK's employer, including heavy lifting work. It appears therefore that the Appellant no longer suffers from the serious back pain which stopped him working in 2019 and 2020. In his first statement, the Appellant says that he worked straightaway when he came to the UK in 2018 and worked in 2019 until he was prevented from doing so in 2019 and 2020 due to back problems. He began work again in 2021 and continued until he was detained.

60. PK does work in the UK. The letter from HL at [AB2/15] is from an employer for whom PK sometimes cleans. He speaks of PK coming to clean the house and bringing Z with her when she was still breastfeeding. I was not impressed by PK's oral evidence suggesting that she could not remember whether she was working when the Appellant was detained for five months and her suggestion that she would not be able to do so with two small children stands in contrast with the letter from HL. I think it probable that PK continued to work, albeit I also accept that she could not carry out contract cleaning overnight as she said she did when the Appellant was living with her and the children.

61. I have read and had regard to the letters of support in the most recent bundle. I can give those little weight however since none of the authors of those letters mention the difficulties there have been in the relationship between the Appellant and PK (the neighbour for example referring to them as having a "solid relationship" and being a "happy couple"). None of them appear to be aware of the arrests or criminal offences of which the Appellant was charged nor of his previous convictions in Poland. The positivity painted by the authors of those letters is I find exaggerated.

FINDINGS AND DISCUSSION

62. I begin with the issue whether the Appellant represents a genuine, present and sufficiently serious threat to justify his deportation under EU law.

63. Contrary to what appears to be suggested by Ms Fisher in her skeleton argument, the threat does not have to be based on actual convictions. Regulation 27(e) of the EEA Regulations makes clear that a decision may be taken on preventative grounds provided those grounds are linked to the individual's conduct. Nor is the threat confined to offences committed in the UK.

64. For those reasons, my starting point is the rape conviction in Poland. I accept that this was committed nearly ten years ago. I also accept that the Appellant was not directly implicated in the actual rape. I

accept the Appellant's evidence that there was some coercion and duress by the person who instigated the offence.

65. However, I also take into account the Appellant's evidence about this offence. I have found that he was not as genuinely remorseful for the offence as he sought to profess. However, bearing in mind that this offence occurred over nine years ago, the threat if it were based on this offence alone could not be said to be imminent.

66. What I have found most concerning in this case is the Appellant's attitude towards the authorities. He continues to insist that he did not believe that he was required to notify the police about any change of address when he was released from immigration detention. The requirement to notify that change is because he is subject to a sex offenders notification requirement arising from the rape offence in Poland. As such, a failure to notify is a serious matter.

67. I accept that the Appellant was not convicted of a breach of notification requirements because of evidential difficulties on the part of the prosecution. As I have said, it appears that the problem was a failure of the civilian investigator to give evidence. However, there was also evidence from the two police officers that the Appellant was told that he needed to go to the police station to register his change of address, but he still failed to do so. That shows a disregard for authority.

68. Turning then to the incident on 16 March 2022, I accept that this did not lead to a conviction because the jury could not reach a verdict. However, as I have pointed out, a conviction is not essential to a finding of a threat. There is in any event a standard lower than the criminal standard which applies in this appeal. As such, I take into account and give weight to the witness statements of PC Reeves and DS Mabbott. The Appellant was given the opportunity to ask for those officers to be called to give oral evidence to the Tribunal but chose not to do so.

69. I have set out at [38] to [45] above, the evidence I had about this incident. I accept that there may have been some element of self-defence or misunderstanding involved. However, as I go on to find, the evidence of the Appellant's aggression when faced with authority is consistent with other evidence. I have therefore concluded that the Appellant did behave aggressively towards the police officers. I have also found that this is consistent with behaviour displayed in December 2021 which led to the caution for criminal damage.

70. It might of course be said (as Ms Fisher did) that the threat displayed by these occurrences/offences is neither present nor sufficiently serious.

71. As to whether the threat is present, much of the Appellant's aggression appears on the evidence to be linked to problems with alcohol. I did not have evidence that the Appellant has sought help with those problems or has even begun to overcome them. That leads me to the conclusion that the Appellant would be likely to behave in the same manner again. He has the propensity to reoffend. The threat is for those reasons a present one.

72. I accept that the most recent conviction was only a caution. As I say, however, what I am required to consider is whether the threat to the fundamental interests of society is sufficiently serious not whether the last conviction was a serious one.

