Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00437/2018

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 12 April 2019	**On 29 April 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MC
(ANONYMITY DIRECTION MADE)

Responden

Representation:
For the Appellant: Mr M Mathews, Senior Presenting Officer
For the Respondent: Mr C Rea, Solicitor, Rea Law

DECISION AND REASONS

1. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal, with the Secretary of State referred to as "the respondent" and MC as "the appellant".

2. The appellant is a citizen of Romania. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge

Buchanan who allowed his appeal against the decision to make a deportation order dated 19 June 2018 on the grounds of public policy and public security by reference to Regulation 23(6)(b) and Regulation 27 of the Immigration (European Economic Area) Regulations 2016. The decision sets out the immigration history of the appellant who had arrived in the United Kingdom in 2002 as a clandestine illegal migrant. He made an unsuccessful application for asylum against which he unsuccessfully appealed and was removed from the United Kingdom the same year.

3. The appellant re-entered the United Kingdom sometime in April 2016. In November that year he was encountered sleeping rough in London and as he was not considered to be exercising EEA treaty rights he was served with removal papers. On 18 October 2017 he was detained and served with notice of liability to deportation. This was by reference to his criminal history as follows:

> "On 06 May 2011 at Court Filasi, Romania, you were convicted of damage/destroy property, illegal entry to property and threats. You were sentenced to 3 years imprisonment.
>
> On 24 November 2015 at Aalborg Court, Denmark, you were convicted of intentionally cause minor injury and unauthorised entry. You were sentenced to 40 days imprisonment and had a 6 year ban on entering Denmark imposed.
>
> On 17 March 2016 at Aalborg Court, Denmark, you were convicted of unauthorised entry/violation of ban on entry. You were sentenced to 3 months imprisonment.
>
> On 19 January 2017 in the United Kingdom, you were issued with a police warning for the misuse of drugs.
>
> On 04 April 2017 you were arrested by Police Scotland. You claimed to them that you were not working and had no fixed abode.
>
> On 22 June 2017 you received a police penalty notice for street drinking."

4. The Secretary of State accepted that despite the lack of evidence the appellant had been working in the United Kingdom since June 2016 and that he had been exercising his treaty rights until November 2016 by when he had been encountered. It was considered clear from the appellant's criminal history that he had a propensity to offend including an offence of such severity that he had been given a three year custodial sentence in Romania. The Secretary of State also considered the case with reference to Article 8 and in particular the appellant's family life with children in the United Kingdom who had been born in 2004 and 2000, as well as his family life with his partner, Miss Brown for whom it would not be unduly harsh to live in Romania should she choose to do so. Finally, the Secretary of State certified the case with reference to Regulation 33 of the 2016 Regulations.

5. The First-tier Tribunal Judge reached the following conclusions at paragraphs [38] to [42]:

"38. In my judgement, the personal conduct of the appellant does not represent a genuine, present and sufficiently serious threat affecting the fundamental interests of society. Taking into account past conduct of the appellant I am not persuaded that deportation is warranted. I conclude that the respondent's decision does not comply with the principle of proportionality; and that the decision, based exclusively on the personal conduct of the appellant, is not warrant in the foregoing circumstances. I recognise that the appellant's previous convictions do not in themselves justify a decision to deport; and in this appeal there are no reasonable grounds to conclude that the decision is justified on preventative grounds because of the appellant's criminal history or the likelihood that the appellant will re-offend.

39. In my judgement, there is evidence to conclude that the appellant has integrated in the United Kingdom. He has met and formed a genuine and subsisting relationship with a new partner since his arrival into the UK; and he has undertaken a positive role in the lives of his partner's children.

40. In my judgement, because of the limited number of offences for which the appellant has been convicted over a small range of offences over a relatively long period [2011-2017 – if the UK encounters can be considered convictions] the appellant does not fall to be perceived as a persistent offender who has served long sentences for his crimes. It is unlikely, in my judgement, that the appellant's continued presence in the UK represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society because of his history of offending [see paragraph 3 of Schedule 1 to the 2016 Regulations].

41. In reaching my judgement on the foregoing matters, I reflect on the nature of offences for which the appellant has been convicted. There has clearly been damage to property at some stage in Romania. The specifics of the offence are not disclosed by any third-party report. However, the conviction is quite aged now and the other offences, for which there are convictions, are not analogous. The offences in Denmark show an unintentional injury having been inflicted; but again, the specifics of the offence are not disclosed in any report. The sentence of imprisonment are so short that I do not consider them a "serious" offence nor a "serious threat" to one of the fundamental interests of society.

