



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2021-001872
First-tier Tribunal No:
DA/00050/2021**

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 29 May 2023**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**LEONARD CRISTEA
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Ms Young, Senior Presenting Officer

For the Respondent: No appearance and no representation

Heard at Bradford (IAC) on 17 April 2023

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal promulgated on 11 May 2021. By its decision, the Tribunal allowed the appellant's appeal against the Secretary of State's decision dated 12 January 2021 to deport him from the United Kingdom.
2. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Leonard Cristea as the appellant, reflecting their positions before the First-tier Tribunal.
3. The First-tier Tribunal did not make an anonymity order and no grounds have been advanced on behalf of the appellant to make such an order.
4. The decision to deport was made under Regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

5. The Secretary of State appealed and permission to appeal was granted by the First-tier Tribunal Judge Andrew for the following reasons:

“I am satisfied that there are arguable errors of law in this decision. The FtTJ made no findings in relation to the escalation in the appellant’s offending. Further her findings in respect of the appellant’s integration in the United Kingdom may be flawed given the finding that he has never resided here as a Qualified Person. In addition there are a lack of reasons in finding in favour of the appellant as to his potential to re-offend.”
6. There are preliminary issues that arise. The appellant did not appear at the hearing nor was he represented. Ms Young on behalf of the respondent informed the tribunal that according to the system the appellant applied for voluntary removal on 17 May 2022 and according to her records left the United Kingdom for Romania on 17 May 2022. She confirmed there was nothing to suggest that he had re-entered the United Kingdom since that date. She was not able to explain why that information had not been provided to the tribunal prior to the hearing date.
7. The first issue is whether the appellant is aware of the hearing by having been served with a hearing notice and whether the appeal should be heard in his absence applying Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended). According to the case log a notice of hearing was sent to the last known address given for the appellant on 6 March 2023. It was confirmed that the last known address was the same as the one the respondent had. The hearing notice also demonstrates that it was sent to the appellant’s nominated email address on 6 March 2023. There is no other alternative address or contact details provided .
8. The procedural history of the appeal is set out in the electronic file. The decision of the First-tier Tribunal was promulgated on 11 May 2021. Permission was sought to appeal the decision by the respondent in an application made on 13 May 2021. The application was determined by FtTJ Andrew on 26 May 2021 by granting permission to appeal to the respondent and the notice of the decision was sent by the tribunal on 30 June 2021 to the appellant to the last known address on the tribunal system. Ms Young submitted that the appellant was aware in June 2021 that the respondent had been granted permission to appeal to challenge the FtT decision by June 2021 as he had been served with the application and the decision of FtTJ Andrew which was before he left the UK on 17 May 2022. When the IA66 was sent to the address the appellant was still residing at that address for a period of time. The appellant was fully aware when he left United Kingdom that there was a pending appeal against the FtT decision allowing the appeal. She further noted that in the previous proceedings the appellant was represented by counsel who was acting on a direct access basis as indicated in an email dated 23 March 2021. Ms Young was not able to give any further information.
9. Rule 38 provides for hearings in a party’s absence. If a party fails to attend the hearing the Upper Tribunal may proceed with the hearing if the Upper Tribunal (a) is satisfied that the party has been notified of the hearing or the reasonable steps have been taken to notify the party of the hearing; and (b) considers that it is in the interests of justice to proceed with the hearing.
10. Applying Rule 38 in the context of the procedural history, I am satisfied that the hearing should proceed in the appellant’s absence as he has been notified of the hearing having been sent a notice of hearing to the last address provided by him (see Rule 13 (5)) and there has been no written notification to the contrary. In the alternative, on the procedural history outlined above, reasonable steps have

been taken to notify the appellant of the hearing. It is in the interests of justice to proceed with the hearing bearing in mind that the history demonstrates that he had been served with notice that permission had been granted to the respondent and he has not provided any new address to the tribunal since his departure.

