Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-005078**
(DA/00364/2020)

THE IMMIGRATION ACTS

Heard at Field House
On the 6 December 2022

Decision & Reasons Promulgated
On the 23 January 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE STOUT

Between

MARIUS COSTEA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr S Cox, instructed by Kalsi Solicitors Limited
For the respondent: Mrs N Willocks-Briscoe (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant appeals against a decision of First-tier Tribunal Judge (FtTJ) Davey promulgated on 1 September 2022 following a hearing on 21 December 2021. FtTJ Davey dismissed the appellant's appeal against the respondent's decision of 25 August 2020 making a deportation order against him with reference to regulations 23(6)(b) and 27 of the

Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016"). Permission to appeal was granted on all grounds by FtTJ O'Garro.

Background

2. The appellant, a national of Romania, was born on 3 July 1989 and is now 33 years old. He has convictions both in Romania and the United Kingdom as follows:

   (i) 15 December 2006, Romania, theft – sentenced to 22 months imprisonment, suspended for 34 months;

   (ii) 15 January 2007, Romania, immigration offences – sentenced to 4 months imprisonment, suspended for 2 years, 4 months;

   (iii) 17 September 2007, United Kingdom, shoplifting and going equipped for theft - absolute discharge following a guilty plea;

   (iv) 29 November 2007, United Kingdom, going equipped and using a vehicle whilst uninsured – sentenced to 12 weeks in a Young Offenders Institution and fined;

   (v) 29 January 2008, Romania, inflicting grievous bodily harm – sentenced to 3 years imprisonment, suspended for 5 years;

   (vi) 20 October 2008, United Kingdom, breach of supervision order – fined £75;

   (vii) 23 May 2014, Romania, causing or inciting prostitution or pornography involving a child aged 13 to 17 – sentenced to 2 years imprisonment, varied on 17 October 2014 to 5 years imprisonment, and restraining order;

   (viii) 23 October 2015, Romania, driving with excess alcohol – sentenced to 1 year imprisonment, varied on 5 April 2016 to 5 years, 4 months imprisonment.

3. On 8 July 2018 he was cautioned by the Metropolitan Police for possession of a controlled drug (Class B). On 4 August 2020 the respondent served him with notice that he was liable to deportation under the EEA Regulations 2016. The appellant made no submissions and on 25 August 2020 the respondent served him with notice of deportation. The respondent was not satisfied that the appellant had been resident in the United Kingdom for a continuous period of five years so as to acquire a right of permanent residence under the EEA Regulations 2016 and accordingly applied the test in reg 27(5)(c) of the Regulations, i.e. whether the appellant's personal conduct represents *"a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account the past conduct of the person and that the threat does not need to be imminent"*. The respondent decided that test

was met and that deportation would not breach the appellant's rights under Article 8.

4. The appellant appealed to the FtT and his appeal was heard by FtTJ Davey on 21 December 2021. The appellant was represented below by Mr Gulamhussein of Kalsi Solicitors. By way of evidence for the hearing, the appellant relied (among other things) on a witness statement for himself and Ms Caroline Howsego (a British Citizen who at the time of signing her statement in July 2021 described herself as the appellant's friend and partner). The appellant and Ms Howsego gave oral evidence. The appellant also relied on a Medico-Legal Report dated 24 May 2021 by Dr Thelma Thomas (GP).

5. The FtTJ's decision states that it was *"Prepared 22 December 2021"* but, despite chasing by the appellant's representatives, it was not signed or promulgated until 1 September 2022. So far as we are aware, no explanation was given FtTJ Davey for the delay in promulgation.

The grounds of appeal

6. The grounds of appeal were unnumbered, but Mr Cox for the appellant grouped them into submissions which we formulate as follows:-

   (i) The FtTJ wrongly placed the burden of proof on the appellant of demonstrating that his conduct did not engage public policy considerations under the EEA Regulations 2016;

   (ii) The FtTJ failed to determine whether the appellant was a person with a right of permanent residence or not and thus which of the legal thresholds in reg 27 should be applied in deciding whether the deportation order was lawful;

   (iii) The FtTJ's assessment of the credibility of the appellant and his witness Mrs Howsego was inadequate/unreasoned;

   (iv) The FtTJ failed to deal with the appellant's case on rehabilitation and/or gave inadequate reasons for his decision;

   (v) There was undue delay (9 months) in the promulgation of the FtTJ's decision, giving rise to unfairness.

