Upper Tribunal
Immigration and Asylum Chamber

Appeal Number:
DA/01840/2013

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice
On 31 March 2014

Promulgated on:
On 2 April 2014

Before

Upper Tribunal Judge Kekić

Between

Mr Andrii Zhovnaruk
AKA Alex Wemburg
(anonymity order not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Determination and Reasons

Representation
For the Appellant: Ms S Javed, Legal Representative
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

Details of appellant and basis of claim

1. This appeal comes before me following my decision to set aside the determination of First-tier Tribunal Judge A W Khan promulgated on 23

December 2013 allowing the appeal against deportation. Reasons for finding an error of law in that decision were set out in my determination dated 25 February 2014 and an extract which provides the findings and conclusions is attached as an annexure to this determination.

2. The appellant is a Ukrainian national born on 27 September 1964. He arrived here as a visitor on 18 June 1993, made an unsuccessful asylum application and appeal, followed by an application for ILR under the regularisation scheme for overstayers, which was granted on 10 February 2003.

3. On 11 July 2002 he was fined £350, ordered to pay costs and disqualified from driving for 18 months for driving a motor vehicle with excess alcohol. On 8 August 2002 he was again convicted of drink driving and fined £500 and disqualified from driving for 3 years. On 15 December 2003 he received another conviction for driving whilst disqualified and with no insurance which resulted in a ban for 12 months and a three month curfew order. In April 2012, at Harrow Crown Court, he was convicted of possessing a firearm and ammunition without a certificate. On 14 June 2012 he was sentenced to five years in prison.

4. On 28 August 2013 the respondent signed a deportation order under s.32(5) of the UK Borders Act 2007. The appellant lodged an appeal which was heard and allowed by a panel of the First-tier Tribunal chaired by Judge A W Khan; it is that decision that has been set aside.

The hearing

5. The resumed hearing came before me on 31 March 2014. I heard oral evidence from the appellant's mother, brother and from the appellant, in that order. All made use of the Russian interpreter; the appellant gave part of his testimony in English.

6. A bundle for the appellant was served just before the commencement of the hearing although the directions were for further evidence to be served no later than seven working days prior to the hearing. I was told that one of the witnesses had not attended the offices of the representatives until March 28. Quite why that affected the submission of the remaining documents is unclear however, so as not to penalise the appellant, I admitted the bundle and Mr Walker confirmed he was not placed in any difficulties as a result.

7. The first witness was the appellant's mother, Iryna Zownaruk (elsewhere stated to be Zhovnaruk: I 5) . She confirmed the contents of her statement and was tendered for cross examination. I should note here that she was in a wheelchair.

8. In response to Mr Walker's questions, the witness stated that when the appellant's relationship with his partner ended in 2009, he moved in with her. He had argued with his wife who had been unhappy because he looked after her. She said he had been her carer since then. It was put to her that according to her witness statement, her grand daughter, Oksana, had been her carer since 2004. She agreed, stating that Oksana took care of all her paperwork.

9. The witness confirmed that the appellant was not in contact with his daughters. She stated that since the appellant had been in prison, she had a carer who came in for an hour in the morning and an hour in the evening. Additionally, her daughter and grand daughter came from time to time but she lived alone. Her husband was in a care home. She lived in a two bedroom council flat; she had been residing there for the last 25 years. That completed cross examination. There was no re-examination.

10. In response to my questions, the witness confirmed she had a private carer whom Oksana had selected. I asked why she could not employ a private male carer if the females looking after her found it difficult to lift her and undertake heavy work. She said that she did want a male carer to assist her with intimate tasks such as washing. When it was pointed out she had her daughter and grand daughter for that, she replied they did not see her every day. On average, they saw her 2-3 times a week. The rest of the time she was alone. Her daughter was a deaf mute and her son's behaviour was unpredictable. The appellant, however, used to take her out in his car.

11. The witness confirmed that her flat had been modified to her needs. She also said she could move from the wheelchair to the toilet. She said she was last in the Ukraine 2-3 years ago. She had travelled with a companion from the Ukrainian club. She had many friends and acquaintances there. When it was pointed out to her that the medical report stated she had been there last year, she denied it and said the report was mistaken. She thought her visit before last was in 2010-2011.

12. Mr Walker had a question arising. He asked the witness how she had travelled and she replied she had gone by coach. However, she did not think she would be able to do so now.

