



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00068/2018

THE IMMIGRATION ACTS

Heard at Glasgow
On 9 August 2018

Decision & Reasons Promulgated
On 6 September 2018

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

CONSTANTIN TUDORA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Bradley, instructed by Peter G Farrell Solicitors

For the Respondent: Mr M Matthews, Senior Presenting Officer

DECISION AND REASONS

INTRODUCTION

1. This is an appeal against the decision of First-tier Tribunal Judge D C Clapham who, for reasons given in his decision dated 23 March 2018, dismissed the appeal against the decision to deport the appellant, a national of Romania pursuant to Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 (the regulations) on grounds of public policy/public security.

2. The appellant was born on 22 October 1995. He claims to have been in the United Kingdom since November 2014.
3. The appellant has been convicted on two occasions. The first was on 9 May 2016 of theft for which he was admonished. The second was on 14 November 2017 when he was convicted in relation to the possession an offensive weapon, culpable and reckless conduct and failing to attend proceedings for which he was sentenced to twelve months' imprisonment. The appellant has accepted before the FtT that he has not acquired a permanent right of residence in the United Kingdom. He gave evidence and relied on a relationship with a British national, [SH] who provided a statement in support. On the appellant's behalf it was argued that the Secretary of State had not made out his case as only a list of previous convictions had been provided.
4. The First-tier Tribunal agreed with the Presenting Officer's submissions that the appellant had never exercised treaty rights in the United Kingdom. No documentation had been provided in respect of his claimed employment at a factory. The judge formed the view that the sentence of twelve months' imprisonment reflected the fact that the appellant was convicted of very serious offences and observed:
 - "28. In my view, the sentence of 12 months' imprisonment reflects the fact that the Appellant was convicted of very serious offences and I do consider that the offences of which the Appellant was convicted, namely possession of a knife, culpable and reckless conduct and failing to attend solemn proceedings were sufficient to allow the Home Office to conclude that this Appellant did represent a genuine, present and sufficiently serious threat to the public to justify his deportation. It is of course possible that the Criminal Justice Social Work Report indicated a low risk of future offending. I simply cannot comment on that because I have not seen the Criminal Justice Social Report. If the Appellant were represented in the criminal proceedings by a solicitor then that solicitor would presumably have a copy of the Criminal Justice Social Work Report in his file but I cannot enter the realm of speculation as to what any such report might or might not have said.
 29. No doubt the Appellant's position could have been significantly different if the Appellant had been exercising Treaty Rights in this country for a period of five years but the plain fact of the matter is that he has not. I do not place any weight on the matter of the Appellant's claimed relationship with [SH] from whom there is no statement. She did not attend at the hearing to give evidence. The information about the appellant's claimed relationship does not suggest that it is of a durable nature and if the relationship were of significance I would have expected that a statement from [SH] would have been provided and that she would have attended at the hearing.
 30. In light of the nature of the Appellant's criminal conviction and consequent sentence of imprisonment, I consider that the Home Office were entitled to reach the decision that they did and that the Appellant's deportation is proportionate. The carrying of a knife is a very serious matter and there is a strong public interest in deterring such behaviour. I shall therefore disallow the appeal."
5. The grounds of challenge argued a failure by the judge to take into account the appellant's future offending. The Criminal Justice Social Work Report now to hand

discloses the appellant as having been assessed “as having a minimum level of risk and needs using the LS/CMI risk assessment tool”. Had this information been before the First-tier Tribunal, the judge might have well come to a different assessment on whether the Secretary of State was entitled to seek the appellant’s deportation.

6. In granting permission to appeal First-tier Tribunal Judge Blundell explaining his reasoning at [2] of the grant of permission as follows:

“I consider it arguable that the judge erred, at [28], in concluding that the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom. It is arguable that the judge did not appreciate that it was for the respondent to establish such a threat: Arranz [2017] UKUT 294 (IAC). It is also arguable that he looked to the past rather than the future, contrary to [17] of Straszewski [2015] EWCA Civ 1245; [2016] 1 WLR 1173. It is further arguable that the judge failed to assess that question for himself, rather than considering whether the respondent was entitled to conclude as she did. And, finally, it is arguable that the judge allowed the public interest in deterring knife crime to play a part in his decision – [30] refers – despite the guidance given at [11] – [20] of Straszewski.”

