Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00132/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 11 July 2016	**On 20 July 2016**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ANDRAS TAMAS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the appellant: Mr P. Duffy, Home Office Presenting Officer
For the respondent: Mr R. Toal, Counsel, instructed by Wilson Solicitors LLP

DECISION AND REASONS

1. The Secretary of State appeals against the determination of First-tier Tribunal Judge T.R. Cockrill promulgated on 20 May 2016 allowing the appeal of Mr Andras Tamas against the decision of the Secretary of State made on 23 February 2016 to make a deportation order against him under the provisions of s. 5 (1) of the Immigration Act 1971. I shall refer to Mr Tamas as 'the appellant', as he was in the First-tier Tribunal.

2. The appellant is a Union citizen, a citizen of Hungary, who was born on 16 April 1974. He is now 32 years old.

3. The appellant entered the United Kingdom on 29 March 2006 and, as an EEA national, he was not subject to immigration control. His entry is not recorded.

However, the respondent does not take issue with the appellant's claim to have entered the United Kingdom in 2006. He was then aged 21.

4. It was accepted by the respondent that he had been present in the United Kingdom and exercising Treaty rights for at least 5 years and was, therefore, entitled to a permanent right of residence and thereby protected against deportation to the extent set out in reg. 21 of the Immigration (European Economic Area) Regulations 2006 (2006 No 1003):

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

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

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

(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.

5. In sum, the test was serious grounds of public policy.

6. On 2 December 2014 the appellant was arrested by the Metropolitan Police. The circumstances of his arrest were that he was found asleep in his vehicle with some £4,000 in cash. It was, however, later accepted by the Secretary of State that he was in possession of this cash lawfully in that it was rent that he had collected. The search also revealed an amount of drugs (the quantity of which is not recorded), a crack pipe found in the driver's door of which the appellant claimed to be ignorant and a calibrated balance '*capable of very fine weighing*' as used for weighing small quantities of drugs which the appellant apparently explained by reference to its use in making pastry [106]. In addition, the search revealed a kitchen knife, the presence of which the appellant explained by saying it was '*just to make sandwiches*' [107] and a baseball bat.

7. He was charged with four offences: (1) possession of an offensive weapon in a public place; (2 and 3) possession of a Class B controlled drug amphetamine and cannabis respectively and (4) possession of a Class A controlled drug, cocaine. The First-tier Tribunal Judge was simply wrong in saying that no further action was taken in relation to those various matters; indeed, they were the subject of convictions that took place at North East London Magistrates Court on 28 April 2015. Insofar as he considered '*it highly pertinent to point out that no further action was taken*', he gave the appellant the benefit of this comment to which the appellant was not entitled. No charges were brought in relation to the knife. Without sight of it, no inferences can be drawn about it, notwithstanding the overall context in which it was found. Mr Toal described it – I assume the blade - as being 8 cms long.

8. It is of considerable significance to record the sentences that were imposed. For possession of an offensive weapon - the baseball bat - the appellant was sentenced to a community order to perform unpaid work; for the two offences of possession of Class B drugs, he was fined £100 on each and for possession of Class A drugs he was fined £500.

9. It is on the basis of these 2015 convictions that the Secretary of State sought to establish there are serious grounds of public policy justifying his removal notwithstanding his having a permanent right of residence and his presence in the United Kingdom since 2006. The Secretary of State attempts this by reference not only to the 2015 convictions but also to three convictions incurred in Hungary in 2001.

10. Turning first to the 2015 convictions, the appellant was not charged with possessing drugs with the intent to supply. Whatever may have first appeared, once it was established that the £4,000 was rent that the appellant had collected, the quantity of drugs (the amount is not recorded) was not such so as to infer the appellant was a dealer and the fines imposed do not suggest otherwise. Whilst the presence of a balance might suggest its use in dealing, it was also consistent with a purchaser intent on checking the amount of his purchase. The crack pipe was consistent with personal use notwithstanding his lame explanation that he was ignorant of its presence in the driver's door.

11. The most serious offence was his possession of an offensive weapon, especially in the context of his being a rent collector, suspicions of the utmost gravity springing to mind. In dealing with this offence, the First-tier Tribunal Judge was plainly influenced by the appellant's explanation [39],

> The appellant had said that he had had the baseball bat in the vehicle for his own protection. To put the matter in context, the appellant, as earlier indicated, had been collecting rent and he had the bat to deal with anyone trying to assault him. He was to expand on that point later by saying that he had been the victim of one incident where he had been attacked but

> that matter had not been reported to the police. The sentence of the court was of course a non-custodial sentence.