13. Ms Javed asked the witness which son she had described as unpredictable. She replied she had been referring to Roman. That completed the oral evidence of this witness.

14. I then heard oral evidence from Roman Jovnarouk, the appellant's brother. He adopted his witness statement and was tendered for cross examination.

15. In response to Mr Walker's questions, the witness confirmed that the appellant had been living with their mother between 2009 and 2011. He did not know where the appellant had been living before that. He said he had a difficult life and had to sleep rough and beg so he could not keep track of what the appellant did.

16. The witness stated he had been in the UK since 1992 and had not returned to the Ukraine. His mother had; he thought her last visit was last year but he was not good at remembering dates. He said he could not provide information about her previous visits as he had spent a lot of time in hospitals and had been a beggar. However he recalled he had a brother, the appellant, who had helped him with his children. He said it would be difficult if the appellant was deported as his parents would suffer. His children were working and so had not come to the hearing. His son had attended a previous hearing. They were both born in the Ukraine but had never left the UK since their arrival here. One of his sons had visited the appellant in prison; the other had not but had taken the appellant's mother to visit him. That completed cross examination. There was no re-examination.

17. The witness told me that he saw his mother when he could. He had spent the weekend with her. He did that from time to time and she supported him. He had not known about the appellant's three previous convictions. The appellant had helped him through difficult times. He did not want to elaborate on the nature of his difficulties but said that his wife had died in 2000.

18. When asked by Mr Walker whether he helped his mother when he stayed with her. The witness replied that he was the one who needed help as he had back problems. He said his niece, Oksana, looked after her and was her official carer but there was no one like the appellant. Oksana helped his mother with her paperwork. He had no idea if she was paid a carer's allowance. Ms Javed had no questions arising and that completed this witness' evidence.

19. I then heard evidence from the appellant. He confirmed his date of birth and the contents of his statement. In cross examination he stated that he stopped living with his partner at the end of 2009. He had lived with her until then. He had been to Ukraine 2-3 times excluding business trips; in all he had been there not more than 10 times. He had various business projects in marketing, finance and media. He had tried to set up a newspaper and had organised consulting seminars but his business ventures were unsuccessful. The appellant was asked to explain why the evidence at his asylum hearing in 1999 indicated that he had not been living with his partner at that time. He explained that they argued a lot and would often separate. The arguments were over the time he spent looking after his mother. He stated he had never married his partner. They had met in Ukraine. She had a daughter whom the appellant adopted and then they had a daughter together.

20. The appellant was asked whether his problems with alcohol abuse which resulted in two drink driving offences had contributed to the problems with his wife. The appellant said he did not have any issues with alcohol and did not drink for most of his life. He said he had had Hepatitis C but was cured after a year of treatment. The cause was unknown. He confirmed he lived with his mother from the end of 2009 until February 2011 when he obtained accommodation from social services. He said he had suffered badly from depression as a result of the medication he had been given for Hepatitis. He had been unable to help his mother whilst he was depressed. In 2011 when nearing the end of his treatment, he turned to alcohol for help. He had been diagnosed with Hepatitis in 2009 or 2010. He said the reference to 2008 in his witness statement was a mistake. He stated that he had still been with his partner at that time and his business problems and debts had caused arguments with his partner. He blamed the interpreter for the reference to being divorced in his statement. He said he had never married. His company closed down in 2009 and he sold it in 2010. His separation from his partner had caused his depression in 2009. He last saw his children at the end of 2009 or early 2010. He had not tried to establish any contact with them whilst he was in prison. He received some information about them through their godmother.

21. The appellant said that his mother had visited Ukraine. So had his ex-partner.

22. He could not see anyone being his mother's carer although the family members helped "bit by bit". She did not go out much and no one lived with her. He had lived with her for over two years and he knew that she needed to live with someone. She needed help with cooking. He used to

take her out for shopping. His siblings did not spend time with her. He had a special connection with her and it was a difficult time for her. He said he did not want to excuse his behaviour but he had driven without insurance because it had been raining and he needed to take his children to school. Since that time he had always had insurance. That completed cross examination. There was no re-examination.

23. In response to my questions, the appellant said that his adopted daughter was 27 and his biological daughter was 23. He said he was from the west of Ukraine. Neither party had any questions arising and that completed the oral evidence.

