IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004360

First-tier Tribunal No: DA/00250/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

13th November 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Nicolae Burta Verde
(AKA Nicolae Baldea Ciuinel)
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr G. Hodgetts, Counsel instructed by Cross Legal Services
For the Respondent: Ms S. Cunha, Senior Home Office Presenting Officer

Heard at Field House on 14 September 2023

DECISION AND REASONS

1. This is an appeal against a decision of the Secretary of State dated 14 September 2021 to deport the appellant, a citizen of Romania born on 30 November 1989, from the United Kingdom pursuant to regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The appeal is brought under regulation 36.

2. The Secretary of State pursues the appellant's deportation on account of his conviction, following a trial, of three offences of incident exposure, committed on 25 June 2019, 17 January 2020 and 3 February 2020, for which he was sentenced to a total of twelve months' imprisonment. The victims in each case were young

girls whom the appellant had deliberately targeted by masturbating in front of them on a route used by families and children for travelling to school.

Principal controversial issues

3. The principal controversial issues are:

   a. The total length of the appellant's residence. He claims to have resided in the UK since 2008. That is disputed by the Secretary of State, whose case it is that the appellant's residence can only be established from 2012 at the earliest. The Secretary of State accepted before the First-tier Tribunal (see paras 4 and 5, below) that the appellant enjoys the right of permanent residence, and has not applied to withdraw that concession;

   b. If the appellant had resided in the UK for a period of ten continuous years before the Secretary of State's deportation decision, whether the effect of his sentence of imprisonment and the circumstances of his offending was to break any integrating links he had previously forged;

   c. Whether, in any event, the appellant's deportation would be lawful under regulation 27 of the 2016 Regulations.

Procedural context

4. The appellant's appeal was originally heard and dismissed by First-tier Tribunal Judge Bart-Stewart ("the judge") by a decision promulgated on 18 May 2022. The appellant's appeal against that decision was heard and allowed by a panel of the Upper Tribunal (Mr Justice Dove, President, Upper Tribunal Judge Mandalia) by a decision promulgated on 19 July 2023. A copy of that decision may be found in the **Annex** to this judgment.

5. The panel set the judge's decision aside and directed that the appeal be reheard in the Upper Tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. It is against that background that the matter has been listed before me, sitting alone.

Factual background

6. The appellant pleaded Not Guilty to the offences for which he was later convicted following a trial in the Crown Court. His defence had been that he was not masturbating. He had merely been urinating, with no sexual motive.

7. The appellant was convicted of three offences and acquitted of one offence. On 4 February 2021, he was sentenced by HHJ Gower QC, who observed that appellant's offending was conducted in exactly the same place on each occasion, a gap in a hedge that runs alongside a route that was frequented by children, alone or with their parents, when returning home from school. The offences were committed shortly after school had finished for the day. Judge Gower said that the appellant's conduct involved deliberate targeting, if not of the identified victim herself, but other girls of a similar (13 or 14) age or younger.

8. Judge Gower said it was clear from the jury's verdicts that the appellant masturbated on each occasion with the intention that he would be seen doing so, that those who saw him would be caused alarm or distress, and that he did so for his own sexual gratification. The identified victim who had witnessed the appellant's crimes captured some of his conduct using a telephone, and the footage was passed to the police. The appellant was apprehended and charged with three counts of indecent exposure. He denied the offences, thereby requiring the primary victim to give evidence at trial. Due to the impact of the Covid

pandemic, the trial was delayed, meaning that the prospects of giving evidence against the appellant was looming over the young victim for a considerable period.

9. Judge Gower said that the impact on the appellant's primary victim had been "profound and long-lasting". It led to her having nightmares. She was no longer able to feel safe while walking home from school using that route, or even in the fields nearby. She blamed herself and, as Judge Gower noted, had written in her victim impact statement that, "somehow a disgusting man has made me blame myself for something I did not do."

10. In addition to the sentence of 12 months' imprisonment, the appellant was made the subject of a Sexual Harm Prevention Order for seven years and informed that he was subject to the notification requirements of the Sex Offenders' Register for 10 years.

11. For the above convictions, the Secretary of State pursued the appellant's deportation.

THE LAW

The 2016 Regulations

12. It is common ground that the 2016 Regulations continue to apply to these proceedings.

13. Regulation 23(6)(b) makes provision of the exclusion of certain persons from the United Kingdom where the Secretary of State "has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27…"

14. Where relevant, regulation 27 provides:

> "(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> […]
>
> (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 a right of permanent residence under regulation 15 and who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision…
>
> (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 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."

15. Schedule 1 to the 2016 Regulations sets out a number of considerations to which I must have regard when taking a decision under regulation 27.

