Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00369/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 January 2020	**On 23 January 2020**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

KLEVIS META
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr F Farhat, Gulbenkian Andonian Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Albania. His date of birth is 7 February 1989. He entered the UK illegally in 2007. He absconded. He was arrested on 27 September 2011. On 25 January 2012 he was convicted of ABH ("the trigger offence"). He received a two -year sentence. The sentencing judge recommended deportation. When sentencing the Appellant, the judge said; -

> "You have pleaded guilty to a serious assault, in my view. This was a persistent and sustained attack on a completely innocent member of the public who was

> seeking to stop you and your friends behaving in a very unattractive way towards a group of girls. So unattractive was your behaviour as a group that the girls had moved to a different carriage on the underground train you were all on. Far from letting them move and leaving them there, you moved yourselves and continued the provocative and unattractive behaviour towards them.
>
> This victim was a lone male completely on his own. He was attacked by you and others in your group and perhaps the worst aspect, as it always is, was that when he went to the ground (and he went to the ground twice, once in the carriage and once outside on the platform) he was kicked a number of times in the head by several of you, including yourself. Afterwards you seemed to be triumphant about your achievement in knocking him down and leaving him unconscious and significantly injured with a broken nose, concussion and a cut and bruised lip ...
>
> I regard it as an aggravating factor that when the police arrived you ran away and when they caught up with you, you struggled violently, and it needed four of them to restrain you ...
>
> It seems to me, looking overall at this situation, this is a very bad case of assault occasioning actual bodily harm and the very least sentence that I can impose and the sentence I do impose is one of two years' imprisonment. That carries with it a recommendation, plainly a recommendation, that you be deported immediately after you have completed that sentence ..."

2. A deportation order was made on 16 April 2012. The Appellant was deported on 31 May 2012. He re-entered the UK unlawfully in breach of a deportation order in 2013. On 6 June 2017 he made an application for a residence card under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") on account of his relationship with an EEA national exercising treaty rights, his wife, a Hungarian citizen, [BS]. The couple married on 2 December 2017. The Secretary of State revoked the deportation order. On 23 May 2018 the Secretary of State made another order to deport the Appellant, this time under reg 23(6)(b) of the 2016Regulations.

3. The Appellant appealed against this decision. His appeal was dismissed by First-tier Tribunal (FtT) Judge P M S Mitchell in a decision promulgated on 31 May 2019, following a hearing at Taylor House on 3 May 2019.

4. In my decision dated 6 November 2019 following an error of law hearing, I set aside the decision of the FtT. I found that there had been an error of law. The salient part of the error of law decision read as follows:-

> "14. What the judge says at paragraph 28 is correct. Under the heading "Burden and Standard of Proof" the judge directed himself on the burden and standard of proof in human rights appeals. However, this appeal was not a human rights appeal, it was an appeal under the 2016 Regulations. Under the same heading the judge at paragraph 34 properly identifies that that the Appellant's conduct must represent a genuine, present and sufficiently serious threat in the terms of reg 27 (5) (c), but he does not identify the correct burden of proof under the relevant heading. Most of what is written in this section is not relevant to an appeal under the 2016 Regulations when assessing the risk or threat posed by an Appellant.

15. What is clear is that what the judge says at paragraphs 59 and 72, although not contained in his self -direction under the relevant heading, is capable of supporting an argument that he properly applied the correct burden of proof. However, I cannot discount what the judge says at paragraph 28. The judge directed himself throughout as thought his were an appeal on human rights grounds. I note that at paragraph 58 the judge referred to the public expecting foreign criminals to be deported which supports the judge having conflated the principles to be applied in deportations under the 2016 Regulations and those under the UK Borders Act 2007. Moreover, whilst I am satisfied that the judge throughout the assessment reminded himself that a decision should not rely solely on the Appellant's criminal conduct, what the judge says at paragraph 64 is troubling because it strongly suggests that the judge has at the very least attached too much weight to the Appellant's historic criminal conduct to justify the decision as opposed to making an assessment of current risk as is required under EU law. The final sentence of the paragraph strongly supports this. This is supported by what the judge said at paragraph which strongly suggests that he reached a conclusion about threat based on the Appellant's past criminality. Whilst I accept that there are certain parts of the decision which support the judge having correctly applied the Regulations, the position is that the decision lacks clarity. Whilst the Court of Appeal in the case of *Straszewski* [2015] EWCA Civ 1245 stated at, paragraph 20, that save in exceptional cases whether someone presents a serious threat is to be determined solely by reference to the conduct of the offender therefore not ruling out that considerations of deterrence and public revulsion have no part to play in the matter, I accept Mr Draycott's submission that it would not apply in a case with these circumstances.

