IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002100

First-tier Tribunal No: DA/00148/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 September 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

RZ
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Broachwalla instructed by Albright Kendrick Solicitors.
For the Respondent: Mr Tan, a Senior Home Office Presenting Officer.

Heard at Manchester Civil Justice Centre on 27 August 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. In a determination promulgated on 26 April 2023 a panel of the Upper Tribunal, composed of Upper Tribunal Judge Bruce and Deputy Upper Tribunal Judge Sills ('the Panel') found a material error of law in the determination of the First-tier Tribunal which dismissed RZ's appeal.
2. Having considered the documentary and oral evidence the Panel set the determination of the First-tier Tribunal aside with no preserved findings.

3. The matter comes before me following the making of a judicial transfer order with a view to my substituting a decision to either allow or dismiss the appeal.
4. There is within the Upper Tribunal case management system notice of information having been received from a Senior Home Office Presenting Officer that the Appellant was not convicted of an additional new offence by the Crown Court, the jury having been instructed to find he was not guilty.
5. The factual background, as recorded by the Panel, shows the Appellant is a citizen of Slovakia born on 22 May 1997 who came to the UK in 2008. On 23 September 2019 he was sentenced to 15 months imprisonment for an offence of violent disorder which led to the decision under appeal.
6. The Crown Court Judge in the sentencing remarks stated:

> "This was an extended and very ugly incident on the car park of a Greek community centre at 2am. It is not really clear from the evidence just what the catalyst was for this violence. There is some suggestion that the families did not get on. There is some suggestion that a 16-year-old girl had been inappropriately touched while she was dancing by someone associated with your group. Whatever started it, the result was that you, and others not before the court, violently attacked a group who had gone outside the venue to smoke. You were known by some of those other people and indeed related to some of them. In the course of what was a large-scale incident of serious public disorder men and women were attacked and put in real fear. Numerous weapons were used. Some of them came from a vehicle used by you, [RZ]. The weapons included shovels, sticks, bats, metal bars and victims were kicked whilst grounded.
>
> "the most serious injuries included a broken ankle. He was subjected to a significant beating involving weapons, including when he went to assist a female, who was under attack by lying over her to protect her. Women described being hit with a shovel and put to the floor."
>
> "the pleas were very belated. They were entered on the second day of the trial after the prosecution had opened the case and significantly, a number of prosecution witnesses had attended to give evidence."
>
> "[RZ], you are now 21. You have two irrelevant cautions some years ago and no convictions. I disregard your summary to the probation officer of what you did."

Discussion and analysis

7. The level of protection to which the Appellant is entitled under the Immigration (EEA) Regulations 2016 ('the 2016 Regulations') must be the starting point.
8. Reference is made to the 2016 Regulations, which incorporate into UK domestic law Directive 2004/38/EC, the free movement directive, as the offence was committed prior 11 PM 31 December 2020, and Article 20(1) of the Withdrawal Agreement makes those the relevant provisions.
9. The Secretary of State does not accept the Appellant is entitled to anything other than the lowest level of protection. In the decision to make a deportation order, in relation to this issue, it is written:

> It is not accepted that you have been resident in the United Kingdom in accordance with the EEA Regulations 2016 for a continuous period of five years. You have submitted evidence in the form of payslips and annual HMRC documents however this does not prove that you have been a resident in the UK continuously for 5 years as there are gaps in your proof. It is noted that you have submitted HMRC documents addressed to your parents relating to child support dated 2013 – 2014 in which where (sic) named.

> You are currently 22 years old. You claim that you arrived in the UK on 2000 date with your parents. However, you have not provided any evidence to substantiate this claimed date of arrival.
>
> The first record which the Home Office has of your residence in the UK is a HMRC document addressed to your parents relating to child support dated 2013 – 2014 in which where (sic) named.