12. This explanation sits uncomfortably with the judges recital of the appellant's evidence set out in paragraph 77 of the determination

> He acknowledged that his baseball bat was in the vehicle behind the seat. He obtained that bat from a tenant who had moved out and the bat had been left behind in that property. The appellant could not say specifically why it had been left behind the passenger seat. He had not used the bat in an offensive way. He had not threatened anyone with it. It was put to him that he had explained that he had it for his own protection. The appellant's reply was to repeat the point as to the circumstances under which he came into possession of this bat.

13. Pausing there, it was necessary to approach this matter with the certain realism. First, the appellant had given what appears to be two different accounts as to the reason why is that was in the back of his vehicle: one, for his own protection; the other, that he could not really say why he had it. Second, persons who have been the victim of an earlier attack are not thereafter sanctioned to carry baseball bats to protect themselves against subsequent attacks and do not usually do so. (The appellant did not appear to me to be unusually vulnerable to attack.) Third, if the possession of this offensive weapon was specifically related to his job as a rent collector, rent collectors do not as a rule have to protect themselves against their tenants - even those who pay rent irregularly - by having a baseball bat. Fourth, the possession of this bat was expressly found by a criminal court to have amounted to the possession of an offensive weapon. If, as the appellant also suggested, this was simply an item that had been left behind by a departing tenant, no reason was given as to why it should find its way into the back of the appellant's vehicle. Offensive weapons are not proscribed because they have been used for acts of violence. There are other offences known to the law if unlawful use has been made of such weapons. They are proscribed because of the *potential* for such harm; particularly so, where violence is likely or tempers are raised. Hence, the Judge's comments in relation to the knife - but equally applicable in relation to the baseball bat - that '*there is no shred of evidence at all to show that it was used aggressively*' misses the point entirely.

14. These considerations do not appear to have entered the Judge's thinking in his determination and he appears to have accepted the appellant's explanations without further analysis, concluding in paragraph 132 by saying somewhat benignly: '*he was caught with a baseball bat in his vehicle*' and in paragraph 144 that it was retained in his van for '*the purposes of his own protection*'. In paragraph 142, the Judge comes precious close to offering a justification for possessing an offensive weapon

> Because of the nature of the work I can quite see that they will come in contact with tenants who are unwilling to co-operate fully…

However, he draws away from what would have been an unlawful conclusion by adding

> …and of course the appellant must not misuse his position and use force

But omitting to ask what was the purpose of having a baseball bat in relation to tenants who did not co-operate with his demands or paid irregularly.

15. It is apparent that the Judge took a benign view of the appellant's conduct in possessing this baseball bat.

16. However, for the reasons I have given, the Judge was not entitled to conclude (even of balance of probabilities) that the appellant was dealing in drugs. Indeed, I doubt if this was even suggested by the respondent. Whilst implausible answers given by the appellant about his knowledge of a crack pipe in the vehicle or the risible explanation that the calibrated balance was used for making pastry amply demonstrate that the appellant was not telling the truth, that did not permit the Judge to conclude on balance of probabilities that he was a dealer.

17. It is impossible to see that possession of a (presumably small) quantity of drugs on a single occasion for personal use can justify removal on serious grounds of public policy.

18. The analysis then had to assess a further vital element of the appellant's past. On 26 April 2001 before the Municipal Court in Budapest, the appellant was convicted of three offences. The first was the illegal possession of a firearm. The second was the possession of controlled drugs. The third was an offence of robbery. For these offences he was sentenced to 8 years imprisonment. No distinction is made in the record as to the individual sentences imposed for each of the three offences. The offences took place on 15 November 1997, now some 19 years ago.

19. It is safe to assume that these offences came to the attention of the UK authorities as a result of his arrest or conviction for the offences in December 2014.

20. The appellant provided what, on its face, was an entirely improbable explanation for his being convicted. He explained that he came to know two individuals in the gym he attended who asked the appellant if they might use his flat for "business". He was told that they wanted to sell a car and needed somewhere convenient to sign the contract. No credible explanation was given as to why the appellant's flat was necessary for such a simple purpose. The appellant claimed that he did not know the other party to the transaction to all and that the potential car purchaser brought a friend with him. A fight ensued at his flat between the four visitors at which point one of them drew a gun and killed one of the potential purchasers. The appellant claimed he reacted immediately by grabbing the gun from the assailant which he managed to do thereby leaving him, literally, in possession of the smoking gun. He also noticed that there was a bag of amphetamine tablets. Presumably, and to his surprise, it was at this stage that the appellant suddenly

saw the light and that this was not a contract for the sale of the motor car but a drug deal.