16. A proper reading of the decision does not disclose what burden of proof the judge ultimately applied in this case or that he properly considered the risk that the Appellant presented at the time of the hearing, 9 years after the trigger offence was committed. Whilst in parts of the decision the judge properly directed himself on the law, it is the case that in other parts of the decision he did not do so. The decision is muddled. Whilst there was an assessment of proportionality to be made if the level of threat posed meets the threshold, which would require on assessment of the Appellant's family life, such matters were not material to an assessment of the level of threat itself. I am not satisfied that a proper reading of the decision indicates, with any degree of certainty, that the judge applied the correct law when assessing the threat and risk the Appellant posed. I am satisfied that it is a real possibility that he applied the wrong burden of proof and considered immaterial matters apart from the Appellant's conduct (including public revulsion (see [46]) and the position of the Appellant's wife (see [52]) or that he based the level of threat posed on past criminality alone. Either approach is erroneous. He conflated the assessment of threat with considerations relevant to an assessment of proportionality. He did not properly consider the appeal in accordance with reg 27(5)(b), (c) and (e). This is a material error of law. In these circumstances the decision of the judge to dismiss the appeal under the Regulations is set aside.

17. There is an additional ground on which permission was granted (("c") of the permission application raised within "D" of the grounds). It is asserted

that the judge failed to adequately consider the care the Appellant provides for his mother-in-law who is herself an EEA national. The evidence before the First-tier Tribunal was that the Appellant had looked after his mother-in-law following her heart attack in November 2018. This was mentioned by the mother-in-law in her statement of evidence, but it was not referred to in the Appellant's own witness statement. In any event, the evidence was insufficient to establish that at the date of the hearing the Appellant was his mother-in-law's carer. There was no evidence before the judge that this was the case.

…

22. I therefore refuse permission on the remaining discrete grounds. I conclude that the judge materially erred in applying the incorrect burden of proof and when considering risk and threat posed by the Appellant, he did not properly apply 27(5) (b), (c) (d) and (e). The assessment is flawed. The decision is set aside. The decision will be remade before the UT.

…

23. I accept that all the findings which relate to the risk or threat posed by the Appellant are infected by the errors identified and cannot stand. There is no challenge to the weight the judge attached to the letters from a psychotherapist, Mr Phelps. The judge accepted the Appellant's wife's evidence that the Appellant has not drunk alcohol for two years which he considered to be a positive point in the Appellant's favour as regards the commission of further offences because the offence was committed whilst the Appellant was drunk. The judge found that the Appellant has family and relatives in Albania. The judge also concluded that there was limited evidence of rehabilitation here in the UK and that the Appellant was not his mother-in law's carer. There is no reason to go behind these findings as they represent the position at the date of the Appellant's appeal before the FTT. However, the UT will make an assessment of the threat/risk posed by the Appellant at a future hearing, taking into account any further evidence submitted in accordance with the following directions:- …"

The legal background

5. The relevant law is contained in the 2016 Regulations. The material parts of which read as follows:-

"**Exclusion and removal from the United Kingdom**

…

23. (5) If the Secretary of State considers that the exclusion of the EEA national or the family member of an EEA national is justified on the grounds of public policy, public security or public health in accordance with regulation 27 the Secretary of State may make an order prohibiting that person from entering the United Kingdom.

(6) Subject to paragraphs (7) and (8), 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;

(b) the Secretary of State has decided that the person's removal is justified on 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).

…

(8) A decision under paragraph (6)(b) must state that upon execution of any deportation order arising from that decision, the person against whom the order was made is prohibited from entering the United Kingdom –

(a) until the order is revoked; or

(b) for the period specified in the order.

(9) A decision taken under paragraph (6)(b) or (c) has the effect of terminating any right to reside otherwise enjoyed by the individual concerned.

…

Decisions taken on grounds of public policy, public security and public health

27. (1) In this regulation, a 'relevant decision' means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who –

(a) has a right of permanent residence under regulation 15 and who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(5) 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 also 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 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.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ('P') 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

(7) In the case of a relevant decision taken on grounds of public health –

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010(2); or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

(8) 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.)".

The Evidence

6. There was no evidence before me served in accordance with the directions of the UT. The Appellant made an application on 30 December 2019 to adjourn which was refused by UTJ Jackson on 31 December 2019. The Appellant claimed not to have been properly advised by his solicitors and sought an adjournment until 27 February 2020 to instruct a new solicitor. On 2 January 2020 Wimbledon Solicitors wrote to the UT to say that they were no longer representing the Appellant. Mr Farhat renewed the application for an adjournment at the start of the hearing before me. The purpose being to obtain an expert report to assess risk of reoffending. In support he informed me that he first received instructions on the 6 January. He had with him email exchanges between the Appellant's wife and Wimbledon Solicitors which he said supported the adjournment. Mr Whitwell opposed the adjournment. There was no expert evidence before the UT; however, in my view the Appellant had had ample time to obtain this. Whilst he blamed his solicitor, he has not made a complaint. Fairness did not demand an adjournment in order for the Appellant to obtain the

opinion of an expert. There was sufficient evidence before the UT for it to make its own assessment of risk of reoffending. Moreover, I was not prepared to admit evidence of an email exchange between to the Appellant's wife and his solicitor to support the Appellant's assertion that he had not been properly advised. The appeal proceeded by way of submissions only.

