Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00383/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 5 November 2014	**On 12 November 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DANIEL-CRISTIAN ZLATCU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: No representative

DETERMINATION AND REASONS

1. The Secretary of State appeals against the decision of the First-tier Tribunal (Judge McLachlan and Mr J H Eames) allowing the appellant's appeal against a decision to make a deportation order against him by virtue of reg 26 of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003 as amended) and s.5(1) of the Immigration Act 1971.

2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Romania who was born on 24 December 1989 and is, therefore, 24 years of age.

4. It is not entirely clear when the appellant came to the UK. He told an Immigration Officer in October 2013 that he had been in the UK since 2008. However, in the course of his appeal he gave evidence that he had come to the UK to work in September/October 2009. The First-tier Tribunal accepted that he had been in the UK since the "latter part of 2009" on the basis that he had been cautioned for theft (shoplifting) on 31 December 2009.

5. The appellant claimed that he had worked in the UK having obtained an A2 Registration Certificate on 20 January 2010. The First-tier Tribunal noted that the appellant had been "wholly opaque" as to what he had done in the UK after his arrival. The First-tier Tribunal did not accept that the appellant had been in the UK exercising Treaty rights since his arrival and therefore concluded that he had no established a permanent right of residence in the UK.

6. The appellant has a substantial criminal record. Between 27 February 2010 and 23 January 2014 he was convicted on eight separate occasions of a total of fourteen offences including going equipped for theft, theft (shoplifting), breach of a conditional discharge, making false representations to make gain for self or another causing loss to another/exposing others to risk, common assault, failing to surrender to bail and possessing a class B controlled drug, namely cannabis/cannabis resin. His most recent conviction was on 23 January 2014 when he was convicted of theft and sentenced to six weeks' imprisonment.

7. On 24 February 2014, the Secretary of State made a decision to make a deportation order against the appellant under reg 26 of the EEA Regulations on the basis of "public policy, public security and public health grounds".

The appeal

8. The appellant appealed to the First-tier Tribunal and that appeal was allowed under the EEA Regulations. The First-tier Tribunal concluded that the appellant's criminal conduct did not represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" and further that his deportation would not be proportionate under EU law.

9. On 11 August 2014, the First-tier Tribunal (Judge Lever) granted the Secretary of State permission to appeal to the Upper Tribunal. The basis of that grant of permission was that the First-tier Tribunal had arguably erred

in law in concluding that the appellant did not represent a "genuine, present and sufficiently serious threat". In particular the First-tier Tribunal's reasoning was flawed that appellant's risk of reoffending would be reduced as a result of a future threat of deportation if he committed a further criminal offence. In para 5 of his reasons Judge Lever said this:

> "it is arguable that the panel failed to provide adequate reasons or evidence to reach the conclusions that they did in the light of the body of evidence that seemed to point to the contrary and failed to give sufficient weight to the interests of society. It could be argued as the respondent does that the conclusion was speculative and based on hope rather than evidence and proper inference."

10. Thus, the appeal came before me.

The Hearing

11. The appellant was not legally represented at the hearing. At the outset, I explained to the appellant the purpose of the hearing and the procedure to be followed including the two potential stages of first identifying an error of law and, if one were identified, secondly remaking the decision. I also provided the appellant with a copy of the First-tier Tribunal's determination in order to assist him in following the submissions made on behalf of the Secretary of State by Mr Richards. The appellant indicated that he was able satisfactorily to read English.

12. After some initial comments by the appellant, I heard submissions from Mr Richards both on the issue of error of law and on remaking the decision. Following that, I gave the appellant an opportunity to make any submissions or comments to me which he did very briefly.

The Submissions

13. Mr Richards relied upon the grounds upon which permission to appeal had been granted. Principally, he submitted that the First-tier Tribunal's decision could not stand as its finding that the appellant did not represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" and that his deportation would be proportionate were inadequately reasoned and, in respect of the former, contradicted the Tribunal's findings in para 30(a)-(e) in respect of the appellant being a persistent criminal, who had shown no marked contrition and who had committed a further offence despite having been notified in October 2013 that he was liable to be removed. Mr Richards submitted that the First-tier Tribunal's reasoning in para 33 was so contrary to those findings that it was irrational and could not stand.