Article 8 ECHR

16. Since this is a removal case, the tribunal enjoys the jurisdiction to consider Article 8 of the European Convention on Human Rights ("ECHR"). Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") lists a number of considerations to which I must have regard when considering the proportionality of the appellant's prospective removal.

17. Section 117C(1) of the 2002 Act provides that the deportation of "foreign criminals" is in the public interest for the purposes of determining the proportionality of deportation under Article 8(2) of the European Convention on Human Rights ("the ECHR"). The appellant satisfies the definition of foreign criminal for the purposes of this section because he is not a British citizen and has been convicted of an offence which led to a period of imprisonment of at least 12 months: see section 117D(2) of the 2002 Act. The remainder of the section provides:

> "(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,

> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

18. In relation to the 2016 Regulations, it is for the appellant to establish that he benefits from the claimed higher levels of protection from removal. It is for the Secretary of State to establish that the relevant criteria to take a restrictive decision under regulation 27 are met. In relation to Article 8, it is for the appellant to establish that his removal would engage Article 8(1) of the ECHR. It is then for the Secretary of State to establish that any interference in the appellant's Article 8(1) rights is proportionate within the terms of Article 8(2). In practice, it is for the appellant to demonstrate that he meets an exception to deportation under section 117C of the 2002 Act, or that his deportation would otherwise be disproportionate. That is because section 117C of the 2002 Act provides that the deportation of foreign criminals is in the public interest; it is for the appellant to demonstrate that one of the exceptions to that principle is engaged. The standard of proof is the standard of probabilities.

The hearing

19. The resumed hearing took place on a face to face basis at Field House. The appellant and the witnesses Abena Animwa Adjepong and Michaela Allen gave evidence by adopting their witness statements. They were each cross-examined. All gave evidence in English.

20. I will summarise the written and oral evidence, and the submissions I heard, to the extent necessary to reach and give reasons for my findings, below. Naturally, I did not reach my findings of fact until I had considered the entirety of the evidence, in the round.

21. I reserved my decision.

The parties' cases

22. The appellant maintains his innocence. He claims he was wrongly convicted. In any event, his case is that he is entitled to the highest level of protection from expulsion, namely the "imperative grounds" standard. His offending conduct gets nowhere near that threshold, he submits. It does not even meet the lower thresholds under the 2016 Regulations. He does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. He has not offended since the offences for which he was convicted and poses a low risk of reoffending. Moreover, the length of his residence in the United Kingdom, the minimal remaining links the appellant has in Romania, his integration and United Kingdom, his relationship with his partner Ms Adjepong

and her inability to relocate to Romania due to the racism she has experienced, all combine to render his deportation disproportionate.

23. Ms Cunha submits that the appellant is, at best, entitled to the "serious grounds" threshold, which he meets. His continued denial of the offences for which he has been convicted demonstrates that he plainly represents a risk of reoffending and cannot claim to be integrated. His deportation would be proportionate.

Issue (1): length of residence

24. The appellant has provided a broad spectrum of evidence going to his claimed residence since 2008. I accept that evidence. But for his period of imprisonment, I find that he has been continuously resident in the UK since his claimed arrival in 2008. This is for the following reasons.

25. First, the appellant's friend Michaela Allen gave evidence that she met the appellant in the UK in 2008. He did some decorating work for her, and they became friends, living near each other in Croydon. Ms Allen left the area around four years ago, and she was in regular contact with the appellant until around 2018. She said they saw each other regularly during that period. He did not leave the country for lengthy periods to go to Romania. Under cross examination, there was no real challenge to Miss Allan's evidence about the length of his claimed residence, which I accept.

26. Secondly, the appellant has two convictions from 2010. On 23 January 2010, he was convicted at the East Devon Magistrates' Court of theft and going equipped for theft, for which he received a conditional discharge. On 26 May 2010, he was convicted at Sussex Central magistrates' court for shoplifting and was fined. The appellant was clearly in the UK in 2010.

27. Thirdly, the appellant's landlord, Murtaza Abbas, has provided a statement in which he states that the appellant was a tenant of his in Croydon from 2008 until 2016. A range of supporting documents, including tenancies in 2008 and 2010, have been provided.

28. Thirdly, the appellant has provided bank statements from 2012 onwards. He explained that he did not have a bank account prior to that date and worked on a 'cash in hand' basis. In light of Ms Allen's evidence, and the appellant's explanation that the accession controls on citizens of Romania and Bulgaria being in place until 2014 meant that he did not take steps to regularise his financial and tax affairs until then, I am prepared to accept that he worked in relatively informal ostensibly self-employed roles at the time. In isolation, this evidence would be hard to accept, as the accession controls Romanian and Bulgarian citizens merely prevented them from exercising free movement rights as "workers", and I have been taken to no evidence that there were restrictions on opening bank accounts that were applied to such persons at the time. The appellant's continued denial of the offending conduct for which he was convicted also throws his personal credibility into sharp relief. However, the remaining evidence concerning the appellant's claimed continuity of residence is not infected by those credibility concerns, and I accept it.

