IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002322
UI-2023-002323
First-tier Tribunal No:
DA/00085/2022
EA/07029/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 27 September 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

Secretary of State for the Home Department

Appellant

and

CCM
(ANONYMITY DIRECTION CONTINUED)

Respondent

Representation:
For the Appellant: Ms Cunha, Senior Home Office Presenting Officer
For the Respondent: Ms Saifolahi, Counsel

Heard at Field House on 29 August 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and/or any member of his family is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant and/or his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, I will refer to the parties as they were designated in the First-tier Tribunal.

Introduction

2. The appellant is a citizen of Romania. His wife and three children have leave to remain under the EU Settlement Scheme.

3. On 19 July 2022 the respondent made a decision ("the SSHD Decision") to deport the appellant under the Immigration (EEA) Regulations 2016, as saved ("the 2016 Regulations"). This was because in November 2021 the appellant was convicted of three counts of theft and sentenced to 2 years imprisonment and the respondent considered that his deportation was justified on serious grounds of public policy and public security.

4. Prior to coming to the UK the appellant had been convicted and imprisoned in both France and Austria for crimes involving dishonesty.

5. The SSHD Decision also considered whether deporting the appellant would breach article 8 ECHR and concluded that it would not.

6. The appellant appealed to the First-tier Tribunal where his appeal came before First-tier Tribunal Juss ("the judge"). In a decision promulgated on 3 April 2023, the judge allowed the appeal. The respondent is now appealing against this decision.

The SSHD Decision

7. The SSHD Decision is in two parts. The first part considers the appellant's position under the 2016 Regulations. The second part considers article 8 ECHR.

8. *The 2016 Regulations*. The respondent accepted that, as the appellant had acquired a permanent right of residence, there would need to be serious grounds of public policy or public security to deport him (regulation 27(3)). The SSHD Decision sets out the relevant principles in regulation 21(5) and identifies, with reference to Schedule 1 of the 2016 Regulations, the "fundamental interests of society" that she considers the appellant threatens. These are: maintaining public order, preventing social harm, protecting public services, excluding EEA nationals with a conviction and maintaining confidence in the ability of the relevant authorities to take such action, and protecting the public.

9. The SSHD Decision sets out key passages from the sentencing judge and highlights the harm to society caused by theft. It is stated that the appellant's conduct indicates a propensity to reoffend.

10. The SSHD Decision considers in detail proportionality under regulations 27(5) and (6). Consideration is given to the appellant's age and state of health, family situation, economic situation, social and cultural integration, links to Romania, and rehabilitation. It is concluded that the decision to deport him is proportionate and in accordance with the principles in regulations 27(5) and (6).

11. *Article 8 ECHR*. After considering deportation under the 2016 Regulations, the SSHD Decision then addresses (entirely separately) article 8 ECHR. It concludes that deportation of the appellant would not breach the UK's obligations under article 8 because the public interest outweighs the appellant's private and family life.

Decision of the First-tier Tribunal

12. After setting out the factual circumstances, the judge stated that the appeal fell to be decided under regulation 21 of the Immigration (EEA) Regulations 2006 ("the 2006 Regulations").

13. The judge then cited, in considerable detail, the findings of several cases concerning aspects of European law.

14. The judge's analysis starts at paragraph 34, under the heading "reasons and decision".

15. In paragraph 34 the judge referred to regulation 21 of the 2006 Regulations and stated, inter alia, that the appellant's conduct:

> "must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (**in this case, public safety**)…" [Emphasis added].

16. In paragraph 35 the judge stated that he was satisfied that the appellant succeeds. The judge then summarised the evidence of the appellant and his wife about how remorseful the appellant feels, listed the evidence that was before the respondent, and set out the sentencing remarks from the criminal case.

17. The judge stated in paragraph 36 that he was satisfied that the appellant was not likely to continue to offend. This was based on the OASYs report, letter from the probation officer and witness evidence. The judge stated:

> "it must not be forgotten that the appellant's previous convictions cannot be put in the balance…"

18. The judge also, in paragraph 36, considered the proportionality of deportation under the 2006 Regulations. This appears to have been considered having regard to *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176.

19. The judge's consideration of article 8 is in paragraphs 37 – 39, where the judge again cited the Court of Appeal decision in *HA (Iraq*). The judge summarised in detail the law on assessing undue harshness under section 117C of the Immigration and Nationality and Asylum Act 2002.

Grounds of Appeal

20. The grounds make the following submissions:

    a. The judge decided the appeal under the wrong regulations, applying the 2006 Regulations instead of 2016 Regulations.

    b. The judge failed to consider the fundamental interests of society as identified in Schedule 1 of the 2016 Regulations.

    c. The judge failed to consider all of the material evidence when determining the risk of the appellant reoffending.

    d. The judge considered the wrong legal framework when addressing proportionality under the 2016 Regulations.

    e. The judge's article 8 assessment lacked any analysis pertaining to the appellant's (and his family's) circumstances.