The evidence of the Appellant

7. The Appellant gave evidence before the FtT. There is a statement of evidence of 1 March 2018. His evidence in that statement can be summarised. He came here in August 2007. He said that he fled Albania because he "never received any love or care from my parents or siblings". He was made to work on a farm. He was arrested in September 2007. He left the detention centre and absconded. He did not know anyone at this time and was scared. In November 2011 he went out with friends. They were drinking alcohol. They became involved in a fight with another man who had also been drinking. The Appellant vaguely remembers punching the man once. He served 6 months in prison. He was deported in 2012 and returned to the UK in May 2013. When he returned to Albania, he did not visit his parents. He spent his time with his friends. He described life there as being a "nightmare". When he came back to the UK in 2013, he stayed with friends. He met [BS] in April 2016. She is a Hungarian citizen. She is an EU national exercising treaty rights here. They started living together in June 2016. Her mother and step-father, with whom she has a close relationship also live in the UK. They married in 2017. He has now "transformed into a new person". He is remorseful. He puts down his criminal behaviour to alcohol. Since he was convicted, he has abstained from alcohol. He wants to work here and have a family.

The evidence of [BS]

8. Ms [S] made a witness statement on 1 March 2018. Her evidence can be summarised. She has been in the UK since 2010. She came here when she was aged 17. She has always worked here. Her parents and step-father love the Appellant very much. He is kind and considerate. Whilst she is at work, the Appellant does the housework. She cannot locate to Albania. She does not speak Albanian.

The evidence of [EF]

9. The witness is the Appellant's cousin. There is a letter from him in the Appellant's bundle. His evidence is that the Appellant has changed since he has been in a relationship with Ms [S]. He is more caring.

The evidence of [OJ]

10. The witness is the mother of Ms [S]. There is an undated letter from the witness in the Appellant's bundle. She supports the relationship and the Appellant. She believes that should he return to Albania the marriage would be ruined.

Submissions

11. Mr Whitwell drew my attention to the preserved findings of the UT. In respect of the threat presented by the Appellant, he accepted that the FtT accepted that he had been alcohol free for two years. Mr Whitwell said that in his evidence the Appellant had "airbrushed" two material events; the details of the offence and his unlawful entry into the UK in breach of a deportation order in 2013. What the Appellant said about the offence cannot be reconciled with the sentencing remarks of the judge. This goes to the issue of remorse or lack thereof. The Appellant was subject to the early release scheme during the currency of his sentence. He entered the UK unlawfully in breach of a deportation order in 2013. Even a deportation order was not able to prevent the Appellant from presenting a threat because he re-entered. Mr Whitwell identified the fundamental interests of society in this case as maintaining immigration control (in respect of breach of the deportation order) and maintaining public order and preventing societal harm (with reference to the trigger offence). He relied on the decision letter and draw my attention to paras [17]-[29] therein. There is no evidence of rehabilitation. The evidence of the Appellant having engaged in charitable works was limited. Mr Whitwell addressed me in respect of proportionality. He reminded me of the preserved findings that the Appellant has family in Albania and that he was found not to be his mother-in-law's carer by the FtT.

12. Mr Farhat addressed me. He reminded me that EU law applied in this case. The assessment was forward looking and concerned the threat presented by the Appellant. In this case the Appellant has committed a solitary offence almost a decade ago. There has been no reoccurrence. There has been no "hint" of violent conduct since then. Rehabilitation was inherent in the passage of time since the offence. At the time of the offence the Appellant was in his early 20's. He is now in his early 30's. He was single at the time. He is now married. The offence took place on public transport. It was fuelled by misplaced bravado and alcohol. It was not suggested that the Appellant has been disruptive or violent whilst in prison or immigration detention. He has reported as requested to the Home Office. He regularly takes public transport. He has shown a willingness and desire to do charity work. He has looked after his mother-in-law when she was unwell. This is evidence of a shift in attitude and that he is now more compassionate. Mr Farhat draw my attention to the evidence of Michael Phelps at page 18 of the Appellant's bundle. He initially submitted that breach of a deportation order went to the issue of proportionality and not to public policy or security and the threat posed by the Appellant. He then conceded that it was intrinsically linked to the index offence. However, the breach took place almost 7 years ago which is before the Appellant had married and settled down. In any event, in respect of immigration control and the need to maintain it, should the Appellant's appeal be allowed, he would not be a threat to immigration control. His exclusion cannot be said to be necessary to prevent unlawful immigration (identified in the decision letter as the fundamental interest which needs protection). Finally, he reminded me that the Appellant's wife has been here since 2010 exercising treaty rights.

