Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01448/2013

THE IMMIGRATION ACTS

Heard at Field House
On 6 March 2014

Determination Promulgated
On 24 March 2014

Before

THE HON MR JUSTICE KENNETH PARKER
UPPER TRIBUNAL JUDGE MOULDEN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR MARIAN-IONUT CREANGA
(Anonymity Direction not made)
Respondent

Representation:
For the Appellant: Mr L Tarlow a Senior Home Office Presenting Officer
For the Respondent: Mr C Nwadi a Solicitor from Nicolas Solicitors

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Romania who was born on 6 January 1995 ("the claimant"). The Secretary of State has been given permission to appeal the determination of a panel consisting of First Tier Tribunal Judge Ruth and non-legal member Ms S E Singer ("the panel") who allowed the claimant's appeal against the Secretary of State's decision of 3 July 2013 to make a deportation order against him under the provisions of the Immigration (European Economic Area) Regulations 2006 ("the 2006

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Regulations") as the family member of an EEA national and that his removal was justified on the grounds of public policy or public security following his conviction on 13 July 2012 at Isleworth Crown Court of attempted robbery for which he was sentenced to two years and six months imprisonment in a Young Offenders Institute. The Secretary of State considered this to be a particularly serious offence.

2. The claimant claimed to have arrived in the UK on 3 September 2007. The Secretary of State did not believe this because there was no evidence of his presence in the UK until his mother referred to him in her self-employment application dated 20 May 2008. As an EEA national he would not have been subject to immigration control on entry. The claimant has committed a number of offences. He was first reprimanded for being drunk and disorderly in December 2010. He received a warning for battery in March 2011; was fined for disorderly behaviour or threatening abusive or insulting words likely to cause harassment alarm or distress in November 2011 and fined for shoplifting in April 2012. The index offence is his conviction for attempted robbery on 13 July 2012 following a plea of guilty at Isleworth Crown Court. On 21 September 2012 he was sentenced to 30 months imprisonment. There was no appeal against conviction or sentence. He has completed his sentence and is now on bail granted by a judge in the First-Tier Tribunal.

3. The Secretary of State concluded that the claimant had not acquired a right of permanent residence in the UK and considered whether his deportation was warranted on the grounds of public policy or public security. Consideration was given to the principles set out in regulation 21 (5) of the 2006 Regulations. The respondent set out the circumstances of the offence and quoted from the judge's sentencing remarks. The claimant had been assessed as posing a medium risk of harm to the public. When he committed the offence he was under the influence of cannabis and his previous offending behaviour was linked to alcohol consumption. The Secretary of State took into account a psychiatric report. The prospects of rehabilitation were addressed and, in relation to the 2006 Regulations, the Secretary of State concluded that there was a real risk of reoffending and that it would be proportionate to deport the claimant in accordance with the principles in regulation 21 (5).

4. The Secretary of State went on to consider the claimant's Article 8 human rights, concluding that whilst he had established a degree of private life in the UK and had some family ties here these were not sufficient to establish a family life. It would not be a disproportionate interference with his right to respect for his private and family life to deport him.

5. The claimant appealed and the panel heard his appeal on 2 January 2014. Both parties were represented. The panel heard oral evidence from the claimant and his mother.

6. The panel found the claimant and his mother to be credible witnesses. The evidence was detailed, internally coherent, spontaneous and not undermined

in cross examination. The evidence of his mother was found to be particularly powerful. Most of the facts were not in dispute. The panel concluded that the claimant had arrived in the UK on 3 September 2007. His mother was an EU citizen who had been continuously working in the UK firstly as a self-employed cleaner, then as a healthcare assistant and now as a nurse who has obtained a mental health nursing qualification.

7. The claimant's left him in the care of his grandparents in Romania and came to the UK when he was eight. He came here when he was 12 and struggled to adjust to the UK education system and to learn English. He left school at 16 and started a business studies course which he failed complete. He was on a motor industry training course when he committed the index offence and was imprisoned. He suffered violence at the hands of his stepfather which led to the involvement of the police and social services. Following a beating from his stepfather he ran away from home and it was during this period that the index offence was committed. He produced evidence of a number of courses completed whilst in prison.

8. Since his release on licence the claimant has returned to live with his mother, half-brother and aunts and cousins in the same household. His stepfather who mistreated him is no longer living there. The claimant helps with the care of his three-year-old half-brother. Most of his family are living in the UK although the grandparents continue to live in Romania and make regular visits to the UK.