21. The others fled. Rather than notify the police as to what had taken place the appellant (who was, according to him, entirely innocent at this stage of any wrongdoing), retained possession of both the gun and the drugs which the Hungarian police subsequently found in his possession. Hence his admission to the possession of drugs and the firearm, according to him, relate solely to his having innocently assumed possession of both *after* the murder and the abortive drug deal.

22. The First-tier Tribunal Judge described this, (again somewhat benignly), as a deal that went '*tragically wrong*', although that would not have been my description of the event.

23. The appellant maintained this implausible account before the First-tier Tribunal Judge who appears to have accepted it on the basis that he had been immature, naive and very stupid. Although he had denied robbery, he had been convicted by the court. The judge records at paragraph 22

> The appellant acknowledged that what had really taken place in relation to the gun was that he possessed it, nothing more than that. He had become involved in what was in effect a joint enterprise concerning the robbery, and that was why it would appear that the court had convicted him in Hungary.

And then at paragraph 129

> The appellant accepted his imprisonment. He did not dispute the matter of robbery by saying he was not involved but was found guilty by the court, presumably on an analysis of joint enterprise or equivalent.

24. Whilst this is an example of accepting the most favourable interpretation of events advanced by the appellant, it is wrong. It is belied by the appellant's conviction on his not-guilty plea of an offence of robbery and by the fact that the totality of his wrong-doing merited 8 years imprisonment. There is no record of an appeal against either conviction or sentence. There is no suggestion of a miscarriage of justice (in relation to which the appellant would be required to provide cogent evidence). The Judge's twice repeated reference to 'joint-enterprise' does not assist the appellant. Had this been a joint-enterprise, the appellant would have been as guilty of robbery as his fellow robbers. On the appellant's account of events, he was entirely innocent of any act of violence associated with a charge of robbery. Hence, on the state of the evidence, it was not open to the Judge to depart from the fact of the conviction or the fact that the conviction merited 8 years imprisonment. It was on any view very serious wrongdoing.

25. Appearing to justify taking the most favourable view of events, the Judge emphasised his early release for good conduct. Whilst this was a matter that the

Judge was properly entitled to take into account, the Judge's assessment contains a short reference to a *substantial* sentence which is then immediately followed by

> …but I think it is highly pertinent given the criteria for assessment of the appellant's situation which focuses on his conduct that he was described as an exemplary prisoner and gained early release in the way that he has described. That is of course enormously to his credit.

26. Following *Secretary of State for the Home Department v. Straszewski* [2015] EWCA Civ 1245 (Moore-Bick, Davis and Sharp LJJ), the burden rests firmly with the Secretary of State and the enquiry is directed to whether the future risk that the community faces is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society by reason of the appellant's past wrong-doing. The issue is whether the appellant's conduct, taken as a whole, establishes a propensity to offend. The respondent's burden does not require that it is discharged by reference to specific reports from the authorities which are directed to the issue of re-offending, the equivalent of an OASys report, probations reports or a judge's sentencing remarks. Rather, it is an evaluation that requires an holistic approach.

27. The First-tier Tribunal Judge clearly attached great weight to the absence of particulars surrounding the offence:

> 126…. it is particularly important to stress that no particulars whatever have been provided by the respondent that tell me the circumstances of these offences.

28. *If* this amounts to a criticism of the respondent for her failure to produce the type of material which directly addressed the risk of offending such as might be found in appeal brought against a deportation appeal when a Union citizen is convicted of an offence in the United Kingdom, the criticism is unjustified. In the case of a deportation order based on a conviction in a foreign country, it is not a requirement that such material, if it exists, is abstracted from the local prosecution, judicial or probation authorities and then translated. Instead, the Tribunal has to apply the structured approach set out in the provisions of reg. 21 and to make its decision on the material before it. I accept that, were it to be necessary as a matter of law, then the fact that the process is onerous (requiring corresponding with the local court or local police in a language both parties might understand or communicating with the national authorities via the Embassy) would be no excuse.

29. The First-tier Tribunal Judge did not hear evidence from the appellant that was consistent with his conviction for robbery. The appellant's account could only be construed as a denial of his involvement with robbery. The sentence of 8 years could only be construed as consistent with a serious offence of robbery. The absence of further particulars about the offence was not capable of permitting the appellant to provide a version of events that was inconsistent with the verdict and the sentence unless the appellant established there has been a miscarriage of justice. The appellant adduced no evidence as to a flawed process which had

resulted in his being wrongly convicted or sentenced to a period of imprisonment which did not reflect the gravity of his offending.

30. In seeking to justify the appellant's removal, the First-tier Tribunal heard evidence from the Secretary of State in relation to other matters adverse to the appellant but which had not resulted in any criminal conviction. It was lawful for the respondent to rely upon such additional matters. However, as the First-tier Tribunal Judge properly pointed out, the material was equivocal for the reasons he gave and it was open to him to attach little weight to it as part of the task required of him to assess whether there were serious grounds of public policy sufficient to justify removal.