Discussion

1. Error of Law

14. The respondent's decision was taken under reg 19(3)(b) of the EEA Regulations which is in the following terms:

> "Subject to paragraphs (4) and (5) a person who has been admitted to, or acquired a right of residence in, the United Kingdom under these Regulations may be removed from the United Kingdom if - ....
>
> (b) he would otherwise be entitled to reside in the UK under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security of public health in accordance with regulation 21."

15. As I have already indicated, the decision to deport the appellant was made on the grounds of "public policy" and consequently is governed by reg 21 which, so far as relevant, provides as follows:

> "21(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.
>
> ....
>
> (5) Where a relevant decision is taken on grounds of public policy or public security it 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;
>
> (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.
>
> (6) 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 ...."

16. The First-tier Tribunal found (at para 24) that the appellant was not entitled to the benefit of the heightened criteria for deportation in reg 21(3) requiring "serious grounds of public policy or public security" because he had not established a permanent right of residence as a result of residence in the UK for a continuous period of five years in accordance with the EEA Regulations. That is a finding that is not challenged. Consequently, the First-tier Tribunal proceeded to consider whether the appellant's

deportation as an EEA national could be justified on the "public policy" criterion. At para 26, the Tribunal directed itself (correctly) as to the two issues it needed to address, namely (1) whether the appellant's conduct satisfied the "public policy" criterion; and (2) if it did, whether the decision to deport him was proportionate in all the circumstances.

17. As regards the "public policy" criterion, the First-tier Tribunal (correctly) noted that it was the future risk to society which was central to the "public policy" issue (see paras 27 and 28 of the determination).

18. At para 30(a)-(e), the First-tier Tribunal set out a number of findings in relation to the appellant's offending as follows:

> "30. We considered the evidence in terms of whether or not this Appellant is likely to re-offend. We do not have the benefit of any reports, such as NOMS assessment or probation report to assist in the assessment of future risk. In terms of his potential reoffending we note:-
>
> (a) He is a persistent criminal – mainly of theft-related offences – although he has been convicted also of common assault and possessing Class B – cannabis/cannabis resin drugs. He has 8 convictions for 14 offences committed between 27/02/2010 and 23/01/2014. Additionally, he was cautioned in December 2009 for theft-shoplifting and in June 2013 for possessing Class B drugs.
>
> (b) He has been punished in a range of ways – cautions, conditional discharge, community service, custody. None has deterred him from offending again. His criminal activities, albeit petty, started within weeks of his arrival in the UK and continued thereafter. He was notified in October 2013 of the Respondent's intention to remove him. He appealed, but this did not prompt him to reform because again, within weeks, he was convicted of shoplifting.
>
> (c) Although, in writing to the Respondent (C1, Respondent's bundle), the Appellant stated "I am sorry for everything bad what I did excuse me" (sic) and he told us at the hearing that he would not steal in the future, he showed no marked contrition for his conduct or understanding for the effect of his behaviour on victims or concerns for them or for broader society. That his attitude to the rule of law is somewhat cavalier is further demonstrated by his past failure to surrender to bail and breach of conditional discharge.
>
> (d) He appeared to justify his crimes by saying he had committed them when he was short of money. On occasions, this had happened because he had lost sums of money, gambling. He claimed that he had worked intermittently but he provided no evidence of settled work since he came to the UK. He stated that he had obtained certificates but did not produce them. He said he had paid tax but had no documents to show that, having thrown them away. He claimed to have no friends in the UK although he did refer to selling goods that he had shoplifted to someone known to him. He spoke of an Indian for whom he had worked in 2011 and speculated that he might give him (the Appellant) a job in the future. It seems that neither work nor community links have checked his offending.
>
> (e) The offences he has committed individually are not particularly serious but together, they do depict a pattern of continuing

> criminality, carried out throughout the relatively short period of time he has been in the UK. His behaviour is compounded by his apparent attitude that he can operate in that way with impunity when he is short of money. Theft, even of a minor nature impacts adversely upon the security and stability of society generally, as well as individual victims or third parties like shopkeepers or shop workers. It can generate fear and alarm while depriving others of property valued by them and rightly their own. The Appellant has pursued his activities with a blatant disregard for the cumulative effect of his offending upon the community. He has been involved also with drug possession and used violence, both of which undermine the fabric of society."

19. Having done so, at para 32 the First-tier Tribunal asked itself the question whether the appellant represented a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" so as to justify his deportation on the grounds of "public policy".

