Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01363/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 December 2013	**On 13 January 2014**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ANDREI ZAHARIA

Respondent/Claimant

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr P Sutton, Counsel, instructed by Lloyds PR Solicitors

DETERMINATION AND REASONS

1. The claimant is a national of Romania born on 26 November 1988.

2. On 5 June 2013 he was served with a notice of decision to make a deportation order and reasons for deportation letter. The claimant sought

to appeal against that decision, which appeal came before First-tier Tribunal Judge Ford and Dr J O De Barros (non legal member) on 7 October 2013.

3. The appeal was allowed.

4. The Secretary of State for the Home Department has submitted a number of grounds contending that the Tribunal acted in error in making the findings which it did.

5. The matter which gives rise to the immigration decision is the offence committed on 2 February 2012, the particulars of which are set out in the sentencing remarks of Judge May QC at paragraph 3 of the determination. On 17 October 2012 the claimant was found guilty by a jury of two offences of wounding with intent to do grievous bodily harm. He was sentenced to fifteen months' imprisonment. The offence involved is of violence towards a previous boyfriend of his girlfriend. A knife was used and the victim was stabbed. Another person, who tried to prevent the argument and fight ,was also stabbed. Both victims were treated in hospital for their injuries.

6. As the appellant is an EEA national, any decision to remove him must be made in accordance with Rule 21 of the Immigration (European Economic Area) Regulations 2006.

7. That is set out in paragraph 9 of the determination in which the decision letter is quoted as to the relevant passage namely:

> "You have committed serious criminal offences in the United Kingdom and, as explained above, there is a real risk that you may reoffend in the future. Account has been taken of the considerations outlined in EEA Regulation 21(6). Nevertheless, given the threat of serious harm that you pose to the public it is considered that your personal circumstances do not preclude your deportation being pursued. It is considered that the decision to deport you is proportionate and in accordance with the principles of Regulation 21(5)."

8. In applying the principles of Regulation 21(5), it is first necessary to determine the status of the appellant in the United Kingdom, in particular whether he has remained in the United Kingdom sufficiently long enough to acquire a permanent right of residence under Regulation 15. If so, then his removal can only be made on serious grounds of public policy or public security and indeed, if he has resided in the United Kingdom for a continuous period of at least ten years, then the relevant decision cannot be taken except on imperative grounds of public security.

9. It is the case for the Secretary of State for the Home Department that the appellant has not, at the time of the decision, acquired a permanent right of residence in the United Kingdom. It is noted at paragraph 10 of the

refusal letter that the appellant claims to have arrived in the United Kingdom on 15 September 2008. Although that is noted at paragraph 10 of the determination, it is also noted at paragraph 13 that in June 2008 he left Romania to join his father in the United Kingdom.

10. That was more reasonably likely to have been a mistake as I note from the statement of the claimant's father of 30 September 2013 that the claimant arrived in the UK in September 2008 and it was his father who arrived in 2007.

11. It is likely therefore that the appellant has not acquired five years' residence so as to acquire a permanent right to remain under Regulation 15. In any event, it is settled that time spent in custody does not count towards that time.

12. There may be some criticism offered of the Tribunal in that it did not make a clear finding of fact as to that matter, although I do not understand from the remarks by Mr Sutton, who represents the claimant before me, that it is contended that the claimant has acquired a permanent right of residence.

13. The status of the claimant is relevant to one aspect of the grounds of appeal that have been advanced, namely that the Tribunal was in error in speculating upon the appellant's chances of rehabilitation so far as the guidance set out in the case of **Essa v SSHD (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC)**.

14. As Mr Tarlow submits, the principles in Essa concerning the requirement of the Tribunal to consider whether the claimant's potential for rehabilitation are better in the United Kingdom or Romania do not arise unless the claimant has acquired a permanent right of residence.

15. Paragraph 26 of the judgment in Essa is quoted in the grounds of appeal as follows:-

> "We agree that the court's reference to genuine integration must be directed at qualified persons and their family members who have resided in the host state as such for five years or more. People who have just arrived in the host state, have not yet become qualified persons, or have not been a qualified person for five years, can always be removed for non-exercise of free movement rights irrespective of public good grounds to curtail free movement rights. If their presence during this time makes them a present threat to public policy it will be inconsistent with the purposes of the Directive to weigh in the balance against deportation their future prospects of rehabilitation."

16. Thus, so far as the criticism made of the Tribunal in the grounds of appeal that they wrongly considered the factor of rehabilitation in the case of the claimant would seem to have been well-founded.

17. It is always part of the balancing exercise to consider what the claimant enjoys in the United Kingdom and what he may conceivably face upon return to Romania. To that extent, the analysis, perhaps, is not wasted. Clearly, the consideration as to rehabilitation was unnecessary in those circumstances.

18. The issue, therefore, which arises for consideration in this appeal is whether the Tribunal, in focusing some of its efforts into the issue of rehabilitation, has failed to consider the central issue in this appeal.