29. Fourthly, the Secretary of State conceded before the First-tier Tribunal that the appellant has the right of permanent residence.

Issue (2): level of protection

30. It is common ground that the appellant has the right of permanent residence. That means that, pursuant to regulation 27(4)(a), he will enjoy "imperative grounds" protection from removal if he has resided for a continuous period of 10 years in the United Kingdom. His imprisonment has the effect, in principle, of breaking his continuity of residence: see regulation 3(3)(a). See also regulation 3(4):

> "(4) Paragraph (3)(a) applies, in principle, to an EEA national who has resided in the United Kingdom for at least ten years, but it does not apply where the Secretary of State considers that—
>
> (a) prior to serving a sentence of imprisonment, the EEA national had forged integrating links with the United Kingdom;
>
> (b) the effect of the sentence of imprisonment was not such as to break those integrating links; and
>
> (c) taking into account an overall assessment of the EEA national's situation, it would not be appropriate to apply paragraph (3)(a) to the assessment of that EEA national's continuity of residence."

31. The above criteria must be read in light of the relevant authorities from the Court of Justice of the European Union concerning this issue, which include *Land Baden-Wurttemberg v Tsakouridis* (Case C-145/09), *MG (Portugal) (*Case C-400/12), and linked cases *B* (Case C-316/16) *and Vomero* (Case C-426/16). In *B and Vomero*, the Court said of the assessment of integration, at para. 72:

> "As part of the overall assessment, mentioned in paragraph 70 above, which, in this case, is for the referring court to carry out, it is necessary to take into account, as regards the integrative links forged by B with the host Member State during the period of residence before his detention, the fact that, **the more those integrative links with that State are solid — including from a social, cultural and family perspective**, to the point where, for example, the person concerned is **genuinely rooted in the society of that State**, as found by the referring court in the main proceedings — the lower the probability that a period of detention could have resulted in those links being broken and, consequently, a discontinuity of the 10-year period of residence referred to in Article 28(3)(a) of Directive 2004/38." (Emphasis added)

32. I now address the regulation 3(4) factors. As to sub-paragraph (a), I find that the appellant was integrated to a limited extent in the United Kingdom before his sexual offending began. He spoke English, worked in different roles in the construction industry, latterly as a carpenter, has paid tax (albeit not for the entirety of the period of his economic activity), and made friends (including Ms Allen). He has acquired a first aid qualification. According to paragraph 2 of Schedule 1 to the 2016 Regulations, "a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom." The comparison inherent to the above definition was with an individual who associated only with those of their own nationality or language. Aside from his work, the evidence of the appellant's societal and cultural integration was limited. He committed two criminal offences in 2010. He was working for several years without paying tax, and without (on his evidence) even having a bank account. He explained at the hearing that he married a Romanian citizen in Romania in 2014, returning briefly to do so. She declined to return to the UK with the appellant because he refused to allow her to

bring her child from an existing relationship; he wanted his wife to leave her child in Romania. The picture that emerges of the appellant as one who, while not living on the margins of society, is unable to point to any significant positive societal, cultural of familial integration prior to his imprisonment (see *Vomero* at para. 72). His relationship with Ms Adjepong commenced only upon his release from prison. I find that before his imprisonment, the appellant was integrated, subject to the observations set out above.

33. As to (b), I find that the appellant's sentence and the circumstances of his offence were such as to break the limited integrating links he had previously forged. This was a serious offence. The author of the appellant's pre-sentence report expressed disbelief at the appellant's continued denial of the offences for which he had been convicted, noting that the images of his offence revealed that his stance was facing out towards the path where his victim was, with his penis exposed. That was conduct, concluded the author (in common with the jury and Judge Gower), that was designed to expose himself, for his own sexual gratification. The natural instinct if urinating would be to turn away, the report said. The appellant did not; not only did he face out towards his victims, but he also returned to the same spot three times, to repeat his offending.

