Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-000618
[DA/00214/2021]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 September 2022	**On 2 November 2022**

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

P C
(ANONYMITY DIRECTION IN FORCE)

Respondent

Representation:
For the Appellant: Ms A Nolan, Senior Home Office Presenting Officer
For the Respondent: Mr J Gajjar, Counsel instructed by Direct Public Access

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent, also called "the claimant", is granted anonymity. No-one shall publish or reveal any information, including the name or address of the respondent, likely to lead members of the public to identify the respondent's children. Failure to comply with this order could amount to a contempt of court. We make this order solely for their benefit of the respondent's children. Their circumstances are relevant to our consideration and they are entitled to privacy.

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent (hereinafter "the claimant") against a decision of the Secretary of State to deport him from the United Kingdom under the Immigration (European Economic Area) Regulations 2016 and to refuse him leave to remain on human rights grounds.

3. We begin by considering the decision of the Secretary of State. This is set out in a letter dated 7 June 2021. It identifies the claimant as a citizen of Romania born in 1981. The "Decision to Make a Deportation Order" begins by noting that the claimant's date of entry into the United Kingdom is unknown but he was certainly present in January 2012 when he applied to be issued with "permanent residence". That application was successful on 27 June 2013.

4. He has committed diverse criminal offences. He was convicted of driving whilst disqualified in May 2012, and in December 2012 he was made the subject of a suspended sentence of imprisonment for offences of dishonesty. There seems to be a break in his offending but on 2 April 2019 at the Crown Court sitting at Snaresbrook he was sent to prison for eighteen months, again for offences of dishonesty. He was told then that he was liable to deportation and he responded by asserting that deporting him would unlawfully interfere with the private and family life of himself, his wife and their two children who are British citizens and minors.

5. On 16 August 2019 at the Crown Court sitting at Harrow he was again convicted of offences of dishonesty and sent to prison for three years on various counts to be served consecutively to the sentence he was already serving. The Secretary of State accepted that the claimant had been resident in the United Kingdom for a continuous period of five years and had so acquired a permanent right of residence under the EEA Regulations. The Secretary of State did not accept that he had been continuously resident in the United Kingdom for ten years in accordance with the EEA Regulations and said:

> "Consequently, consideration has not been given to whether your deportation is justified on imperative grounds of public security".

6. It should be noted that the Secretary of State was uncertain of the length of the claimant's continuous residence in the United Kingdom and the Secretary of State did not express any view about the extent of the claimant's integration into the United Kingdom.

7. The decision then outlines the circumstances of the offence. Essentially the claimant was involved in money laundering. The Secretary of State's letter then looked at the claimant's attitudes to his offences and to re-offending. According to the Secretary of State, the OASys Report assessed him at a "medium risk". The Secretary of State took the view that any re-offending was likely to be of a similar or more serious nature and so deportation was justified on serious grounds of public policy or public security. The Secretary of State directed herself that:

> "The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the individual and that the threat does not need to be imminent before deportation of an EEA national is justified."

8. Although this direction is clearly set out in the letter we cannot trace in the letter any indication that it was actually considered and resolved in favour of deportation.

9. The letter did explain why, in the opinion of the Secretary of State, deportation and consequent removal did not interfere unlawfully with the private and family life of the people concerned.

10. We consider now the First-tier Tribunal Judge's decision. Paragraph 15 of the Decision and Reasons refers to the Secretary of State's submissions concerning integration. We think this is particularly important and we set it out below:

> "[The Secretary of State] relied upon the decision letter and submitted that there is insufficient documentary evidence to demonstrate that the [claimant] has resided in the UK 10 ten years. It is submitted that the integrative links of the [claimant] were broken not when he went to prison on 11.5.2019 but when he started to commit criminal offences. The [claimant] had not shown remorse for his crimes but had sought to put the blame on others. His criminal behaviour had escalated over time".

11. The judge then noted that a document from social services that the claimant's representatives should have included in the bundle was missing and the judge was asked to permit the claimant to rely on it. The judge did, subject to it being made available for the Secretary of State's representative to consider, and the Presenting Officer made additional submissions.

12. The claimant had produced a Children and Families (C & F) assessment dated 28.12.2020 from the London Borough where the claimant's family lived and, according to the assessment, the claimant had worked in both Canada and in Romania. The claimant's case is set out at paragraph 18. The judge said:

> "[The claimant] relied upon the skeleton argument and submitted that the appropriate threshold was imperative grounds of public security. Reference was made to the case of **Hafeez v The Secretary of State for the Home Department [2020] EWCA Civ 406** and to periods of imprisonment not counting towards a period of residency (at paragraph 36). It was submitted that the tax documentation provided demonstrates that the [claimant] was working between 2007 and 2013. [The claimant] referred to the updated OASys assessment and to the low risk of re-offending posed by the [claimant]. The impact upon the children of the [claimant] and his family was emphasised".

13. At paragraph 25 the judge directed himself that the two principal issues to be resolved were the level of protection to which the claimant was entitled, that is, was it "serious grounds" or "imperative grounds" and, once the level of protection was established, was the decision lawful?