10. The Appellant's claim is that he entered the UK as a minor and was in education and has worked during his adult hood, between 2008 and 2022. The Appellant turned 18 on 22 October 2015.
11. The Appellant also relied upon his HMRC employment history, the employment history of his mother from HMRC, in addition to his GP records between 2009-2021 including correspondence to the Appellant from various departments with the NHS.
12. The Secretary of State in the notice of deportation accepted evidence had been provided to show the Appellant was resident in the UK exercising treaty rights in the year 2016, 2017, 2018 – April 2019, but claims he provided no evidence for 2015.
13. There is within the bundle a letter from St Marks Primary School dated 22 February 2021 confirming he was admitted to that school in December 2008, left in July 2009, after which he went to Thistley High School.
14. The Appellant has provided a letter from Thistley Hough Academy confirming he attended school between 7 September 2009 to 19 July 2010 and 29 September 2010 to 13 December 2011. The Appellant stated he then attended Birches Head High School between 10 September 2012 and 18 July 2014, in addition to witness statements from himself, his wife, and others addressing his period of residence in the UK.
15. In his witness statement the Appellant claims that he commenced secondary school in September 2009 but in 2012 transferred to Birches Head High School in Stoke-on-Trent where he remained until he was 16 years of age, after which he went to Cauldron College in Stoke-on-Trent where he remained for two months after which he left in obtained work on a building site as a labourer.
16. The Appellant claims that it was at Birches High School that he met his partner ES with whom he has been in a relationship since 2012. There is no reference to when they met in ES's statement of 8 September 2023 or the schools that she attended in the UK, nor in the witness statement of ES's mother.
17. The witness statement of the Appellant's own mother states she arrived in the UK with her four sons and two daughters. The Appellant was enrolled in St Marks Primary School. Beyond that statement there is no reference to the Appellant's education in the UK.
18. The statement of the Appellant's brother, ZF, states that since the Appellant has been in the UK he has gone to primary and secondary schools and also went to Stoke-on-Trent College in Shelton and that he has worked since he was 18 years of age and worked in factories and warehouses.
19. The Appellant claimed he went to college aged 16 and left after two months to obtain work on a building site which is contradicted by ZF who claims to Appellant worked from 18 years of age.
20. Relevant persons in relation to this appeal, who filed witness statements on the Appellant's behalf are ES, the Appellant's partner, IM, ES;s mother, HZ, the Appellant's mother, FZ the Appellant's brother, and ZR Jnr, the Appellant's son who is now eight years of age. The witness statements are dated 8 September 2023 and have all been taken into account.
21. It was not disputed the Appellant has returned to Slovakia with his family and he discussed with Mr Tan occasional visits there. He stated he has no family

remaining in Slovakia with all the family being in the UK. The Appellant claimed the last time they visited was about 2015 – 2016 when they stayed in a hotel, although Mr Tan put it to the Appellant that in his evidence before the First-tier judge he stated they went in 2018. The Appellant accepted he may have made a mistake and got it wrong, and that if he had relevant documents, he would be able to provide the exact date.

22. The location of the Appellant is a key issue in determining the level of protection.

23. In his bundle prepared for the purposes of this hearing the Appellant has provided a number of documents in support of his evidence in relation to period of residence in the UK. These include Tax Credit award letters from HMRC for the period 6 April 2011 to 5 April 2013, 6 April 2017 to 5 April 2018, 6 April 2018 to 5 April 2019, and 6 April 2019 to 5 April 2020, in the name of his mother, HZ and father, ZB, containing the home address in Stoke-on-Trent. They refer to both Working Tax Credit and Child Tax Credit.

24. The letter for the period 6 April 2011 to 5 April 2012 refers to there being three qualifying children under 16 and one aged between 16 and 20. The letter for the period 6 April 2012 to 5 April 2013 also refers to 3 children aged under 16 and one between 16 and 20. The document for 6 April 2016 – 5 April 2017 refers to two qualifying children under 16.

25. Mr Tan accepted there was evidence that the Appellant was in the United Kingdom from 2008 to 2011 but submitted there was a gap in the evidence from then until 2015. He submitted there was no evidence in relation to the parents for this period and that between June 2011 to 2016 there is also a gap in the Appellant's GP records which is said to be significant as each side of this gap there was significant involvement with the GP. Mr Tan's submission is at the Appellant had not established he was exercising treaty rights for a period of five years such as to warrant my finding he had obtained a right of permanent residence, and therefore had not acquired the right to the highest level of protection.

26. The Appellant's date of birth or when he entered the UK is not disputed. There is also evidence that whilst in the UK he was in education. As a family member of an EU national exercising treaty rights in the UK his right to equal treatment by virtue of Article 24 Directive 2004/38/EC entitled him to the right to access maintenance aid for studying, including vocational training.

27. Mr Tan refer to 2008 which, to 2011, would be a period of three years and not the minimum five years required. At that time he would have been between approximately 11 and 14 years of age. During the period of concern to Mr Tan the Appellant would have been between 14 and 19 years of age.

28. It was not disputed before me that the parents were exercising treaty rights in the UK.

29. Working Tax Credits and Child Tax Credit award for the period 22 July 2016 to 5 April 2017 has also been provided in the names of the Appellant and his partner ES referring to one child under the age of 16, which will be RZ Jnr.

30. A letter from HMRC dated 27 April 2021 provides details transcribed from the National Insurance Recording System for the tax years 2014/15 to 2019/20 which record no employers or benefits recorded for 2014/15 but evidence of employment with a recruitment agency from 2015/16 to 2019/20. A further letter dated 17 October 2022 provides details of the Appellant's employment history for the tax years 2018 to 2019, 2019 to 2020, 2020 to 2021, 2021 to 2022, and 2022 to 2023. There are also statutory sick pay fitness for work notes following back pain as a result of a fall.