11. The second preliminary issue that arises relates to whether the appeal is statutorily abandoned. Ms Young submitted that the Upper Tribunal has a statutory duty to deal with a pending section 11 Tribunal, Courts and Enforcement Act 2007 appeal by undertaking the section 12 "error of law" procedure.
12. She further submitted that his appeal is not statutorily abandoned as section 92 (8) only applies to s.82 appeals and this appeal was brought under the EEA Regulations 2016. Regulation 35 (4) provides that: "a pending appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom." It is respectfully submitted that regulation 35 is applicable to this appeal.
13. Having considered the legislative provisions identified above, Section 92(8) of the Nationality, Immigration and Asylum Act 2002 (as amended), sets out :

"(8) Where an appellant brings an appeal from within the United Kingdom but leave the United Kingdom before the appeal is finally determined, the appeal is to be treated as abandoned unless the claim to which the appeal relates has been certified under section 94 (7) or section 94(B).
14. This is not an appeal under Section 82 which relates to appeals where Secretary of State has decided to refuse a protection claim or a human rights claim or to revoke protection status, but is an appeal brought under the EEA Regulations and as the status of the appeal is a "pending appeal" Regulation 35 (4) applies, and the appeal is not treated as abandoned solely because the appellant leaves United Kingdom. There does not appear to be any other relevant provision and I accept the submission made on behalf of the respondent that there is jurisdiction to decide the appeal.
15. The background to the appeal is set out in the decision of the FtTJ, the decision letter and the bundle provided. The appellant is a citizen of Romania born on 7 October 1988. He claims to have arrived in United Kingdom on 9 November 2011 with his wife and 2 other children. He also has a third child born in the United Kingdom. The history demonstrates that he had lived outside of Romania in Italy as he had been convicted of 2 offences in 2010 and 2011 while resident there. On 9 December 2019, he was convicted of conspiracy to commit burglary with intent and was sentenced to 26 months imprisonment on 28 July 2020. The sentencing judge considered this was a planned and focussed conspiracy to burgle commercial business property. The appellant with others planned to carry out a burglary of a shop with intention of stealing a significant amount of cash, to be stolen from a cash machine and also money from the safe which with the profits and proceeds of the shop. The judge accepted was not at the highest end of sophistication but that it was carefully planned and whilst they claimed different roles judge found also that all the defendants knew the terms of the plan, the conspiracy, its purpose and all 3, if successful were going to gain financially from it. As to culpability judge found that there were 4 factors that were present in terms of high culpability, the premises were targeted, there was significant planning, they were equipped and acting as a group. As to the question of harm, whilst it was not successful, the Hamas be considered as greater harm because of the significant potential of the plan has achieved a significant loss of money

and therefore was in the highest category. The judge found that it was a serious incident of conspiracy to burgle.

16. The appellant was served with notice of the decision to deport him under the EEA Regulations, in response to which he made representations on the 11 September and 30 October 2020. They were rejected in the decision letter dated 12 January 2021.
17. The appellant appealed the decision, and it came before the FtTJ on 27 April 2021. Whilst no date was given in the decision for when the appellant was released from custody, it appears that it was in or about December 2020. In a decision promulgated on 11 May 2021, the FtTJ allowed the appeal on the basis of the respondent had not demonstrated that the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of society. As a result the FtTJ did not consider issues of proportionality.
18. The respondent sought permission to appeal the decision on 13 May 2021 and permission was granted by FtTJ Andrew on 26 May 2021.
19. Ms Young on behalf of the respondent relied upon the written grounds of challenge and supplemented them with her oral submissions. Ground 1 related to a material misdirection in law relying upon the assessment made of whether the appellant was a genuine, present and sufficiently serious threat. It is submitted that the FtTJ failed to engage with the respondent's case as to how the appellant posed a present threat and that whilst it was accepted that considerable period of time had elapsed between the prior convictions and the index offence, it is submitted that this is not proof of cessation and offending nor did it indicate a lack of current threat. Ms Young submitted that the FtTJ failed to take into account the escalation in his offending.
20. Dealing with ground 2, it was submitted that the judge failed to give adequate weight to the appellant's lack of integration into the UK. Ms Young submitted that respondent's case was recorded at paragraph 13 that the appellant had been unable to provide documentation that he was entitled to demonstrate a higher level of protection and the concession was recorded at paragraph 13 that he could only rely on the "basic protection". She submitted that whilst the judge set out at paragraph 14 Regulation 27(5) and the reference to the fundamental interests of society, the written grounds emphasise the point that he was not entitled to any enhanced protection and the failure to comply with the Regulations demonstrated a lack of integration in the UK which placed him in the category of those as a threat to society and the public interest as set out in Schedule 1 (f), (h) and (j). As a result she submitted his assessment was flawed.
21. Ms Young further submitted that ground 2 was related to ground 3 which made the point that the FtTJ had failed to take into account relevant considerations in his assessment of risk and the potential to reoffend at paragraph 20. In particular, the grounds identify that the reasoning that the appellant's licence conditions which were in place until 2022 was a factor to demonstrate a lack of risk failed to take account of the fact that licence conditions are indicative of risk and that was capable of amounting to misdirection in law. Furthermore, the grounds refer to the reasoning that the appellant's family would be a protective factor however he failed to give adequate reasons for reaching that decision and in the alternative failed to balance this against the fact that they have never been so historically. Ms Young also pointed to the fact that one of his co-defendants was a member of his family (brother-in-law). The written grounds also identify the return to gainful employment as a protective factor. However the

submitted that it had been accepted that the appellant was unable to produce evidence of any gainful employment either historical or current is set out at paragraph 13 and thus it was unclear on what basis the judge was able to find that was a protective factor why returning to a position which did not prevent offending in the first place, would assist in an assessment of risk.