19. The central issue which arises from Rule 21 is that set out at 21(5)(c) whether "The personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".

20. It is perhaps a matter of some concern that paragraph 22 of the determination makes no reference specifically to Rule 21.

21. Certain of the requirements of that Rule have been taken into account.

22. It is unfortunate indeed that the Tribunal failed to focus expressly upon the issue as to whether there is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

23. In fairness to the Tribunal, however, it is clear that it has sought to assess the risk which the claimant now poses to society. It dealt with various reports at paragraphs 5 and 6 of the determination. It notes that one set of scoring places the risk of offending as low and another scoring the risk as medium.

24. At paragraph 20 the Tribunal makes the following comments:-

> "We do not accept that the Appellant poses a medium risk of reoffending and we find the assessment set out in 16th May 2013 e-mail at K1 of the Respondent's bundle to be more reliable. We are satisfied that there is a low risk of reoffending in this case. The relationship that led to the confrontation and the assault is over and such a situation is highly unlikely to recur."

25. The Tribunal goes on at paragraph 21 to note:-

> "The Appellant's father and his father's partner are of the view that the behaviour of the Appellant in February 2012 was completely out of character and that they anticipate no repeat of that behaviour."

26. At paragraph 30 the Tribunal states as follows:-

> "We recognise that great weight must be attached to the decision of the Secretary of State, following legislation and guidance, that this Appellant should be deported to Romania. However, we are not satisfied that the Appellant's deportation serves the public interests of public policy and/or public security, given the level of risk the Appellant poses to society, the level of risk of repeat offending and reduced prospects of his rehabilitation if he were to be removed to Romania."

27. As I have indicated, it is unfortunate that the Tribunal does not articulate precisely the issue upon which they have to adjudicate, namely whether there is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

28. That having been said, however, the findings as to risk have been made and they are put within the proper context of day to day support by the claimant's parents, his continuous employment, his previous good character, essentially the support which is provided to him by his family in the United Kingdom, a support which would not be reasonably to be expected were he to return to Romania.

29. Although the Tribunal has not articulated the precise issue, it is clear, as I so find, that in the passages to which reference has been made, it has come to a conclusion that the claimant does not now present a genuine, present or sufficiently serious threat to one of the fundamental interests of society. The Tribunal has given reasons for its findings which are sustainable and properly open to be made. It has conducted the proportionality exercise. It has compared the lifestyle of the claimant in the United Kingdom with that which he may face if returned and has concluded that the balance falls in his favour.

30. The Secretary of State for the Home Department in the grounds of appeal also seeks to criticise the Tribunal's assessment as to the issue of low risk of re-offending, contending that the panel has failed to give adequate weight to the Secretary of State's public interest and public safety policies. Reliance is placed upon **DS (India) [2009] EWCA Civ 544**. The grounds go on to express the view that the public interest in the deportation of those who commit serious crimes is beyond the need to deprive the individual of the opportunity to have the chance to re-offend in a country which extends to the need to deter others and prevent serious crime generally and to uphold the public abhorrence of such offending.

31. As I indicated to Mr Tarlow, I find that that ground is not one that has merit, given the issue which needs to be addressed in Rule 21.

32. Indeed, that principle is set out clearly by the Court of Appeal in the decision of Essa, to which reference has been made. The court said at paragraph 32:-

> "We observe that for any deportation of an EEA national or family member of such national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in the case of criminal conduct, short of the most serious threats to public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. In such a case, if there is acceptable evidence of rehabilitation, the prospects of future rehabilitation do not enter the balance, save possibly as future protective factors to ensure that rehabilitation remains durable."

33. Thus, although in a normal deportation case deterrence and abhorrence are relevant considerations, this is not so for an EEA case. In those circumstances, I find that ground 3 of the Secretary of State's grounds of appeal is misconceived.

34. Rule 21(6) requires, before taking a relevant decision, the decision maker must take into account considerations of age, state of health, family and economic situation, the person's length of residence in the United Kingdom, his social and cultural integration in the United Kingdom, and the extent of personal links with his country of origin. It is clear that that has been done by the Tribunal.

35. It is unfortunate that the determination is somewhat muddled and not focused, as I have indicated, expressly on the issue. However, it is clear that the findings made in that determination, when applied to the issue, are determinative of it.

36. Although there are obvious errors in the approach taken by the Tribunal, it is clear that overall the findings which were made support the conclusion that the claimant does not currently present a sufficiently serious threat, indeed any threat. In those circumstances, it is clear that on those findings there is no basis to remove under Rule 21.

37. In those circumstances, the appeal by the Secretary of State for the Home Department is dismissed. The findings made by the Tribunal allowing the appeal in respect of the immigration decision and that in respect of Article 8 of the ECHR shall stand.

Signed Date

Upper Tribunal Judge King TD