73. I take into account that the events on 16 March 2022 did not lead to a conviction. I have also accepted that there may have been an element of self-defence and misunderstanding involved. However, those events coupled with the Appellant's attitude in relation to his failure to register his change of address with the police when asked is in my estimation a sufficiently serious threat to public order and security to meet the test.

74. I turn then to proportionality of the decision to deport.

75. The Appellant is aged forty years. He came to the UK about five years ago. He worked at first but was prevented from doing so during 2019 and 2020 following an accident at work. He worked again from 2021 until he was detained.

76. There is limited evidence about the Appellant's life in the UK beyond the letters of support in the Appellant's bundle to which I have given less weight due to the apparent lack of awareness of the authors of the Appellant's offences and arrests and the failure to mention, for example, problems in the relationship between the Appellant and PK. I have found the positivity painted in those letters to be exaggerated.

77. The Appellant has his father and siblings in Poland. Having grown up and worked there, he will be aware of the culture of that country and be able to integrate on return. By contrast, there is limited evidence of any integration in the UK.

78. I accept that the Appellant is in a relationship with PK, but I regard that relationship as precarious for the reasons I have given. PK could of course remain in the UK if the Appellant were to return to

Poland. I have explained why I did not accept some of PK's evidence about her inability to work whilst the Appellant was detained.

79. The Appellant has one child with PK. Z is now aged four years. He also has a stepdaughter, H, now aged eleven. Both children could remain in the UK with PK if the Appellant is deported. Whilst I accept that the Appellant is currently living with PK and the children, that has not always been the case (even when he has not been in detention). There is no evidence that the children have suffered emotionally due to the precariousness of the relationship between their parents and the Appellant's absence at times from the family home.

80. I appreciate that PK and the children will not wish to return to Poland. It is of course open to them to do so if they so wish. It was suggested that the children do not speak Polish. I have rejected that suggestion as the Appellant's English is quite limited. I accept that for the children to go to live in Poland would remove them from their education and friends in the UK. However, whether the family accompanies the Appellant if he were deported is a matter of choice for them.

81. Having taken into account the relevant considerations, such as age, family situation, length of residence and integration and links in the UK and Poland, I am satisfied that deportation of the Appellant would not be disproportionate under the EEA Regulations.

82. I have also taken into account the issue of rehabilitation. As I have already found, there is no evidence that the Appellant has undertaken any rehabilitative work, particularly in relation to his alcoholism. I am therefore satisfied that deportation would not disproportionately interfere with his prospects of rehabilitation.

83. The Appellant does not fall within Part 5A Nationality, Immigration and Asylum Act 2002 because of the EU context. However, I am required to consider whether the Appellant's deportation would breach his Article 8 ECHR rights and those of the persons affected by the deportation decision (PK and the children). That requires me to conduct a balance sheet assessment of the interference with those rights as against the public interest in deportation due to the Appellant's offending. Many of the factors which apply to proportionality in the EU law context apply equally to Article 8 ECHR.

84. I begin with the children's best interests. I accept that those are a primary consideration albeit not paramount. Although I have found that the relationship between the Appellant and PK is an unstable one, I accept that the Appellant has a genuine and subsisting relationship with his children. Therefore, their best interests are to have both their parents in their lives (whether together or

separately). Particularly in the case of H who is older, I also accept that their best interests are to remain living in the UK where they are settled and in education, albeit Z will only just have started school. However, given the precarious nature of the relationship between the Appellant and PK, the children's best interests more strongly favour remaining with their mother wherever she is living.

85. Ms Fisher prayed in aid the case of Uner. Taking the factors referred to in that case in turn I make the following findings:

Nature and seriousness of offence:
It is accepted by Ms Fisher that the Appellant's offence of rape in Poland was serious. I have already had regard to the fact that this occurred many years ago. However, my findings about the incidents stemming from that offence and the Appellant's attitude to authority and aggressive behaviour particularly when faced with authority is also relevant under this heading. I have already found that the Appellant has shown no signs of rehabilitation and his remorse for the initial offence is not as genuine as expressed.

Length of Appellant's stay in the UK
The Appellant has only been in the UK since 2018. His stay was lawful but with such a short stay, I reject the submission that weighty reasons are required to justify deportation. The Appellant's greater integrative links given his age and length of residence in Poland are with that country.

Time elapsed since conduct, age at date of commission and during that period
As above, if one restricts this consideration only to the offence of rape, that occurred many years ago. However, that offence is relevant to his behaviour in the UK more recently. As above, it is the Appellant's aggressive behaviour when faced with authority and his attitude to authority together with his failure to rehabilitate (particularly with regard to his misuse of alcohol) which supports the public interest in this case.