24. The appellant then sought to submit further documentary evidence which I refused to admit at this stage in the proceedings. I then reserved my determination which I now give.

Findings, conclusions and the law

25. When reaching my conclusions, I have taken into account the written and oral documentary evidence and the submissions made by the parties. I have assessed the evidence as a whole and have also had regard to the law and the judgment of MF (Nigeria) [2013] EWCA Civ 1192 which was included in the appellant's bundle but not referred to in submissions. I bear in mind that it is for the appellant to show, on the balance of probabilities, that he meets the requirements of the Immigration Rules.

26. The relevant rules are set out below:

> 363. The circumstances in which a person is liable to deportation include:
> (i) where the Secretary of State deems the person's deportation to be conducive to the public good; …….
>
> This applies as the deportation order was made under section 32(4) of the UK Borders Act 2007. The appellant is a foreign criminal and the Secretary of State is therefore obliged to make a deportation order under section 32(5), subject to s.33.

27. The appellant relies on private and family life established in the UK:

> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
> (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
> ……..

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

28. As he does not have a subsisting parental relationship with either his adopted or biological adult daughters or with a partner, paragraph 399 does not apply. Paragraph 399A does not apply either, as the appellant has not spent twenty years living in the UK excluding the period of his sentence and he is not under 25 years of age.

29. Therefore the parties' submissions focused on whether there were exceptional or compelling circumstances which would mean that the public interest was outweighed by other factors. The factors relied on by Ms Javed were the appellant's relationship with his mother and father which were said to go beyond those of normal family ties and would be severed by his deportation and on the strong bond he had with other family members. She also argued that the appellant had been given the minimum sentence in respect of the index offence, that he had not used the gun for illegal means and that it was not clear whether the appellant's depression and ill health had been taken into account by the sentencing judge. Although Ms Javed did not argue that his long residence in the UK was an exceptional circumstance, I have considered that as a factor in his favour. Ms Javed also submitted that the appellant's business ties with the Ukraine had ended in 2008.

30. I have considered the appellant's skeleton argument dated 28 March 2014 but have to say that it is of little assistance as it focuses on why there was no error of law in the determination of the First-tier Tribunal. That is not relevant at this stage, that determination having already been set aside. There is no attempt to engage with the issues at hand; why the appellant should not be deported. Indeed, it appears that the same skeleton argument used for the earlier hearing and dated 24 February, has been reproduced and given a more recent date.

31. The appellant has been convicted of a serious crime for which he received a five year sentence. Ms Javed referred me to the judge's sentencing remarks and sought to make arguments about the circumstances of the conviction and possible shortcomings in the evidence which led to the conviction. None of that is relevant at this stage. I must proceed on the basis that the appellant was fairly convicted; there being no challenge to the conviction or sentence, it is difficult to see how Ms Javed can now argue that all the relevant evidence may not have been before the trial judge.

32. Ms Javed also argued that the appellant had been given the minimum sentence however I note that the judge did have a discretion to reduce the sentence if he were to find exceptional circumstances relating to the offence or the offender (paragraph D at G4). He took into account the mitigation put forward that the gun was never intended for any illegal purpose (paragraph F) but discounted it and found there were no exceptional circumstances (G6) which justified reduction of the sentence. If those matters did not assist the appellant in his attempts at mitigation then, I fail to see how they can be used to assist him now.

33. Having received a sentence of five years, the presumption is that the public interest demands the appellant's deportation unless there are compelling circumstances which would outweigh it.

34. To that end, I have considered the submissions made on the appellant's behalf. There is medical evidence to confirm that his mother (aged 79) has various health problems brought about by diabetes (an ulcerated heel), hypertension and constipation. The report from the Royal Free confirms that she has had two strokes; in 1996 and 2001 and a report from North Middlesex University Hospital confirms she has a pacemaker. She attended the hearing and I accept she is confined to a wheelchair due to spinal decompression ten years ago. I accept that her poor health causes her hardship and that she would be much happier if the appellant was living with her. However, I also note that according to Haringey Social Services, Mrs Zownaruk's needs are being met by her family and that her grand daughter is her carer. She also appears to have regular visits by district nurses. A hospital report issued on 22 March 2013 states that she visited the Ukraine last year although she maintains the visit was a few years ago when she travelled by coach. An August 2013 hospital report confirms she has private carers, that she "mobilises with wheelchair" and is independent in "transfers".

