IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00781/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 October 2015	**On 27 October 2015**

Before

UPPER TRIBUNAL JUDGE WARR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ION EMILIAN IORGA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Ms C Querton, Counsel instructed by Ennon & Co Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Romania born on 30 July 1973 as the appellant herein.

2. The Secretary of State appeals the decision of First-tier Tribunal Judge Finch on 8 December 2014 to allow the appellant's appeal against the respondent's decision to make a deportation order against him on 14 April 2014.

3. The respondent noted that the appellant had been convicted of five counts of exposure and the commission of a further offence during the operational period of a suspended sentence on 10 February 2014. The appellant was sentenced to fifteen months' imprisonment and the previous suspended sentence of twelve weeks was activated. It was the respondent's case that the appellant posed a genuine, present and sufficiently serious threat to the interests of public policy if he was allowed to remain in the United Kingdom and his deportation was justified under Regulation 21 of the EEA Regulations.

4. An issue before the First-tier Judge was whether the appellant had acquired a permanent right of residence under Regulation 15 of the EEA Regulations. In order to achieve permanent residence the appellant needed to demonstrate that he had resided in the United Kingdom in accordance with the Regulations for a continuous period of five years before being imprisoned. Under Regulation 21(3) "a relevant decision may not be taken in respect of a person with a permanent right of residence under Regulation 15 except on serious grounds of public policy or public security".

5. The First-tier Judge set out her findings and conclusions as follows:

> "11. The Respondent accepts that the Appellant is a national of Romania and, therefore, a foreign national. The Home Office Bundle contained an order for imprisonment and the sentencing remarks made by the judge on 10th February 2014. These confirm that the Appellant was sentenced to 18 months imprisonment. Therefore, the Respondent was obliged to make an automatic deportation order under Section 32(5) of the UK Borders Act 2007 and my starting point should be that the deportation of a foreign national criminal is conducive to the public good.
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> 12. However, as the Appellant is an EEA national the Immigration (EEA) Regulations 2006, as amended, also apply. Regulation 19(3) states that a person who has acquired a right to reside in the United Kingdom under these Regulations may be removed if (b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with Regulation 21.
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> 13. In addition, Regulation 21(1) states that "a 'relevant decision' means an EEA decision taken on the grounds of public policy, public security or public health" and Regulation 21(3) states that "a relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security".
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> 14. It is the Appellant's case that he has acquired a permanent right of residence in the United Kingdom and that, therefore, Regulation 21(3) means that he cannot be deported unless the Respondent established that there are serious grounds of public policy or public security.
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> 15. In order to show that he has acquired a permanent right of residence under Regulation 15 he must establish that he had resided in the

United Kingdom in accordance with the EEA Regulations for a continuous period of five years before being imprisoned. The refusal letter confirmed that the Appellant's passport indicated that he had entered the United Kingdom on 2nd August 2006. At this time Romania had not yet acceded to the European Union. It did so the following year and I note that there is a letter from HM Revenue & Customs, dated 9th February 2007 which indicates that the Appellant had provided some tax records and been advised to start making tax returns. There was also a self-assessment tax assessment for 2007-2008 in the Appellant's Bundle. The Home Office Bundle contained a letter from the UK Border Agency, dated 30th June 2009, which said that the Appellant had been issued with a Registration Certificate confirming that he was exercising a Treaty right as a self-employed EEA national. There was also a letter from Vlavar Ltd, dated 9th May 2009, which confirmed that the Appellant was carrying out plastering work for that company at that time and had been working for them previously. There was also a letter and some invoices from Marian Tudorache, dated 18th October 2011, which confirmed that the Appellant had been working for her since 2009 as a sub-contractor. In addition, there was also correspondence from HM Revenue & Customs which confirmed that the Appellant was paying tax in 2010 to 2012.

16. Furthermore, the Appellant's Bundle contained tax calculations made by HM Revenue & Customs for 2008-09, 2009-10, 2011-12-13 and 2013-14. There were also invoices for his plastering jobs for Ellite Cladding in 2008 and statements of payment and subcontractor payment certificates for his work for Vladar Ltd in 2009 and 2010 and a CIS Subcontractor Service Agreement with Sprite Construction Limited, dated 1st December 2011. Taking this and the totality of the evidence and applying a balance of probabilities I find that the Appellant has acquired a right of permanent residence in the United Kingdom by the time he was sent to prison.

