IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006177
First-tier Tribunal No: DA/00229/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 20 March 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Secretary of State for the Home Department

Appellant

and

Nicolae Cristu
(NO ANONYMITY DIRECTION MADE)

Respondent

REPRESENTATION

For the Appellant: Ms, R Arif, Senior Home Office Presenting Officer
For the Respondent: No appearance

Heard at Birmingham Civil Justice Centre on 28 September 2023

DECISION AND REASONS

INTRODUCTION

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Cristu. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Cristu as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Romania. On 12 February 2020 he was served with a Notice that he may be liable to deportation pursuant to the Immigration (European Economic Area) Regulations 2016 ("the 2016

Regulations"). The appellant was informed that the respondent considered the appellant's deportation may be justified because between 3 January 2020 and 28 January 2020 he had been convicted of two offences in the United Kingdom, that were committed within three months of entering the United Kingdom on 26 November 2019.

3. The respondent noted the appellant was convicted on 3 January 2020 at Cambridgeshire Magistrates Court of two counts of common assault. The offences were committed on 2 January 2020. The appellant was sentenced to 4 months imprisonment, to pay compensation of £100 and a restraining order was imposed. It appears that these offences were committed within the context of domestic abuse. The restraining order forbids the appellant from having contact with his former wife or his 14-year-old daughter. The order did not cover his infant son.

4. The respondent also noted that on 28 January 2020 at Cambridgeshire Magistrates Court the appellant was convicted of theft. He committed that offence on 16 December 2019 and was sentenced to 2 months imprisonment. The respondent provided the appellant with an opportunity to set out any reasons he relies upon as to why he should not be deported. The appellant did not respond.

5. On 1 May 2020 the respondent made a decision to make a deportation order. The respondent concluded the appellant's deportation is justified on grounds of public policy in accordance with regulation 23(6)(b). The respondent concluded the appellant poses a genuine, present and sufficiently serious threat to the interests of public policy if he were to be allowed to remain in the United Kingdom and that his deportation is justified, proportionate and in accordance with the principles of Regulations 27(5) and (6).

6. On the 17August 2020 the appellant was released on immigration bail, having served the custodial part of his sentence. However, he appears to have then breached the terms of the restraining order and was recalled to prison, still being subject to licence conditions. He was subsequently convicted of breaching the terms of the restraining order on 12 November 2020 and sentenced to a further 4 months immediate imprisonment. He was then served with a deportation notice on 13 December 2020 and was subsequently deported.

7. The appellant's appeal against the respondent's decision to make a deportation order was listed for hearing before First-tier Tribunal ("FtT") Judge Rose on 15 November 2022. The appellant was neither present nor represented. The judge dealt with the absence of the appellant as a preliminary issue and considered whether it was appropriate, in the circumstances, to proceed with the hearing. The judge was persuaded that it was both fair and proportionate to proceed for reasons set out in paragraphs [5] and [6] of the decision. The judge was not persuaded that there is even a reasonable likelihood that the appellant poses a sufficiently serious threat. The judge allowed the appellant's appeal for reasons set out in paragraphs [12] to [20] of the decision.

THE GROUNDS OF APPEAL

8. The respondent advances three grounds of appeal. First, the respondent claims that in reaching the decision, the judge failed to identify and/or appreciate that having only arrived in the UK in 2019, the appellant was only entitled to the lowest level of protection, that is, whether the appellant's removal is justified on grounds of public policy, public security or public health and the deportation complies with the principles set out in Regulation 27(5). The respondent claims that at paragraph [13] the judge states he considered the appellant's conduct alone, and at paragraphs [20] to [21] the judge erroneously concluded that he was not persuaded there is even a reasonable likelihood that the appellant poses a 'sufficiently serious threat' suggesting the judge had in mind the test applicable in respect of those with a right of permanent residence where a decision may not be taken except on 'serious grounds of public policy and public security'. Second, the respondent claims the judge referred to the evidence before the Tribunal about the appellant's offending, convictions and the sentences imposed but "distracted himself with the absence of the probation service assessment of the appellant". It is said that in reaching his decision the judge gave undue weight to the absence of evidence from the probation service and speculated about the availability of evidence in the form of a pre-sentence report or an OASys assessment. Finally, the respondent claims the judge adopted the wrong standard of proof. Furthermore, the judge referred to Regulation 27(6) of the 2016 Regulations and found that none of those factors support the appellant staying in the UK. The respondent submits the appellant did not engage with the appeal, and there was no evidence of rehabilitation. The respondent claims the appeal should have been dismissed.