The parties' submissions

7. Mr Cox submitted that the FtTJ's error in relation to the burden of proof was a material one as it had infected the whole decision. Likewise, the delay in promulgation had led to unfairness because the FtTJ had not properly dealt with the appellant's case and evidence. He submitted that it had been argued on the Appellant's behalf before the FtTJ that the appellant had a longer period of residence (based on the fact that the appellant's Police National Computer records indicated he was arrested in the United Kingdom a number of times in 2007) and that the FtTJ had

failed to determine which threshold should have been applied to the appellant under the EEA Regulations 2016. He accepted that there was no arguable case that the appellant had been resident for more than 10 years, but maintained that the FtTJ should have dealt with the appellant's case that he had acquired a right of permanent residence. Mr Cox submitted that the FtTJ had not given adequate reasons for why he rejected the evidence of the appellant and Mrs Howsego and that the decision is unsafe because it does not appear even to recognise that evidence was received from Mrs Howsego. On the rehabilitation issue, Mr Cox drew our attention to the skeleton argument of Mr Gulamhussein below which had advanced the argument, by reference to the British Embassy Bucharest's Information Pack for British Prisoners in Romania that as the appellant had been released early from the five year sentence of imprisonment to which he was sentenced in Romania in May 2014 and/or October 2015 (as he was back in the United Kingdom by 2017) that meant that a competent judge had decided that he had *"improved his/her behaviour and can be reintegrated in society"*. Mr Cox accepted that there may have been other reasons why the appellant was apparently released early, but it was incumbent on the FtTJ to explain why he rejected that argument or regarded it as *"minimal evidence"* at [9].

8. Mrs Willocks-Briscoe for the respondent relied on the Rule 24 response letter dated 18 November 2022, save that she accepted that FtTJ Davey had erred in law in placing the burden of proof on the appellant (ground (i) above), but submitted that it was not a material error. She argued that notwithstanding that error the judge had properly considered all the factors relevant to assessing the level of threat posed by the appellant and that, although the decision was not well-structured, the judge had taken into account the appellant's evidence, including the medical evidence and the appellant's drug use, and reached conclusions that were open to him on the facts.

9. As to what we should do if we found an error of law, both parties submitted that it would be appropriate for the matter to be remitted to the FtT.

Discussion and conclusion

10. We take each of the grounds as we have formulated them in turn.

11. As to ground (i), there is no dispute that FtTJ Davey erred in law in this case when directing himself at [2] of the decision, contrary to *Arranz v SSHD (EEA Regulations – Deportation – Test)* [2017] UKUT 294, that the burden was on the appellant to show that there were not public policy grounds for deporting him. In many cases, an error in stating the burden of proof is immaterial, but in this case we agree with the submission of Mr Cox that it is material as the error has infected the FtTJ's reasoning later in the decision too. For example, at [10] the FtTJ in the first sentence appears to accept that the appellant's past offending history alone justifies the deportation decision (contrary to reg 27(5)(e)) and then in the rest of the

paragraph sets out reasons why the appellant has failed to persuade him to the contrary by reference to arguments about rehabilitation, whereas the correct approach is to consider the evidence in the round in deciding whether the threshold is met. The error in the burden of proof is also restated in [11] (*"In terms of public confidence in a justice system and immigration controls, I did not find that the Appellant had shown that there was any basis to remain"*).

12. As to ground (ii), we do not consider that the FtTJ erred in law in his determination of what test to apply to the appellant. The burden was on the appellant to demonstrate that he had acquired a permanent right of residence. His submission on that was put in vague terms towards the end of Mr Gulamhussein's skeleton argument (*"He has … been resident on and off for over 14 years since 2007 …"*). Taking a structured approach to the decision, the FtTJ should have dealt with that argument before considering any of the other issues in the appeal. He did not do so, but in our judgment the issue was dealt with at [13] and [14]. It is apparent from those paragraphs that the FtTJ was not persuaded that the appellant had established a permanent right of residence because it was unclear on the evidence when he had entered and left the United Kingdom and whether he was exercising Treaty rights during the periods he was here. That was a conclusion properly open to him on the evidence and the reasons for it are adequate. Having so concluded, the FtTJ was bound to, and did, apply the test in reg 27(5)(c) as to whether the appellant presented a *"genuine, present and sufficiently serious threat"* to the public interests.