35. The case as presented was that the appellant was the only person who could properly care for Mrs Zownaruk but the evidence does not support that claim. Contrary to the appellant's evidence that he lived with her for well over two years, it would appear he moved in with her at the end of 2009, only because his relationship with his partner broke down and not because of his mother's needs, and that he then moved out in February 2011. That does not suggest that she needed 24 hour care as Ms Javed submitted. I also note that the appellant moved to Willesden; his mother lives quite a distance away, in Wood Green. The appellant himself admitted that he was no help to his mother whilst he was suffering from depression; according to his evidence, which varied to some extent, this

started in 2008 or 2009 and continued at least until his arrest for the most recent offence in September 2012. The three medical certificates issued (all duplicated in the bundle) are all dated 2011. Plainly someone was caring for his mother throughout this time. The appellant's initial witness statement confirmed that his sister, Natalia, was caring for their mother. Indeed she attended the hearing and appeared to be responsible for wheeling her mother in and around the hearing room. Other evidence indicates Natalia's daughter, Oksana, has taken over as the primary carer. Whilst Mrs Zownaruk maintained she was alone most of the time, her son, Roman, gave evidence that he would stay with her from time to time. Had she been in need of additional care or been unable to manage with the care that she received, I do not accept that she or her relatives would have led Social Services to believe that all her needs were being met. For all these reasons, whilst I fully accept Mrs Zownaruk would prefer it if the appellant remained in the UK, I do not accept that the quality of the care available to her would be inferior without him.

36. It was submitted by Ms Javed that the ties between the appellant and his parents went beyond those of a normal parent-child relationship. I do not accept this. The care of elderly parents inevitably poses various difficulties but this is part of the ageing process and the circumstances of the appellant's elderly parents are not exceptional, nor do they support the claim that the ties are something more than what would be expected between an elderly parent and adult child. It was argued that the appellant's removal would mean that ties between him and his parents would be severed as his father is in a care home and his mother can no longer travel. If that is the case, it is unfortunately, a consequence of deportation. I would note, however, that I have not seen any medical evidence to confirm that Mrs Zownaruk is unable to travel and note that she has been to Ukraine at least twice since her confinement to a wheelchair. No evidence has been put forward as to why the appellant's siblings would not be able to travel to visit him if they so wished. In any event, their relationship does not appear to be close. The appellant's written evidence was that he did not have much contact with his sister and indeed he says nothing about needing or wanting to be with either of them or about having a close relationship with them. His brother, Roman, gave evidence claiming that the appellant had helped him through difficult times however he did not even know where the appellant used to live and was not aware of his three previous convictions. He himself admitted in evidence that as he had his own problems he did not keep track of the appellant's life. There was is no evidence before me of how often they would see each other, of time spent together or activities shared.

37. Little is known about the appellant's private life in the UK. It seems he tried to set up various businesses linked to the Ukraine but these did not succeed. There is no evidence of any employment he has ever undertaken in this country (other than two P60s for 1996 and 1997) or of any contributions he has made to society. There are no supporting statements from friends or neighbours. The appellant has never been married and his relationship with his former partner (who joined him from Ukraine with her daughter and his after the expiry of his visit visa) does not appear to have lasted very long; there is contradictory evidence as to whether they separated in 2009 or much earlier, prior to 2000 (according to the determination dated 8 March 2000). The appellant maintained there had been many separations. Whatever the date of the final separation, it remains the case that the appellant has no contact with her or with his adopted daughter or biological daughter. Both are in their twenties. It is said that he is a committed Christian but no evidence from his Church is before me. There is, in fact, very little to show for the years he has spent here and nothing to show any ties formed in this country.

38. The appellant maintained he had not had any issues with alcohol but plainly he did given the two convictions for drink driving. He said he turned to alcohol in the wake of his depression when he fell ill with Hepatitis but that was in 2010/2011 and does not address the situation in 2002. I accept that he has, however, sought to address the problem whilst he has been in prison. Different reasons are put forward for his depression; it is said it was brought on by his domestic problems or by his business failures, debts or the medication he received for the treatment of Hepatitis C. That no longer appears to be an issue; the appellant is now well. In any event, it is not suggested that he would be unable to obtain treatment for depression in Ukraine.