31. There is also was in the bundle a Registration Certificate relating to the Accession State Worker Registration Scheme dated 10 January 2011 for

Appellant's mother HZ recording that she commenced employment on 6 December 2010.

32. None of these documents cover the period of concern to Mr Tan.

33. The Appellant's medical records produced as a result of a Subject Access Request for the Appellant refers to a 5 November 2008 entry, a discharge summary report on 30 March 2011, and little recorded activity of a medical nature to 2021. The records do, however, show the prescription of medication from 11 April 2009, through to 6 December 2010, with a gap than to 14 December 2020. There is evidence of a consultation with the GP on 11 February 2009, 6 December 2010, 26 January 2011, a discharge summary/report from University Hospital North Staffordshire Paediatrics dated 30 March 2011, reference to attending a walk-in centre on 10 June 2011, reference to an attempt to contact the appellant describes a failed encounter with message left on an answering machine on 22 January 2011, but then a gap until 14 November 2016 with various related entries thereafter which are not relevant to this particular point.

34. Mr Tan also made reference to the original decision of the First-tier Tribunal which has been set aside. Notwithstanding, it remains as a record of the evidence given by Appellant at that stage of the proceedings.

35. The First-tier Tribunal Judge also refers to deficiencies in the HMRC evidence [32], evidence relating to period of time the appellant had been in the UK, with ES giving evidence that the Appellant returned to Slovakia to play his music and the fact that they had spent months there at times during their relationship [33].

36. The First-tier also referred to family members, that the Appellant's evidence was that his other brothers also face deportation who were, at that time, waiting for their appeals (no doubt arising from the same incident) and that the witnesses who may be best placed to assist his case, his mother/mother-in-law, siblings had failed to attend to give oral evidence.

37. In relation to the nature of protection, Mr Broachwalla claimed the imperative ground had been made out on the basis of the evidence from the school showing the Appellant was in school to 2018.

38. I do not agree it is that clear cut. Despite the First-tier Tribunal Judge having identified differences between the various account concerning the schools and in relation to the level of protection, there still remains limited evidence to support the Appellant's claim in relation to his period of time in the UK.

39. The submission by Mr Broachwalla that there was nothing to show the Appellant was not in the UK is, in effect, reversing the burden of proof, as it is for the Appellant to prove that he was for the requisite period. Although it was submitted it was more likely than not the Appellant was in school during the missing periods, submissions are not evidence.

40. In relation to the clear gap in the medical evidence, Mr Broachwalla submitted that between 2012 and 2016 the Appellant was a child, healthy, and not likely to engage with the medical services despite the clear indication of regular consultations both prior to and after the period in question, as identified by Mr Tan.

41. The only evidence to corroborate what is claimed in relation to the Appellant's time in the UK is the witness evidence of he and his family members together with that referred to above.

42. The First-tier Tribunal Judge was found by the Panel of the Upper Tribunal to have materially erred in law in relation to your assessment of the appellant's time in the UK this matter where they write at [14] – [17]:

> 14. Ground 5 mounts a reasons and/or rationality challenge to the Tribunal's finding that A is not entitled to any enhanced protection under regulation 27(4). We have

concluded that the ground is made out. The Judge's approach contains a clear legal error. At para 39 that the Judge states that A turned 18 on 22 May 2015 and so cannot rely on his mother's status after that to establish that he was exercising treaty rights. That statement is wrong in law, as under Reg 7, direct descendants such as A remain family members of their parents until they reach 21. Hence the Judge has adopted an incorrect legal approach.