20. At para 33, the First-tier Tribunal addressed that issue as follows:

> "33. Notwithstanding the Appellant's behaviour and the concerns we have noted and expressed, we have concluded that the threat of re-offending conduct is not sufficiently serious to justify his removal. He is a petty criminal, mostly of an opportunist nature, and his crimes are towards the lower end of the scale. There is some evidence that he has been persuaded into certain instances of crime by others. He has been punished with progressively more serious penalties and now has spent time in prison. He can be under no illusion that further offending will lead to increasingly unpleasant consequences for him. The Appellant should be aware of how close he has come to deportation and cannot deceive himself that if he does commit crimes again, he will face once more the prospect of deportation. That thought should reduce the risk of his continued involvement in criminal behaviour and prompt him to turn his energies to rehabilitation."

21. Then, finally at para 36, the First-tier Tribunal concluded, having considered all the evidence in the round, that the appellant's conduct did not represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".

22. Mr Richards submitted that the First-tier Tribunal's reasoning in para 33 could not stand in the light of its findings in para 30(a)-(e). First, he submitted that the First-tier Tribunal had wrongly characterised the appellant as a "petty criminal" in para 33 given its findings that he was a persistent criminal (para 30(a)) and that the effect of his "pattern of continuing criminality" affected adversely "the security and stability of society generally, as well as individual victims or third parties like shopkeepers or shop workers" (para 30(e)).

23. Secondly, he submitted that the First-tier Tribunal's conclusion in para 33 that the future risk of deportation would reduce the risk of the appellant's future offending and lead him to "turn his energies to rehabilitation" stood in stark contrast to the Tribunal's earlier findings that he showed "no marked contrition for his conduct or understanding for the effect of his behaviour on victims or concerns for them or for broader society" (see para

30(c)) and that, having been notified of an intention to remove him in October 2013, the appellant had within weeks committed and been convicted of a further offence of shoplifting (see para 30(b)). Mr Richards submitted that the First-tier Tribunal's finding in para 33 was pure speculation not based on any evidence in the appellant's favour and, in the light of the First-tier Tribunal's earlier findings, was contradicted by those findings and therefore irrational.

24. Further, Mr Richards submitted that the First-tier Tribunal's view in para 35 that: "If he focuses on future undertakings of like kind and avoids contact with those who would invite him to participate in inappropriate activities such as gambling and low level crime, the future risk he presents, we believe, is low" was also pure speculation.

25. I accept Mr Richards' submissions. The First-tier Tribunal made clear adverse findings in paras 30(a)-(e) in respect of the appellant's criminal behaviour and future risk. The appellant was rightly categorised as a "persistent criminal". He had been convicted on eight occasions of fourteen offences between 27 February 2010 and 23 January 2014. Those offences were, as the First-tier Tribunal noted, "individually ... not particularly serious" but "depicted a pattern of continuing criminality" over a relatively short period. I entirely agree with the First-tier Tribunal's view expressed in para 30(e) that this persistent offending, albeit individually not particularly serious, adversely impacts upon the security and stability of society generally as well as individual victims and shopkeepers who suffer loss as a result of the offending. In addition to the dishonesty offences, the appellant had also been convicted of possession of a class B controlled drug and, albeit at a low level, a violence offence. Further, the appellant had shown a blatant disregard for the criminal justice system, not only in his repeated offending, but in his failure to surrender to bail and being in breach of a conditional discharge order. The First-tier Tribunal made a clear finding that the appellant was not deterred from future offending even when he had been subject to an earlier decision to remove him in October 2013, having committed within weeks a further offence of shoplifting (para 30(b)). The First-tier Tribunal also noted that the appellant's offences were committed when he was short of money, for example when he had lost sums of money gambling. The Tribunal noted that "neither work nor community links had checked his offending".

26. In the light of those findings, it was in my judgment wholly irrational for the First-tier Tribunal to describe the appellant as a "petty criminal" and to conclude that there was a prospect of deterring him from committing further offences now that he faced the prospect of deportation. In my judgment, those inferential findings were flatly contradicted by the First-tier Tribunal's earlier findings in para 30(a)-(e). In relation to his risk of future offending, it was pure speculation that he would avoid situations which caused him to be a persistent criminal and "turn his energies to rehabilitation" having faced the risk of deportation.