34. In *B and Vomero*, the Court of Justice said at para. 73 that, as part of this assessment, it was necessary to examine "the nature of the offence that resulted in the period of imprisonment in question and the circumstances in which that offence was committed". I have already set out the impact of the offences on the appellant's primary victim, who had the misfortune of witnessing the appellant's selfish and unlawful public sexual gratification on three occasions. Moreover, not only did she blame herself, but the impact upon her of having given evidence against the appellant had clearly been troubling. Judge Gower took the step of assuring the victim, in open court, that responsibility for the appellant's imprisonment was his alone, and not a matter for which she bore any responsibility. This was plainly a highly traumatic period of time for the appellant's young victim and, despite the strength of the evidence against him (that is, video footage), the appellant maintained the fiction that he was simply urinating, thereby effectively re-traumatising his victim through the criminal proceedings. The judge also took the unusual step (remarking that he had never done so previously) of making an award in favour of the victim for the steps she had taken to ensure the appellant was brought to justice. While the offences were isolated and the appellant has not re-offended, as I set out below, his continued denial demonstrates that he has not engaged with responsibility for his offending and continues to pose a risk of reoffending. In my judgment, this was conduct that broke the limited integrating links that were previously forged by the appellant.

35. As to (c), Mr Hodgetts submitted that the appellant's conduct, and his overall circumstances, were such that an overall assessment clearly militated in favour of the appellant's continuity of residence being unaffected by his imprisonment. Mr Hodgett's submitted that the length of the appellant's imprisonment was relatively short, 12 months, and that it was significant that he had not re-offended. Moreover, the author of the pre-sentence report recommended a non-custodial sentence.

36. Mr Hodgetts also relied on *Ali Hafeez v Secretary of State for the Home Department* [2020] EWCA Civ 406 at para. 35:

> "Suppose an EEA national has resided in the UK for 15 years before being sentenced to 12 months' imprisonment; he then serves six

> months in custody. Six months after his release he is given notice that he is to be deported. In contrast with the position for permanent residence, the period in custody does not automatically reset the ten-year clock (if one can imagine a clock counting backwards) to zero. Otherwise, as Ms Hirst rightly pointed out, since all but a tiny proportion of deportations follow the imposition of a prison sentence, the ten years' continuous residence test could almost never be met. The hypothetical appellant whom I have described has 16 years' continuous residence if the time in custody is counted, but 15 ½ years non-continuous residence if the time in custody is treated as interrupting continuity. **It seems to me highly likely that he would be held to have imperative grounds protection.**" (Emphasis added to reflect Mr Hodgetts' submissions)

37. In my judgment, the Court of Appeal was not purporting to establish a general rule that the integration of an EU citizen with 15 years of pre-imprisonment residence can never be broken by a sentence of 12 months' imprisonment. Rather it was addressing the uncertainty identified by the Supreme Court's judgment in *Vomero* concerning whether periods of imprisonment count towards meeting the 10 year threshold. By definition, it could not have been seeking to establish a general rule or otherwise put a gloss on the CJEU authorities or the Regulations. The hypothetical individual at the heart of the court's illustration could only ever be subject to a case specific, fact sensitive analysis. There is nothing in the court's example concerning the hypothetical appellant's pre-offending integration, nor any discussion of the cultural, societal or familial factors which must lie at the heart of any such assessment, still less any consideration of whether the term of imprisonment had the effect of breaking the integrating links previously forged. The Court of Appeal cannot have been attempting to prescribe a one-size-fits-all, hard-edged approach for determining continuity of residence.

38. I accept that the appellant is now in a relationship with Ms Adjepong; there was no challenge to the genuineness of their relationship. The relationship demonstrates a degree of integration of a greater depth than the appellant's pre-offending integration. However, the relationship was formed after the appellant's convictions and imprisonment. There is minimal additional evidence of post-offending integration.

39. The appellant maintains his denial of responsibility for his offending. In my judgment, his continued denial demonstrates that he continues to present a risk, notwithstanding his offence-free conduct following his release from custody. It is nothing to the point, contrary to the submissions of Mr Hodgetts, that the author of the presentence report recommended a non-custodial sentence. First, the report had been ordered without the court providing a preliminary indication of the range of sentencing options under consideration, meaning the author of the report was unaware of the magnitude of the sentence the court had in mind. Secondly, the report was drafted some two and a half years ago, and the author did not have the benefit that I now have of hearing the appellant continue to deny his responsibility for the offences, despite the passage of time. Thirdly, the judge who passed sentence was best placed to assess the appellant's culpability and the suitability of a custodial sentence. Fourthly, the report assessed the appellant as representing a medium risk of sexual harm to women and female children and assessed the likelihood of him exposing himself again in the future as medium.

40. Of course, while the appellant's total length of residence is a factor of significance, it is only one factor. I also take into account the fact that the appellant is now in a relationship. Ms Adjepong explained that she was fully aware of the appellant's past convictions when she started her relationship with him. The appellant, through his relationship with her, has achieved a degree of post-imprisonment integration that many in his position would struggle to achieve. The custodial element of his sentence of imprisonment was only six months. He has not reoffended. Those are factors to his credit. Against those factors, I set his limited pre-offending integration, the seriousness of the offence, and the continued risk that he still poses consequent to the continued denial of criminal responsibility.