9. The claimant has enrolled on a college course to study English, mathematics, IT and business administration. He has stopped taking drugs and misusing alcohol and has cut his links with his previous bad company. The claimant's mother believes that he had been shocked by his period in prison and has made a positive decision to reform himself. The panel accepted this.

10. The panel concluded that whilst the claimant was liable to deportation under section 3(5) of the Immigration Act 1971 he had been living in the UK as the dependent family member of his mother, who was a qualified person, for a period of five years from 3 September 2007 and as a result had acquired a right of permanent residence under the EEA regulations, contrary to the view taken by the Secretary of State.

11. The panel addressed the risk of reoffending which had been assessed in the probation report at 69%. However the assessment set out a list of factors likely to either increase or reduce the risk. It was found that there were factors which substantially reduced the risk. This had diminished although not disappeared. The claimant was most unlikely to be a serious risk to public policy or public security.

12. The panel concluded that deportation of the claimant would not be a proportionate response to the risk which he now posed. The appeal was allowed under the 2006 Regulations.

13. The panel went on to consider the claimant's Article 8 human rights grounds, finding that, although he was now an adult, he was not only living with his mother but was financially and emotionally dependent on her. There were emotional and other ties which went beyond those normally existing between an adult child and a parent. It was found that the claimant did have a family life in this country as well as a private life built up over the time he had been here. Deportation would be a disproportionate interference with his human rights. The appeal was allowed on Article 8 human rights grounds.

14. The Secretary of State applied for and was granted permission to appeal. The grounds argue that the panel erred in law by making a material misdirection of law. It was not open to the panel to conclude that the claimant had established permanent residency in the UK. There were no adequate reasons for the conclusion that he arrived here in September 2007. No consideration had been given to the fact that imprisonment broke the period of continuous residence. This also impacted on the Article 8 reasoning. Those who had not become qualified persons because of five years continuous residents could be removed for non-exercise of free movement rights irrespective of the public good grounds. The claimant had not demonstrated ties which went beyond normal emotional ties and had not established a family life with his mother and siblings (sic). The panel had improperly taken into account the future increase in his private life ties rather than concentrating on the circumstances at the date of the hearing. Finally, the panel had failed to give adequate consideration to the Secretary of State's public interest policies.

15. Mr Tarlow relied on the grounds of appeal. He submitted that the panel should not have accepted the date on which the claimant said that he arrived in the UK without corroborative documentary evidence. Of the possible dates for the start of the claimant's imprisonment Mr Tarlow favoured a date in April 2012 when he was first remanded in custody. The test which the Secretary of State had to apply before deciding to deport the claimant had a lower threshold if he had not acquired a right of permanent residence. It involved conducting a balancing exercise with, on the one hand, his private and any family life and on the other the public interest. We were asked to find that the panel had erred in law.

16. Mr Nwadi submitted that it was open to the panel to conclude that the claimant arrived in the UK in September 2007. He accepted that the panel should have considered the effect of the claimant's imprisonment in relation to the question of permanent residence. He submitted that the start date for imprisonment was the date on which the claimant was sentenced which was 21 September 2012. By that date he had just achieved five years in this country. The panel reached conclusions open to it on all the evidence and there was no error of law. However, if we concluded otherwise he accepted that we could remake the decision without the need for any further evidence. Both representatives agreed that if we were to remake the decision they would not wish to make any further submissions.

17. We reserved our determination.

18. In paragraph 9 of the refusal letter the Secretary of State said in connection with the claimant's period of residence in the UK and the question of whether he had acquired a right of permanent residence; "In this context, "residence" means lawful residence within the community. It is not considered that time spent in prison constitutes residence for the purpose of the EEA regulations (LG and CC [2009] UKAIT 0024 and Carvalho [2010] EWCA Civ 1406)."

19. The panel did not consider whether the claimant's period of residence in the UK had been affected by the time he spent in prison. This should have been done and we find that the failure to do so is an error of law. SO (imprisonment breaks continuity of residence) Nigeria [2011] UKUT 00164 (IAC) (Silber J and Warr UTJ), which reviews the earlier authorities referred to in the refusal letter states, in paragraph 16; "The position therefore is that it is quite clear from the cases that a person who is sentenced to imprisonment is not to be regarded as living continuously in this country during the period when he is in custody and that period has to be disregarded with the consequence that the five year continuous period starts afresh…."