7. Mr Bradley explained that the appellant was not at the hearing because he had been removed on 14 April 2018 following the hearing in the First-tier Tribunal. He sought to amend the grounds based on the points raised in the grant of permission and I gave permission in the light of the need to give effect to European law in respect of the Member States national’s rights in play in this case.
8. Dealing first with the issue whether the First-tier Tribunal had erred in law, Mr Bradley argued that the judge had failed to understand that the burden of proof was on the Secretary of State. Furthermore, the judge had misdirected himself with regard to the public interest. In his submission there was insufficient evidence to justify the finding reached.
9. By way of response Mr Matthews considered the crux of the appeal lay in the judge’s analysis at [28] of his decision. He accepted that the burden of proof was on the respondent. He further accepted that the decision indicated that the judge was reviewing the Secretary of State’s decision rather than looking at all the evidence before him.
10. I gave my decision at the hearing that I was satisfied the judge had materially erred in law in that he had failed to undertake the task required which was to assess whether the appellant represented a genuine, present and sufficiently serious threat by reference to the provisions in regulation 27. He had looked back to the respondent’s decision and decided that it was one that the Secretary of State was entitled to make rather than undertaking a merits decision himself on the circumstances at the date of hearing. This indicated to me that the judge had lost sight of the important point that the burden of proof lay on the Secretary of State to establish that the appellant came within regulation 27(5)(c) and Schedule 1 of the Regulations. I therefore set aside the decision and sought submissions for its re-making.

REMAKING THE DECISION

11. Mr Bradley asked for an adjournment in order for the appellant to give evidence. Mr Matthews indicated that he was ready to go ahead. Mr Bradley maintained his request.
12. I refused the application for an adjournment as no application had been made under regulation 41 to return to the United Kingdom in connection with his appeal. No statement been provided by the appellant and there was therefore no indication of the evidence that he would be giving. There had been plenty of time for the request to be made. Mr Bradley had earlier acknowledged that he had been in communication with the appellant. I nevertheless granted permission for the Criminal Justice Social Work Report to be admitted into evidence. The following matters were preserved in the decision of the First-tier Tribunal:
 - (i) The appellant does not have a permanent right of residence. I might add in this regard that he himself has acknowledged this to be the case as explained in his statement dated 6 March 2018.
 - (ii) The judge's findings at [25] of the decision in relation to the exercise of treaty rights by the appellant are as follows:

"I agree with the submission of the Home Office Presenting Officer to the effect that there is no evidence that this Appellant has ever exercised Treaty Rights in the United Kingdom. Although the Appellant said that he had been working in a factory neither wage slips nor any P60 had been produced. No documentation was produced from HMRC to suggest that the Appellant had been working or paying Income Tax or National Insurance in the United Kingdom. If the Appellant had been exercising Treaty Rights then I would have expected some documentation to support that to be forthcoming."
13. I initially indicated that the findings in relation to the appellant's relationship with [SH] were also preserved however Mr Bradley reminded me that the judge had erred and referred me to a statement by [SH] dated 13 March 2018.
14. This statement explains that she is 18 and a pupil at an academy. She is now seeking work. She had known the appellant for about five or six months before he was taken into detention and describes her affection for him. She had been previously living with her mother who was an alcoholic. She was happy to be with the appellant and each time she had visited in prison it was difficult to leave. She explained their plans to live together and the kindness the appellant has shown her. The judge had indicated that there was no statement from her. He was wrong to do so but it is unarguable that she was not present at the hearing on 15 March 2018.
15. The detail of the offending by the appellant who arrived in the United Kingdom was as follows:
 - (i) 9 May 2016 – convicted of theft at common law for which the appellant was admonished.