41. In my judgment, considering this issue in the round, the appellant's integrating links were broken by his period of imprisonment. This was a serious offence that involved the deliberate sexual targeting of young girls in a location where they are entitled to feel safe while travelling to and from school. The appellant has declined to accept responsibility, and maintains his case, rejected by the jury, that he was simply urinating. I observe there was a degree of inconsistency in his evidence before me on this point; he initially said that he had never urinated in the bush near his victim, but then later said he would "not ever again" go to the bush to urinate; either way, he continues to deny responsibility for his offending. I note that the pre-sentence report assessed the appellant's risk of reoffending as high based on statistical factors, and medium based on the author's professional judgement by reference to his or her assessment of the appellant. Nevertheless, the appellant has not reoffended since. However, and as stated above, his continued denial means that he cannot be regarded as rehabilitated, and that he continues to pose a risk of reoffending. The passage of time since the pre-sentence report has cemented the appellant's defiant attitude, and I find that he does represent a risk of re-offending. Moreover, the harm from his offences was significant. If he re-committed such offences, the harm would be repeated. The appellant's pre-imprisonment integration was limited. It was broken by the appellant's imprisonment.

42. It follows that the appellant's continuity of residence was broken upon serving the sentence of 12 months' imprisonment. That being so, he does not enjoy protection from removal pursuant to the "imperative grounds" grounds threshold. In light of the Secretary of State's concession before the First-tier Tribunal, he does, however, enjoy protection from removal pursuant to the serious grounds of public policy and security threshold.

Issue (3): Whether deportation lawful under the 2016 Regulations

43. In this part, I address:

    a. Whether there are serious grounds of public policy and public security which justify the deportation of the appellant;

    b. If so, whether his deportation would otherwise be compatible with regulation 27?

44. As to the first issue, I conclude that there are serious grounds of public policy and security. The appellant committed three serious sexual offences which targeted young teenagers and children in the same spot. He did so for his own sexual gratification, intending to cause distress to his victims. The impact of his offending on the primary victim was significant and had had a lasting impact upon her. The appellant has shown no remorse and continues to deny responsibility for the offending, maintaining, falsely in light of the jury's verdict,

that he was simply urinating. I accept that there was no physical sexual assault. But the offences were still serious, and the appellant's conduct caused harm. This conduct was serious and, in turn, provides serious grounds of public policy and security to justify the appellant's removal.

45. As to the second issue, regulation 27(5) and (6) of the 2016 Regulations, read with Schedule 1, are key. The considerations inherent to such an assessment are multifaceted. A holistic assessment, conducted in the round, is required.

46. In my judgment, the appellant's personal conduct represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society. I have largely set the reasons for this conclusion out already in this decision, in the context of addressing whether the appellant's conduct broke any integrating links previously forged. The appellant's conduct was not a one-off error of judgment. It was repeated at the same location; Judge Gower said, "it would be naïve of me to regard this as pure coincidence and I have no doubt that it was not." The appellant repeatedly targeted victims in the same location. Based on the Risk Matrix 2000 tool used by the Probation Service, the appellant represents a high risk of re-offending, and a medium risk pursuant to the probation officer's own assessment. The author of the report noted "the possibility of his going onto commit a contact sexual offence cannot be dismissed."

47. In addition to the reasons outlined above, I ascribe significance to the imposition of a sexual harm prevention order and the subjection of the appellant to the requirements of the Sex Offenders' Register for ten years. Under section 346 of the Sentencing Act 2020 and section 103A(2)(b), a court may make a sexual harm prevention order where it is satisfied that it is necessary to do so in order to protect the public or any particular members of the public from sexual harm from the subject of the order. While it may be said that that order mitigates the risk otherwise posed by the appellant, in my judgment the fact that it was necessary to make such an order is itself a testament to the risk posed by the appellant. The coverage of such an order (which in the case of this appellant prohibits the exposure of his genitals in a public place and prohibits him from entering certain specified locations) mitigates but does not eradicate risk.

48. I also note that the appellant has not undertaken any rehabilitative courses or other treatment aimed at targeting his underlying offending behaviour.

49. The need to guard against the commission of such sexual offences is one of the fundamental interests of society in the United Kingdom, as defined by para. 7 to Schedule 1 of the 2016 Regulations. See para. 7(c) (preventing social harm); (f) (removing an EEA national with a conviction, including where the conviction has caused public offence: the pre-sentence report noted that the local news paper in the area of the offending had identified significant local concern arising from what was, at that stage, a series of unsolved incidents of the same male masturbating in public); and (j) protecting the public.