22. Lastly it is submitted that the appellant had not presented any evidence to demonstrate rehabilitation. Thus Ms Young submits that the grounds are made out in the assessment of threat or risk is flawed.

The legal framework:

23. The deportation of EEA nationals was subject to the regime set out in the Immigration (European Economic Area) Regulations 2016 ('The EEA Regulations') which were made under section 2 of the European Communities Act 1972 by way of implementation of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States. The Directive sets conditions that must be satisfied before a Member State can restrict the rights of free movement and residence provided for by EU law.
24. By virtue of Regulation 23(6) of the 2016 regulations an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if:
- (a) that person does not have or ceases to have a right to reside under these Regulations; or
 - (b) the Secretary of State has decided that the person's removal is justified on the grounds of public policy, public security, or public health in accordance with regulation 27; or
 - (c) the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3).

Regulation 27 of the EEA Regulations provides as follows: -

- ' 27. - (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security, or public health.
- (2) A relevant decision may not be taken to serve economic ends.
 - (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.
 - (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who-"
 - (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
 - (b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989
 - (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-”

- (a) the decision must comply with the principle of proportionality.
- (b) the decision must be based exclusively on the personal conduct of the person concerned.
- (c) the personal conduct of the person 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 person and that the threat does not need to be imminent.
- (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision.
- (e) a person's previous criminal convictions do not in themselves justify the decision.
- (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.).

SCHEDULE 1

25. CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

Considerations of public policy and public security

The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

Application of paragraph 1 to the United Kingdom

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present, and sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as-

(a) the commission of a criminal offence.

(b) an act otherwise affecting the fundamental interests of society.

(c) the EEA national or family member of an EEA national was in custody.

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including-

(a) entering, attempting to enter, or assisting another person to enter or to attempt to enter, a marriage, civil partnership, or durable partnership of convenience; or

(b) fraudulently obtaining or attempting to obtain or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

The fundamental interests of society

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

(a) preventing unlawful immigration and abuse of the immigration laws and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area.

(b) maintaining public order.

(c) preventing social harm.

(d) preventing the evasion of taxes and duties.

(e) protecting public services.

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action.

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union).

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27).

- (i) protecting the rights and freedoms of others, particularly from exploitation and trafficking.
- (j) protecting the public.
- (k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child).
- (l) countering terrorism and extremism and protecting shared values."

Discussion:

26. The grounds challenge the FtTJ's assessment of whether the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of society. The appellant has not provided any response to the grounds however he would likely seek to uphold the decision. In assessing the grounds, it is important to take account that judicial restraint should be exercised when the reasons the tribunal has given for its decision are being examined. However having taken that into account I am satisfied that the respondent has demonstrated that the FtTJ's decision involved the making of an error on a point of law as set out in the grounds and as identified in the grant of permission.
27. There is no dispute that the FtTJ set out the relevant law at paragraph 12 and was correct to identify that the burden of proof lay on the respondent. It is also not in dispute that in assessing whether a person is a genuine, present and sufficiently serious threat it should be based exclusively on the personal conduct of the person involved and that the threat need not be imminent (see paragraph 14). Previous criminal convictions do not in themselves justify the decision (as set out at Regulation 27 (5) (e)).
28. However as the grounds identify it is the assessment of the evidence relevant to that test and whether the FtTJ took into account all considerations and evidence relevant to that assessment to carry out a balanced assessment.
29. The propensity of the appellant to reoffend was central to the assessment as identified by the FtTJ at paragraph 15. In undertaking that assessment, the FtTJ set out the circumstances of the appellant's offending and quoted the sentencing judge's remarks. Whilst the FtTJ accepted the seriousness of the offence (at paragraph 18) the reasons given by the FtTJ for finding that the respondent had not demonstrated that the appellant was a genuine, present and sufficiently serious threat can be summarised as follows. Firstly, it was not an offence of violence towards members of the public and was his first immediate sentence of imprisonment. Secondly he had learned the value of the family, thirdly he was subject to supervision under licence until January 2022 and lastly he was required to avoid contact with his co-defendants and his brother-in-law (who the appellant had confirmed was one of his co-defendants who had already been deported to Romania). At paragraph 21, the FtTJ found that the appellant had returned to gainful employment and that there would be significant family pressure on him not to reoffend.
30. When assessing ground 1, it was open to the FtTJ to take into account the time that had elapsed between his prior convictions and the index offence. However in reaching an overall assessment, the nature of the appellant's offending was relevant to his offending history. This began outside of Romania in Italy in November 2010 for offences of fraud where he was sentenced to one year 4 months imprisonment which was suspended. In March 2011 he was again