15. We also have concerns about the Judge's analysis of the evidence. The Tribunal appears to have placed significant weight on the fact that the A is himself hazy about the exact date that he arrived, being undecided about whether it was 2008 or 2009. He had managed to obtain a letter from his primary school confirming that he was admitted to the school in December 2008 and left in July 2009. In drawing adverse inferences from the A's own "vague and contradictory" recollection the Tribunal has not considered that at the relevant time A was a young child who had just arrived in a strange country. Nor has the Judge considered that A was giving evidence about events some 13 or 14 years ago. Finally, the documentary evidence concerning school attendance indicates that A arrived in late 2008, making uncertainty over whether he arrived in 2008 or 2009 all the more understandable. It is in our view unsurprising that he is unable to give an accurate account of his movements at that time, and that a safer route would be to rely on the unchallenged documentary evidence from the schools, and indeed the HMRC record which shows A's parents to have registered as tax payers in the UK in 2008.
16. The Judge also fails to recognise and resolve a conflict in the evidence about when A began attending Thistley Hough High School (Thistley). At para 38, the Judge refers to there being a gap between him leaving primary school in July 2009 and starting Thistley in September 2010. While the letter from Thistley states A started in 2010, both A's evidence and the letter from St Mark's states that A started attending that school in 2009. The Judge fails to note the evidence from St Mark's on this issue.
17. Further, the Judge claims at paras 23 and 38 that A's statement states he went to St Mark's C of E primary school from 2008 until 2009 when he went to Thistley from 2009-2012. He then went to Birches Head High School. The Judge then refers to a letter from Thistley which states he attended from 29.9.2010 until 13.12.11 and goes on to state that this differs from A's account of when he went to Thistley because he was not there in 2012 as claimed. We do not accept that A's account of when he left Thistley differs from the information on the letter from the school because A's statement does not give a date for when he left Thistley. It simply states that he started Thistley in 2009 and then Birches Head High School in 2012. Given the school letter states that he left Thistley on 13 December 2011, just before the Xmas holiday, it is plausible if not likely that A would have left Thistley in 2011 and started at Birches Head in 2012 as claimed. So there is no contradiction on that point between A's statement and the letter from Thistley. These issues are significant as the Judge rejects A's evidence about his uncorroborated school attendance from 2012 onwards on the basis of his own unsatisfactory evidence. However, as shown, the Judge's reasoning in relation to the matters identified is inadequate. Accordingly we find ground 5 is also made out and we set the decision aside in its entirety.

43. Mr Tan was concerned about the period 2011 to 2016, claiming there was no evidence to corroborate the appellant's presence in UK in this period, but the decision to deport specifically refers to the Home Office having a record of his residence in relation to a child support application dated 2013-2014. There is no evidence the application was treated as fraudulent or that the payment was not made. Although the decision-maker was not satisfied that 2013-2014 evidence corroborated the claim of being in UK since 2008 there was other evidence that I have referred to above covering that period.
44. Combining the additional evidence made available, including replies given to questions put in cross examination, findings in the error of law decisions that the was no contradiction in relation to the Appellant's assertions concerning his education, which goes directly to the point relied upon by Mr Tan concerning the

period 2011 to 2016, I find the Appellant has established on the balance of probabilities he was continually in the UK as a qualified person, a dependent family member of his parents who were exercising treaty rights in the UK, under the age of 21, and as a worker for a continuous period of at least five years.

45. Although Mr Tan submitted the evidence in relation to the exact dates is not as clear as one would prefer it to be, the letter from St Marks Primary School specifically refers to the Appellant attending that school from 2008 to 2009. That evidence clearly corroborates the fact he arrived in the UK in 2008, which ties in with the date provided by Mr Tan. As he had acquired five years continuous residence under EU law between 2008 and 2013, at the date of his imprisonment he had acquired 10 years continuous residence in the UK, 2008 – 2018, and is, therefore, entitled to the higher level of protection against deportation under EU law.

46. Rather than live a lawful life in the UK, however, the Appellant chose to get himself involved in the violent disorder resulting in his being imprisoned on 23 September 2019. It is not disputed that time in prison is not regarded as legal residence for the purposes of acquiring the right to permanent residence, but the Appellant had already acquired this under EU law.

47. In some circumstances, depending on the specific facts, a period of imprisonment can break a person's links to the UK but in this case insufficient evidence has been provided by the Secretary of State to establish the period of imprisonment broke the integrity of his links in the United Kingdom that had been accrued previously. Those ties being in education, employment, with his family, his partner, and day-to-day society in general outside extensive familial and societal links with persons of the same nationality or language which the Regulations say cannot amount to integration.

48. I accept the one-off event for which the Appellant was convicted, an offence of serious violence, was not consistent with integration in respect and recognition of the need to follow the laws of the United Kingdom, but other than referring to the alleged gap between 2011 and 2016 nothing further was said on behalf of the Secretary of State sufficient to establish the integrity of links that were formed had been broken as a result of the period of imprisonment, compared to the evidence relied upon by the Appellant to the contrary.

49. Regulation 27 of the 2016 Regulations reflects the content of Directive 2004/38/EC which provides criteria governing the expulsion of the nationals and their family members who are settled in other Member States.

50. Regulation 27 can be summarised as follows:

27(1) the decision to deport must, in this case, have been taken on the grounds of public policy and/or public security.