50. Any decision to deport the appellant would be based on his personal conduct. It would not be based on the mere fact of his convictions alone, but rather on the underlying conduct of the appellant in committing the offences, and his risk of reoffending, which is underlined by his continued denial of responsibility for them.

51. I take into account the appellant's age (33). He has lived in the UK since 2008 when he was a young man. While his pre-conviction integrating links were limited and were broken by his imprisonment, he has since achieved a degree of integration. His overall length of residence is a significant factor. He is earning through working in the construction industry and declared an income of £50,000

in the last financial year. If he were to leave the UK, he would lose his UK-based employment history.

52. The appellant's relationship with Ms Adjepong is a factor of significance. They have been cohabiting for two and a half years; that period coincides with the post-conviction evidence of integration. Ms Adjepong has never visited Romania. She said she had experienced racist abuse in other eastern European countries while visiting as a tourist, and expected to experience similar abuse in Romania, she said. Against that, there is no background evidence concerning racism in Romania. The country is a Member State of the European Union and committed to the rule of law. While Ms Adjepong's experience in other countries is deeply regrettable, there is no evidence before me that the Romanian State fails to offer effective protection against racist behaviour. There is also no evidence that Ms Adjepong would not be able to secure a work permit or some form of employment in Romania, if she chose to accompany the appellant. She currently works as a compliance manager for a social housing organisation; aside from bald assertion, there is no evidence that she would not be able to secure employment in Romania.

53. While the appellant has not lived in Romania since 2008, he has visited regularly. In 2014 he married there. It is not clear whether he has divorced his wife, but there is no suggestion that the relationship continues. The appellant's mother still lives in Romania. He still speaks Romanian.

54. Drawing this analysis together, the remaining question under the 2016 Regulations is whether the appellant's deportation would be proportionate. The appellant has lived in the UK for the entirety of his adult life. He has achieved a degree of integration, albeit the strongest evidence of his integration post-dates his imprisonment, which had the effect of breaking the integrating links he had previously forged. The appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. He has acquired transferrable skills in the construction industry, and has not lost all links to Romania, where his mother still resides.

55. In my judgment, the appellant's deportation to Romania would be proportionate and therefore lawful under the 2016 Regulations.

Article 8

56. Mr Hodgetts did not pursue any separate Article 8 ECHR submissions. On the facts of this case, Article 8 ECHR does not provide the appellant with any additional protection from removal over and above the 2016 Regulations. The appellant's deportation would plainly engage his Article 8 private and family life rights, and the family life rights of Ms Adjepong. The interference would be in accordance with the law, in the sense that it is governed by a legal framework, accompanied by a right of appeal to this tribunal. It would, in principle, be necessary in a democratic society on the grounds set out in Article 8(2). The remaining question is whether his deportation would be proportionate. To answer that question, I turn to section 117C of the 2002 Act.

57. The appellant is a "foreign criminal" as defined. There is no evidence that he meets either of the statutory exceptions to deportation, and on my findings set out above, he would not be able to do so. As to whether there are "very compelling circumstances over and above" the exceptions (section 117C(6)), I have already concluded that the appellant's deportation would be proportionate for the purposes of regulation 27(5)(a) of the 2016 Regulations. There is no

additional factor not considered under that assessment that would render the appellant's deportation disproportionate for the purposes of section 117C(6).

58. I therefore conclude that the appellant's deportation would not be unlawful under section 6 of the Human Rights Act 1998.

Notice of Decision

The decision of First-tier Tribunal Judge Bart-Stewart involved the making of an error of law and is set aside.

I remake the decision by dismissing the appeal.

The appeal is dismissed under the Immigration (European Economic Area) Regulations 2016.

The appeal is dismissed on human rights grounds.

I make no fee award.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 October 2023

Annex – Error of Law decision

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-004360

THE IMMIGRATION ACTS

Heard at Coventry Combined Court	**Decision & Reasons Promulgated**
On 14th February 2023	.....

Before

THE HON. MR JUSTICE DOVE, PRESIDENT
UPPER TRIBUNAL JUDGE MANDALIA

Between

NICOLAE BURTA VERDE
AKA NICOLAE BALDEA CIUINEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hodgetts, Counsel instructed by Cross Legal Services
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Romania who was born on 30th November 1989. He appeals with permission against the decision of the First Tier Tribunal Immigration and Asylum Chamber ("FtTIAC") promulgated on 18th May 2022. That decision was to dismiss the appellant's appeal against the respondent's decision to make a deportation order by virtue of section 5(1) of the Immigration Act 1971.