Analysis

21. Both representatives made clear and concise submissions, for which I am grateful. I was also assisted by Ms Saifolahi's helpful Rule 24 Response. Ms Saifolahi made an admirable effort to defend the decision. However, I was not persuaded by her arguments and, for the reasons given below, am satisfied that all of the respondent's grounds are made out.

Applying the wrong regulations

22. The applicable regulations in this appeal are the 2016 Regulations, not the 2006 Regulations. The judge therefore erred by applying the wrong regulations.

23. The error is material because although regulation 21 of the 2006 Regulations is similar to regulation 27 of the 2016 Regulations, there is an important difference, which is that regulation 27(8) of the 2016 Regulations (which requires a tribunal to have regard to the considerations contained in Schedule 1) has no equivalent of the 2006 regulations. The failure to consider Schedule 1 gave rise to the second error of law.

Failure to consider the fundamental interests of society identified in Schedule 1 (and in the SSHD Decision)

24. Regulation 27(5) of the 2016 Regulations requires consideration to be given to the fundamental interests of society when a decision is made on public policy or public security grounds. Paragraph 7 of Schedule 1 sets out a list of 12 "fundamental interests of society".

25. In the SSHD Decision the respondent identifies five of the fundamental interests of society listed in Schedule 1 as applicable. The judge did not engage with the question of whether these five fundamental interests were applicable. Instead, he indicated in paragraph 34 that the only fundamental interest of society relevant is "public safety". The failure to consider the fundamental interests identified (and relied upon) by the respondent is an error of law that undermines the decision.

Failure to consider all material evidence when determining the risk of reoffending

26. The judge stated in paragraph 36 that "the appellant's previous convictions cannot be put in the balance". This appears to be a reference to the appellant's convictions in France and Austria for various crimes.

27. Regulation 27(5)(c) of the 2016 Regulations states that when considering the personal conduct of an appellant account must be taken of the "past conduct of the person". The appellant's convictions in France and Austria is past conduct that is relevant. Accordingly, the failure by the judge to consider these convictions was legally erroneous.

28. A further error arises from the failure by the judge to address the respondent's argument that there was no evidence of a material change in the appellant's circumstances which would make him less likely to offend. The appellant stated that he had offended because of his difficult financial circumstances. The respondent argued that as there was no evidence before the judge that his financial circumstances had improved the risk of re-offending remained high. In my view, the failure to address this submission by the respondent constitutes an error of law. It may be that the error is immaterial in the light of the OASYs report, to which the judge was entitled to attach substantial weight. However, given the other errors identified in this decision, I am not satisfied that the same conclusion on this point would have been reached in the absence of the legal errors.

Proportionality under the 2016 Regulations

29. Regulations 27(5) and (6) set out a range of factors that must be considered. These include that the decision must comply with the principle of proportionality, and account must be taken of the appellant's age, health, family circumstances, economic situation, length of residence, integration in the UK, and connections to his own country. These factors were considered in the SSHD Decision. However, rather than, as the respondent did in the SSHD Decision, consider proportionality under regulations 27(5) and (6) having regard to these factors, the judge instead considered proportionality under Article 8 ECHR, referring in paragraph 36 to *HA (Iraq*) and the test of undue harshness. Applying proportionality under Article 8 rather than regulation 27 was an error of law. The error is material because although there are overlaps between the two distinct frameworks, they are far from identical. In particular, the test of "undue harshness" is not relevant to an assessment under regulations 27(5) and (6).

Inadequate article 8 assessment

30. In paragraph 37 the judge summarised case law concerning the approach required when assessing whether the effect of deportation would be unduly harsh on a child. The judge noted, inter alia, that an individual assessment is required. However, the only individual assessment by the judge is the last sentence of paragraph 37, where the judge states that the appellant's children need their father and are well settled in the UK and in education. This single sentence does not, in any view, constitutes an adequate assessment of whether the effect of deportation would be unduly harsh on the children or, more broadly, whether deportation would be disproportionate under article 8 ECHR. The judge therefore erred by failing to carry out an adequate assessment of article 8 ECHR.

Disposal

31. Given the extent of the errors in respect of the 2016 Regulations and that article 8 has not been meaningfully assessed at all, I consider, having regard to paragraph 7 of the Practice Statement, remittal to be First-tier Tribunal with no findings preserved to be appropriate.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside. The case is remitted to the First-tier Tribunal to be made afresh by a different judge.

D. Sheridan
Upper Tribunal Judge Sheridan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 September 2023