Nationalities of those involved
The Appellant, PK and the children are all Polish. However, PK and the children have status to remain in the UK if they so wish.

Solidity of cultural, social and family ties with the host country and country of destination
As above, the Appellant's more solid cultural and social ties are with Poland. He has family remaining in that country. I accept that his deportation may well fracture his links with his family in the UK (PK and the children) if they decide to remain here. However, I have also pointed out that the relationship with PK in particular is unstable.

86. The Article 8 balance in this case is between the impact of the Appellant's deportation, primarily on his children, against the public interest.

87. Whilst I give weight to the children's best interests, I have found that those are more strongly favoured by remaining with their mother. The weight of the public interest in this case is significant, particularly given the Appellant's aggressive behaviour and attitude to authority. I have found that he represents a genuine, present and sufficiently serious threat to the fundamental interests of society which is enough to justify his deportation under EU law. That is sufficient also to outweigh the best interests of the children and the interference such as it is with the Appellant's private life and the impact of deportation on what is an unstable relationship between the Appellant and PK.

88. For those reasons, I dismiss the appeal on EU law and human rights grounds.

NOTICE OF DECISION

The Appellant's appeal is dismissed on EU law and human rights grounds.

L K Smith

Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 November 2023

APPENDIX: ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006352

First-tier Tribunal No:
EA/01098/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

.....On 01 June 2023.....

Before

UPPER TRIBUNAL JUDGE SMITH

Between

P Z
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Fisher, Counsel instructed by Turpin and Miller
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 14 April 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the Appellant and/or any member of his family are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant and/or any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge F E Robinson promulgated on 14 October 2022 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 18 January 2022 making a deportation order against the Appellant under the Immigration (European Economic Regulations) 2016 ("the EEA Regulations") and also refusing the Appellant's application to remain in the UK under the EU Settlement Scheme ("EUSS").

2. The Appellant is a national of Poland. He came to the UK on 2 September 2018. Prior to coming to the UK, in 2014, he was convicted of burglary and sentenced to one year in prison (although it appears that may have been a suspended sentence) and, in 2015, he was convicted of rape and sentenced to three years in prison. Since coming to the UK, the Appellant received a caution in December 2021 for damage to property and possession of a Class B drug.

3. The Appellant was required to be placed on the sex offenders' register as a result of the rape conviction in Poland. In breach of the notification requirements, he failed to register. He refused to do so when approached by the police. Accordingly, the police attended his home on 16 March 2022 and an incident took place. As a result of that incident, the Appellant was charged with having assaulted a police officer. He was later acquitted of that offence.

4. Notwithstanding the Appellant's acquittal of that latter offence, the Judge relied upon the March 2022 incident and found that this coupled with the other offences of which the Appellant had been convicted, showed that he represented a genuine, present and sufficiently serious threat to one of the fundamental interests of society. The Judge found that the Appellant was entitled only to the lowest level of protection as he was not permanently resident in the UK. The Judge went on to consider whether the Respondent's decision to deport was proportionate and concluded that it was. She also considered a claim by the Appellant that his deportation would breach Article 8 ECHR but rejected that case. She therefore dismissed the appeal on all grounds.

5. The Appellant appeals on three grounds as follows:

   Ground one: the Judge erred in her conclusion that the Respondent had discharged her burden of showing that the Appellant represented a genuine, present and sufficiently serious threat.
   Ground two: the Judge took into account irrelevant matters and failed to give sufficient weight to relevant matters.

Ground three: the Judge erred in her conclusion as regards Article 8 ECHR as her assessment of risk was in error and that tainted the conclusion in relation to the Appellant's human rights claim.

6. Permission to appeal was granted by First-tier Tribunal Judge Thapar on 21 November 2022 on the basis that the grounds were all arguable.

7. The appeal comes before me to determine whether the Decision contains errors of law. If I conclude that it does, I then have to decide whether to set aside the Decision in consequence of those errors. If I set aside the Decision, I then have to go on to either re-make the decision or remit the appeal to the First-tier Tribunal.

8. I had before me the core documents relevant to the challenge to the Decision as well as the Appellant's and Respondent's bundles before the First-tier Tribunal. I do not need to refer to documents in those bundles. I also had before me a rule 24 reply from the Respondent seeking to uphold the Decision and the skeleton argument prepared by Ms Fisher for the hearing before Judge Robinson.

9. Having heard submissions from Ms Fisher and Ms Isherwood I indicated that I would reserve my decision and provide that in writing which I now turn to do.