17. Therefore, the Respondent has to show that there are serious grounds of public policy or public security, which require the Appellant to be deported.

18. I have also reminded myself that in accordance with Regulation 21(5)(b) of the EEA Regulations I must base my decision exclusively on the Appellant's personal conduct and in accordance with Regulation 21(5)(e) I must take into account the fact that the Appellant's previous criminal convictions do not in themselves justify the decision. I have taken into account the criminal judge's sentencing remarks and have noted that the Appellant exposed himself to women on the London underground on five separate occasions and that he targeted women travelling in the evening. On some occasions he also followed these women after exposing himself. Three of these offences were also committed when the Appellant had already been sentenced to a community order for outraging public decency and in breach of a previous suspended sentence for another offence of exposure. I have taken into account the fact that the Appellant is also subject to a Sex Offenders Prevention Order and an order preventing him travelling on the London Underground between 6:30pm and 5:00am. However, I do not think that this indicates an additional seriousness of his offences as these are standard responses to such offences and do offer some protection to any possible future victims.

19. I must also consider whether the Appellant's actions represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. When considering this I have also taken into account the fact that the Appellant pleaded guilty to all five counts at the start of his trial and that the civilian witnesses had been stood down at an earlier pre-trial hearing. In his oral evidence, he also said that he had tried to sign up for sex offending courses whilst in prison but that his English was not good enough for him to attend the course. He also confirmed that since being released from prison he had not drunk any alcohol, which was said to be a contributory factor to his offending. In addition, in his oral evidence he said that he wanted to apologise in public for his actions and realised that his offences had affected his victims as well as himself and his own family. He also said that he took full responsibility for his actions. In addition, it was accepted that he was complying with his reporting conditions. In her oral evidence, the Appellant's wife also made it clear that her relationship with the Appellant was much better and that she was offering him her full support to address his problems. I have also taken into account the fact that the OASys report, completed on 25th February 2014, concluded that there was a low likelihood of the Appellant re-offending and that there was a medium risk of serious harm to others. Taking this and the totality of the evidence into account and applying a balance of probabilities, I find that the Appellant does not present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society justifying his deportation.

20. I have also reminded myself that Regulation 21(a) requires me to consider the principle of proportionality. I have reminded myself of the great weight which I must give to the fact that the Appellant was convicted of serious sexual offences and that the young women concerned were traumatised by their experiences. However, there was no evidence to suggest that their trauma had had any serious long term effect on them and it is my view that the Appellant expressed genuine remorse and that his risk of re-offending is low. In addition, I have taken into account the fact that the Appellant's wife is working and exercising her Treaty rights in the United Kingdom and has done so for some years. Her and the Appellant's three children were also all born in the United Kingdom and have lived here all their lives. I have reminded myself that as part of any proportionality exercise I must treat a child's best interest as a primary consideration. I accept that the Appellant's wife said that, if the Application were to be deported, she and the children would accompany him. But I have also taken into account the fact that the oldest child has started at Chalk Hill Primary School and the two younger children attend Willow Children's Centre and their attendance and education would be disrupted if they did so. It is also clear that the Appellant and his wife are exercising their Treaty rights here because they do not believe that they could obtain employment and housing in Romania and that the children's best interests would be better met by living here.

21. Finally, in oral evidence the Appellant stated that he was having an operation on his testicles on 23rd December 2014 and he was not sure what treatment he could access if he were deported to Romania. Taking this and the totality of the evidence into account and applying a

balance of probabilities I find that it would be disproportionate to deport the Appellant to Romania."

6. The Secretary of State applied for permission to appeal. The First-tier Tribunal refused permission. The application was renewed and Upper Tribunal Judge Perkins granted permission with specific reference to the issue of whether the First-tier Judge had erred in deciding that the appellant had accrued five years' residence which the respondent had argued failed to take into account a period of imprisonment in the financial year 2013/2014. The respondent made reference to **Onuekwere v Secretary of State C-378/12**.

