IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005332

First-tier Tribunal No: HU/01634/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

31st January 2024

Before

UPPER TRIBUNAL JUDGE OWENS
DEPUTY UPPER TRIBUNAL SHEPHERD

Between

AA
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Unrepresented
For the Respondent: Ms Ahmed, Senior Presenting Officer

Heard at Field House on 23 January 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and his family are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Hussain sent on 29 August 2023 dismissing the appellant's appeal against a decision dated 5 August 2022 refusing his human right's claim.

Background

2. The appellant is a national of Romania who claims to have entered the United Kingdom with his mother on 4 October 2011, aged 12, in order to join his stepfather who was working in the UK as a mechanic. It is not clear from the documentation whether the appellant had acquired permanent residence in the UK prior to the 31 December 2020. Nor is it clear whether he applied for a pre-settled status prior to that date. An application for pre-settled status was made on 21 October 2021.

3. On 17 May 2021 at Ipswich Crown Court, he was convicted of possession of class A drugs, heroin and cocaine, with intent to supply, as well as possessing a blade/sharp pointed article in a public place and various other counts. We will come onto the length of sentence below.

4. As a result, on 7 October 2021, the appellant was served with a Stage 1 Notice of Liability to deport. The Secretary of State deemed the appellant's deportation to be conducive to public good under section 5(1) of the Immigration Act 1971 and pursuant to section 3(5) and in accordance with section 32 (5) of the UK Borders Act 2007 on the basis that the appellant was a "foreign criminal".

5. On 21 October 2021 the appellant submitted a handwritten letter stating that his deportation would breach his human rights due to his family and private life in the United Kingdom. He claimed to have been in the UK continuously since 2011 with his Romanian mother and stepfather, that he completed his education in the UK and that he had a genuine and subsisting relationship with his fiancée and their two British citizen children, one of which has autism. His partner has mental health problems.

6. On 9 September 2022, the respondent decided to refuse the appellant's human rights claim. In this decision the respondent decided that the EEA Regulations 2016 did not apply to the appellant because there was no evidence that prior to 31 December 2020 he was lawfully in the country by virtue of the Regulations and that he had an outstanding application to join the EU settlement scheme. The respondent decided that the appellant did not meet either of the Exceptions at 117C of the Nationality, Immigration and Asylum Act 2002 and that the appellant had not demonstrated that there were any "very compelling circumstances" over and above the Exceptions. The respondent decided that it was not a disproportionate breach of Article 8 ECHR to remove the appellant from the UK. On the same date the respondent refused the appellant's application for EU settlement. In that decision letter, the respondent considered whether the deportation order was justified on the grounds of public policy, public security or public health in accordance with Regulation 27 of the EEA Regulations 2016.

The Decision of the First-tier Tribunal

7. Neither party was represented. AA attended the appeal with his former partner and mother and gave oral evidence. The appellant handed up an agreement endorsed by social services. The oral evidence before the judge was that the appellant has contact with his two British children at his mother's home every weekend, that his ex-partner has mental health problems and that one of the children was being assessed for autism.

8. In his decision, the judge set out the respondent's decision letter in some detail. The judge's factual findings appear in seven very short paragraphs from [37] to [43] of the decision. The judge very briefly stated that the respondent was correct in asserting that none of the Exceptions apply to the appellant and there was no evidence that before the Tribunal that without the appellant's role in the life of his children, their welfare would suffer to such an extent that the clear public interest in his deportation was outweighed. The judge concluded that the respondent's decision was proportionate.

Grounds of appeal

9. The grounds of appeal were drafted by the appellant who is a litigant in person and unsurprisingly given the complexity of the law in this area do not particularise any public law errors.

10. In summary, the grounds assert that the judge did not properly consider the appellant's family life in the UK and the effect his deportation would have on his children, failed to take into account the difficulties he would face in Romania and failed to take into account the fact that he was a carer for one of his friends.

Grant of Permission

11. Permission was granted by First-tier Tribunal Judge Dixon on 1 March 2023 on the following basis:

> "I am however concerned that the correct framework has not been applied. The Judge proceeds on the basis that the appellant has been sentenced to at least 4 years such that he must show very compelling circumstances in order to defeat the public interest in deportation. It does not seem, however, that the appellant has in fact accrued a sentence of the requisite length. The last conviction resulted in the longest sentence: of 44 months. The Judge should have firstly considered whether any of the exceptions applied to the appellant (here it seems that exception 2, as to partner and children under section 117c of the Nationality, Immigration and Asylum Act 2002 potentially apply here). In this respect I note that the Judge made reference to the appellant's partner having mental health problems which is relevant to the assessment of unduly harsh in respect of exception 2 but that assessment has not been undertaken. Although this point has not been taken in the grounds of appeal, I bear in mind that the appellant is unrepresented and that the best interest of the child principle is engaged".

The Rule 24 Response

12. There was no rule 24 response although Ms Ahmed indicated that she would not be opposing the appeal.

Decision to proceed in the absence of the appellant

13. The appellant did not attend the error of law hearing. We were satisfied that a notice of hearing had been sent to the appellant's address by post. The address was the same address as on the grounds of appeal and Ms Ahmed confirmed that this is the same address to which the appellant was released on bail in November 2023 and where he is required to live as a condition both of his bail and also of his licence. The clerk to the Tribunal also attempted to contact the appellant by telephone without success. In these circumstances we are satisfied that the appellant was properly notified of the hearing. There was no indication that he

had contacted the Tribunal to explain his absence or request an adjournment of the hearing. Given that the appellant is a litigant in person and that the issues were primarily legal issues, we considered that the appellant's presence was not necessary to determine the error of law hearing fairly. In these circumstances taking into account the need for swift administration of justice and the importance of the issue to the appellant we decided that it was in the interests of justice to proceed with the hearing in the absence of the appellant.