42. In the instant appeal in my judgement, the UK state's interest in protecting its citizens from crime and those other interests listed in schedule 1 of the 2016 Regulations does not override the weight to be given to the appellant's family's hope that they might live together in the UK because: the criminality is at the lower if not the lowest end of the scale (including the 3 years in Romania where the option appears to have been a period of imprisonment of up to 30 years); because the offences are all quite aged; and the recent encounters with the police in Scotland did not lead to convictions and arise out of circumstances which cannot be described as uncommon."

6. The judge also addressed Article 8 and after reflecting on matters set out in section 117B of the Nationality, Immigration and Asylum Act 2002 (but noting that the provision applied in relation to non-EU citizens) concluded at [46]:

> "46. In my judgement, for the reasons given in my decision on the application of the 2016 Regulations, I am not persuaded by the respondent that interference with the rights to be accorded to the appellant and the individual family members by application of article 8 ECHR is a proportionate response. Proportionality requires to be assessed when applying the 2016 regulations to the appellant's circumstances; and I adopt the reasons discussed above about the appellant's EU rights as forming the reasons for concluding that interference with private and family life is not proportionate in this appellant's claim."

7. The Secretary of State relies on the single ground that the judge had materially misdirected himself as to the law and considered that the judge had failed to give adequate reasons for his finding that the appellant did not represent a threat with reference to:

   (i) By downplaying the seriousness of the offence in Romania.

   (ii) The appellant's expulsion from Denmark, and being subject to a six year re-entry ban.

   (iii) The erroneous use of Rule 398 as a "yardstick".

   (iv) Treatment of the appellant's mature years as offending was more likely to be a one-off event.

   (v) A failure to take into account material matters, being the appellant having continued to come to the attention of the police.

   (vi) There was no reason why rehabilitation might not take place elsewhere than the United Kingdom.

   (vii) A failure to consider Section 117C in the Article 8 exercise.

   (viii) Error over assessment of the appellant's financial independence.

   (ix) Failure to take into account the appellant's record of attempt to enter Denmark in breach of his six year travel ban.

8. In granting permission to appeal Upper Tribunal Judge Kebede observed:

> "There is arguable merit in the assertion in the grounds that the judge arguably downplayed the seriousness of the appellant's offending and his conduct, in assessing the threat he posed to society, and arguably failed to have regard to all material matters as set out in the grounds …"

9. In response to my enquiries at the outset of the hearing it was accepted that the appellant had no UK convictions but instead a warning and a penalty. It also emerged that the offences of which he was convicted in Romania took place in 2008. The only evidence of the foreign offending

was a document provided by the UK Central Authority for the Exchange of Criminal Records and no sentencing remarks or probation report or its equivalents were provided. As to the criminal history the judge detailed this at [20] to [23]:

> " [by age 32 – in or about April 2011]
>
> 20. The appellant was convicted in Romania on 21/04/2011 for "destruction of property"; "violation of domicile"; and "threat" and appears from the record to have received a cumulative sentence of 3 years imprisonment [see RB-E2 where listing under Decision 1 sanction ID S-00104 which states "sanction S-00104 replaces S-00101 to S-00103."]
>
> [by age 36 – in or about November 2015]
>
> 21. The appellant was convicted in Denmark on 24/11/2015 for a crime of attempt or preparation of violence relating to an offence categorised as "unintentionally causing minor bodily injury"; and for a crime of "unauthorised entry or residence"; and appears from the record to have received a sentence of 40 days imprisonment and expulsion and ban on entering Denmark for 6 years.
>
> [by age 37 – in or about March 2016]
>
> 22. The appellant was convicted in Denmark on 17/03/2016 for a crime of violating a ban on entry; and appears from the record to have received a sentence of 3 months imprisonment; and expulsion and ban on entering Denmark for 6 years.
>
> [in or about January 2017 – June 2017]
>
> 23. The respondent does not produce a formal police record to the appellant's conduct in the first half of 2017, but in the Notice of Decision dated 19 June 2018, the respondent notes (1) police warning for the misuse of drugs; (2) arrest by the police (for undisclosed circumstances); and (3) police penalty notice for street drinking. The entries are not convictions, though obviously the events leading to the intervention of the police might constitute conduct which could fall to be assessed in terms of regulation 27(5) of the 2016 Regulations."

