



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005114

First-tier Tribunal No: DA/00060/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 18th March 2024

Before

DEPUTY UT JUDGE FARRELLY

Between

The Secretary of State for the Home Department

Appellant

and

Mr George Coustache
(anonymity order not made made)

Respondent

For the Appellant: Mr E Terrell, Senior Home Officer Presenting Officer.
For the Respondent: Counsel instructed by Duncan Lewis Solicitors.

Heard at Field House on 12nd September 2023

DECISION AND REASONS

Introduction

1. It is the Secretary of State who is the appellant in these proceedings. For convenience I will hereinafter continue to refer to the parties as in the First-tier Tribunal.
2. The appellant is Romanian, born in August 1986. He said he came to the UK in or around 2014 but this is not confirmed. On 2 September 2019 he applied under the settlement scheme and was granted leave for five years.
3. On 16 October 2020 he was convicted in the Crown Court on four counts of dishonesty. He was sentenced to 4 years imprisonment. The offences involved fraud, with the appellant opening a large number of bank accounts in false identities used to obtain monies on false pretences. There are other acts of dishonesty and it is estimated £1.6 million was involved.
4. The OASY assessment found the risk of reoffending was low unless he fell into financial difficulties. The respondent did not see evidence of rehabilitation.

5. He claimed to have a partner but this was not accepted. The respondent took the view that he had not integrated into life in the United Kingdom. Very significant obstacles to his return to life in Romania were not identified. Regarding article 8, no compelling circumstances were identified and the decision was considered proportionate
6. On 27 July 2022 the respondent made a deportation order further to regulations 23 and 27 of the Immigration (EEA) Regulations 2016.

The First tier Tribunal.

7. His appeal was heard before First-tier Tribunal Judge Aldridge at Hatton Cross on 30th September 2022. The appellant and respondent were represented . The appellant gave evidence in English. He said he had recently obtained employment as a delivery driver. He had previously worked in construction and as a personal trainer. He had attended university in Romania.
8. In submissions his representative said that he was not a persistent offender, having one conviction.
9. The judge concluded the evidence demonstrated he had resided in the United Kingdom for a continuous period of at least five years. However, whether this was in accordance with the EU regulations was not supported by evidence. Consequently, he was entitled to the basic level of protection.
10. The judge found that between 2018 and 2020 he had committed numerous offences of dishonesty. However, the judge did not see this as persistent offending, having a single conviction. The judge found he was integrated into life in the United Kingdom. The judge found that he could be rehabilitated and found the decision to be disproportionate . Consequently, the appeal was allowed .

The Grounds

11. Permission to appeal was granted by First-tier Tribunal Judge Hatton on 28 October 2022. It was arguable that the judge erred in concluding the appellant was not a persistent offender. Whilst the judge referred to one conviction there were four counts with offences of dishonesty on numerous occasions.

The Upper Tribunal.

12. At hearing I was advised that counsel for the appellant had tested positive for Covid last night. The digital files show that there had been a request for the matter to be converted to CVP hearing which was done. There was no application to adjourn.
13. The presenting officer said there was a fundamental error in the decision in the conclusion at paragraph 23 that the appellant was not a persistent offender. The judge had found the appellant was entitled to the lowest level of protection under the regulations.

14. It was submitted that the judge should have focused on the question of risk. At paragraph 23 the judge had said that between 2018 and 2020 he committed offences of dishonesty on numerous occasions and then went on to say:

I do not consider this pattern of offending to amount to persistent offending, the appellant had no previous convictions prior to the offending behaviour and, while serious, I do not find that the pattern of offending can be described as persistent as there is only one conviction.'

15. I was referred to the grant of permission at paragraph 3 which quoted the sentencing judge at paragraph 23:

... That between 2018-2020 the appellant has committed acquisitive offences of dishonesty on numerous occasions which have involved deliberate preparation.

16. The presenting officer said that the respondent's decision was based upon public policy. In this regard I was referred to paragraph 23 of the deportation decision. It was submitted that the error affects a proportionality assessment .

17. In response, the appellant's representative referred me to the rule 24 response . This details the notion of a persistent offender and refers to the decision of Chege[2016] UKUT 00187 and the reference to persistence and someone who keeps on breaking the law. It was argued that on the facts the judge was entitled to find the appellant was not a persistent offender and the reasoning was not faulty. It was also suggested that even if the judge did err it was immaterial on the 2016 regulations. This was on the basis the judge had found at paragraph 27 his personal conduct did not at the date of hearing represent a genuine, present and sufficiently serious threat.

18. If I found a material error then Mr E Terrell suggested the matter could be retained in the Upper Tribunal with the finding that the appellant was entitled to the lower standard of protection preserved. The appellant's representative suggested in the event of an error being found it should remain in the First tier.

Consideration

19. The deportation is under the Immigration(European Economic Area)Regulations 2016 The order was made on the grounds of public policy. Paragraph 23(6)(b) of the regulations provides that the respondent may deport if removal is justified on the grounds of public policy. The decision must accord with regulation 27. This sets out the levels of protection available. The judge had concluded the appellant was entitled to the lowest level. The judge found that while he had been in the United Kingdom in excess of five years but had not demonstrated the exercise of Treaty rights during that time. That was a finding open to the judge on the evidence and this has not been challenged.

20. Mr E Terrell submitted that the focus should be upon the risk the appellant presented. The assessment of the threat is contained at paragraph 21 onwards of the decision letter. Paragraph 398 of the immigration rules do not directly apply to the appellant as an EEA national. That provision at (c) refers to the public good where the person is a persistent offender. The immigration rules are nevertheless considered by the respondent to ensure consistency in the

application of article 8. It refers to the appellant being convicted on four counts of serious offences and that he is considered to pose a risk to the public.

21. The OAYs assessment refers to the appellant opening bogus bank accounts of at least 76 occasions. He offended for financial gain. The risk of his right offending was considered low.

22. It is my conclusion that the judge has materially erred in law. The judge has focused on the fact the appellant had one conviction and concluded therefore he could not be considered a persistent offender. However, this ignores the fact there were four counts relating to multiple offences over several years. In this regard therefore the judge failed to have regard to the overarching consideration of the risk presented to the time of the hearing. At paragraph 21 the judge had referred to the appellant as having committed serious offences which he was highly culpable and a leading figure in fraud. The judge acknowledged there was a pattern of offending within a long period of time at paragraph 23. However the judge went on to say that this pattern was different from persistence because there was only one conviction. I find this to be a mistaken approach. This error in turn infected the judge's article 8 assessment. Consequently, the decision is set aside.

23. I have considered whether this matter should be retained in the Upper Tribunal. The electronic papers approach 1000 pages. This material will have to be assessed and findings made. It is my conclusion it would be more appropriate for this to be dealt with in the First-tier Tribunal. I would preserve the finding that he does not have a permanent right of residence as this was not disputed at hearing before me.

Decision

The decision of First-tier Tribunal Judge Aldridge is set aside and the appeal is remitted to the First-tier Tribunal for a de novo hearing. The finding that the appellant does not have a permanent right of residence under Treaty provisions is preserved.

Francis J Farrelly
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date 19/12/2023