DISCUSSION

10. There is substantial overlap between grounds one and two and ground three depends on ground one in particular being made out. I therefore deal first with grounds one and two taken together.

11. At the heart of the Appellant's appeal lies the Judge's treatment of two witness statements of Detective Sergeant Laura Mabbott and Police Constable Thomas Reeves both dated 16 March 2022 and concerning the incident on that day (to which I have referred above). I refer to those statements together as "the Witness Statements".

12. The Witness Statements set out the substance of what is said to have occurred on 16 March 2022 when DS Mabbott and PC Reeves attended the Appellant's home. It is common ground that the Respondent did not rely on the Witness Statements in the decisions under appeal. She could not have done so since the incident occurred after those decisions were taken.

13. I enquired in the course of the hearing before me how the Witness Statements came before Judge Robinson. My attention was drawn to [6(2)] of the Decision where reference is made to the Respondent having produced the Witness Statements at the hearing before Judge Robinson. As Ms Isherwood pointed out, notwithstanding that the Witness Statements were produced only at the hearing, the Appellant

indicated that he was ready to proceed ([7]) and the Judge said at [8] of the Decision that no issues were taken with the fairness of the hearing.

14. Ms Fisher did take issue however with what was said about the Appellant's acceptance of the evidence contained in the Witness Statements. It is therefore necessary to set out the Judge's assessment of that evidence and the other evidence on which the Judge relied when determining that the Appellant presented a threat:

> "45. I accept that the Appellant did not commit any offences for over 3 years following entry to the United Kingdom. I place weight on PC Kate Sherwood's assessment that his current sexual risk is low and find that this is the case. I also give some weight to her assessment that *'there were no concerns around him'* and that he *'appeared to be doing well in the community'* though this is based on limited contact as PC Sherwood had only met the Appellant once and team only visited in total three times and there is no timeframe for this limited contact. However, there is evidence of recent offending, namely the offence against property and drug offence in December 2021.
> 46. In addition, I accept in light of the witness statements adduced from DS Laura Mabbott and PC Thomas Reeves that an incident took place at [S] Road on 16th March 2022 when he was visited by police officers as he was in breach of the Sex Offenders Notification Requirements. These witness statements have not been challenged and I place weight on them. Whilst the Appellant was found not guilty of assault on police officers, it is evident that the Appellant was not compliant with the instructions to register the address for the purposes of the Sex Offender Register and I do not find that the explanation he gives for not complying with the Sex Offenders Registration requirements to be adequate.
> 47. I also find that he did not comply with police officers during their visit to [S] Road on 16th March 2022 and that during that visit, due to his non-compliance, he created a situation which was, on the evidence, was likely to be frightening for his daughter ZK aged two years who was present. However, in his second witness statement the Appellant says, regarding the acquittal for assault in August 2022, *'I was so happy when I was acquitted of the charges against me. I believe I had none nothing wrong..'*. In this instance he again appears to not fully take responsibility for his actions. For all these reasons I find that any remorse and commitment not to reoffence which might be contained in the Appellant's stated intention to '*rebuild my life with my family'* and not *..do anything that would put my family at risk'* is qualified.
> 48. I find that the Appellant has a history of offending, including serious offences in Poland and recent offending the United Kingdom and in all the circumstances and in light of all the evidence I conclude the Appellant has a propensity to offend and the evidence, as it stands, shows that the Appellant does represent a present and sufficiently serious threat to public order and security."

15. As Ms Fisher pointed out, it was not evident to the Appellant at the hearing that any weight would be placed on what occurred on 16 March

2022 nor on the Witness Statements. As I have already pointed out, the Respondent could not have relied on the incident in the decisions under appeal as it had not occurred by then. There was no Respondent's review after the appeal was issued. The Respondent had not included the Witness Statements in her bundle. They were handed in only at the hearing. As a result, the Appellant could not be faulted for failing to deal with the incident in his own statement save to point out that he had been acquitted of any criminal offence.

16. I should say at once that I do not accept as may be suggested by the Appellant's ground two that the Judge was not entitled to take the Witness Statements into account for two reasons. First, the standard of proof in criminal proceedings is different and higher. Second, the issue for the Judge was whether the Appellant presented a continuing threat to public order/security not whether he had been convicted of this offence. It may be, for example, that the Appellant was acquitted as a result of a defence of, say, self-defence. It may be that one or both of the police witnesses did not attend the trial. It may be of course that their evidence was not accepted. However, if the Judge was to place weight on the Witness Statements as to what occurred, she should at least have checked whether the Appellant disputed the contents of the Witness Statements and, if so, to have sought his version of events. It is to be noted that the police officers were not called to give evidence and therefore their version of events was not tested.