9. Permission to appeal was granted by First-tier Tribunal Judge Curtis on 30 November 2022. Judge Curtis noted the reference made by Judge Rose to his having "applied the lower standard of proof, i.e. reasonable likelihood, per Bah (Liability to deportation) [2012] UKUT 196.." Judge Curtis said:

> "3. Bah, though, was a case involving a Turkish national and was not an appeal against deportation under the Immigration (EEA) Regulations 2016 (or its 2006 predecessor) as in the current appeal (although it did provide guidance in respect of deportation appeals not falling within s.32 of the UK Borders Act 2007, as is the case in the present appeal). The Judge does not explicitly set out who shoulders the burden of proving that the Appellant, for instance, represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (reg. 27(5)(b) of the 2016 Regulations).
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> 4. As Lady Paton confirmed in SA v SSHD [2018] CSIH 28 (reaffirming the Court of Appeal in SSHD v Straszewski [2015] EWCA Civ 1245) the burden of proof in an appeal under the 2006 Regulations (which can be followed through to the 2016 Regulations) lies with the Respondent.
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> 5. In terms of the standard of proof, whilst the Judge relies on Bah, it seems to me that the Upper Tribunal's reference to the *"standard of a reasonable degree of likelihood"* was limited to the assessment of future risk

based on past conduct (see [64]). That particular reference does not make it into the headnote which provides guidance, in terms, as to the applicability of the civil standard. For instance, in head note i)a. guidance is provided that the Judge must consider whether the person is liable to be deported on the grounds set out by the Respondent which will require an examination of *"whether the material facts alleged by the Secretary of State are accepted and if not whether they are made out to the civil standard flexibly applied"*. In [77] of the judgment it is also states that *"it is plain therefore that the panel applied at least the civil standard"*.

6. Whilst I recognise that if the Judge was not satisfied that it was reasonably likely that a certain state of affairs existed (vis a vis the risk of future relevant conduct) he is unlikely to have been satisfied to the higher civil standard that that risk existed, I also bear in mind that the Respondent in this application only has to demonstrate it is arguable that an error of law has occurred.

7. It seems to me at least arguable that the application of the lower standard of proof to the risk of future relevant conduct, in the absence of confirmation that the higher civil standard applied to the remaining features of the case, would not stand up to scrutiny in the light of SA and Straszewski. Particularly in light of the fact that Bah did not involve an appeal under the 2006 or 2016 Regulations.

8. Give the above, and given the absence of any reference to the burden of proof, it seems to me at least arguable that this created a degree of confusion (termed in the grounds as a failure "to exercise due care and attention") that would warrant permission to appeal being granted in this appeal.

9. Ground 3 is arguable and I make no discrete findings in relation to grounds 1 and 2."

THE HEARING OF THE APPEAL BEFORE ME

10. The appellant did not attend the hearing of the appeal before me. As was the case before the FtT, the appellant was neither present nor represented. I note the appellant had been deported back to Romania before the hearing before the FtT, and as was the position before the FtT, his current whereabouts are unknown and there are no contact details for him. No attempt has been made by the appellant since he was deported to either contact the respondent or the Tribunal, to provide his new address and contact details.

11. The appellant succeeded in the appeal before the FtT and I have considered both the fairness of conducting these proceeding in the appellant's absence and the proportionality of adjourning the proceedings. In the absence of any way in which the appellant might be contacted to ensure that he is aware of the decision of the FtT and can participate in the appeal before the Upper Tribunal, there is nothing to be gained by an adjournment. It is therefore fair and proportionate to continue to deal with the appeal in the appellant's absence.

12. Ms Arif adopts the respondent's grounds of appeal and maintains the judge applied the wrong test. She submits the appellant had been in the UK for a short period and had not acquired permanent residence. The issue for the judge was therefore whether the appellant's removal is justified on grounds of public policy, public security or public health in accordance with Regulation 27; Regulation 23(6)(b). She submits that in reaching his decision the judge had sufficient evidence concerning the appellant's offending history and convictions. She submits that in the short time the appellant had been in the UK, he had demonstrated a propensity to offend. Ms Arif submits that in considering the issue before the Tribunal the Judge erroneously applied the lower standard of proof (i.e., a reasonable likelihood), and irrationally concluded that it is not reasonably likely that the appellant poses a sufficiently serious threat to one of the fundamental interests of society.