10. The judge also described the nature of the offences at [24] and thereafter gave his reasons:

> "24. The nature of offences for which the appellant has been convicted overseas are varied though limited; but in my judgement only the conviction in Romania falls within a category which might be called a "serious" offence.
>
> 25. I reach that conclusion because the sanctions imposed for the remaining offences committed overseas illustrate that the convicting courts and/or prosecuting authorities did not regard the offences as "serious" crimes. I have regard to paragraph 3 of Schedule 1 of the 2016 regulations which states that where there is a custodial sentence, the longer the sentence or more numerous the convictions, the greater the likelihood that the

appellant's continued presence in the UK represents a genuine, present and sufficiently serious threat affecting of [sic] the fundamental interests of society. In this appeal, the remaining sentences (those other than imposed in Romania) are not long and they are not numerous. I also take as a yardstick, for want of any better comparative tool, the different categories of foreign criminal given in immigration rule 398 which distinguishes between those who are (i) sentenced for a period of imprisonment in excess of 4 years; (ii) sentenced for a period of imprisonment of between 1 and 4 years; and (iii) persistent offenders who show a particular disregard for the law. In my judgement none of the appellant's conduct other than the events leading to conviction in Romania ought to be perceived as "serious" or showing a particular disregard for the law as the sanctions imposed for the relevant conduct is likely to have been at the lowest range of options for imprisonment for each conviction.

> 26. In relation to the events leading to the appellant's encounters with the police in the UK in the first half of 2017, I note that none has given rise to criminal proceedings. I am unable to hazard a guess at the number of people who might be encountered by the police conducting themselves in a similar manner on any given night in Scotland; but in my judgement taken from informing myself by reading the press and taken from observing the community at large, it cannot be considered to be uncommon behaviour. No convictions arise from that conduct."

11. The judge then described evidence he had heard regarding the Romanian offence at [27]:

> "27. The appellant explains at WS2 that on 6 May 2011 he was convicted for trespassing in Romania which led to his conviction there. He states that the offence was committed in 2008; and he states; "The reasons that I was given a three-year prison sentence was because I did not attend at the diets for my criminal matter in Romania as I was in Denmark at the time." In oral evidence, the appellant said that the events leading to conviction arose out of an argument which ended with him breaking a gate to property. He said that he served 2 years and 5 months of the 3 years' sentence. He said that his father was caught up in the events too."

12. Under the heading of Re-offending the judge set out his survey of the evidence and conclusions between [28] and 34 as follows:

> "28. In my judgement, having regard to the very small number of offences committed by the appellant over the course of his adult life I am persuaded that the prospects of re-offending are low. I reach that conclusion because the appellant's offence in Romania was committed when he was relatively mature in years. He was not in the first flush of youth when the events took place. I consider that that is significant because it illustrates that the appellant is not a "career" criminal or indeed a "persistent" offender. In my judgement, to reach the age of about 32 before

being convicted for an offence is more likely to arise in circumstances claimed by the appellant: that there was an argument which got out of hand. It is likely to be more of a "one-off" event; than conduct which is likely to be repeated.

29. In the Notice issued by the respondent it is said that the appellant committed a serious criminal offence in Romania, and "as explained above, there is a real risk that you may re-offend in the future." The explanation "above" is summarised in a section entitled "Risk of harm/reoffending conclusion". There the respondent states "All the available evidence indicates that you have a propensity to re-offend and that you represent a genuine present and sufficiently serious threat to the public to justify your deportation on grounds of public policy." What is founded upon by the respondent as "evidence" is stated in the preceding paragraph in the following manner: "It is clear from your criminal history that you have a propensity to offend. In Romania your offending was of such severity that you received a 3 year custodial sentence. While this was some time ago, since then you have offended twice in Denmark where you have been handed a re-entry ban, and convicted on three occasions since arriving in the UK."

30. I note that the factual basis upon which the respondent proceeds to conclude that there is a risk of re-offending is incorrect if the summary given at the outset for "criminal history" is relied on. There it is stated that on 19 January 2017, the appellant was issued with a police warning for the misuse of drugs. That is not a conviction. Next it is stated that on 4 April 2017 the appellant was arrested. That is not a conviction. Next it is stated that on 22 June 2017 the appellant received a police penalty notice for street drinking. That is not a conviction. Direct measures such as a warning or a penalty notice do not constitute criminal convictions. In my judgement, it was wrong for the respondent to conclude that the events in the UK amount to "convictions" on three occasions since his arrival here.

31. Having regard to the nature of offences in Denmark, these appear to be at the very lowest end of the scale of criminality though the violation of the ban on entry does indicate a disregard for the law. AT WS3, the appellant does not explain why he attempted to re-enter Denmark despite having received a travel ban. But given that the appellant is no longer trying to enter Denmark and has committed himself to living in Scotland, it appears unlikely that the appellant would re-offend by travelling there within the period of the existing ban. One of the offences relates to "unintentional" minor bodily injury; and in my judgement that too must be at the lowest end of the scale of criminality, given that there was an "unintentional" element to it; and standing the sanction of imprisonment of only 40 days. In my judgement, as the Tribunal was not informed about sentencing options, it cannot be discounted as a possibility that a period of imprisonment was imposed because a financial penalty might not have been thought appropriate due to impecuniosity or simply because it would be expected that the appellant would have to leave the country and so would have little likelihood of paying a fine.