- (ii) Conviction on 14 November 2017 of an offensive weapon, for which the appellant was sentenced to 12 months' imprisonment.
 - (iii) Conviction on 14 November 2017 of culpable and reckless conduct at common law for which his sentence was accumulated with (ii) above.
 - (iv) Conviction on 14 November 2017 on a failure to attend solemn proceedings in the Sheriff/High Court, with similar accumulation of the sentence.
16. The appellant relied on a statement before the FtT. He explains that he had no criminal convictions in Romania and although accepting the crime for which he had been convicted in the United Kingdom was serious, he did not agree that he represented a genuine present and sufficiently serious threat affecting one of the fundamental interests of society. With reference to the refusal letter he explains that the conviction was not for a violent act upon another person with a knife and that he did not accept that in the circumstances of his case the chances of a harmful incident taking place had greatly increased. He referred also to his private life in the United Kingdom having lived here for approximately three years and his relationship with [SH]. Removal would be in breach of his Article 8 rights.
17. The Criminal Justice Social Work Report (the report) is dated 1 December 2017. The author Ms M Brown had one interview with the appellant on 30 November 2017 together with assistance from an interpreter. She also had access to the indictment, Social Work Department records and liaison with the Fines Enforcement Department at Glasgow Sheriff Court. The report focusses on the convictions on 14 November 2017 and it is explained that the appellant pleaded guilty to those offences. He attributed his actions to attempting to help his ex-partner after receiving a phone call from her friend advising that they were in danger from her husband. He attended the victim's home with a knife and proceeded to kick the front door of the property after being assaulted. He denied that he had threatened to kill the victims or presented a knife at them. In relation to the failure to attend solemn proceedings, the explanation given to Ms Brown was that the appellant had moved home but had not informed the court or his solicitor. He did not therefore attend the court because he was unaware of the date.
18. As to the level of responsibility for the offence, Ms Brown records:
- "Mr Tudora accepted partial responsibility for his actions. He minimised responsibility for his offending behavior by denying that he acted in a manner detailed in the indictment, stating that he did not utter death threats or present a knife at the victims.
- Mr Tudora also attempted to minimise responsibility for failing to attend court by stating that he was not aware of the hearing. This is despite him failing to provide details of his current address to the court.
- Furthermore, Mr Tudora attempted to apportion a level of blame onto the victim stating that he kicked the door after being assaulted by one of the victims."
19. Ms Brown records that the appellant's offending behaviour was planned and that he had made a conscious decision to attend the home with a knife and acted in a reckless manner. As to his insight and attitude she notes:

“Mr Tudora acknowledged that it was his intention to gain access to the home of one of the victims in order to assault the male victim. Despite this, he was unable to recognise the potential consequences of his actions, maintaining that he would not have used the knife in his possession.

Mr Tudora was able to recognise that his actions [sic] were unacceptable, however presented as lacking remorse for his offending behavior. He did not recognize the gravity of his actions.”

20. The report refers to the appellant’s unemployment in Romania on completion of his education and also to employment at a carwash on relocating to Glasgow for some four months, followed by employment in a chicken production factory where he remained for a year before securing employment in an abattoir where he was then employed. He reported that he had no outstanding fines however Ms Brown indicates that liaison with the Fines Enforcement Department at Glasgow Sheriff Court indicated that he had four outstanding fines totaling £255 from 2015. He had not made any payments towards those fines.

21. The risk factors identified by Ms Brown were:

- (i) Attitudes/orientation: supportive of crime.
- (ii) Limited insight into offending.
- (iii) Lack of victim empathy

22. Her risk assessment undertaken records a failure by the appellant to recognise the seriousness of his action and that harm that could have been caused. She refers to his actions being planned and that he had made the conscious decision to carry a weapon and committed the index offence with an intention to inflict violence on the victims. In respect of likelihood, she records:

“Mr Tudora has been assessed as having a minimum level of risk and needs using the LS/CMI risk assessment tool. This is attributed to his limited prior involvement in offending behavior and his largely pro-social lifestyle. Despite this, Mr Tudora’s offending behavior is of serious concern as it had the capacity to cause significant harm to others.”

23. In respect of serious harm/imminence, Ms Brown explains that despite the capacity to cause serious harm to others the appellant had no other convictions relating to violence and therefore there was no indication that he currently presents an imminent risk of harm to others. By way of conclusion she reports:

“Mr Tudora appears before the court for the second time since his initial involvement in offending in 2016. The index offences reflects a shift in the nature of his offending and relates to violence and a failure to appear in court. Mr Tudora lacked insight into his offending behavior and was unable to recognise the potential consequences of his actions and the impact on victims.

Mr Tudora has been assessed as having a minimum level of risk and needs using the LS/CMI risk assessment tools. The primary factor associated with this offending behavior has been identified as attitude towards offending behavior. Despite this Mr

Tudora's offending behavior was of a serious nature and had the capacity to cause serious harm to the victims."

24. The relevant provisions of reg. 27 are as follows:

- "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.
- ...
- (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 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 a resident of 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 in the United Kingdom and the extent of P's links with P's country of origin.
- ...
- (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 fundamental interests of society)."

25. Schedule 1 is in the following terms:

"SCHEDULE 1

CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

Considerations of public policy and public security

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

Application of paragraph 1 to the United Kingdom

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.
6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including –
 - (a) entering, attempting to enter or assisting another person to enter or to attempt to enter, a marriage, civil partnership or durable partnership of convenience; or
 - (b) fraudulently obtaining or attempting to obtain, or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

The fundamental interests of society

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);
- (i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;
- (j) protecting the public;
- (k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);
- (l) countering terrorism and extremism and protecting shared values.”

