IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005980
First-tier Tribunal No:
EA/05892/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 April 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANDREI CELMARE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Presenting Officer
For the Respondent: Mr M Allison, Counsel, instructed by Wilsons Solicitors LLP

Heard at Field House on 22 March 2023

DECISION AND REASONS

1. I shall refer to the parties as they stood before the First-tier Tribunal: therefore the Secretary of State is once again "the Respondent" and Mr Celmare is "the Appellant".

Introduction

2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Grey ("the judge"), promulgated on 29 November 2022, following a hearing on 22 November 2022. By that decision, the judge

allowed the Appellant's appeal against the decision of the Respondent to deport him from the United Kingdom and the refusal of his human rights claim.

3. The Appellant is a Romanian citizen, born in 2000, who came to the United Kingdom in March 2019 at the age of 18. In February 2022, he was sentenced to 16 weeks' imprisonment for three offences, which he had committed eight days apart in August the previous year. One of the offences involved spitting at an emergency worker, and another involved battery against a neighbour.

4. The appeal to the judge was brought under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. The Appellant had a right of appeal under regulation 6 of those Regulations and, because the Respondent had considered and refused the human rights claim (made in response to a section 120 Notice), he was also able to rely on Article 8 in his appeal. None of this is contentious.

The judge's decision

5. In summary, having set out the relevant background, legislative framework, evidence and submissions, the judge proceeded to deal with the issues before her. The first of these was whether the Appellant met the definition of a "foreign criminal" within the meaning of section 117D(2) of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"). The two possibilities relied on by the Respondent were that his offending had caused "serious harm" and/or that he was a "persistent offender". In respect of the former, the judge considered a range of relevant factors, directed herself to the Court of Appeal's judgment in R (Mahmood) v the Upper Tribunal [2020] EWCA Civ 717 and concluded that his offending had not in fact caused serious harm. In respect of the latter category, the judge considered the Appellant's offending history and directed herself to relevant authorities including SC (Zimbabwe) v SSHD [2018] 1 WLR 4474 and concluded that

he was not a persistent offender. In light of this, the judge concluded that section 117C of the 2002 Act did not apply.

6. The judge went on to consider Article 8 and proportionality. In so doing, she took into account a range of evidential sources including evidence from the Appellant, witnesses, and a Consultant Forensic Psychologist. The judge deemed the Appellant and witnesses to be entirely credible, placed weight on the psychological report and concluded that the Appellant had established both private and family life in the United Kingdom. She deemed that the Respondent's decision was disproportionate and that the appeal fell to be allowed.

The grounds of appeal

7. This is a case in which it is appropriate to set out the Respondent's grounds of appeal in some detail in order that the reader is fully appraised of the challenges mounted against the judge's decision:

> " Ground One - Making a material misdirection of law/failing to give adequate reasons for findings on a material matter - Foreign criminal
>
> …
>
> 2. The decision to deport was made in response to the appellant's sentence of 16 weeks' imprisonment imposed on 7 February 2022 .... It is respectfully submitted that whilst assault by beating is the lowest level offence in the hierarchy of violent offences, it is still a violent offence for which the appellant has two convictions. Therefore, it is respectfully submitted that the appellant meets the SSHD definition of serious harm as per the published guidance which states that where a person has been convicted of one or more violent, drugs or sex offences, they will usually be considered to have been convicted of an offence that has caused serious harm and an offence that has caused 'serious harm' means an offence that has caused serious physical or

psychological harm to a victim or victims, or that has contributed to a widespread problem that causes serious harm to a community or to society in general. It is submitted that it is at the discretion of the Secretary of State whether she considers an offence to have caused serious harm.

[The judgment in Mahmood is then cited, with passages from paragraphs 41–42 set out].

...

4. It is respectfully submitted that the FTTJ has failed to treat the offence of assaulting an emergency worker with the required seriousness due because of the public-service role of the victim.

5. It is respectfully submitted that the FTTJ has failed to consider the refusal point that the appellant's actions have a wider impact upon society. It is clear that such assaults have a wider impact beyond the immediate victims as knowledge of such attacks have a wider impact of fear in the community.