32. I note that there is no formal report from any third party agency about the risks of re-offending.

33. I do not regard the list of convictions are “numerous”; and with only one “long” sentence of imprisonment for something committed (as claimed) in 2008 or for something in which conviction was imposed in 2011, I am not persuaded that that conviction along with the Denmark offences and encounters with the police in Scotland could be perceived as constituting a present threat to one of the fundamental interests of society.

34. In my judgement, the prospects of “rehabilitation” if a live issue for this appellant would be better served by him remaining in the UK. He has only recently forged a relationship with a British Citizen and her children; and the British Citizen is pregnant with the appellant’s child. The formation of family ties and the responsibilities of parenting are likely to constitute good grounds for leaving any offending behaviour in the past. Thus it may be argued that the sort of behaviour which might have brought the appellant into contact with the police in Scotland in the past are unlikely to repeat themselves now that he has a stable family relationship with at least two adults relying on him; and with parental responsibilities for the younger of his wife’s boys and with impending parental responsibility for a new born child which is hoped for in the near future.”

13. After considering in brief terms the child’s best interests the judge set out his conclusions under the Regulations during which he revisited some of the points already expressed before a final paragraph at [46]:

“48. In my judgement, for the reasons given in my decision on the application of the 2016 Regulations, I am not persuaded by the respondent that interference with the rights to be accorded to the appellant and the individual family members by application of article 8 ECHR is a proportionate response. Proportionality requires to be assessed when applying the 2016 regulations to the appellant’s circumstances; and I adopt the reasons discussed above about the appellant’s EU rights as forming the reasons for concluding that interference with private and family life is not proportionate in this appellant’s claim.”

14. Consideration then turned to Article 8**.**

15. In his submissions, Mr Mathews explained that he did not rely on a rationality challenge but instead relied on the grounds on which permission was granted and (in summary) he contended that the judge had not logically taken all relevant matters into account. For his part Mr Rea considered that the reference to the foreign criminal provisions was a red herring and that the appellant had been believed that the Romanian offences had taken place in 2008. He reminded me that the burden was on the Secretary of State. Both accepted that the human rights claim stood or fell with the claim under the Regulations. Neither had anything to add in the event that I found error and set the decision aside.

16. I take each of the points of challenge in turn. As to (i), the judge was entitled in my judgment to characterise the Romanian offending as he did. The evidence before him was limited and without more, the lengthy sentence may have been influenced by the appellant's explained absence. He did not seek to avoid the sentence. Point (ii) was emphasised by Mr Mathews as a key factor. He argued that exclusion must have taken place on the same basis as considered by the judge. The effect of a decision by the Danish authorities to exclude the appellant is simply an indication of a Member State deciding that someone should be excluded. There is no evidence that the decision was tested in the courts nor is there any evidence given of the process undertaken by Denmark before the decision was reached, including in particular whether any representations were invited. It is not however something that the judge overlooked. He refers to it in [29] when setting out the Secretary of State's case and gave consideration to the offending in Denmark in detail in [31]. In my judgment the judge gave appropriate weight to this aspect.

17. Turning to the reference to Rule 398 raised in point (iii), I am not persuaded the judge erred. He made it clear in [25] that he was using the provisions as a yardstick in deciding the seriousness of the offending. He was entitled to do so. Point (iv) overlooks the context in which the judge had regard to the appellant's maturity. In [28] the judge explained why this was significant as it illustrated the appellant was neither a career criminal nor a persistent offender. It was a view legitimately open to him on the evidence. Point (v) suggests that the judge failed to have regard to matters in the UK. These however were taken into account and properly considered: see [23]. The judge gave rational reasons without error on the subject of rehabilitation (point vi). In respect of point (vii) it is not clear why it is argued that Section 117C applies. The appellant did not come within the definition of 'foreign criminal' as defined in Section 117D of the 2002 Act. As to point (viii), in the light of the parties accepting in their submissions that the Article 8 claim stood or fell with the claim under the Regulations, this challenge has no material relevance. Finally, in relation to point (ix), the judge indicated at [31] that the appellant had not explained why he attempted to re-enter and gave a reason open to him to explain why he did not consider this of relevance.

18. In short, I consider that the grounds of challenge reveal no more than a disagreement with the judge's decision which he reached on a correct direction as to the law and proper understanding of the facts including the history of offending. It was a decision that was open to the judge on what was before him and one reached without legal error. This appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant

and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 23 April 2019

UTJ Dawson
Upper Tribunal Judge Dawson