2. The appellant's factual case was that he had come to the UK in 2007 after Romania joined the European Union and was therefore not subject to immigration control. In his witness statement for the hearing before FtTIAC the appellant explained that he had obtained work at a car wash, and thereafter he worked with friends in the building trade, and was paid cash in hand and sometimes paid that cash into a bank account which was opened in April 2012. On 23rd January 2010 the appellant was convicted at East Devon Magistrates Court of theft and going equipped for theft; he was sentenced to a conditional discharge. Again on 26th May 2010 the appellant was convicted at Sussex Central Magistrates Court for shoplifting and fined. On 30th March 2014 the appellant obtained a national insurance number and started to work with an employment agency as an employee as well as continuing to work in a self-employed capacity in construction work. In 2018 the appellant qualified as a carpenter, a trade in which he continued to work thereafter.

3. On 18th December 2020 the appellant was convicted on three counts of indecent exposure. In short, the offences were committed on three separate dates, 25th June 2019, 17th January 2020 and 3rd February 2020. He was convicted of exposing himself and masturbating in the vicinity of a path used by children and parents to walk to and from school. He was filmed doing this by a young girl who also identified a motorcycle linked to the appellant leading to his arrest. The appellant continued to maintain his innocence even after he had been convicted. The appellant was sentenced on 4th February 2021 to 12 months in prison along with a Sexual Harm Prevention Order for 7 years and registration on the Sex Offenders Register for 10 years.

4. On 8th April 2021 he was served with liability to deportation on the grounds of public policy in accordance with the Immigration (EEA) Regulations 2016 ("the 2016 Regulations"). Following consideration of his representations submitted on 17th April 2021 the respondent made the decision to deport him pursuant to the Immigration Act 1971 and UK Borders Act 2007 which is the subject of these proceedings.

5. At paragraph 8 of the determination the judge accurately set out the relevant provisions of the 2016 Regulations. Under Regulation 23(6)(b) of the 2016 Regulations the respondent has the power to deport an EEA national from the UK where it is decided that the person's removal is justified on the grounds of public policy, public security or public health. Where an EEA national has a right of permanent residence in the UK they can only be deported on serious grounds of public policy or public security; if the EEA national has resided in the UK for a continuous period of at least ten years prior to the deportation decision then deportation may only be on imperative grounds of public security: see Regulation 27 of the 2016 Regulations.

6. In the skeleton argument that was before FtTIAC for the purposes of the hearing it was contended on the part of the appellant that he was entitled to a finding not only that he had permanent residence, and should therefore be afforded the protection that he ought not to be deported unless that decision was on serious grounds of public policy or public security. In addition it was submitted that on the evidence that as the appellant had been present in the UK for more than 10 years prior to the decision in fact he was entitled to the enhanced protection from deportation that it should only be ordered on the grounds of imperative grounds of public security. Whilst at the time of the decision the respondent had maintained that the appellant could not prove he was entitled to permanent

residence, by the time the matter came before the FtTIAC it was conceded that the appellant did qualify for permanent residence. The judge went on to consider whether, in accordance with the contentions made in the appellant's skeleton argument, he had been resident in the UK for at least 10 years prior the decision.

7. The judge's reasoning in relation to this issue were as follows:

> "36. The grounds of appeal refer to the appellant having resided in the UK for at least 7 years prior to the decision to deport and therefore has the enhanced protection of only being able to be removed on imperative grounds of public security. Imperative grounds [of] public security applies to a person who has lived in the UK for at least 10 years. The burden of proof is on the appellant to evidence the continuous residence since 2007 as he claims. The evidence before me does not show that the appellant has lived continuously in the UK from the date of claimed arrival. He has convictions in 2010 for shoplifting and then there is a gap with regards to his whereabouts with no documentary evidence until 2014.
>
> 37. In his witness statement he says that he worked in a car wash with other Romanians when he arrived in the UK and later worked with friends in a building company for about three years. He was always paid cash in hand. He opened a bank account in April 2012. He obtained a National Insurance number in 2014 and continued to work cash in hand until January 2016 when he registered with an employment agency and as self-employed with HMRC. His only witness is his partner with whom he commenced a fairly recent relationship. There are no letters or statements from any other friends, relatives or employer that might support his claim to have been in the UK before 2014. I am not satisfied that on the balance of probabilities the appellant has resided in the United Kingdom for a continuous period of at least 10 years prior to the decision."

8. The judge went on to make findings in relation to the risks of reoffending and harm arising from further offences, and concluded that the appellant presented a genuine, present and sufficiently serious threat. The judge then went on to give consideration to proportionality within the framework of Regulation 27(6) of the 2016 Regulations. The judge observed:

> "There is no evidence of continuous gainful employment in the UK since the date he claims to have arrived or of social integration until 2016."