6. Reliance is placed on SC (Zimbabwe)... To submit that the appellant is a persistent offender as someone who keeps breaking the law, and that there is insufficient evidence the appellant is reformed particularly (*sic*) he was only recently released on 30 June 2022.

7. It is respectfully submitted that when the correct threshold for a foreign criminal is applied to the appellant then the appeal should have been dismissed.

8. It is respectfully submitted that contrary to the finding [that there was family life between the Appellant and his father] the determination contains no evidence of elements of dependency that go beyond the normal emotional ties...

9. Furthermore, it is submitted that the evidence is that the appellant and his father have spent many long periods of time apart .... It is submitted that the evidence is that once in the UK the appellant has chosen to move away from his father twice, spent time in prison, therefore they have spent very limited time together...

10. It is respectfully submitted that the FTTJ has erred when finding the appellant has 'developed a private life of some significance'. It is respectfully submitted that the FTTJ has failed to take into consideration that the appellant has only been in the UK since March 2019, during which time he spent a month in Romania and been incarcerated.

..."

8. Permission was refused by the First-tier Tribunal, but granted by the Upper Tribunal. The Upper Tribunal Judge deemed it arguable that there was "no adequate evidence of dependency going beyond normal ties" and that "it is difficult to see from the facts how the judge could reach the conclusion that there was a private life sufficient to engage Article 8".

9. Subsequent to the grant of permission, the Appellant provided a rule 24 response, dated 13 March 2023.

The hearing

10. At the hearing Mr Whitwell relied on the grounds and assisted me with concise oral submissions. In addition to the judgment in Mahmood, he referred me to the Upper Tribunal's decision in Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 00350 (IAC) Mr Whitwell then referred me to [36]–[38] of the judge's decision. In respect of [37] in particular, he submitted that the judge had taken the absence of victim impact statements against the Respondent, when she should have deemed this to be a neutral consideration as there was no requirement to adduce such evidence. This, he submitted, undermined the judge's

conclusion that the Appellant's offending had not caused serious harm. In respect of [38] of the judge's decision, Mr Whitwell submitted that the judge had apparently deemed the potential of the Appellant's offending to cause harm as being relevant, although he acknowledged that this submission was on a more tentative basis than the first. He had nothing to add to the grounds insofar as the judge's assessment of Article 8 outside of the "foreign criminal" context was concerned.

11. Mr Allison relied on the rule 24 response and submitted that all of the judge's findings and conclusions had been open to her. In respect of [37], the judge had simply noted the absence of a victim impact statement and had not held this against the Respondent's case. She had proceeded on the evidence which was before her.

12. There was no reply from Mr Whitwell.

13. Having risen to consider the matter for a short while, I announced to the parties my decision that there were no errors of law in the judge's decision. I now provide my reasons for that conclusion.

Discussion and conclusions

14. In short terms, the grounds as drafted (and unamended) read as a series of outright disagreements with the judge's decision, amounting to little more than submissions which could have been, and indeed perhaps were, put to the judge. In my judgment, they fail by some distance to identify any errors of law.

15. Taking the points raised in more detail, I begin with the "serious harm" challenge.

16. In essence, the Respondent's assertion is that it was simply a matter for her as to whether or not the offending constituted "serious harm" for the purpose of the definition of "foreign criminal" under section 117D(2)(c)(ii) of the 2002 Act. Apparently in support of this contention, the grounds refer to the judgment in Mahmood, as did the judge at [38].

Both Mahmood and Wilson (which was not referred to by the judge, but that does not of course constitute an error of law) make it clear that categorising offences as having caused "serious harm" is ultimately a matter for the relevant tribunal, albeit that the Respondent's view is relevant.

17. That approach is precisely the one identified by the judge at [38] of her decision. The judge had considered the particular circumstances of the offending over the course of six paragraphs preceding her accurate legal self-direction and then her conclusion. She plainly took full account of the Respondent's view, including quoting from the reasons for refusal letter at some length. The judge had regard to relevant factors and did not have regard to irrelevant factors. Her conclusion was very far short of being irrational. Indeed, I note the observation stated at [56] of Mahmood:

> "56. Provided the Tribunal has taken into account all relevant factors, has not taken into account immaterial factors and has reached a conclusion which is not perverse, its conclusions will not give rise to an actionable error of law".