7. There was a Rule 24 response settled by Counsel previously instructed.

8. Mr Avery relied on all the grounds that had been submitted and argued that the appellant had been issued with an EEA residence card in 2009 and he had in fact applied to the Secretary of State as a dependant of his wife which did not suggest that he was economically independent. The appellant's English was inadequate and there was a gap in his employment history and Mr Avery submitted that the judge's approach in paragraph 16 had been "sketchy". There had been totally inadequate evidence to establish permanent residence at the time of imprisonment.

9. The judge had minimised the serious nature of the offending of the appellant. There had been an escalation in the offending behaviour and he had demonstrated a disregard of the law by offending again during the period of a suspended sentence. The judge had minimised the effect of the appellant's offences on the victims in paragraph 20. The OASys Report had found that the appellant demonstrated a low risk of re-offending – it had not been found that he had demonstrated no risk of offending.

10. Counsel submitted that the grounds represented a reasons challenge to the determination. She said that the appellant had been remanded in custody from 18 July 2013 and that was the appropriate start date from which to consider his imprisonment – she referred to **Essa [2013] UKUT 00316 (IAC)**. She submitted that the judge had made appropriate calculations and addressed herself correctly to the Regulations in paragraphs 15 and 16 of the determination. She referred to the evidence before the First-tier Judge which she had listed in paragraph 34 of her skeleton argument. The judge had heard from both the appellant and his wife and appeared to have accepted them as credible witnesses. The judge had heard submissions from Counsel summarised in paragraph 7 of the decision referring to the evidence in both the Home Office and appellant's bundles relating to his previous history of self-employment. The registration certificate issued in 2009 was evidence of the existing position. However this was confined to self-employment and if the appellant wished to take employment then he would need to apply as a dependant of his wife. There was nothing inconsistent in making such an application. The points argued in the original grounds did not raise an

error of law but represented an expression of disagreement with the judge's assessment. The judge had had material before her to support the fact that the appellant had expressed contrition in the shape of a letter from the prison chaplain dated 3 April 2014. She submitted that the judge had properly taken into account the aggravating factors in the appellant's offending history as well as the risk assessment set out in the OASys Report. In respect of Article 8 the judge had not found that the appellant represented a genuine, present and sufficiently serious threat and by reference to paragraph 29(b) of **MC (Portugal) [2015] UKUT 00520 (IAC)** it was not relevant to consider whether the decision was proportionate.

11. In reply Mr Avery submitted that the judge had not been specific as to when the five year period ended and the judge had minimised the effect of the appellant's actions in paragraph 20 of the decision.

12. At the conclusion of the submissions I reserved my decision. I can of course only interfere with the decision if it was materially flawed in law. The principal point on which permission to appeal was granted was the question of the appellant's imprisonment had wrongly been taken into account when the judge had calculated the appellant's five year's residence in the UK. The problem with that argument is that the judge expressly reminds herself in paragraph 50 that it is necessary to demonstrate a continuous period of five years before being imprisoned (emphasis added). At the end of paragraph 16 the judge finds that the appellant had acquired a right of permanent residence in the United Kingdom "by the time he was sent to prison" (emphasis added). The First-tier Judge had material before her to confirm her assessment including the tax calculations made by HMRC. In the response previous Counsel had taken a later start date for the appellant's period of imprisonment (10 February 2014) but his argument that the appellant would have accrued five years' residence by April 2013 would appear to apply equally to the start date of 18 July 2013 proposed by Ms Querton.

13. In relation to the points made in the initial grounds of appeal I am not satisfied they go further than expressing disagreement with the judge's decision. The findings of fact made by the First-tier Judge were open to her. In relation to the principal points she was entitled to conclude that the appellant had established a permanent right of residence and she had sufficient material before her to justify those findings. Having made her finding that the appellant did not present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society it was not incumbent on her to make further reference to the issue of proportionality for the reasons given in **MC (Portugal)**, paragraph 29(b) of which reads as follows:

> "It is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (regulation 21(5)(c)) that it becomes relevant to consider whether the decision is proportionate taking into account all the considerations identified in regulation 21(5)-(6)."

In any event I do not find that part of her determination is materially flawed as argued by the respondent.

14. Accordingly the respondent's appeal is dismissed. I direct that the decision of the First-tier Judge shall stand.

15. The First-tier Judge made no anonymity direction and I make none.

Fee award

No fee is paid or payable and therefore there can be no fee award.

Signed Date 20 October 2015

Upper Tribunal Judge Warr