DECISION

13. It is useful to begin with the EEA Regulations 2016 that applied. The appellant arrived in the UK on 26 November 2019. He had not acquired permanent residence. Regulation 23(6)(b) provides that an EEA national who has entered the United Kingdom may be removed if the respondent has decided that the person's removal is justified on grounds of public policy. Regulation 27 as far as it is material to this appeal provides:

> "27.—(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
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> …
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> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—
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> (a) the decision must comply with the principle of proportionality;
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> (b) the decision must be based exclusively on the personal conduct of the person concerned;
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> (c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
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> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
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> (e) a person's previous criminal convictions do not in themselves justify the decision;
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> (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.
>
> (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

…

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.)."

14. It is also convenient to set out Schedule 1 of the 2016 Regulations as far as it is relevant to this appeal.

"The fundamental interests of society

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

…

(b) maintaining public order;

(c) preventing social harm;

…

(g)

(j) protecting the public

…"

15. To justify interfering with the appellant's rights to free movement and residence in the UK, the respondent must establish the appellant's removal is justified on grounds of public policy and public security. As set out in Regulation 27(5)(c), the appellant cannot be removed unless his personal conduct represents "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct and that the threat does not need to be imminent". Paragraph 1 of Schedule 1 confirms that the EU Treaties do not impose a uniform scale of public policy or public security values and member States enjoy considerable discretion, acting within the parameters set by the EU Treaties to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time. The application of paragraph 1 to the United Kingdom is informed by what follows at paragraphs 2 to 6 of Schedule 1.

16. I reject the claim made by the respondent that the judge applied the wrong test. At paragraph [9] of his decision, the judge quite property noted that on the appellant's immigration history, this is not a case to which either serious or imperative grounds apply. At paragraph [12] he noted the respondent's case is that the appellant's deportation is justified on the grounds of public policy and/or public security. The judge plainly recognised the appellant was only entitled to the lowest level of protection. That is, whether the appellant's removal is justified on grounds of public policy, public security or public health in accordance with Regulation 27. The judge, again quite properly, said at

paragraph [12] that the starting point is to consider those factors set out in Regulation 27(5). It was in that context that the judge referred, at paragraphs [14] to [21], to the question whether the personal conduct of the appellant represents a genuine, present and sufficiently serious threat. That is a relevant factor identified in Regulation 27(5)(c). If there was any doubt it is clear from the opening sentence of paragraph [14] that the judge was considering whether the appellant's conduct represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society. When the decision is read as a whole, the judge was not therefore considering whether the appellant is entitled to the medium level of protection applicable to an individual who has acquired a permanent right of residence. The judge was not considering whether the deportation is justified on serious grounds of public policy and public security.

17. I accept however that the judge erroneously applied the lower standard of proof (i.e. reasonable likelihood). In *Bah (EO (Turkey) - liability to deport)* [2012] UKUT 00196, the Upper Tribunal said that when considering whether the person is liable to be deported on the grounds set out by the Secretary of State, the judge will normally examine, *inter alia,* whether the material facts alleged by the Secretary of State are accepted and if not, whether they are made out to the civil standard flexibly applied. The reference to 'a standard of reasonable degree of likelihood' in paragraph [64] of the decision was in respect of the assessment of future risk based on past conduct in the context of national security. At paragraph [63] the Tribunal had said:

> "…we consider that any specific acts that have already occurred in the past must be proven by the Secretary of State, and proven to the civil standard of a balance of probability. The civil standard is flexible according to the nature of the allegations made, see House of Lords in Re B [2008] UKHL 35, and a Tribunal judge should be astute to ensure that proof of a proposition is not degraded into speculation of the possibility of its accuracy."

18. At paragraph [65] the Tribunal went on to say:

> "We summarise our conclusions as follows. We are satisfied that where the Secretary of State seeks to exercise the power to make a deportation decision against a person who is not a British citizen or otherwise exempt under the Immigration Acts, she must first identify the factual basis for the exercise of the power in the decision letter or amplified reasons for the decision; second, where the factual basis is contested she must satisfy the Tribunal of the factual basis on the balance of probabilities. Third, any material relevant to meet that standard may be received by the Tribunal whether it is hearsay or a summary of information held by others, if it is supplied in time and in accordance with case management directions but the weight to be attached to such material will depend on its nature, the circumstances in which it was collected or recorded, the susceptibility of the informant or original informant to error, and the extent to which the appellant is able to comment or rebut it."