27. In my judgment, those findings and the finding based upon it that he did not represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" were legally flawed and cannot stand.

28. Turning to the issue of proportionality, the First-tier Tribunal dealt with this in para 35 as follows:

> "35. We believe that the Appellant's motive originally in coming to the UK was to work, and thus exercise Treaty rights. He did take steps once in the UK to obtain a qualification within the construction industry and now professes himself anxious to pursue such a career. Although there is some uncertainty over whether the Appellant has been in the UK continuously since 2009, we are satisfied that he has resided here for some years. In the past, he has carried out work from time to time on building projects and thus established himself within a commercial community. If he focuses on future undertakings of like kind and avoids contact with those who would invite him to participate in inappropriate activities such as gambling and low level crime, the future risk he presents, we believe, is low."

29. Having done so, at para 36 the First-tier Tribunal concluded that the respondent's decision did not comply with the principle of proportionality.

30. Mr Richards submitted that that finding was wholly unreasoned.

31. There is, in my judgment, no satisfactory answer to that submission. The First-tier Tribunal's reasoning in para 35 is wholly inadequate to sustain its finding that deportation would not be proportionate. The issue of proportionality required the First-tier Tribunal to look at the appellant's offending and future risk and balance against it all the individual circumstances, including the impact upon the appellant of his deportation. The First-tier Tribunal failed to do so. In particular, it failed to take into account the matters which it had set out at para 11 of the determination, namely that the appellant was single and had no children, he was in good health and he had no relatives or apparently close friends in the UK and his parents lived in Romania. Before me, the appellant confirmed that he had no family or anybody in the UK and that his parents were in Romania.

32. For these reasons, the First-tier Tribunal's finding that the Secretary of State's decision did not comply with the principle of proportionality was also legally flawed and cannot stand.

2. <u>Remaking the Decision</u>

The EEA decision

33. On behalf of the Secretary of State, Mr Richards invited me to remake the decision dismissing the appellant's appeal. He submitted that the appellant did represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" and, given his lack of connection with the UK, his deportation would be proportionate.

34. It is unnecessary to repeat the First-tier Tribunal's findings in para 30(a)-(e) which I have set out above. Those findings are not challenged and stand. The appellant is a persistent criminal who has been convicted of fourteen offences on eight separate occasions. Those offences include theft, possessing class B drugs, common assault. I agree with the First-tier Tribunal finding in para 30(e) that individually these offences are not "particularly serious". However, taken cumulatively, they represent a "pattern of continuing criminality". The appellant showed no contrition for his conduct or understanding of the effect of his behaviour on victims or broader society. He continued to offend despite being subject to an earlier decision to remove him in October 2013.

35. There is no pre-sentence report or NOMS assessment. I am in no doubt that the appellant continues to present a future risk of repeat offending of the sort committed in the past. Whilst each individual offence may not be "particularly serious" his future offending will further add to his "pattern of continuing criminality" as a "persistent" offender. There is no evidence to suggest that he will change his ways. His offending appears to be linked, as the First-tier Tribunal noted, to when he lacks money because, for example, he has lost money gambling. There is no evidence before me to suggest that he will in the future avoid a lifestyle which would reduce the risk of his offending because of his need for money. To the extent that he has worked in the past that did not obviate the need for him to steal and further offend.

36. Given the appellant's persistent offending and future risk, even though the offences are not in themselves "particularly serious", I am satisfied on a balance of probabilities that the appellant represents a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".

37. Further, I am satisfied that his deportation would be proportionate. He is 24 years of age and has only been in the UK since, on the First-tier Tribunal's findings, sometime late in 2009. His evidence about his work was vague and, although he claimed that he had paid taxes, he had thrown away all the paperwork (see para 25 of the determination). On the basis of this evidence, it is difficult to conclude that the appellant has established that he has worked, as he claimed, in the past in the UK. In any event, it is likely, in my view, that in the future he will either be unable or unwilling to work and presents a risk of reoffending. The evidence before the First-tier Tribunal, which is not challenged, is that the appellant is single and has no children. He has no relatives or apparently close friends in the UK. His parents live in Romania. He is in good health and there was no evidence before the First-tier Tribunal of any significant private life enjoyed by the appellant in the UK. The appellant has not established anything other than the very weakest social and cultural integration into the UK but has strong family links with his own country, Romania.

