IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003898
First-tier Tribunal No: DA/00033/2022

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 6 December 2022

Decision & Reasons Promulgated
On the 21 February 2023

Before

THE HON. MRS JUSTICE THORNTON
[SITTING AS A JUDGE OF THE UPPER TRIBUNAL]
UPPER TRIBUNAL JUDGE SMITH

Between

ADRIAN LUCA
[ANONYMITY ORDER NOT MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Clarke, Senior Presenting Officer.
For the Respondent: Mr Slatter instructed by TMC Solicitors

DECISION AND REASONS

Introduction

1. The Secretary of State for the Home Department appeals, with permission, against the decision of the First Tier Tribunal, promulgated 4 July 2022, upholding Mr Luca's appeal against her decision, dated 16 March 2022, to make a deportation order, on grounds of public

policy and security, pursuant to Regulations 23(6) and 27 of the Immigration (European Economic Area) Regulations 2016 (2016/1052) (the 'EEA Regulations'). It is common ground that the EEA Regulations, as saved, apply.

2. For ease of reference, the parties are referred to in this decision as they were in the First Tier Tribunal (i.e references to the Appellant are to Mr Luca and references to the Respondent are to the Secretary of State).

3. At the end of the oral hearing on 6 December 2022, we notified the parties that our decision is that we are not persuaded of any error of law by the First Tier Tribunal. These are the written reasons for our decision.

Legal Framework

4. Regulation 23(6) of the EEA Regulations provides, in relevant part, as follows:

> *Exclusion and removal from the United Kingdom*
>
> *23.-*
>
> *(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—*
>
> …
>
> *(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27; or*

5. Regulation 27 of the Regulations provides, in relevant part, 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.*
>
> …
>
> *(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(1).*
>
> *(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.

…

(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.).

6. Schedule 1 sets out relevant considerations of public policy and public security and a (non-exhaustive) list of the fundamental interests of society.

The Appellant's immigration and criminal history

7. The Appellant is a Romanian national born on 24 July 1976. The Respondent accepts that he has been living in the UK since at least 2000 and has acquired permanent residence.

8. The Respondent's decision sets out his immigration and criminal history.

9. The Appellant claimed to have arrived in the UK in September 1998, entering the UK alone at approximately 21 years of age. Romania had not yet joined the EU at that time so the Appellant would have been subject to immigration control on arrival. Romania joined the EU

on 01 January 2007, and the Appellant would have been exercising the right of free movement as an EEA national from that date.

10. In June 2000 the Appellant was convicted of obtaining pecuniary advantage by deception and theft and received a conditional discharge. In March 2007 he received a caution for common assault. In June 2011 he was convicted of driving otherwise than in accordance with a licence, using a vehicle while uninsured, aggravated vehicle taking and damage to property. In July 2011 he was sentenced to a community order and disqualified from driving. In July 2011 he was convicted of possession of a false/improperly obtained identity document for which he received a suspended imprisonment order of 3 months. In July 2012 he was convicted of failing to comply with the community requirement of a suspended sentence. In January 2013 he was convicted of possession of a controlled drug, Class B, and received a fine. In May 2018 he received a caution for destroying or damaging property. In December 2018 he was convicted of making false representations, for which he received a suspended imprisonment of nine months. Most recently, and seriously, on 22 December 2020 he was convicted of causing grievous bodily harm, with intent to do grievous bodily harm, for which he received a sentence of six years imprisonment.