Conclusions

13. The 2016 Regulations transpose into UK domestic law the requirements of the Citizens Directive 2004/38. A person may be removed from the UK if the Secretary of State has decided that removal is justified on grounds of public policy, public security or public health. The 2016 Regulations set out a hierarchy of levels of protection based on criteria of increasing stringency. The Appellant as the spouse of an EU citizen exercising treaty rights is entitled to protection of the Citizen's Directive. In this case he has the lowest level of protection. His removal may be justified "on the grounds of public policy, public security or public health". However, the decision must be taken in accordance with the principles set out in reg 27 (5). I remind myself that the burden of proving that the Appellant represents genuine, present and sufficiently serious threat affecting one of the fundamental interests of society rests on the Secretary of State: see Arranz (EEA Regulations – deportation – test) [2017] UKUT 00294. In Nazli and Others v Stadt Nurnberg [2000] ECR 1-957 CJEU the following was said at [64]:

> "That EU law precludes the expulsion of a Turkish national who enjoys a right granted directly by that decision when it is ordered, following a criminal conviction, as a deterrent to other aliens without the personal conduct of the person concerned giving reason to consider that he will commit other offences prejudicial to the requirements of public policy in the host member state";

14. I find that the breach of deportation order in May 2013 does not assist the Appellant because it shows a lack of regard for immigration law which is capable of undermining his evidence of rehabilitation and remorse in respect of the ABH. It is therefore capable of increasing the threat posed by the Appellant. In addition, I accept that it could potentially present a discrete threat to immigration control, as advanced by Mr Whitwell. There can be no doubt that protecting members of society from serious violent crime is clearly a fundamental interest of society as is the maintenance of immigration control. However, I must consider whether the Appellant has a propensity to re-offend/behave in a similar way. I find that the risk of reoffending or behaving in a similar way in respect of both matters on which the Secretary of State relies is low.

15. The FtT took a dim view of the Appellant's immigration history. In so far as he was not here lawfully, this is in my view is not material to the assessment of the level of threat presented by the Appellant. However, the fact that he entered the UK in breach of a deportation order imposed as a result of his conviction for the trigger offence is a matter material to the assessment of risk. I accept that should the Appellant reoffend the consequences would be serious; however, I must assess whether there is a risk so that the Appellant represents a threat in accordance with the 2016 Regs. The Appellant is now aged 30. He has one previous conviction for a serious and unpleasant assault that took place almost 9 years ago. He pleaded guilty to this offence. The sentencing comments disclose that it was considered by the judge to be a serious ABH with aggravating features. However, whilst the offence was serious, it is not an offence which carries a maximum penalty of 10 years. The

maximum sentence is 5 years. The offence was fuelled by alcohol consumption. There is no reason for me to go behind that finding of the FtT that the Appellant has not consumed alcohol for two years (at the date of that hearing). The Appellant has repeatedly expressed remorse. There is support for this given that he is not drinking alcohol and that he has remained out of trouble. I accept that there is a gap between the Appellant's account of what happened and the sentencing remarks of the judge. However, the Appellant's witness statement in these proceedings was made some years after the event and it is accepted that at the time of the offence he was inebriated. He has not undertaken courses aimed specifically at rehabilitation, but he has undergone counselling sessions. There is before me no expert evidence about the risk posed by the Appellant; however, I attach significance to him having remained out of trouble for some years and that he is alcohol free. It is also significant that he is older and in a stable relationship.

16. I take on board when assessing the threat posed by the Appellant that he breached immigration laws in May 2013 (6 ½ years ago) when he re-entered the UK unlawfully and in breach of a deportation order. I accept that at that time he had a disregard for immigration law. This sheds light on his attitude to the trigger offence in 2013. However, it cannot sensibly be argued that his exclusion is necessary to prevent further immigration offences.

17. Having considered the evidence in the round, the Respondent has not established that the Appellant's conduct presents a genuine, present and sufficiently serious threat affecting unlawful immigration, public order and social harm. Exclusion is not justified on grounds of public policy, public security or public health. There is no need for me to consider whether the decision is proportionate considering factors in reg 27 (6).

18. The Secretary of State has not established that the threat posed by the Appellant's conduct is genuine, present and sufficiently serious to justify deportation on grounds of public policy. Thus, the appeal is allowed

Notice of Decision

19. The Appellant's appeal is allowed under the 2016 Regulations.

No anonymity direction is made.

Signed *Joanna McWilliam* Date 11 January 2020

Upper Tribunal Judge McWilliam