26. By way of submissions Mr Matthews referred to a failure by the appellant to have demonstrated that he was exercising a right of free movement and referred to the pattern of offending that arose after the appellant’s arrival in the UK. The Civil Justice Report was required to be read as a whole and it referred to aspects of the report which indicated the appellant did not have insight. Of the factors to be taken into account with reference to reg. 27(5), the appellant’s age was not a feature, nor were there any health issues. He argued that the appellant had not established family life with [SH]. The appellant’s residence was short and the economic situation of the appellant did not tell in his favour.
27. Mr Bradley argued that with reference to Schedule 1, that it did not appear the appellant was a persistent offender and furthermore the prison sentence of twelve months was at the lower end of the scale. The burden of proof was on the Secretary of State to prove the threat that the appellant posed. There was an absence of anything to show in the Criminal Justice Social Work Report that the appellant posed a threat and there was a large gap of some eighteen months between the appellant’s offending. He directed me to aspects of the report in support of his contention that the appellant did not pose a threat, which I discuss in more detail below in my analysis. He urged that the appeal should be allowed.
28. I have set out at some length detail from the report since I consider this critical to whether the respondent has discharged the burden to demonstrate that the appellant

represents a sufficiently serious threat other than the meaning of reg. 27. Ms Brown makes clear that the appellant had been assessed as having a minimum level of risk and needs using the LS/CMI risk assessment tool. The tool has not been provided. Under the heading "Serious Harm/Imminence", she concludes that there was no indication that the appellant currently presented an imminent risk of harm to others. The latter indication appears however to be informed by the absence of other convictions relating to violence. Nevertheless, the report notes a shift in the nature of offending and that the appellant had made a conscious decision to carry a weapon with an intention to inflict violence on the victims. Furthermore, Ms Brown observes that he was unable to recognise the potential consequences of his actions and although able to recognise they were not acceptable, he presented as lacking remorse for his offending behaviour. He did not recognise the gravity of what he had done. He had attempted to apportion a level of blame onto the victims, explaining that he had kicked the door after being assaulted by one of those victims.

29. The report was prepared prior to sentencing. The appellant's witness statement will have been prepared after he had the opportunity of reflecting on matters during his sentence. Nevertheless, I consider it significant that the statement before the First-tier Tribunal indicates that he has not understood the seriousness of what he did and no remorse is expressed. He explains that the conviction was not for a violent act upon another person with a knife and he did not accept that in the circumstances the chances of a harmful incident taking place had greatly increased. In my judgment, this evidence, read with the concerns expressed in the report, indicates that the appellant continues to reject the seriousness of what he did and this increases the risk that he might again resort to violence in order to resolve disputes that are best settled by other means.
30. As to previous offending, it is correct that the appellant was given the lowest form of punishment for theft but it is nevertheless indicative of offending. Despite the appellant having denied to Ms Brown having no outstanding fines, her own enquiries indicated this was not the case. I only give limited weight to this latter aspect since no detail has been provided of how the fines arose.
31. Taking all matters in the round I am satisfied that the appellant, at the date of decision represented a genuine, present and sufficiently serious threat. He continues to do so. It may not be an imminent threat but that is not the test. He has demonstrated a propensity to use violence to resolve matters rather than other means for sorting out disputes and this constitutes a threat from which society clearly needs to be protected. The decision to expel him is in all the circumstances proportionate. The finding that the appellant was not exercising treaty rights has been preserved. It has been open to the appellant to produce evidence by way of rebuttal and it is significant he has not done so. The appellant maintained with Ms Brown that he had been employed in the United Kingdom, yet it remains the case that he has not produced any evidence of that employment. Taking his case at the highest the appellant may well have been intermittently employed at some point but I can give minimal weight in the light of the absence of any evidence. He readily accepts that he has not established a permanent right of residence. There is no evidence before me that the appellant faces

difficulties in Romania. The statement by [SH] indicates that the parties had been seeing each other for a limited period before he was taken into detention. The life the appellant has established with her is found at the very beginning of a relationship. [SH] has provided no more recent evidence to indicate the status of that relationship or whether she has visited him in Romania. Aside from [SH] there is no evidence of the appellant having integrated in the United Kingdom. These factors even when taken together do not show that expulsion of the appellant is disproportionate to the need for society to be protected. Mr Bradley accepted that this appeal turned on application of the regulations and he did not seek to rely on any discreet article 8 rights.

32. By way of summary therefore I set aside the decision of the First-tier Tribunal for error of law but come to the same conclusion and dismiss this appeal.

NOTICE OF DECISION

The appeal is dismissed.

Signed

Date 31 August 2018

UTJ Dawson

Upper Tribunal Judge Dawson