9. The judge went on to conclude that there would be no significant obstacles to the appellant returning to Romania, in particular on the basis of his trade qualifications which he could use to earn a living. The judge then went on to assess Article 8 in the context of the deportation decision, and the judge observed that at "the highest he has spent 15 years in the UK". He concluded that there were no insurmountable obstacles to the appellant's partner either living in Romania with the appellant or remaining in the UK without the appellant. The relationship was recently established and she was not financially dependant upon him. Whilst the appellant's partner had expressed her concerns in relation to being the subject of racist ill-treatment were she to have to live in Romania, the judge observed that "[s]adly racism is a factor in many countries" and that whilst she may have problems in this respect and also as a result of language differences these did not amount to insurmountable obstacles to her living in Romania. In summary the judge concluded that the respondent had established

that were serious grounds of public security requiring the appellant's deportation and that it would not be disproportionate to deport him.

10. In granting permission to appeal in this case the Upper Tribunal Judge was particularly impressed with the first ground upon which the application for permission to appeal was launched. This ground is that the FtTIAC decision failed to take into account evidence in relation to the appellant's length of residence in the UK, in particular in respect of the appellant's case that he had lived in the UK continuously for more than 10 years. The appeal was also granted permission to proceed on other grounds, but in the light of the conclusions which we are about to set out in respect of ground 1, we have reached the view that there is no need to form conclusions on those grounds.

11. The crux of the appellant's submission is that within the bundle which was before the judge there was material which supported and corroborated the appellant's evidence that he had been continuously resident in the UK for 10 years, and in particular since he had arrived in the UK in 2007. This evidence was in the form of bank statements for a bank account in the name of Nicolae Baldea Cuinel, an alias which the appellant was known from the evidence to use, covering the period April 2012 to January 2014, into which irregular but relatively frequent payments of cash (often a £100 or more) were paid. This evidence is consistent with the evidence of the appellant that he was working at that time and being paid cash in hand. In addition to this there are two statements which support the appellant's evidence that he was continuously present in the UK from 2007. The first is in the form of a statement from a friend who met the appellant in the UK in 2008 and with whom the appellant worked in construction work. The second is in the form of a statement from a relative who knew the appellant when they were both children in Romania and who was accommodated by the appellant when he arrived in the UK in 2011. The judge fell into error when he concluded, for instance, that there were no "letters or statements from any other friends, relatives or employer that might support his claim to have been in the UK before 2014".

12. In response to this contention it was submitted by Mr Clarke that the evidence would not have been capable of supporting the contention that the appellant did have continuous residence for 10 years. He submitted that the statements do not evidence that the appellant was exercising treaty rights, and the bank statements only go back to 2012 and not the start of the relevant 10-year period. Thus, it was submitted that even if it were an error of law for this material to be disregarded, the appellant could not succeed on the basis that he needed to establish 10 year's continuous residence whilst exercising treaty rights. This latter point was contested by Mr Hodgetts on behalf of the appellant on the basis that whilst it was a prerequisite of eligibility for the appellant to have permanent residence and that had been conceded before the FtT, it was not necessary for the appellant to establish that he had permanent residence throughout the relevant 10-year period. For the reasons which follow we do not propose to resolve that dispute.

13. We are satisfied that there was a clear error in the judges decision on the basis set out in ground 1 of the appeal. The difficulty is the unambiguous and apparently conclusive reasoning of the judge that there were no statements or other documentation which could support the appellant being resident in the UK before 2014. In fact that was clearly not the case, and there were documents which were material considerations which the judge should have taken into

account. As a consequence of the judge's approach there was no evaluation of that evidence, nor any lawful fact finding in relation to whether, and if so in what circumstances, the appellant had resided in the UK for 10 years continuously. A further consequence of the judge overlooking this material was that it played no part in a proper evaluation of the appellant's credibility and his account of his presence in the UK. The foundation for any arguments in respect of status and consequences of the appellant's residence for over 10 years had therefore not been laid by a lawful fact-finding exercise. We are not prepared to second-guess what the detailed conclusions of such an exercise might be in the manner potentially required by Mr Clark's submission. In our view the proper response to the error of law which we have found is for this decision to be remade in the Upper Tribunal, and having found that there was an error of law we adjourn these proceedings for that remaking to be undertaken with no findings preserved.

Notice of Decision

14. The making of the decision of the First-tier Tribunal involved the making of an error of law.

15. The decision of the First-tier Tribunal is set aside with no findings preserved.

16. The appeal is adjourned for re-making at the Upper Tribunal.

Signed **Ian Dove** Date 24th April 2023
Sitting as an Upper Tribunal Judge.