27(5)(a) if grounds of public policy and public security are demonstrated, the decision must nonetheless comply with the principle of proportionality;

27(5)(b) the decision must be based exclusively on the personal conduct of the appellant;

27(5)(c) the personal conduct of the appellant must represent a "genuine, present and sufficiently serious threat" affecting one of the fundamental interests of society;

27(5)(d) matters isolated from the particular facts of the case and/or generalised considerations do not justify a decision to deport;

27(5)(e) a person's criminal convictions do not in themselves justify the decision;

27(6) a wide variety of factors must be taken into account, including age, health, length of residence, and social and cultural integration;

27(8) public policy and public security requirements involve consideration of the fundamental interests of society, including in particular the considerations set out in Schedule 1 to the Regulations.

51. There is also a requirement for such decisions to take account of the person's age, state of health, family and economic situation, length of residence in the UK and the extent of the links with the country of origin.
52. It is important not to lose sight of the fact that the burden is upon the Secretary of State to discharge the burden of showing the Appellant presents a genuine, present and sufficiently serious threat to the fundamental interests of society and that the decision to deport is in accordance with the 2016 Regulations and, if so, whether the decision would be proportionate in all the circumstances.
53. I turn at this point to one aspect which was discussed in the error of law finding, which is material to whatever level of protection an individual has, namely the provision of regulation 27(5)(c) that the personal conduct of an appellant must represent a "genuine, present and sufficiently serious threat" affecting one of the fundamental interests of society. This, in effect, means that there must be evidence of a real risk, which need not be imminent, that a person is likely to reoffend. I accept that preventing crimes of violence relates to a fundamental interest of society, namely the protection of members of society from the same.
54. The evidence relating to risk of reoffending is out by the Appellant and his family members who in their statements state that he will not reoffend in the future. There is also an OASys report dated 30 March 2021, which is the only professional assessment in relation to risk of reoffending.
55. The report confirms the Appellant's actual release date from custody of 12 June 2020 and the applicable license requirements which include (a) the need to comply with any requirement specified by the supervising officer for the purposes of ensuring that he addressed his alcohol problems that the Alcohol Workbook at the Probation Office at Stoke-on-Trent, (b) to comply with any requirement specified by the supervising officer for the purposes of ensuring that he address his anger problems at the Anger Management Workbook at the Probation Office in Stoke-on-Trent, and, (c) to comply with any requirement specified by his supervising officer for the purpose of ensuring he addresses his violent offending problems at the Anger Management Workbook/Threshold Workbook at the Probation Office in Stoke-on-Trent.
56. Having set out the circumstances of the offence for which the Appellant was convicted it is noted at [2.6] that the Appellant does recognise the impact and consequences of his offending on the victim, community and wider society.
57. At [2.7] that five others were involved, and that peer group influences were a relevant factor, in relation to which it is written: "*there are five co-accused all of which are close or extended family members of RZ. This was a mass assault with numerous victims, but there is no indication in the CPS documents that RZ led the assaults. Although RZ states that comments made to his partner was the cause of the incident*".
58. In relation to why the event happened, the trigger is identified in the report as being alleged unwanted comments made to RZ's partner by one of the victims and his family members becoming involved in a brawl with the victims. Influences are said to be excessive alcohol use, peer influence, sense of loyalty to his family and partner, and in relation to motivation to punish the victim for unwanted

comments allegedly made to RZ's partner and for allegedly attempting to assault him/assaulting his family, possible lack mentality.

59. The claim by RZ that he was defending his partner and family from the victims is said to be contrary to CPS documents indicating that the violence was started by RZ and his family – [2.11].

60. There is also reference to RZ having previous offences; in 2015 Driving whilst disqualified, I 2017 Drive whilst disqualified, and in 2018 criminal damage, threatening and abusive words, and driving whilst disqualified.

61. In relation to the identification of the offence analysis issue in relation the factors contributing to the risk of offending and harm, at [2.14], it is written:

> Physical injuries to multiple victims, mass disorder, use of weapons, but no established pattern of violent offending on RZ's part.
>
> The use of weapons in the assaults is extremely worrying. CPS documents indicate that RZ went to his brother, R's car to retrieve the weapons from the boot before commencing the assault. This evidences intent and may indicate that some member of RZ's family are well versed in violence and the use of weapons. It is potentially more by chance than design that more serious injuries were not inflicted upon the victims.
>
> Peer/family influences, drinking to excess, perceived sense of loyalty to his family, use of weapons, thinking skills, anger management and victim empathy are the areas for intervention.

62. Section [6.10] concerning identify relationship issues contributing to the risk of offending and harm, records that RZ's relationship with his current partner is found to be supportive but in relation to other family it is written:

> "It is of concern that RZ committed the current offence in the company are five other family members, including his brothers, brother-in-law and sister-in-law.
>
> It would appear that they were influenced by each other in risk taking behaviour. It seems they did not try to encourage each other to leave the scene and the situation escalated. There was a metal bar, cricket bat and a spade in the boot of R's car which they used to assault the victims. It is difficult to believe that these objects were placed in the boot for any other reason than to use as weapons should the need arise. They acted as a gang and beat other Slovakians, both men and women, from a different area of Stoke-on-Trent.
>
> Due to the above Relationships are linked to offending behaviour and serious harm."

