Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/02929/2015**

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent	**Determination Promulgated**
On 3rd February 2016	**On 16th February 2016**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ROMAN VLACUHA

Respondent

Representation:

For the Appellant: Ms C Johnstone, Senior Home Office Presenting Officer
For the Respondent: In person (through an interpreter)

DETERMINATION AND REASONS

1. The Secretary of State for the Home Department (SSHD) was granted permission to appeal the decision of the First-tier Tribunal which allowed Mr Vlacuha's appeal against a decision to make a deportation order on grounds of public policy in accordance with regulation 19(3)(b) and regulation 21 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 EEA Regulations").

2. The SSHD relied upon 3 grounds:

   a. That it was perverse of the judge to find that it was speculation on the part of the SSHD to find in the decision letter that the victim of the rape would be traumatised and may suffer long term psychological harm.
   b. That the suggestion that Mr Vlacuha had been convicted of drink driving in the Czech Republic was not made out because there was no PNC was perverse given the evidence of Mr Vlacuha and because of his conviction in the UK of driving whilst disqualified.
   c. The judge's approach to the evidence was suggestive of an attempt to minimise the seriousness of the offending and the Article 8 findings were

inadequate; no attempt had been made to consider whether family life could continue in the Czech Republic.

3. Mr Vlacuha has three convictions:
   - He was convicted of rape in the Czech Republic on 19th November 1991 for which he was sentenced to 2 years suspended. That sentence was subsequently converted into a custodial sentence;
   - He was convicted, in the Czech Republic on 15th February 1995, of assault on a police officer (driving his car at him) failure to support a dependant and unauthorised possession of property for which he was sentenced to 20 months imprisonment;
   - On 7th January 2014 in the UK he was convicted of driving whilst disqualified and fined £150, driving licence endorsed with 6 penalty points, costs £85 and victim surcharge £20.

   Although it appears that the FtT was under a misapprehension as to the crimes committed by Mr Vlacuha, it was clear after questions put by me during the hearing that Mr Vlacuha agreed that he had been convicted of these offences.

4. The FtT judge erred in his factual analysis of the offences for which Mr Vlacuha had been convicted. The fact that there was no PNC does not mean, given the evidence of Mr Vlacuha, that he had not committed the offence of assault against a police officer with his car. Although Mr Vlacuha said that it was a minor offence that was treated as a major offence, the existence of the offence was not denied. Mr Vlacuha stated that it was because of that offence that the suspended sentence was converted to a custodial and that was why he served 44 months in prison. Furthermore a conviction for driving whilst disqualified presupposes a prior sentence which consisted of disqualification – a likely sentence for the 1995 offence.

5. The view expressed by the FtT judge that it was speculation on the part of the SSHD to conclude that the victim of rape had been traumatised and may suffer long term psychological harm is not understandable. Although the circumstances of the rape were not known, what was known was that the victim was raped. It would be speculation to consider that a victim of rape was not traumatised.

6. The finding of the judge that the motoring offence was not sufficiently prejudicial to the requirements of public policy is not explained. Mr Vlacuha was convicted of driving whilst disqualified- that is a serious offence. That he was not imprisoned may be as a result of mitigating factors but as a conviction it is serious. Furthermore Mr Vlacuha has amassed three serious convictions – rape, driving a car at someone and driving whilst disqualified, albeit over a lengthy number of years. The judge has only, in reaching his decision considered two offences – the rape in 1991 and the driving whilst disqualified in 2014.

7. Ms Johnstone submitted that Mr Vlacuha had failed to produce any evidence that he had rehabilitated himself or that he was at low risk of committing further crime. She submitted that if someone is offending over a long period of time, as here, that does not reduce the propensity to offend but rather increases it – even if the nature of the crimes are different. She submitted that the judge had failed to consider the threat posed and that there was no evidence to support the judge's

contention that the short period of immigration detention had a deterrent effect. She submitted there had been inadequate consideration of the proportionality of deportation. In so far as Article 8 is concerned she submitted that there had been a failure on the part of the judge to consider whether the family could return to live in the Czech Republic.

8. Mr Vlacuha does not have permanent residence in the UK. His deportation has to be justified on the grounds of public policy, public security or public health. Regulation 21 (5) sets out considerations that apply in the deportation of EEA nationals:

- The decision must comply with the principle of proportionality
- The decision must be based exclusively on the personal conduct of the person concerned
- The personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society
- Matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision
- The person's previous criminal convictions do not in themselves justify the decision.

9. The FtT judge, although directing himself to the required regulation has failed to accurately or adequately consider the evidence before him. His findings are unquestionably tainted by his failure to take account of one serious conviction, by minimising the seriousness of the rape conviction and categorising the driving offence in the UK as a 'transgression'. He simply failed to properly address the issue of whether in the light of Mr Vlacuha's convictions he was a genuine, present and sufficiently serious threat.

10. I am satisfied the FtT judge erred in law and I set aside the decision to be remade.

Remaking the decision

11. Both parties agreed that if I were to set aside the decision to be remade I had all the evidence I required to enable me to remake the decision without a further hearing. The submissions made by both parties were before me and I took account of all the material evidence.

12. Mr Vlacuha has been convicted of three serious offences, the fact that two took place in the Czech Republic does not prevent them being considered in any assessment of the proportionality of deportation or issues of personal conduct or threat. The first offence has not been repeated either as a particular offence or any type of sexual offence. It occurred 25 years ago and, given there has been no repetition it is reasonable to conclude that despite the horror and seriousness of that offence, the applicant does not have a propensity to commit that type of offence.

13. That is not a similar consideration for the other two offences, both of which involved driving matters, one of which resulted in a period of imprisonment and

the other a fine. That first driving matter was however committed some 19 years ago. Regulation 21(5) makes clear that previous criminal convictions do not in themselves justify the decision. It is important to consider the most recent conviction and the impact of that conviction along with the previous conviction on the assessment of Mr Vlacuha's personal conduct and propensity to commit crime. Were these two offences closer together in time this could indicate a propensity to commit crimes of this nature. But a time distance of 19 years with no intervening convictions does not tend towards a conclusion that Mr Vlacuha has a propensity to commit crimes of this nature. Even if the rape is taken into account the time between the offences overall does not indicate a propensity (an inclination or tendency) to commit crime today. Ms Johnstone submitted that he had not provided any evidence of rehabilitation or evidence that he posed a low risk of further criminality and whilst that is correct in terms of documentation, Mr Vlacuha's behaviour is indicative of rehabilitation and low risk. One offence since 1995, albeit involving a driving offence cannot reasonably be seen as indicative of a propensity towards further criminality.

14. The decision is to be based exclusively upon Mr Vlacuha's personal conduct. Whilst the seriousness of the offences committed by him cannot be minimised, the lack of a tendency to commit further crimes means that he does not and cannot represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society.

15. His wife and most of his children are in the UK. One of his children requires specialist treatment and education. It is unclear whether and to what extent any of the other children are working or whether and to what extent his wife is working but in the absence of a genuine, present and serious threat it is simply not lawful to deport Mr Vlacuha.

16. In so far as Article 8 is concerned, whilst the FtT judge does not refer to the possibility of continuing family life in the Czech Republic, it is axiomatic that if it is unlawful to deport Mr Vlacuha then his deportation would be a breach of Article 8.

17. I allow the appeal of Mr Vlacuha against the decision of the SSHD to deport him.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal by allowing it.

Upper Tribunal Judge Coker Date 11th February 2016