The Secretary of State's decision

11. The Respondent's decision letter concludes that deportation is justified on imperative grounds of public security, as follows:

> *77. You have committed a serious criminal offence in the United Kingdom and, as explained above, the professional assessment is that there is a real risk that you may re-offend in the future. You have made representations and account has been taken of these. Nevertheless, for the reasons set out above, and in particular the genuine, present and sufficiently serious threat you pose to one of the fundamental interests of United Kingdom society, it is considered that your deportation is justified on grounds of public policy/public security in accordance with regulation 23(6)(b) of the EEA Regulations 2016, as saved. Your personal circumstances have been considered but our view is that, given the threat you pose, the decision to deport you is proportionate and in accordance with the principles of regulations 27(5) and (6).*

12. The decision cites the Appellant's criminal convictions; identifies the offence of GBH as a very serious offence; sets out the sentencing remarks on conviction; analyses the OASYS assessment; identifies the absence of a genuine and subsisting relationship with the Appellant's son in the UK. In terms of reoffending, the decision states that the Appellant has demonstrated the capability to cause psychological and physical harm to others whilst under the influence of alcohol and drugs; refers to the six previous convictions dating back to 2000; notes there are no previous convictions for violent offending before the conviction for GBH, save for a caution for common assault in 2007. Despite the Appellant's attendance on offence-related courses while in custody, including Alcoholics Anonymous, this does not in itself rehabilitate an offender or guarantee that the risk of re-offending will reduce after release and there is insufficient evidence that the Appellant has fully and permanently addressed all the reasons for the offending behaviour. Even though the courts have afforded seven opportunities to rehabilitate, the Appellant has repeatedly continued to offend. It is therefore considered that the potential exists for him to continue to offend and to present a risk of harm to the public as long as he remains in the UK. In the absence of any evidence that he has fully and permanently overcome his drug addiction and with alcohol, it is believed that he is likely to

revert to using drugs/alcohol upon release from prison which would, in turn, increase the risk of re-offending and continuing to pose a risk of harm to the public.

The First Tier Tribunal Decision

13. Having set out the relevant background, the legal framework and the evidence, the judge turns to his findings and reasons.

14. He notes that the Respondent has accepted that the Appellant benefits from the highest level of protection by virtue of a permanent right of residence and 10 years continuous residence. It was also considered that the Appellant met the integration test. Therefore, imperative grounds of public security must be shown to justify deportation.

15. The Judge considers the OAYS assessment. He notes the guilty plea and the aggravating and mitigating factors. He poses the question 'Are there imperative grounds of public security?' He observes that the burden is on the respondent to establish the threat. He notes that the Respondent's refusal letter referred to the case of Tsakouridis and proceeded on the basis that 'imperative grounds of public security' could extend to the Appellant's offending, before stating that

> *"19 However, at the hearing the PO, as above, Mr Wightman, accepted that the offending did not come within the types of offending covered by imperative grounds of public security."*

16. The Judge goes on to state that:

> *21 The Appellant's offending is clearly serious and is set out above. The seriousness is reflected in the sentence of 6 years which he received on 11 February 2021. He was convicted of a serious assault. He does not dispute the account in the refusal at paragraph 43. He punched, kicked and used a golf club, breaking ribs and leaving his victim unconscious. However, the refusal accepted that the offence was an isolated incident of violence. Further, the risk would be greater if he lived in a house of multiple occupancy - but the unchallenged oral evidence from the sister is that the Appellant could live with her on release. I find that clearly reduces the risk of repetition, of what has been accepted as a one- off incident.*
>
> *22 I have also read the sentencing remarks which are in the Respondent's bundle. Although the Appellant admitted the attack and that he lost control, it was a vicious and sustained attack with the use of weapons, causing serious injury. There were aggravating factors (the location and alcohol) but also mitigating factors – including that he only had one previous caution for a minor offence of violence. He had done courses in custody and had pleaded guilty.*
>
> *23 I have considered and applied case law including Land Baden-Württemberg v Tsakouridis (Case C-145/09) CJEU (Grand Chamber), 23 November 2010 and LU 30.1.2011…..…*

17. The Judge concludes that:

> *28 Based on the above findings, the Respondent's own guidance, the case law, and taking account of the Appellant's submissions in the skeleton and made orally, I find that the threshold requires offending of a significantly higher degree. I find that this*

> *offence, whilst serious, does not meet the very high threshold of "imperative grounds of public security". That is sufficient to dispose of the appeal, which must therefore be allowed.*

18. He considers the proportionality of deportation, whilst reminding himself that it is not strictly necessary to do so, and concludes that removal would be disproportionate given the level of protection to be afforded to the Appellant.