31. I have been at pains to point out the way in which the First-tier Tribunal Judge appeared to have marginalised or minimised some elements of the case which had been mounted against the appellant. In my judgment, he should have viewed the events in 1997 as properly reflected in the convictions. Absent a credible justification for the appellant's conviction for robbery, he could place no weight on the appellant's attempts to spin a thoroughly incredible account that he was an innocent bystander to a robbery or his involvement with firearms and drugs. The Judge's reliance on the Secretary of State's failure to provide full particulars of the offences did not justify the Judge's acceptance of an account which was inconsistent with the convictions when no evidence of a miscarriage of justice was advanced; all the more so when the account provided was scarcely credible and the appellant's account of the circumstances of his later convictions in 2015 were not, in part, credible [144].

32. Had the Judge approached the 1997 offences as he should, he must have approached those offences as ones of the gravest character. Indeed, firearms, drugs and violence are the scourge of our society and merited a clear statement to that effect. I do not find this in the determination and the Judge's reference in [130] to a *substantial sentence* is immediately neutralised by reference to his good behaviour in prison as *'enormously to his credit'*.

33. Yet the fact remains that even if the Judge had properly examined the 1997 convictions, these events had taken place 19 years before, well over half his lifetime ago. In the meantime, there had been no repeat offending apart from the single occasion in December 2014 when the offences which triggered the deportation decision took place. If the decision maker or the Tribunal strips away the possession of drugs for personal use which cannot significantly contribute towards establishing serious grounds of public policy (but which I emphatically do not condone), there remains the offence of possessing an offensive weapon for which the appellant received a community order. Just as the First-tier Tribunal Judge is not permitted (without proper justification) to go behind the 2001 convictions and sentence, nor can I go behind the 2015 convictions and sentence. These reflect, at least as a starting-point, the nature and gravity of the offence. Most importantly, they do not establish involvement in the supply of, or dealing

in, drugs. Nor does the evidence establish intimidation and violence in either supplying drugs or the collection of rent.

34. A comparison between the earlier offending and the more recent offences bears close examination. First, both include involvement in the illegal possession of drugs. Second, and more worryingly, both include acts of violence or the potential use of violence; the violence implicit in a robbery, the potential violence implicit in possessing an offensive weapon. Third, in each case a weapon was involved; a gun or a baseball bat. If, as a result of a proper examination of the facts, the appellant was involved in drug dealing in 1997 which resulted in violence using a weapon and was then found to have been involved in drug dealing in circumstances where a weapon was readily accessible, either a kitchen knife or a baseball bat then it would have been open to the Judge to find that, despite the passage of time, the appellant has not altered his ways. This was simply a case of history repeating itself. In that event, the appellant was a hoodlum in Hungary and has continued to be so in the United Kingdom albeit there are no known intervening incidents. On the strength of such reasoning, it would have been open to the Judge to conclude the risk continues. Indeed, he may have been obliged to make such a finding.

35. However, the evidence simply is not capable of drawing that conclusion. The evidential link between the events of 1997 and those of 2014, when combined together, do not establish the serious grounds of public policy required under the 2006 Regulations. Without this, the 2014 offences do not justify removal given the appellant's otherwise lawful presence in the United Kingdom as a Union citizen since 2006.

36. It is impossible to overlook the serious suspicions that the appellant's conduct has given rise to: large amounts of cash, drugs, an offensive weapon, a knife, calibrated scales, the possible implication of the use of violence or intimidation in pursuit of unpaid rent or in his dealings with other people. Whilst they fall short of establishing that the appellant is a threat to society, they suggest a life on the fringe. If (and the Secretary of State may well say that it is not *if* but *when*) these suspicions are supported by credible evidence of criminal wrong-doing, the appellant will indeed be shown to be a threat. He should be in no doubt of the consequences of this. By then, of course, he may well have established a presence in the United Kingdom in excess of 10 years and entitled to the greatest level of protection, namely that afforded by reg. 21 (4) of the 2006 Regulations, imperative grounds:

> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—
>
> (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision

37. Were that stage to be reached in the case of a violent drug dealer or rent collector using improper force, the threshold test of imperative grounds will easily have been made out and the appellant will be removed. On the other hand, if the

appellant has indeed led a blameless and worthwhile life since his release from prison, he must forgive the imputation of unworthy conduct and consider himself misunderstood.

DECISION

The Judge made no material error on a point of law and the original determination of the appeal shall stand.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
14 July 2016