63. There is within the report, an indication that RZ acknowledges an issue in his personality that would have contributed to the offending behaviour where it is written at [7.5]:

> "RZ's offence indicates that he is capable of reckless and risk-taking behaviour. It is also evident that in certain situations, mainly when he is under the influence of alcohol, he can be influenced by criminal associates (certain family members) to behave in an inappropriate way (violence, pack mentality). Given this his lifestyle and associations are assessed as being linked to offending behaviour and serious harm".

64. The author of the report also notes the index offence was committed when RZ was under the influence of alcohol and that he himself had acknowledged that he is more prone to physical violence when he is under the influence of alcohol and with certain family members. It is noted that all bar one of his previous offences had been committed when under the influence of alcohol. RZ advised the author of the report that he is a social drinker who only consumes alcohol when he goes

to parties etcetera, which is not very often, and that he intends to stop binge drinking due to the negative effect it can have on his behaviour - [9.5].

65. At [11.10] the author of the report finds that the fact RZ became involved in the offences when he was intoxicated, he did not like the way one of the victims spoke to his partner, shows misguided loyalty to other family members, and failure to resolve the conflict in an appropriate manner, resulting in his use of violence and weapons, which showed a deficiency in his thinking skills, problem-solving skills and conflict management/temper control.

66. At [12.8] it is written that the offence indicates RZ holds some pro-criminal attitudes, i.e. use of violence and weapons to resolve conflict, although he has expressed remorse for his part in the offence stating that “it won’t happen again”; but that he also expressed little empathy for the victims of the offence. RZ indicated that he was keen to comply with this license and rehabilitation process.

67. In the section of the report setting out the assessment of Risk of Serious Harm Summary (Layer 3), those at risk are identified as being the general public, adult males and females, of no specific age or ethnicity, based upon RZ’s current offence of violent disorder, although it is noted he has not verbalised any threat or ill will towards the victims of the offence – [R10.1].

68. The nature of the risk is said to be physical violence including kicking, punching and the possibility of use of a weapon and the threat of violence notwithstanding the emotional and psychological harm which such behaviour causes – [R10.2].

69. In relation to when the risk is likely to be the greatest, it is said that is when RZ is intoxicated, not in control of his emotional management, is with certain pro-criminal members of his family, feels the need to protect loved ones, has access to weapons, as a result of which he uses distorted thinking skills to solve the problem and fails to think of pro-social conflict resolution skills. Risk is not considered immediate due to the restrictions of his licence, immigration bail restrictions, the fact RZ has expressed remorse for his offending behaviour, states he does not want to go back to prison or to be deported, has expressed a wish to comply with probation and his licence, wants to support his partner and child, advises he will not be binge drinking in the future, and is going to avoid certain members of his family – [R10.3].

70. The assessment of risk at [10.6] is that RZ poses a low risk to children in the community and in custody, a low risk to known adults in the community and in custody, a low risk to staff in the community and in custody, a low risk to prisoners in custody, a medium risk to members of the public in the community but a low risk to them in custody.

71. Low risk of serious harm is classified as being that the current evidence does not indicate likelihood of serious harm. Medium risk of serious harm is classified as there being identifiable indicators of risk of serious harm, that the offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse.

72. A letter from the Probation Service based in Stoke-on-Trent dated 16 March 2021, written by RZ’s offender manager, confirms that following his release from custody on 7 May 2020 RZ complied fully with his licence and attended all probation supervision appointments as directed and completed offence focused work dealing with alcohol awareness, anger management, thinking skills and victim work.

73. It is also relevant to note that the OASys provides a percentage chance of reoffending over a 1 a 2 year period and that there is no evidence of any such reoffending today, albeit that RZ is aware of the Secretary of State’s desire to

deport him from the UK and the existence of these proceedings which will act as a deterrent in any event.

74. The predicted score percentage of risk category are said to be:

	1 year %	2 year %	Category
OGRS3 probability of proven reoffending	22	37	Low
OGP probability of proven non-violent reoffending	12	20	Low
OVP probability of proven violent type offending	12	21	Low

75. It also recorded in the OASys report that RZ is both very motivated and very capable of undertaking rehabilitation work as required, as is demonstrated by the letter from his Offender Manager.

76. I accept that the evidence shows that in the Appellant's day-to-day life there is no evidence that he is likely to reoffend. The issues that were identified as trigger points for reoffending did not arise and he has, in effect, got on with a normal life including with his partner and his son.