The Secretary of State's grounds of appeal

19. The Respondent submits that the Judge failed to assess the threat posed by the Appellant, in particular the risk of re-offending. Reliance is placed on Kamki [2017] EWCA Civ 1715 which found even where the risk of re-offending is low, the threat can be sufficiently serious if the consequences of re-offending are very serious. Given the short period of time that has passed since the index offence and the Appellant remains in prison it is too soon to say that he does not represent a threat. It is also said that whilst the Judge notes Schedule 1 para 7 of the EEA regulations, he fails to engage with it. There is no reason why the Appellant, given his age, health and work experience could not undertake his rehabilitation in Romania. The Judge has failed to consider the absence of genuine and subsisting relationship with the son.

Discussion

The legal framework

20. The Respondent's decision letter refers to Recitals 23 and 24 of EU Directive 2004/58 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The recitals set the context in relation to expulsion of EU citizens and family members who have become genuinely integrated into the host member state (as it was common ground the Appellant has).

21. The recitals state as follows:

> *'(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the [EC] Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.*
>
> *(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure.*

22. The case of Land Baden-Württemberg v Tsakouridis (Case C-145/09) CJEU (Grand Chamber), 23 November 2010 ("Tsakouridis") addresses what is meant by imperative grounds of public security as follows:

> *"40 It follows from the wording and scheme of Article 28 of Directive 2004/38, as explained in paragraphs 24 to 28 above, that by subjecting all expulsion measures in the cases referred to in Article 28(3) of that directive to the existence of 'imperative grounds' of public security, a concept which is considerably stricter than that of 'serious grounds' within the meaning of Article 28(2), the European Union legislature clearly intended to limit measures based on Article 28(3) to 'exceptional circumstances', as set out in recital 24 in the preamble to that directive.*
>
> *41 The concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words 'imperative reasons'.*
>
> *44 The Court has also held that a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (see, inter alia, Case 72/83 Campus Oil and Others [1984] ECR 2727, paragraphs 34 and 35; Case C-70/94 Werner [1995] ECR I-3189, paragraph 27; Albore, paragraph 22; and Case C-398/98 Commission v Greece [2001] ECR I-7915, paragraph 29).*
>
> *45 It does not follow that objectives such as the fight against crime in connection with dealing in narcotics as part of an organised group are necessarily excluded from that concept."*

23. In addition to referring to the case of Tsakouridis, the First Tier Tribunal Judge analysed relevant case law on the meaning of imperative grounds of public security, including MG and VC (Ireland) ([2006] UKAIT 00053); VP(Italy) v SSHD ([2010] EWCA Civ 806) and VP(Italy) v SSHD ([2010] EWCA Civ 806). From these cases it is apparent that an imperative risk to public security must amount to an actual risk to the safety of the public, or a section of the public, so compelling that it justifies the exceptional course of removing someone who has become 'integrated' by 'many years' residence in the host state. The threshold is not met by the ordinary risk to society arising from the commission of further offences by a convicted criminal. Serial or targeted criminality of a sufficiently serious kind may meet the test but the threat to the public or a definable section of the public must be sufficiently serious to make expulsion "imperative" and not merely desirable as a matter of policy. During the hearing Mr Clarke took us to the case of Hafeez v Secretary of State[2020] EWCA Civ 406, but the extracts he relied on simply repeated the principles cited above.

Application of the legal framework to the facts of the present case

24. Before us (and before the FTT) it was common ground that the Appellant benefits from the highest level of protection by virtue of a permanent right of residence and 10 years continuous residence. In addition, the Respondent concedes that the Appellant is genuinely integrated into the UK such that the continuity of his residence has not been broken by the sentence of imprisonment. Accordingly, as was common ground, the relevant test is whether there are imperative grounds of public security to justify the removal of the Appellant and the burden is on the Respondent to establish the existence of the grounds.

