Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00556/2018

THE IMMIGRATION ACTS

Heard at Bradford **Decision & Reasons promulgated**
On 14 August 2019 **On 30 August 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ATTILA [T]
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person.
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. On 26 March 2019 the Upper Tribunal found a judge of the First-tier Tribunal had erred in law in allowing the appellants appeal against the order for his deportation from the United Kingdom. The appeal comes back before the Upper Tribunal to allow it to substitute a decision to either allow or dismiss the appeal.

Background

2. The appellant is a national of Hungry born on the 14 April 1967 who has been convicted of numerous driving offences, despite having been warned by the Secretary of State that consideration will be given to his deportation from the UK if he continues to break the law, which he did, resulting in the order dated 13 August 2018 to deport him form the UK.

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3. On 22 October 2018 the appellant was removed to Hungry.
4. The appellant was permitted re-entry to the United Kingdom for the purposes of attending this appeal albeit that he remained in immigration detention. The appellant was escorted to the hearing centre and from the hearing centre back to Morton Hall and left the United Kingdom on 16 August 2019 to Hungary. The appellant was therefore able to fully participate in the appeal process on the day. The appellant was accompanied by his partner Ms [S].
5. The First-tier Tribunal did not accept the claim by the appellant and Ms [S] that the offences were only committed as a result of medical emergency, it being found the appellant drove on a regular basis and the conviction represented only the time he had been caught doing so. This is a preserved finding.
6. Oral evidence was heard from the appellant who was cross-examined by Mr McVeety.

<u>Relevant level of protection</u>

7. It is not disputed that until his removal the appellant had lived in the United Kingdom since 2008. Ms [S] told the First-tier Tribunal that the appellant had worked from 2008 until he suffered a heart attack in 2012, after which she worked for an agency and then as a carer, leading to a finding the appellant resided in the UK as a worker and then family member of an EEA national. The First-tier Tribunal concluded the appellant had shown he had acquired the 5 years required to enable him to claim a right of permanent residence meaning the respondent was required to show serious grounds of public policy or public security to justify the deportation.
8. Two issues raised by the respondent are that there is no evidence Ms [S] worked in the UK nor to show the appellant is her family member. It is said to be unclear if Ms [S] divorced her husband, a Nigerian national, who did not qualify for a residence card as Ms [S] was unable to show she was exercising treaty rights.
9. There is no evidence the appellant has married Ms [S] nor formally applied to be recognised as her partner meaning the appellant is unable to bring himself within regulation 8, nor rely upon Ms [S], to establish a right to permanent residence. In *Macastena v Secretary of State for the Home Department [2018] EWCA Civ 1558* it was found the applicant could not combine a period as a partner in a durable relationship with time spent as a spouse for the purposes of acquiring permanent residence where the applicant had never applied to the Secretary of State for a residence card on the basis of that durable relationship. The tribunal could not exercise the discretion under regulation 17(4) if the Secretary of State had not exercised it.
10. In *Kunwar (EFM – calculating periods of residence) [2019] UKUT 63* it was held a person is only residing in the UK in accordance with regulations when a residence document is issued and only periods since the issue can count towards establishing a permanent right of residence.

11. Both *Macastena* and *Kunwar* were approved in *SSHD v Aigbanbee [2019] EWCA Civ 339* in which it was said that time prior to the issue of a residence card did not count at all even if one had been applied for.
12. The appellant claimed to be in a durable relationship with Ms [S] but has provided no evidence of any application being made for him to be granted a Residence Card. Accordingly the applicant fails to establish that he is entitled to anything other than the lower level of protection.

The law

13. In *VB (deportation of EEA national: human rights?) Lithuania [2008] UKAIT 00087* the Tribunal said that (i) the respondent's power to deport an EEA national is governed by the EEA Regulations 2006 and is much more restricted than in an 'ordinary' conducive case. Only if satisfied that deportation is required on grounds of public policy or public security should the Tribunal go on to consider whether deportation would contravene the Human Rights Convention.
14. The 2016 regulations came fully into force on 1 February 2017. From that date a decision to remove a person under regulation 19(3)(a)(b) or (c) of the 2006 regulations is treated as a decision to remove that person under regulation 23(6)(a), (b) or (c) of the 2016 regulations and a deportation order made under regulation 24(3) of the 2006 regulations is treated as a deportation order made under regulation 32(3) of the 2016 regulations (schedule 6 para 5 2016 regs).
15. By virtue of Regulation 23(6) of the 2016 regulations (a similar provision was in regulation 19 (3) of the 2006 regulations) 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:

    (a) that person does not have or ceases to have a right to reside under these Regulations; or

    (b) the Secretary of State has decided that the person's removal is justified on the grounds of public policy, public security or public health in accordance with regulation 27; or

    (c) the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3).