19. The question for me is whether any error as to the standard of proof adopted by the judge is material to the outcome of the appeal. If the judge was not satisfied that the appellant's conduct represents a

genuine, present and sufficiently serious threat to 1 of the fundamental interests of society, to a lower standard, the appellant could say the judge was bound to reach the same conclusion if he had considered the same question on a balance of probabilities.

20. On its own, I am satisfied that the adoption of the erroneous standard of proof would have been immaterial to the outcome of the appeal. However there is also merit in the remaining ground of appeal, and I am satisfied, that reading the decision as a whole, the judge placed undue weight on the absence of information from the probation service, such as a presentence report or an OASys assessment.

21. At paragraph [14] the judge referred to the fundamental interests of society. At paragraph [15], he said that he has very little evidence with which to work. He said:

> "15. …I know that the Appellant was convicted of two assaults, committed in a domestic context, and apparently affecting both his former wife and his daughter. I know that they were sufficiently serious to justify a sentence of immediate imprisonment. I know too that his convictions for theft crossed the custody threshold. However, that is the extent of the information that I have been provided with. I have no details about the offences, I know nothing about the Appellant's conduct, besides the fact of his convictions, and I have not been provided with any information with regard to the probation service's assessment of him, such as a pre-sentence report or an OASys assessment.
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> 16. Schedule 1 tells me that, where an Appellant has received a custodial sentence or is a persistent offender, the longer the sentence or the more numerous are the convictions, the greater the likelihood that the Appellant will meet the test contained in Regulation 27(5)(c). In this case, the Appellant has on the face of it, five separate convictions for which he has received a total of ten months imprisonment.
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> …
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> 18. I have, in particular, borne in mind that the Appellant's offences of assault were committed in a domestic context. This is an aggravating feature, all the more so because the offending involved his daughter."

22. The judge also said at paragraph [17] of his decision that he has had regard to the factors set out in Regulation 27(6) and did not consider that there was anything there that supports the appellant's claim. Nevertheless, the judge said, at [19], that having assessed all the factors in this case, and taking the appellant's conduct at its highest, he cannot say that it is reasonably likely that the appellant poses a sufficiently serious threat to one of the fundamental interests of society. His reasons for that conclusion are set out at paragraph [20]:

> "The offending involved common assaults, so did not result in actual bodily harm. They were limited to two offences only. Similarly, the Appellant's theft convictions were limited to two only. The Appellant breached the restraining order once. I cannot say that he has been persistent, or that the custodial sentences have been lengthy. Whilst I do not underestimate the impact which the Appellant's offending has had on his former wife and daughter, or

> the seriousness of domestic abuse generally, the test is that the threat posed is a serious one."

23. A finding as to whether the conduct of the appellant represents a genuine, present and sufficiently serious threat is a prerequisite for the adoption of an expulsion measure. The judge identifies a number of factors that plainly weigh against the appellant. At paragraph [15] of his decision the judge refers to the absence of any details about the offences, but it is clear there was evidence before the Tribunal regarding the offences of which the appellant was convicted and the context in which the offences were committed. The judge said that he knows nothing about the appellant's conduct, besides the fact of his convictions. The judge was aware of the sentences of imprisonment that had been imposed during the appellant's short period of presence in the United Kingdom and and the lack of any further evidence regarding the appellant's conduct in the UK, was because the appellant had not furnished the Tribunal with any evidence that he relies upon. The absence any pre-sentence report or OASys assessment is, in context, insufficient reason.

24. The judge said at paragraph [20] that the *"test is that the threat posed is a serious one"*. That in my judgement fails to have proper regard to the issue that the Tribunal was required to determine. That is whether the personal conduct of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent *(my emphasis)*". What is absent from the decision is any recognition by the judge that taking into account the past conduct of the appellant, the threat does not need to be imminent.

25. It follows that in my judgement, the decision of Judge Rose must be set aside.

DISPOSAL

26. It is appropriate, as Mr Arif submits, for the decision to be remade in the Upper Tribunal based upon the findings made by Judge Rose.