25. The FTT Judge recorded the following concession about the Appellant's offending conduct (grievous bodily harm with intent to do grievous bodily harm) by the Home Office presenting officer:

> *"the offending did not come within the types of offending covered by imperative grounds of public security." (19)*

26. The Secretary of State's grounds of appeal and skeleton argument did not address the concession. Nor did they seek to withdraw it. Before us, there was some debate as to how this concession was to be interpreted. Mr Slatter submitted that the concession amounted to a comprehensive acknowledgement that the offending was not capable of falling within the category of imperative grounds of public security and the Judge's reasoning, which is also criticised by the Respondent, must be assessed on this basis. Further, the Respondent had not followed the appropriate procedure if the concession was now being withdrawn. Mr Clarke said he did not seek to withdraw the concession but submitted it was limited to the concession recorded at paragraph 8 of the FTT decision, which sets out the Presenting Officer's submissions and includes as follows

> *"He said that counsel sets out in his skeleton fairly the sorts of crimes which might justify that – see paragraph 26 (terrorism, trafficking etc). He accepted that the offence in this case is not the same bracket or category".*

27. We do not consider it necessary to resolve the issue. Even if the concession is limited in the way suggested by Mr Clarke, as we are inclined to accept, the concession remains, that the offending conduct in play in this case is not in the same bracket or category as 'the sorts of crimes which might justify' a finding of imperative grounds of public security (adopting the language in paragraph 8 of the FTT decision which Mr Clarke relied upon in this regard).

28. In addition, contrary to the case advanced by the Respondent, the Judge did consider the risk of re-offending, as is apparent from paragraphs 21 and 22 of the decision, which are set out in full above. Paragraph 21 concludes with the following - *I find that clearly reduces the risk of repetition, of what has been accepted as a one- off incident.* Paragraph 22 refers to the mitigating factors in the offending as the Appellant "*only had one previous caution for a minor offence of violence. He had done courses in custody and had pleaded guilty."*

29. Mr Clarke took us through the OAYS report, pointing out that the index offending represented an escalation in offending behaviour. He also pointed to the analysis that indicates the risk of reoffending will be greatest if the appellant lives in a house of multiple occupancy, given the potential for a repeat of the type of violent confrontation which led to the index offence. He highlighted the Judge's reference to the sister's evidence that the Appellant could live with her (at paragraph 21), submitting this was not the same as a finding that the Appellant would live with her. However, the finding at paragraph 21 must be read in the context of the Judge's note of submissions by Appellant's Counsel at paragraph 11 '*he will live with his sister, as she confirms'*. In our view, Mr Clarke's submissions amounted, in effect, to an attempt to reargue the merits. Nor do we accept that the decision was inadequately reasoned. The reasons are adequate and intelligible and enable the Respondent to understand why she lost, namely that the offending, whilst serious, did not meet the necessary (high) threshold for imperative grounds of public security.

30. Given the Judge's analysis in this respect, we are not persuaded that he erred in not addressing obstacles to reintegration or the relationship with the Appellant's son. Neither was

material to the outcome given the Judge had reached the core conclusion that the offending was not to be regarded as reaching the requisite degree of seriousness. It cannot be said that the Judge failed to engage with the Schedule to the EEA Regulations, given his scrutiny of the offending conduct, the potential for re-occurrence, the Appellant's conduct in prison and his accommodation on release. Moreover, the Judge refers to taking the Schedule into account. As Mr Clarke conceded, as a specialist tribunal, the Judge is presumed to understand the legal framework unless there is evidence to the contrary.

31. Given our reasons above, it is not necessary for us to address Mr Clarke's criticisms of the Judge's assessment of the proportionality of removal.

Notice of Decision

The decision of First-tier Tribunal Judge Roots promulgated 4 July 2022 does not disclose any material error of law. We therefore uphold the decision with the consequence that the Appellant's appeal remains allowed.

Signed: MRS JUSTICE THORNTON DBE Date 16/12/2022
The Hon. Mrs Justice Thornton sitting as an Upper Tribunal Judge