77. The evidence in relation to risk of reoffending is now over three years old. The percentage calculation referred to above was specifically focusing upon 2022 and 2023. At the date of this hearing, in August 2024, the actual rate of reoffending has been 0%.

78. The report does however identify concerns in relation to the Appellants thought process. He left school without qualifications but is clearly motivated to work and to be able to remain in the UK as a normal citizen. There is an indication in the OASys report in relation to his ethnic category that he is White – Gypsy or Irish Traveller. The Appellant is clearly not an Irish Traveller but Slovakia is a country with a high number of Romani in terms of population albeit in Slovakia it is only since 1999 that the gypsies have been able to call themselves Roma.

79. The Appellant's mother stated the family moved to the UK as they had nothing in Slovakia and were in search of a better life and education for the children. It is not disputed that Roma people suffered serious discrimination in Slovakia including in education and employment, and it may have been the norm for such groups to resort to violence if issues of family honour or matters arose that offended them. Whilst that may be the norm in some societies it is not acceptable within the UK.

80. The Appellant's own admission is that he is an uneducated individual possibly from this ethnic group. To him it was his loyalty to his family rather than the law, and the fact his reaction was hindered by lack of adequate thinking skills and excessive alcohol, which led to his offending. If such a situation was to arise again there may be a real risk to members of the public as highlighted by such risk being assessed as a medium risk by the author of the OASys report.

81. However, the letter from the Offender Manager indicates the Appellant has undertaken the work required as a term of his licence. If the appellant takes what he has been taught on board, and engages with it, that may be sufficient to avoid any repeat of such an incident in the future although I note there has been no reclassification of the risk of harm. I therefore find on that basis the personal conduct of the Appellant does represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society as required by Regulation 27(5)(c).

82. However, I find there is a failure by the Secretary of State to properly analyse the issue of risk of reoffending. In a notice of deportation it is written:

> "You have no means to support yourself therefore, it is highly likely that you would resort to reoffending in order to support yourself.
>
> All the available evidence indicates that you have a propensity to reoffend and that you represent a genuine, present and sufficiently serious threat to the public to justify your deportation on grounds of public policy."

83. I question whether this is a "cut-and-paste" job as 'means of support' bears no relationship whatsoever to the facts of the offence or any indicator of the reasons for the offence or propensity to reoffend in the future. The reasons in relation to risk of reoffending provide no basis to enable me to find that for the reasons advanced by the Secretary of State this is made out.
84. Notwithstanding, it is important to consider the impact of the level of protection of a person who has right of permanent residence under regulation 15 and who has resided in the United Kingdom for a continuous period of at least 10 years prior to the relevant decision.
85. The leading authority on the case is the decision of the Court of Justice of the European Union in B v Land Baden- Wurttemberg (C-316/16) [2018] 2 W.L.R 1035 which was considered jointly with FV(Italy) v Secretary of State for the Home Department (C-424/16), a preliminary reference from the UK Supreme Court [2017] 1 C.M.L.R 3. The CJEU held:

- The right permanent residence is a prerequisite of enjoying the highest status of protection against deportation;
- Have a 10 year period of residence for the purposes of regulation 27(4)(a) - it is necessary to conduct an overall assessment to determine whether the individuals integrity of links have been broken;
- date of assessment is the date of the expulsion decision.

86. It was found the relevance of being entitled to the highest level of protection is that the "imperative ground" is considerably stricter than the middle "serious ground" and must be interpreted strictly [19] and [23], and that the concept of "imperative grounds of public security" presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words "imperative grounds" [20].
87. In FV (Italy) v Secretary of State the Home Department [2013] 1 W.L.R. 3339 the Court of Appeal applied the test and found "no real prospect of the tribunal finding "imperative grounds of public security" to justify deportation "in circumstances where the appellant had committed a serious offence of violence against a person justifying a sentence of eight years imprisonment who had also had committed other offences" [98].
88. The key offence committed by the Appellant in this appeal is very specific, relating to the circumstances that occurred at the relevant time, for the reasons set out in the OASys report. The decision to deport must be based solely upon the offence that led to his imprisonment.
89. I accept that the thrust of the Directive appears to suggest that whilst it should, the very least, be difficult to expel an EU citizen on the basis of crime of dishonesty, violence is a different matter.
90. The need to establish a "present threat" can be taken to refer to the possibility of the threat arising at some point in the future, indicating the test is looking forward rather than backward.