16. Regulation 21(5) of the 2006 regulations (reg 27(5) 2016 regulations) states that, 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) shall, (in addition to complying with the preceding paragraphs of this regulation,) 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 concerned 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.

17. Regulation 21(6) (regulation 27 (6)) states that before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

18. Regulation 27(8) of the 2016 regulations says that 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).

19. The 2016 regulations (schedule 1 para 7) set out what the fundamental interests of society in the UK include namely preventing unlawful immigration and abuse of the immigration laws and maintaining the integrity and effectiveness of the immigration control system including under the regulations and of the common travel area, maintaining public order, preventing social harm preventing the evasion of taxes and duties, protecting public services, excluding or removing the EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action, tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension), combating the effects of persistent offending, protecting the rights and freedoms of others, particularly from exploitation and trafficking, protecting the public, acting in the best interests of a child, countering terrorism and extremism and protecting shared values.

20. The 2016 regulations, schedule 1 paragraph 3, state that where an EEA national/family member has received a custodial sentence or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual’s continued presence in the UK represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society.

21. The public policy ground for removal is an exception to the fundamental principle of the free exercise of EU rights and, as such, has to be construed restrictively. In *R v Bouchereau 1978 QB 732 (ECJ) 760* it was said that the presence or conduct of the individual should constitute a genuine and sufficiently serious threat to public policy.

22. In relation to the burden of proof: in *Straszewski [2015] EWCA Civ 1245* it was said that it was for the Member State to justify its action where the removal of an EEA national would prima facie interfere with treaty rights. In *Arranz (EEA regulations – deportation –test) [2017] UKUT 294* the Upper Tribunal held that the burden of proof lay on the SSHD to prove that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. That the burden of proof lies on the SSHD has recently been accepted by the Inner House of the Court of Session in *SA v SSHD [2018] CSIH 28*.

Discussion

23. A finding that a threat to public security exists can only be made in a case such as this if it is shown the appellant has a propensity to act in the same way in the future.

24. The appellant's immigration history shows that between 3 June 2015 and 21 June 2018 he committed various offences leading to six convictions and is a persistent offender.

25. The appellant was asked at length during the hearing why he committed the offences to which he repeated the claim made to the First-Tier Tribunal that they were as a result of emergencies including the need to go to and from hospital and also to pick up medication. That such a claim has been found not to be true is a preserved finding of the First-Tier Tribunal in which it was found at [25] of that decision "*She (Ms [S]) told me that the offences were all committed because of medical emergencies. That the only times he drove whilst disqualified were when these emergencies occurred, I find it more likely that he drove on a regular basis and the convictions were the only times when he was caught. I am also sceptical about whether he has now received a "wake-up call" did not stop him reoffending. Neither did the warning letter sent in May 2007*". The fact the appellant maintains an explanation that has been found to lack credibility undermines the weight that can be placed upon his evidence generally. The impression given by the appellant was that he was seeking to minimise and avoid responsibility for his actions.

26. Mr McVeety asked the appellant whether he could have taken a taxi or other form of transport to obtain a prescription and the appellant's claim he could not lacked plausibility. The reality of the impression given by the evidence was that the appellant drove when he wished to do so as opposed to using other forms of public or other transport as it was more convenient for him, notwithstanding that he had been disqualified from driving and had no insurance.

27. The appellant referred in evidence to the difference in the system that existed in Hungary and that in the United Kingdom but that does not provide him with an excuse for his offending behaviour. If the appellant believed that because there was no need to secure insurance for the individual within Hungary he could

drive without the same in the United Kingdom this demonstrates a lack of integration and understanding or respect for the laws of the UK where it is the individual and not the vehicle that is insured. The appellant did accept, however, in his evidence that no insurance created danger to the public and although creating an impression of being somewhat evasive did seem to accept that driving whilst disqualified will be an offence if he was stopped by the police in Hungary too.

28. It is accepted that the appellant's age, he was born in 1967, means he grew up during the period when Hungary was under communist rule, which ended in 1989, where the State accepted responsibility for almost everything that went on within that country. If an individual was able to purchase a vehicle but the vehicle was involved in an accident if it was perceived the vehicle was property of the State the State would deal with the consequences. Such a position has never existed in the United Kingdom of which the appellant must have been aware.

29. In Hungary I accept the car itself is insured instead of the driver, but some policies have restrictions on the driver's age, policyholder age, gender and marital status that can influence the price. Third party liability car insurance (kötelező felelőség biztosítás) is required and only registered cars can be insured. When driving in Hungary, a proof of insurance payment (bank transfer or a yellow postal cheque receipt) along with the car's registration papers must be carried in the vehicle at all times. The appellant's claim of no requirement similar to that in the United Kingdom is therefore without merit as there is still a need to take out a valid policy of insurance albeit the insured item/subject may be different.