14. It was the claimant's case that he had lived in the United Kingdom since 2007 and so had acquired ten years' continuous residence at some point in 2017. The Secretary of State contended that "insufficient documentary evidence had been submitted to demonstrate that the [claimant] has ten years of continuous residence in the UK". The Presenting Officer also pointed out that the C & F assessment mentioned above referred to the claimant having worked in Romania and in Canada which suggested the claimant had spent time working outside the United Kingdom. The judge considered the decision in **Hafeez**.

The judge noted that periods of imprisonment do not positively count towards ten years' residence but then said:

> "Accordingly, it is clear that any period of imprisonment of the [claimant] that commenced in 2019 does not count towards his ten years' residence. In relation to the [claimant] having worked in Romania or Canada, the only reference to which I was directed in that respect was in the [C & F] assessment which contained a broad comment but did not provide any additional detail".

15. The judge was satisfied that the claimant had resided in the United Kingdom for a continuous period of ten years. The judge gave reasons. The judge said that the claimant had "clearly" been in the United Kingdom for some time before obtaining qualifications in 2009 and before his first child was born in the same year. He obtained permanent residence in 2013 and must have shown five years' continuous residence to have obtained that. He also provided tax calculations for each tax year from year ending 2013 to year ending 2018 and receipts that he had submitted tax returns for each tax year ending 2008 until 2013. The judge said at paragraph 28:

> "Consequently, I find that it is more likely than not that the residence of the [claimant] in the UK commenced at some point in 2008 at the latest such that he would have acquired 10 years continuous residence at the latest at some point in 2018. That, importantly, is prior to his two convictions in 2019 and prior to his being imprisoned such that any period of imprisonment is not, I find, relevant to the assessment of whether or not the [claimant] has acquired at least 10 years continuous residence in the UK. I find, therefore, that the [claimant] should have been afforded protection on the basis of imperative grounds of public security".

16. The judge then directed himself that, following **Hafeez**, the "focus" must be on the claimant's present and future risk to the public rather than the seriousness of his past offending. The judge noted the sentencing judge's description of the claimant as a "thoroughly dishonest man" and the First-tier Tribunal Judge described the lead offences as "serious crime which involved planning".

17. However, dealing with the risk of re-offending, the judge looked at an updated OASys Report dated July 2021 which put the likelihood of re-offending over the next two years as low. The report recognised there was a risk of serious harm but it was a low one. The judge looked for signs of the claimant rebuilding his life. He was given time to care for his father-in-law who was seriously ill. He did some work in the construction trade and the judge noted that he had only been released from prison for six months which gave only a short period of time to form a view. Nevertheless, the judge found the claimant was taking "positive steps" to care for his family and although there was a risk of re-offending it was a low risk. The judge found there were not imperative grounds of public security that justified deporting the claimant. The judge allowed the appeal.

18. Ground 1 makes three points. It concludes with the following:

> "It is therefore submitted that the FTTJ had erred in finding that the [claimant's] deportation may only be justified on imperative grounds of public security".

19. Points 1 and 2 purport to offer reasons to support this conclusion. Point 2 complains that the judge failed to consider that the claimant's criminal

behaviour rather than simply his imprisonment breaks his continuity of residence and integration.

20. Point 1 criticises the weakness of the evidence supporting the finding that the claimant had lived in the UK since 2007. It referred to the claimant registering with a general medical practitioner and obtaining a qualification in 2009 but noted there was no evidence of employment until the tax year ending 2013. The grounds assert that is not sufficient evidence to support the conclusion that the claimant was living in the UK in accordance with Regulations and exercising treaty rights.

21. It continues:

> "Further, the FTTJ fails to give adequate reasons for not accepting evidence that the [claimant] had worked in Canada, breaking his continuity of residence in the UK in any event".

22. The second point deals with the failure to give adequate reasons for finding on the risk of re-offending.

23. Ground 2 is headed:

> "Failing to give adequate reasons for findings on a material matter: Risk of reoffending".

24. The complaint is that the judge finds that there is a low risk of re-offending but this, according to the grounds, was drawn from reference to the OVP score on the OASys assessment and the judge failed to have regard to the fact there was a proven risk of re-offending within two years assessed as a medium at 50% on the OGRS3 score. The grounds continue that the judge had "failed to note" that the claimant continues to work in the same sector, that is refurbishing properties that he exploited in order to commit fraud. It was said that the judge erred by regarding this as a protective factor. The ground continues that the claimant had been released from prison in June 2021 and "there has therefore been insufficient time to demonstrate that he does not present a risk to the public".