91. In FV (Italy) the appellant was born on 18 December 1957, arrived in the UK on 3 March 1985 aged 27, married, had five children, and brought a property in joint names. Whilst his wife worked as a teacher the appellant cared for the children but he left the marital home in 1998 and in May 1999 moved into accommodation with Mr EM with whom he had a turbulent relationship.
92. The offence bears some similarity to that in the current appeared albeit that it was far more serious as recognised by the sentence passed down. On 1 March 2021 FV killed EM. Both men had been drinking, a fight occurred, and FV struck EM at least 20 blows to the head with weapons including a hammer, and then strangled him with the flex from an iron.
93. FV was convicted by a jury at the Central Criminal Court although the charge of murder was reduced to manslaughter by reasons of provocation. He was sentenced to 8 years imprisonment on 2 May 2020.
94. It is also the case that FV had previous convictions for assault on police, driving a motor vehicle whilst unfit through drink or drugs, and driving whilst disqualified.
95. The test that arises from the judgements is that the “imperative ground” test presents a very high threshold, a compelling risk to public security needs to be demonstrated, although that did not necessarily mean a risk to national security.
96. I find the Secretary of State has not established that even if the Appellant re-offends as he has done previously, for which I find is a real but remote risk, that the higher threshold will be reached on the facts of this appeal.
97. The higher level of protection means the Secretary of State has not established on the facts that the decision complies with the principles of proportionality as understood in EU law terms.
98. For the sake of completeness, had it been necessary to consider the other aspects of the Regulations I would have found as follows.
99. The decision is based exclusively on the Appellants personal conduct (Regulation 27(5)(b)).
100. That matters isolated from the particular facts and/or generalised considerations were not considered in relation to the decision to deport (Regulation 27 (5)(d)) and that notice has been taken of the fact the Appellants convictions do not in themselves justify the decision (Regulation 27(5)(e)).
101. I accept the fundamental interests of society demand that violent offending is to be prevented and squashed at every opportunity.
102. In relation to Schedule 1 to the 2016 Regulations, I find as follows:

    (a) Integration - whether a person is integrated is a question of fact. A person can have the majority of their links within the same ethnic group within the UK and still be integrated. A significant degree of wider cultural societal integration being present before a person can be regarded as integrated appears very restrictive but, in this case, the Appellant clearly has wider integration through working in the UK, with his work friends, albeit that the majority of his time appears to be with his family.
    (b) The longer the sentence or the more numerous convictions the greater the likelihood and individuals continued presence in United Kingdom presents a genuine, present and sufficiently serious threat affecting the fundamental interests of society - that is noted as is the sentence handed down to the Appellant but specific finding have been made in relation to whether he presents a genuine, present, and sufficiently serious threat affecting a fundamental interest of society.
    (c) Little weight being attached to the integration of an EEA national if the alleged integrating links were formed around the same time as (i) the commission of a criminal offence, (ii) an act otherwise affecting the fundamental interests of society, or (iii) EEA national family member of an

EEA national was in custody, is noted, but on the facts of this appeal the Appellant's integrative links were formed prior to his period of imprisonment and were not found to have been sufficiently broken during that time.

(d) Removal from the UK of an EEA national who is able to provide substantive evidence of not demonstrating a threat/likely not to be proportionate - that is because if a person is able to demonstrate they do not pose a threat they cannot be deported. They will therefore not pose a real risk as is required under the Regulation.

103. Having stood back from the facts as a whole I find the Secretary of State has failed to discharge the burden upon her to the required standard to show that the Appellant's deportation from the UK is lawful and that to do so will breach his Treaty rights.
104. There are two further subsidiary comments I wish to make. First, that this decision is fact specific relating to this Appellant and does not create a precedent/ guidance/or authority in relation to any other appeals concerning other members of the family who were involved in the violent disorder.
105. The second point is that the Appellant appears to be genuine in his desire to avoid further problems in the future, as recorded in the OASys report, and has to date done so. If he offends in the future, as such offending will occur after 11 PM 31 December 2020 he will not have the protection under EU law that he has benefited from on this occasion, which makes it much harder to deport a person from the UK, as any appeal against a deportation order will be considered on the basis of domestic law. That does allow the full extent of his previous offending history to be taken into account and it is likely that if there are any further acts of violence or offences as a result of excess consumption of alcohol or otherwise, it is more likely than not that he will be deported from the UK.
106. I do not need to consider Article 8 ECHR but I am satisfied that the Appellant is in a genuine subsisting relationship with his partner and has a genuine subsisting relationship with his son who wants his father to remain in the UK so they can continue to live as a family unit which is in the child's best interests. There was no need to explore whether it will be unduly harsh for any family member to return to the Appellant's own country and on the evidence that I have seen, if this issue was explored in detail, it may have been found in the negative. As I say, that is merely a view rather than a finding.
107. The Appellant's rehabilitation appears to have been very successful as evidenced by the lack of further offending. It is in his best interests and those of the family members that remains the case in the future.

Notice of Decision

108. Appeal allowed.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 September 2024