27. In reaching my decision, I have taken into account relevant considerations such as the age, state of health, family and economic situation of the appellant, his length of residence in the United Kingdom, his social and cultural integration into the United Kingdom and the extent of his links with Romania.

28. The appellant arrived in the United Kingdom on 26 November 2019. He is 42 years old and there is no evidence before me of any adverse physical or mental health conditions. He remained in the UK for just over one year but much of that time was spent in prison or in immigration detention. During the brief spells the appellant lived in the community, he committed the offences that form the backdrop to the respondent's decision and to this appeal. The appellant lived in Romania previously and he has been returned to Romania. There is no

evidence before me that he did not retain his links to Romania when he was in the UK and I am satisfied that he was returned to Romania. There is no evidence that the appellant has experienced any difficulty in his integration in Romania.

29. I have had regard to the appellant's immigration and offending history as set out in the respondent's decision and which I have set at paragraphs [2] to [6] of this decision and which I do not repeat. I have reached my decision based exclusively on the personal conduct of the appellant. I have carefully considered whether the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct and that the threat does not need to be imminent.

30. On 3 January 2020 the appellant was convicted of two counts of common assault. The offences were committed on 2 January 2020 and the appellant was sentenced to 4 months imprisonment, ordered to pay compensation of £100 and a restraining order was imposed. As judge Rose noted, the assaults were committed in a domestic context, and affected his former wife and daughter. The offences were sufficiently serious to justify the imposition of an immediate custodial sentence.

31. The appellant was then convicted on 28 January 2020 at Cambridgeshire Magistrates Court of theft. That offence had been committed on 16 December 2019, only a matter of days after the appellant's arrival in the UK. The appellant received a 2 month sentence of imprisonment.

32. In assessing the appellant's propensity to reoffend I take into account the fact that between 3 January 2020 and 28 January 2020 the appellant had been convicted of offences in the United Kingdom, that were committed within three months of his arrival. I also note, as Judge Rose did previously, that on 17 August 2020 the appellant was released on immigration bail, having served the custodial part of his sentence. However, he appears to have then breached the terms of the restraining order and was recalled to prison, still being subject to licence conditions. He was subsequently convicted of breaching the terms of the restraining order on 12 November 2020 and sentenced to a further 4 months immediate imprisonment. He was then served with a deportation notice on 13 December 2020 and was subsequently deported.

33. Drawing all these factors together and in the absence of any evidence from the appellant, I am satisfied that the appellant has demonstrated a complete disregard for the law and has demonstrated controlling and violent behaviour towards his partner and daughter in the past. In context, he spent a considerable period of his time in the UK in prison because of his offending. Viewing the evidence as a whole, I conclude that the respondent has satisfied me that the appellant continues to present a genuine, present and sufficiently serious threat affecting the fundamental interests of society that include maintaining public order, preventing social harm and excluding an EEA national with a conviction and maintaining public confidence in the ability of the relevant

authorities to take such action. I have also had regard to the fact that the threat does not need to be imminent.

34. I then turn to consider whether the decision complies with the principle of proportionality.

35. In assessing proportionality and having had regard to the factors set out in the Regulation 27(5) and 27(6) and Schedule 1, I note the appellant was the subject of a restraining order that prevented him from having contact with his former wife or his 14-year-old daughter. I accept the order did not cover his infant son. There is no evidence before me of any relationship that the appellant established or continues to enjoy with his infant son. There is no evidence at all before me that the appellant continues to have a family life with his former wife, and children. The appellant appears to have separated from them before he was removed to Romania. The appellant, apart from his previous relationship with his ex-wife and children does not have any ties to the United Kingdom. He has been returned to Romania and his residence in the United Kingdom ended some years ago now.

36. I have assessed proportionality on the assumption that the appellant's freedom of movement was inhibited, which is a serious factor in his favour. However, I am satisfied, having had regard to all the relevant factors, that it is proportionate to maintain the removal of the appellant. I find that is so with reference to whether there is simply a propensity to reoffend or that he presents a threat to public one of the other fundamental interests of society identified, given the nature of his offending. I am also satisfied that even were it the case that he did not have a propensity to reoffend, that the nature and timing of his offending would, in all the circumstances of this case, be sufficient to justify, on a proportionate basis, his continued exclusion.

NOTICE OF DECISION

37. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

38. I remake the decision by dismissing the appeal.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 February 2024