38. To the extent that rehabilitation is relevant to this appeal, and I was not addressed directly on that issue by Mr Richards, it is reasonable to suppose

that there is a greater chance of rehabilitation for the appellant in Romania where his family are based rather than in the UK where he has no family or support network.

39. Taking into account all the circumstances, including the appellant's age, that he has lived in the UK since late 2009 and his continued links with Romania which are absent with the UK, I am satisfied that the appellant's deportation based upon public policy grounds is proportionate in all the circumstances.

40. For these reasons, I am satisfied that the appellant's deportation is in accordance with the requirements of EU law.

Article 8

41. The First-tier Tribunal did not consider whether the appellant's deportation breached Art 8 of the ECHR because of the favourable view it took under the EEA Regulations.

42. To the extent that Art 8 continues to be relied upon, the appellant has only established a weak claim to have private life in the UK. He has no relatives and there was no evidence of any close friendships or of any integration into the community and society in the UK.

43. In remaking the decision in respect of Art 8 of the ECHR the new deportation provisions introduced by the Immigration Act 2014 in Part 5A of the Nationality, Immigration and Asylum Act 2002 apply as do the new deportation rules in paras 398-339A of the Immigration Rules in effect from 10 July 2014 (HC 432, amending HC 395) (see YM(Uganda) v SSHD [2014] EWCA Civ 1292).

44. The general public interest considerations are in s.117B and those particular to deportations are in s.117C. In this appeal, the principal considerations are in s.117C.

45. The appellant is a "foreign criminal" within s.117D(2) as he is not a British citizen, he has been convicted of an offence in the UK and is a "persistent offender". For the purposes of Art 8, his deportation is "in the public interest" (s.117C(1)). By virtue of s.117C(4), having been sentenced to a period of imprisonment of less than four years, the public interest requires the appellant's deportation unless Exception 1 or 2 in s.117C(4) and (5) respectively applies (s.117C(3)). Neither exception applies to the appellant.

46. As regards Exception 1 the appellant cannot establish any of the cumulative requirements of s.117C(4), namely that (a) he has been lawfully resident in the UK for most of his life (he has only been here since late 2009 when he was 20 years old: he is now 24 years old); (b) he is socially and culturally integrated in the UK (see my findings above); and (c) there would be very significant obstacles to his integration in Romania (his family

is based there and he has only been in the UK 4 years, there was also some evidence he had travelled to Romania in 2011).

47. As regards Exception 2, he does not meet the requirements of s.117C(5) because he does not have a "genuine and subsisting relationship" with either a "qualifying partner" or "qualifying child" in the UK.

48. The new 2014 Rules reflect those statutory requirements and, in a case such as the appellant's where he has not been convicted of an offence with a sentence of at least one year's imprisonment but is a "persistent offender" and where paras 399 and 399A do not apply (reflecting the requirements in Exceptions 1 and 2 in s.117C(4) and (5)), only where there are "very compelling circumstances over and above those described in paragraphs 399 and 399A" will the public interest in deportation be outweighed.

49. Whether based upon the new statutory provisions or otherwise, in my judgment, any interference with the appellant's private life is justified under Art 8.2 on the basis of the legitimate aim of preventing disorder or crime. The appellant's deportation would, in my view, be proportionate. The public interest is not outweighed by his personal circumstances. I adopt my findings in relation to the EEA Regulations in respect of the appellant's offending and his personal circumstances both in the UK and in Romania where his family are based. There are no "compelling", let alone "very compelling", circumstances which outweigh the public interest. In my judgment, the interference with his private life, given his lack of integration in the UK and the existence of his family in Romania, is outweighed by the public interest reflected in his past offending and future risk of offending.

50. For these reasons, the appellant has failed to establish a breach of Art 8 of the ECHR if he is deported to Romania.

Decision

51. For the above reasons, the First-tier Tribunal's decision to allow the appellant's appeal under the EEA Regulations involved the making of an error of law. That decision cannot stand and is set aside.

52. To that extent, therefore, the Secretary of State's appeal to the Upper Tribunal is allowed.

53. I remake the decision dismissing the appellant's appeal under the EEA Regulations and also under Art 8 of the ECHR.

54. No anonymity direction is made.

Signed

A Grubb
Judge of the Upper Tribunal

5 November 2014