13. As to ground (iii), we find that FtTJ Davey erred in law in his approach to the witness evidence of the appellant and Ms Howsego in this case. The thrust of the appellant's witness statement was that although his parents still lived in Romania, there was not room for him to live with them and they had not been able to prevent him committing crimes there in the past, that he had reformed since 2018 and been working and that his relationship with Ms Howsego since 2018 had helped him to avoid further serious offending (although he had been involved in low-level offending), and that he felt suicidal about returning to Romania. Ms Howsego in her witness statement confirmed that she (a British Citizen) and the appellant were friends and partners, that she suffers from medical conditions that require care for which she receives support from the local authority, that the appellant has been helping to care for her and she wishes in future to employ him as her carer. Save for a brief reference to the appellant having worked ([6]), none of these matters are dealt with in the FtTJ's decision, but it appears that none of this evidence was accepted as the FtTJ holds that the appellant and Ms Howsego are not partners, that the appellant was not claiming that the effects of his removal would be significant on Ms Howsego ([6]), that there was *"nothing to suggest if the appellant returned to Romania it would prejudice the prospects of any rehabilitation"* ([9]) and *"nothing by way of evidence that could be given any real weight to show that the Appellant had reformed or rehabilitated successfully"* ([10]). Neither party has suggested to us that the reasons for these conclusions would have been clear to those present at the hearing.

On the face of the decision, it is not possible to tell why the FtTJ has rejected the evidence in the statements and reached these conclusions. The decision is also written in terms (see in particular [6]) that suggest that only the appellant gave evidence and not also Ms Howsego. In the premises, the FtTJ has erred in law because the reasons are inadequate to enable the appellant to understand why he has lost, or even to be sure that the relevant evidence has been taken into account.

14. As to ground (iv), we also accept Mr Cox's submission that FtTJ Davey has erred in law by failing to take into account and/or give any reasons for rejecting the appellant's argument (which was advanced both in the appellant's witness statement and Mr Gulamhussein's skeleton argument) that his early release from prison in Romania in 2017 indicated that a competent judge in Romania must have considered that he had rehabilitated while in prison in Romania so as to be *"reintegrated in society"*. This evidence and argument by the appellant is not mentioned at all in the decision. While it may be (as Mrs Willocks-Briscoe submits) that there could be alternative explanations for the appellant's early release, the question of whether the appellant had rehabilitated was an important one, evidence of rehabilitation being expressly mentioned in paragraph 5 of Schedule 1 to the EEA Regulations 2016 as a factor that may mean removal is disproportionate. As such, the failure even to mention this evidence or argument is a material error of law: either a relevant factor has been left out of account or inadequate reasons have been given for the decision.

15. Finally, as to ground (v), delay is not itself a reason for setting a decision aside, the question is whether the delay has infected the decision so as to cause injustice (*SS (Sri Lanka)* [2018] EWCA Civ 1391). In this case, we note that FtTJ Davey's decision states that it was 'prepared' the day after the hearing, but not signed and promulgated until nine months' later. Where there is a delay of that length, good practice, and courtesy to the parties, requires that the judge provide some explanation for the delay. In this case, it would also have assisted us to have a paragraph in the judgment explaining what was meant by the decision having been 'prepared' the day after the hearing. As it is, it is unclear whether the errors we have identified above in relation to FtTJ Davey's approach to the evidence are attributable to the delay or not. However, as we have concluded that they are errors in their own right, we do not need to determine whether the decision in this case was also unsafe on grounds of delay.

Disposal

16. For all these reasons, we find that FtTJ Davey erred in law and the decision must be set aside. With reference to paragraph 7.2 of the Senior President's Practice Statement, the effect of the errors in this case is in our judgment that the appellant was deprived of a fair hearing, and in any event the necessary fact-finding will be extensive as the errors we have identified mean that the appeal needs to be completely reheard. As such,

we are in agreement with the parties that it is appropriate for the matter to be remitted to the FtT to be heard by a different judge. The appellant is, we are informed, currently in immigration detention and so the remitted hearing should be expedited.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and we set it aside. The decision shall be remitted to the First-tier Tribunal.

Signed: H Stout Date: 13 December 2022

Deputy Upper Tribunal Judge Stout