20. We have not been referred to any authority which covers the particular circumstances of this case and defines the precise date on which the period of custody commences. For reasons which appear later we find that it was open to the panel to come to the conclusion that the claimant entered this country on 3 September 2007 at which point the clock started to run. The index offence was committed on 2 April 2012. He pleaded guilty and was convicted at Isleworth Crown Court on 13 July 2012. He was sentenced at the same court on 21 September 2001. The sentence was one of 30 months imprisonment. By 21 September 2012 he had spent 167 days remanded in custody in connection with the relevant offence. By section 240(3) of the Criminal Justice Act 2003 the 167 days of remand in custody counted as "time served by him as part of the sentence", and the sentencing judge duly accorded him full credit for the 167 days in pronouncing sentence. In other words, for a person who subsequently pleads guilty or is convicted of an offence, Parliament treats the sentence of imprisonment as beginning when the offender is remanded in custody in connection with the offence. 167 days already served by the claimant were directed to be deducted from his sentence. If the defining date is 21 September 2007 then the claimant had by then achieved five years residence on 3 September 2007. If the defining date is prior to 3 September 2007 then he had not. We find that the period of custody commenced and the clock stopped running on the claimant's period of residence when he was first imprisoned, 167 days before 21 September 2007. Clearly that was the date on which the period of custody commenced. There is no indication that the claimant was at liberty at any stage between the commencement of the 167 day period and sentencing. We note that the claimant also pleaded guilty before the five-year period elapsed. We accept that the position and the consequence would have

been different if, for example, the claimant had been remanded in custody but subsequently acquitted.

21. We conclude that the claimant had not been living continuously in this country for five years prior to the period when he was in custody and that he has not achieved five years since his release from custody.

22. It was open to the panel to come to the conclusion that the claimant entered this country on 3 September 2007. The Secretary of State had not suggested any alternative date only that the claimant had not established that it was any earlier than May 2008. The panel found that the claimant and his mother were both credible witnesses. This has not been challenged in the grounds of appeal. It was open to the panel to come to this conclusion and that the claimant had arrived in this country on 3 September 2007. Corroborative documentary evidence is not essential.

23. The grounds of appeal suggest that the claimant has had two periods of imprisonment. This is incorrect, as Mr Tarlow accepted.

24. We find that it was open to the panel to come to the conclusion that even though the claimant was a young adult he had established that he had a family life with his mother and half-brother which went beyond the normal emotional ties between a parent and adult child. The panel gave clear and sufficient reasons in paragraphs 44, 45 and 53 which were properly based on the evidence. The panel did not, as the grounds suggest, assess the claimant's private life on the basis of what the future might hold as opposed to the position that the date of the hearing. This appears to come from a misreading of paragraph 54. The panel did not fail to give adequate consideration to the Secretary of State public interest policies.

25. SO, quoting from paragraph 10 of (LG (Italy) v Secretary of State [2008] EWCA Civ 190) records that;

> "The 2006 Regulations have introduced a new hierarchy of levels of protection, based on criteria of increasing stringency.
>
> (1) A general criteria that removal may be justified 'on the grounds of public policy, public security or public health';
>
> (2) A more specific criterion, applicable to those with permanent rights of residence, that they may not be removed 'except on serious grounds of public policy, or public security';
>
> (3) The most stringent condition applicable to a person 'who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision' who may not be removed except on 'imperative grounds of public policy'."

26. Thus the panel should have applied the test of “grounds of public policy, public security or public health” as opposed to “serious grounds of public policy, or public security”. In this appeal the only difference is the presence or absence of the word “serious” because no issues of public health arise.

27. Whilst we do not apply any “near miss” test the length of time the claimant has lived in this country is relevant. It was nearly 5 years. His age was relevant to question of family life because he had not long since passed his 18th birthday.

28. Whilst the panel erred in law in concluding that the appellant had acquired a permanent right of residence we find that the panel reached the alternative conclusion that the claimant would also have succeeded had he not done so. In paragraph 42 the panel said; “In our view the appellant is most unlikely to be a serious risk to public policy or public security at this point. Indeed, even if we had concluded the appellant had not acquired a permanent right of residence we would still have concluded he did not pose a sufficient risk to public policy or public security even with the lower level of protection to which he would have been entitled.” We find that on all the evidence before the panel it was entitled to reach this conclusion and that as a consequence the claimant’s appeal succeeded under the 2006 Regulations. There would have been no knock-on effect to invalidate the reasoning or conclusion in relation to the Article 8 grounds.

29. We have not been asked to make an anonymity direction and can see no good reason to do so.

30. In these circumstances we find that whilst the panel erred in law the error has made no difference to the outcome of the appeal and there is no need to set aside the decision. Had it been necessary for us to remake the decision we would have reached the same final decisions as the panel.

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Signed Date 18 March 2014
Upper Tribunal Judge Moulden