18. In respect of Mr Whitwell's submission that the judge impermissibly took the absence of a victim impact statement against the Respondent at [37], I disagree with his interpretation of that passage. Reading the judge's decision holistically and sensibly, all the judge was in truth doing there was to state as a fact that there were no such statements (or indeed any other evidence from the Respondent) which might have added to the Respondent's case. That is *not* the same as having positively taken the absence of evidence *against* the Respondent. It is worth bearing in mind that at the beginning of the paragraph immediately following that particular observation by the judge, she directed herself to Mahmood which itself makes clear that there was no requirement to adduce evidence such as victim impact statements. In my view it is untenable to suggest that the judge had simply forgotten to apply the guidance set out in Mahmood.

19. In respect of Mr Whitwell's submission on [38] of the judge's decision, there is, with respect, no merit to it. The judge's reference to the potential of the Appellant's offending to cause harm to others was immediately followed by her factually accurate statement that there had been no evidence as to serious harm. Far from being legally erroneous, that was entirely consistent with the correct approach: in other words, the potential to cause harm is irrelevant.

20. In respect of the point raised at paragraph 5 of the grounds, the decision in Wilson is clear enough: at paragraph 53(3)(h) the Upper Tribunal concluded that:

> "… The fact that a particular type of offence contributes to a serious/widespread problem is not sufficient; there must be some evidence that the actual offence has caused serious harm".

21. That aspect of the guidance speaks for itself and renders the assertion in the grounds untenable.

22. I turn to the "persistent offender" issue. This aspect of the challenge has less merit than the first. The judge plainly had proper regard to the Appellant's offending history, noted the absence of any reasoning put forward by the Respondent's representative at the hearing and then directed herself to the relevant authorities on the meaning of the phrase "persistent offender". The analysis carried out at [44]–[45] has not been the subject of any identifiable challenge. Her conclusion at [46] that the Respondent had failed "by some margin" to discharge the burden in establishing that the Appellant was a persistent offender was one to which she was plainly entitled to reach.

23. The final element of the Respondent's challenge relates to the judge's assessment of proportionality under Article 8 more generally. What the grounds entirely fail to acknowledge (as they should have) is the absence of any challenge to the evidence provided to the judge by the Appellant, his witnesses and the psychologist. For the avoidance of any doubt, the judge was, on any view, fully entitled to regard the

evidence as being entirely credible. That evidential platform formed the context for her conclusion that the Appellant had established a private life "of some significance" and family life with his father.

24. In respect of the private life, it is in my view disingenuous of the author of the grounds to assert that the judge had "failed to take into consideration that the appellant has only been in the UK since March 2019. It is abundantly clear from the decision as a whole (with particular reference to [49], [53], and [57]) that the judge was fully aware of the timescale in question. She had regard to a variety of factors relating to private life, all of which were relevant and all of which entitled her, cumulatively, to find that private life had been established and was indeed of "some significance". Whether or not the judge erred in respect of the existence of family life (which in my judgment, she did not - see below), I am satisfied that she was entitled to have allowed the appeal solely on the basis of the private life (which in any event would have included the relationship with his father).

25. As regards family life, the judge accurately described the Appellant's relationship with his father and the relevant circumstances over the course of time. Her analysis at [61] has to be seen in the context of her acceptance of the psychological report (which went to the Appellant's troubled background). Further, the judge did in fact direct herself to the relevant legal test, namely whether the relationship went beyond normal emotional ties between an adult child and their parent.

26. Overall, given the judge's sustainable finding that the Appellant was not a "foreign criminal" and in light of the range of evidential sources before her (all of which were deemed credible) and the relevant legal framework, the judge's ultimate conclusion that the Appellant succeeded in his appeal was one to which she was entitled to reach.

Anonymity

27. No anonymity direction was made by the First-tier Tribunal and there is no sound reason for me to make such a direction at this stage. I make no direction.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal stands.

H Norton-Taylor

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 29 March 2023