25. Other points are made relating to Article 8 matters.

26. The document described as "Assessment" was prepared for the London Borough by a social worker. We have not seen anything on this to suggest that the document's circulation is subject to any legal restriction. Nevertheless, we see no need whatsoever to identify the children or indicate the reasons for social service involvement. The claimant is described there as a "household member". The report noted that the claimant "works as a Construction worker in the UK and abroad. During the assessment, [the claimant] was working abroad in Canada and Romania and I was not able to speak directly with [the claimant]". It is also said that the claimant "is employed in Construction and is currently working in Romania/Canada". The report indicated that the referral was received on 11 November 2020 and the assessment was due on 16 December 2020 but was in fact completed on 27 December 2020.

27. We consider now the arguments before us.

28. Ground 2, we find, is misconceived. Indeed, Mr Gajjar argued with some force that it was wrongly drawn and had asserted claims that the person who drew

the grounds (not Ms Nolan) should have realised were not right. The OASys assessment in response to question 28 "Do you think you are likely to offend in future?" records the claimant's answer "Unlikely". At R4.4 the risk of re-offending is said to be "low". The "Predictor Scores % and Risk Category" give an OGRS3 probability of proven re-offending as "medium". As Mr Gajjar pointed out in submissions, the OGRS3 is the "Offender Group Reconviction Scale" and, by definition, is not nuanced to the claimant whose personal risk was low.

29. Further, the finding that the risk of reoffending was low was supported by an "Up to date OASYS assessment of appellant" dated 6 December 2021 which the ground supporting the application for permission to appeal appear to have ignored.

30. We are quite satisfied that there is nothing in ground 2. It is based on a misreading of the OASys Report. The OASys Report supports the judge's finding, not the contention by the Secretary of State.

31. We do not agree that the judge erred in law because he "failed to note that the [claimant] continues to work in the same sector". The judge was clearly aware of the nature of the claimant's employment. This is not a case where returning to a business in refurbishing properties gives a particular or specific opportunity for re-establishing his criminal life. He committed offences because he was willing to cooperate with people who were cheating rather than anything specific to the construction industry. There is no error of law there. The judge might have evaluated it differently but that is all that can be said. The judge was entirely aware of the short time that the claimant had been in the community and made his assessment on the totality of the evidence. It was a conclusion open to him. The judge gave entirely proper reasons for concluding that the risk of offending was low. One of them is that, unlike the Secretary of State, he had read the OASys Report properly.

32. Ground 1 is more problematic. Essentially there are two points made and, after consideration, we find them unimpressive. The judge heard evidence and was entitled to believe the claimant. He did not have to give reasons for "not accepting evidence that the claimant had worked in Canada". The evidence that the claimant was working in Canada or had worked in Canada was exceedingly skimpy. It was recorded that that was what was said by the claimant's wife to the social worker. Further, on a literal reading of the report it only said that the claimant was working in Canada or Romania during the six weeks or so when the report was prepared. That would not be enough to have broken the continuity of residence in the United Kingdom but, more importantly, it was known to the Secretary of State that it could not be true because the claimant was in prison at that time. In taking this point the Secretary of State has relied on something that a proper reading of the papers would have shown was wrong. Further, the document was admitted only after the Presenting Officer had had an opportunity of reading it and the Presenting Officer did not ask for the claimant to be recalled to be cross-examined. The opportunity to take any point there was lost. We were told that if the claimant had been recalled he would probably have realised that his wife was being untruthful as she wanted to be discreet about her husband truly being in prison. There is no point to be made there.

33. Neither is there any point to be made about the judge accepting the time in which the claimant was in the United Kingdom. Perfectly proper reasons had been given for believing the claimant's evidence that he was in the United Kingdom. They relate to his registering with a general medical practitioner and his tax affairs. The claimant was recognised in 2013 as having settled status. The judge was entitled to assume that the decision was made properly and for good reasons. The reasons are not particularly compelling but they were supplemented by oral evidence which we were not in a position to evaluate. There is nothing unlawful about making the findings that were made on the evidence that was there.

34. What we find much more problematic is the point that was not argued before us although the grounds were relied upon and that is that the judge erred in finding that the claimant's deportation may only be justified on imperative grounds of public security. There are reasons to think that the integrative link had been broken. We do not agree with Counsel that once ten years' residence is established then deportation is only possible on imperative grounds. Rather, proper enquiries had to be made to see if the integration established was disrupted both by the period of imprisonment or indeed the period of criminality. This has just not been done although our conclusions are based on a plain reading of point 3 in the grounds rather than any argument or submissions. We have in mind the decision of the Court of Appeal in **Hafeez**. At paragraph 43 of its judgment the court makes clear that a person relying on imperative grounds of protection who had served time in prison has to prove both that he has ten years' continuous residence ending with the date of the decision (not starting from his arrival), and has sufficiently integrated within the host state during that ten year period. This exercise has just not been carried out. This is an error.

35. However, we do not find it to be a material error. As we have indicated the judge's finding that the claimant presents a low risk of re-offending was clearly open to him and there is no basis on which the judge could have concluded that the claimant was now a real and present risk so although the point was not taken expressly we must respect the judge's finding on that and that is a proper reason to allow the appeal.

36. It follows that there is no material error. We dismiss the Secretary of State's appeal against the First-tier Tribunal's decision.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 22 September 2022