39. I have taken note of the Prison Release Plan for the appellant and the Prison case notes. I see that he has behaved well whilst in prison and has been helping other prisoners in various ways. That goes to his credit but does not come anywhere close to being an exceptional circumstance. One would expect good behaviour from someone facing deportation and under close scrutiny.

40. It was argued that the appellant has no ties to the Ukraine. The appellant came here as an adult. Although he has been away from Ukraine for many years, he still retains ties in the form of the religion, culture and language. He has visited several times, as has his mother, and he has also had business dealings with Ukraine in the past. He may not have relatives but it would not be impossible to re-adjust to life there. His mother's evidence

was that she had many friends there. They may be able to help him find his feet.

41. It was clarified in MF (which appears in part in the appellant's first bundle and in whole in the second) that the scales are heavily weighted in favour of deportation and something very compelling, which will be exceptional, is required to outweigh the public interest in removal (paragraphs 42 and 46). I have carefully considered all the factors that have been put forward on behalf of the appellant, his long residence here and the presence of his family, but find that they do not amount to very compelling circumstances such as would outweigh the public interest in his deportation.

Decision

42. The appeal is dismissed.

Anonymity order

43. The First-tier Tribunal did not make an anonymity order and there was no request for one to the Upper Tribunal.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

1 April 2014

ANNEX:

Findings and Conclusions

13. I reach the conclusion that the panel made errors of law such that the decision has to be remade.

14. I see nothing in the panel's proportionality assessment which can be described as an adequate consideration of the public interest apart from a brief reference to it in the final paragraph of the determination which gives the appearance of being an afterthought. The assessment of the evidence focuses on the factors argued for the appellant; there is no reference to the factors put forward by the Secretary of State. A balancing exercise should be exactly that; this assessment gives the impression of being very one sided.

15. The weight to be given to the public interest in the deportation of foreign criminals is substantial following the switch from executive to legislative policy as recognised by the courts and set out in the authorities Mr Wilding referred to. There is nothing in this determination which acknowledges that importance or which engages with it. A throwaway line in the concluding paragraph, made after a decision on proportionality is already reached (see paragraph 23) is wholly inadequate.

16. I agree with Mr Wilding that the panel had no business to re-assess the circumstances of the offence. These facts had already been considered by the sentencing judge who found that they were not exceptional and did not merit a reduction in sentence. The panel's belief that the judge had no discretion in sentencing is contradicted by the remarks of Judge Price himself (at Annex G).

17. Contrary to what the panel stated, this conviction was not a one off. The appellant had several previous convictions, although I accept they did not involve firearms but his persistent abuse of the legal system and the breach of orders issued by the courts do not reflect well on his character and should have formed part of the assessment.

18. It is said that he has addressed his alcohol problem whilst he has been in prison. No explanation is provided, however, for why he did not do so

when he was repeatedly convicted of drink driving offences. It may be that being the subject of a deportation order may have focused his mind but good behaviour at a time when one is under intense scrutiny pending an appeal does not carry the same weight as behaviour at other times.

19. The panel does not explain why having family here rather than abroad is an exceptional circumstance. The Tribunal regularly hears from appellants who make that claim. Further, having an elderly mother is to be expected at the appellant's age. It appears that his sister has taken over her care and indeed in his witness statement the appellant also refers to other relatives who assist. In those circumstances it is unclear why the panel found a dependency on the appellant such as to engage Article 8. Although it is now maintained that the appellant's sister is disabled and unable to provide proper care, this was not mentioned in the appellant's witness statement or at the hearing before the First-tier Tribunal.

20. The panel accepts that the appellant had forgotten he had a gun and that he had behaved "bizarrely" waving it around in the street when he was drunk. The appellant's own description of what happened that night is contained in his witness statement and appears to contradict the claim of being so drunk that he did not know what he was doing.

21. There is an attempt by the Tribunal to minimise the crime; it is said that the appellant did not know the gun would be illegal here, that it was legal in the Ukraine, that he only intended to use it for target practice and that he had forgotten he had it. None of those factors detract from the fact that the appellant had a loaded gun in a public area, that great harm could have resulted and that the sentencing judge who considered those matters did not find them to be exceptional or to mitigate the offence.

Decision

22. The First-tier Tribunal made errors of law. I set the decision aside. It shall be re-made by the Upper Tribunal at a future date to be arranged.