17. The Appellant has not expressly pleaded that the hearing was procedurally unfair as such. However, that is suggested by what is said at [21] of the grounds.

18. It might be said that the Judge was careful not to rely on the alleged assault at all in what she says at [46] and [47] of the Decision. Her focus at [46] of the Decision is as to the Appellant's failure to register on the Sex Offenders Register. The focus at [47] of the Decision is on the Appellant's failure to express remorse for what occurred. However, as Ms Fisher pointed out, there is no reason why the Appellant should be required to show remorse for an offence of which he was subsequently acquitted.

19. As Ms Isherwood pointed out, and I accept, the Judge was entitled to take into account the Appellant's previous offences in Poland. As Ms Fisher pointed out, however, the Judge accepted that the Appellant was at low risk in connection with the more serious of those two offences which occurred as long ago as 2016 in any event. The Respondent had to show not only that the Appellant was a sufficiently serious threat but also a present one. The Judge was entitled to rely on the pattern of offending including the offence for which the Appellant had only been cautioned. As the Appellant points out in his ground one, however, the burden of establishing that the Appellant represents a present and sufficiently serious threat is on the Respondent and is a high hurdle. Although as Ms Isherwood pointed out, the Judge has properly directed

herself to the test which applies, it is not at all clear on what basis the Judge found the test to be met on the facts of this case.

20. Although as I have accepted above, the Judge was entitled to take the Witness Statements into account, I am also satisfied, as pleaded by the Appellant's ground
two, that the Judge placed excessive weight on the Witness Statements, particularly when those are read with the email from Detective Constable Sherwood about the risk which the Appellant does or does not pose (and which evidence the Judge accepted, in particular in relation to the risk of the Appellant committing another sexual offence).

21. The Appellant's grounds also take issue with the Judge's reliance on the Appellant's failure to register on the Sex Offenders Register. It is said that he did not do so as he was unaware of the need to do so because he was homeless. I accept as Ms Isherwood pointed out that this is not an adequate explanation as the police had made contact but the Appellant had made clear that he did not intend to comply, leading to the visit on 16 March 2022 which led to the incident to which I have referred. The Judge was therefore entitled to find that explanation not to be adequate. I accept that there is an important public policy imperative requiring those convicted of sexual offences to register. It is however worth repeating that the Judge accepted the police assessment that the Appellant was at low risk of reoffending in this regard.

22. For those reasons, the Appellant has made out his first two grounds. As indicated above, the Judge's conclusion on the human rights ground depends on the assessment of risk which I have found to be flawed. Accordingly, the Appellant's third ground is also made out.

23. For those reasons, I conclude that there is a material error of law in the Decision and I set it aside. The parties agreed that, if I were to find an error of law, the appeal could remain in this Tribunal. There is a limited amount of fact finding to be carried out. Although part of my reasoning relates to some limited procedural unfairness in the previous hearing, that was not expressly pleaded and any unfairness in relation to the Witness Statements can be corrected by directions in relation to that evidence and an opportunity given to the Appellant to address that evidence prior to the next hearing. I have given directions below in that regard.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge F E Robinson promulgated on 14 October 2022 involves the making of errors of law. I set aside that decision and make the following directions to re-make the decision in this Tribunal.

DIRECTIONS

1. **Within 28 days from the date when this decision is sent, the Appellant shall file with the Tribunal and serve on the Appellant any further evidence on which he relies.**

2. **Also within 28 days from the date when this decision is sent, the Appellant shall indicate whether he challenges the events as set out in the Witness Statements and, if so, whether he requires the police officers concerned to attend the hearing before this Tribunal in order to cross-examine them.**

3. **In the event that the Appellant indicates a wish to cross-examine the police officers concerned, the Respondent shall indicate to the Tribunal and the Appellant within 14 days thereafter whether she intends to continue to rely on the Witness Statements. If she wishes to continue to rely on the Witness Statements, she shall make enquiries whether the police officers are willing to attend the appeal hearing and notify the Appellant whether they are willing to do so within 14 days thereafter so that, if appropriate, the Appellant can ask the Tribunal to issue a summons requiring their attendance.**

4. **The appeal shall be relisted on the first available date after ten weeks from the date when this decision is sent with a time estimate of ½ day. If an interpreter is required, the Appellant shall notify the Tribunal accordingly, within 14 days from the date when this decision is sent.**

L K Smith

Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 April 2023