convicted in Italy of theft and sentenced to 2 months and 20 days imprisonment suspended for 5 years. In December 2009 for the index offence of conspiracy to commit burglary with intent he was sentenced to a sentence of 26 months imprisonment. The sentencing judge's view was this was an offence which required immediate custody and could not be suspended.

31. As regards the offending history, whilst it was permissible to take into account the gap in time, the FtTJ did not take into account the history of offending and that the circumstances of the index offence demonstrated an escalation in his offending. All of his previous offending was of the same type of acquisitive crime as were the circumstances of the index offence but of a much more serious nature. Whilst the judge found that it was not an offence of violence towards any member of the public (see paragraph 20) the escalation in his offending was a relevant consideration in the assessment of present threat.
32. Furthermore at paragraph 21 the FtTJ took into account that the appellant had returned to employment and his wife was at work and that "lawful income is a factor to consider in quantifying the risk of acquisitive crime". However in assessing this as a protective factor the FtTJ failed to take account of the evidence before the tribunal which went the other way. As Ms Young submits a concession was made at paragraph 13 that the appellant could not demonstrate permanent residence and therefore the lowest form of protection applied. The FtTJ found at paragraph 13 that there was no satisfactory evidence to show an exercise of treaty rights identifying the lack of payslips, P60 and letters from employment. The appellant did not provide any further evidence and there was little evidence in the respondent's bundle (see decision letter paragraphs 13 - 15). It consisted of one document at page 54 which showed an income of £5994 for the period 2016 - April 2017. Thus the FtTJ left out of the assessment that he had not demonstrated a prior picture of employment during his time in United Kingdom and when the index offence was committed when assessing whether this was in fact a protective factor and the circumstances of his offending as "acquisitive crime".
33. As to the assessment at paragraph 20, I accept the submission made that the fact that the appellant was on licence until January 2022 was not a factor to determine either the issue propensity or reduction of risk of reoffending. As the grounds that out the licence conditions are indicative of the risk posed.
34. Whilst the FtTJ was not assisted by the lack of an OASys's report, there was no evidence from the appellant as to what courses, if any he had attended relevant to his rehabilitation and reduction of risk (paragraph 39 of the decision letter).
35. The last issue relates to the protective factor of his family, whilst it may have been open to the FtTJ to consider the likely effect upon him of his family members, the FtTJ failed to give adequate reasons as to why they would be such a protective factor or in the alternative to balance that finding made against the history that none of the family members historically had prevented him from offending in the past. It is of note that whilst the FtTJ stated that the respondent was unable to direct him to anything other than criminal convictions, the decision letter between paragraphs 39 - 42 set out issues relevant to the assessment of risk.
36. Whether or not there was a failure to engage with particular evidence amounts to an error of law will depend on the circumstances including what it relates to and the importance of the issue under consideration. On the facts of the appeal, the errors identified are material as they go to the fundamental issue of whether the

appellant presented a genuine, present and sufficiently serious threat to 1 of the fundamental interests of society are set out in Schedule 1 of the EEA regulations 2016.

37. For those reasons, the grounds are made out and the decision of the FtT involved the making of an error on a point of law. It is set aside. In her oral submissions Ms Young submitted that the appeal should be remitted to the FtT.
38. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

39. I have considered the submission made by Ms Young and have done so in the light of the practice statement recited and the recent decision of the Court of Appeal in [AEB v SSHD \[2022\] EWCA Civ 1512](#). I am satisfied that in light of the fact findings which will be necessary, the appeal falls within paragraph 7.2 (b) of the practice statement. The decision was made in 2021 and the current circumstances of the appellant are unknown. I therefore remit the appeal to the First-tier Tribunal for that hearing to take place.

Notice of Decision:

40. The decision of the FtT involved the making of a material error of law and is set aside and is remitted to the FtT for a rehearing. The respondent should provide any further information they have as to the appellant's address to the FtT.

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

25 May 2023