30. In relation to the driving licence issue, motoring laws in the UK and Hungary are strikingly similar in that drivers in Hungary have to pass tests in theory, practical driving and basic first aid. The appellant's claim to the contrary is a further example of his attempts to avoid responsibility for his actions.

31. There is no evidence the appellant has done anything by way of his thought processes or understanding to evidence that he will not reoffend in the future if the opportunity arises. His explanation which was also put before the First-tier Tribunal that there will be no need to do so as Ms [S] was hoping to drive herself soon does not answer the question. Whilst this answer indicates there will be a vehicle available in the household there is no guarantee that Ms [S] will be able to secure her licence or that, even if she did, the appellant will not be tempted to drive again if it suited him as he has done in the past. I find the personal conduct of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

32. In relation to the issue of rehabilitation, consideration has been given to the decisions of the Upper Tribunal in *Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC)* and *MC (Essa principles recast) Portugal [2015] UKUT 00520 (IAC)*.

33. In this appeal there is no evidence of any attempt by the appellant at rehabilitation or any intention to seek the same. The reliance upon an explanation which has been rejected and found to lack credibility together the

answers given by the appellant at the hearing does not establish a great deal of hope for the future. The appellant fails to address the issue of rehabilitation or to show there are reasonable prospects of the same which will be dependent upon a major change in the appellants thought processes. It was not made out that service that could assist rehabilitation are not available in Hungary.

34. Considering the proportionality of the decision, the appellant lived with his partner Ms [S] before his deportation from the United Kingdom. Their relationship started in August 2008 although they had known each other before then. They entered the United Kingdom in November 2008. They have family life together.

35. The appellant has received treatment for a heart condition claiming that after suffering two heart attacks he was no longer able to work due to ill-health but there is insufficient evidence from a medical practitioner in relation to the extent of the alleged disability or to show that the appellant will not be able to receive adequate medical treatment in Hungary as he has been able to obtain medication with the support of friends since he was deported from the United Kingdom about a year ago.

36. There are two children in the United Kingdom who have remained in the care of Ms [S].

37. It was accepted by Mr McVeety that the issue in this case is the proportionality of the decision. The personal conduct of the appellant shows that during a period of three years he committed twelve offences for which he received convictions despite having been warned by the respondent that if he continued to offend deportation will be considered.

38. The offences are serious and could have resulted in very serious consequences as an uninsured driver and demonstrate the appellant's continued efforts to flout the law. He is a repeat offender.

39. The appellants reasons for the same are an explanation that has been rejected on the evidence. The evidence relied upon by the appellant to explain his conduct and to reassure the Tribunal there will be no repeat of his behaviour in the future was poor with no medical evidence to support the alleged urgency requiring him to drive for hospital treatment and it clearly being the case that the appellant chose to drive to pick up a prescription when no urgent need to do so was established. As Mr McVeety submitted the evidence supports a finding the appellant could not be bothered to get a taxi.

40. The propensity to reoffend has been made out in accordance with the findings above.

41. The appellant claims he has strong connections to the United Kingdom and if this is the case he would have known that the law of the UK required him to have obtained a valid driving licence and insurance, yet he obtained neither.

42. There is no evidence of rehabilitation or evidence of steps to minimise the risk of reoffending.

43. The appellant's claim to have severed all ties to Hungary is not accepted on the basis of his own evidence. The appellant's claimed level of integration into the United Kingdom is, arguably, impacted upon by his conduct.

44. The appellant's partner does not work in the United Kingdom and the evidence regarding the cost of his ongoing medical treatment in Hungary being met suggests that there is available support. There was no evidence that any healthcare required would not be available.
45. It is not disputed the appellant has two children in the United Kingdom.
46. Ms [S] is a Hungarian national and it was not made out that, although she would not choose to do so, she could not return to Hungary with live with the appellant and continue family life there with the children. The best interests of the children are to remain with their mother who is their primary carer.
47. When weighing all the factors relied upon by the appellant and Ms [S] in support of the appellant's objection to his being deported from the United Kingdom, the fact the appellant presents a risk to the public of further commission of serious offences placing the public at risk weighs heavily in the proportionality assessment.
48. The appellant does not work in the United Kingdom and is therefore not being denied the chance to exercise treaty rights and neither does his partner. The risk of reoffending is real. Connection with Hungary clearly exists.
49. I find the Secretary of State has discharged the burden upon her to the required standard to establish that it is proportionate in all the circumstances for the appellant to be deported from the United Kingdom. Whilst the appellant would like to remain in the United Kingdom to see the children grow up here, to receive medical treatment on the NHS to deal with any health needs, and to remain here with MS [S], the evidence considered in the round clearly supports the finding that, pursuant to the EEA regulations, this appeal must be dismissed.

Decision

50. **I remake the decision as follows. This appeal is dismissed.**

Anonymity.

51. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 22 August 2019