Discussion and Decision

14. At the outset of the hearing, Ms Ahmed indicated that there appeared to be a mistake at part 2 of the decision letter. This states that the appellant had been sentenced to 44 months and then proceeds to assert that since he has been sentenced for over four years, he can only succeed in his deportation appeal if there exist "very compelling circumstances" over and above the Exceptions. This is manifestly an error because 44 months equates to 3 years and eight months and, as First-tier Tribunal Judge Dixon commented in the grant of permission, the Exceptions would apply if the sentence were for less than four years. This seeming error of the judge was carried over into the judge's decision at [1] where the judge refers to a sentence of 44 months. However, at [44] the judge proceeds on the basis that the appellant has been sentenced to a period of imprisonment of at least four years.

15. On the face of it this is an obvious error of law. However, Ms Ahmed clarified that according to the PNC print out in her possession, the appellant had in fact been sentenced to 54 months. She forwarded a copy of the PNC print out to the Tribunal. This was consistent with the judge's sentencing remarks which are as follows:

> "I give you credit for plea, as I said that I would, and I make a reduction for totality. The sentence in your case is one of five years 10 months. The sentence is structured in this way: 54 months for the drugs offences, count 1 and count 2; 14 months consecutive for the bladed article on the committal for sentence file; and 2 months consecutive on the money laundering offence and that is count 12, as far as you are concerned. On the substantive counts, I'm a little unclear as to why it is that there are substantive and a conspiracy. On the substantive counts, 3, 4, 9 and 10, there is a concurrent 3 years 8 months sentence. It is perfectly clear that 38 D12 that offending was, as the Crown said at the outset, part and parcel of the conspiracy".

16. On this basis we are satisfied that the appellant was sentenced to 54 months in total. This is considerably more than the 44 months as stated in the decision letter and takes the appellant over the four-year threshold. The effect of this is that the judge did not err in proceeding on the basis that the appellant had been sentenced to a period of imprisonment of at least four years.

17. However, there is another obvious error made by the judge. When assessing "very compelling circumstances", the judge must factor into the assessment the extent to which the appellant met either of the Exceptions. The judge dealt with the Exceptions at [39] as follows:

> "I am satisfied that the respondent is correct in asserting that none of the exceptions apply to the appellant".

18. This is clearly unsatisfactory. The judge does not consider for himself where the best interests of the children lay. The evidence before the judge was that social services had been involved with the appellant's family and in the bundle, there was evidence that social services had written a supportive letter about the appellant's role in assisting his ex-partner to bring up the children. The appellant's ex-partner has mental health problems, and the evidence was that the appellant had his children every weekend at his mother's home. The evidence was also that one of the children is having tests for autism. We were not able to understand from the extremely brief statement in the decision what the judge made of the appellant's evidence, what conclusions the judge came to in respect of the best interests of the children, what the judge thought the effect the appellant's deportation would have on them and his ex-partner and how close the appellant came to meeting the "unduly harsh" criteria which would have informed the judge's assessment of "very compassionate circumstances". The judge has failed to undertake the basic task of resolving conflicts in the evidence and make findings of fact. In our view this is manifestly an error of law.

19. We are satisfied that although the grounds are couched in layman's terms, they are wide enough to cover an allegation that the judge erred in the proportionality assessment, by failing to take into account various factors. Alternatively, if this is not the case we are of the view that the First-tier Judge was correct to grant permission in accordance with AZ(error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC) which states that "leave to appeal should be granted if the judge is of the opinion that it is properly arguable that a point not raised in the Grounds of Appeal to the Tribunal had a strong prospect of success if leave to appeal were to be granted. In our view it is strongly arguable that the judge had erred by failing to carry out the "unduly harsh" assessment.

20. We are also satisfied that the error is material to the outcome of the appeal because it cannot be said that if this error had not been made another Tribunal would inevitably have come to the same conclusion.

Disposal

21. Ms Ahmed indicated that in these circumstances (where there was a failure to make findings, and the judge had failed to resolve factual and legal issues) that it would be appropriate for the appeal to remitted to the First-tier Tribunal to be reheard de novo. We are in agreement that we should deviate from the normal course in this appeal because of the dearth of factual findings and out of fairness to the appellant.

22. We note that the appellant's circumstances appear to have moved on since the decisions to deport were taken on 9 September 2022 in respect of his family situation as well as potential further offending. It is open to the appellant of course to seek legal advice in respect of his position. This is a matter for him, but this area of law is very complex.

23. We also note that two separate decisions were taken on 9 September 2023, one was to refuse his human right's claim and the other was to refuse his application under the EEA settlement scheme. The second decision was taken on the basis that he was subject to a deportation order and therefore refused under grounds of suitability. That decision also addressed the EEA Regulations because the offending took place prior to 23.00 GMT on 31 December 2020 (the offences took place in September 2018) and the appellant's application could only be refused

under the EU settlement scheme on the grounds of suitability if the deportation order was justified on the grounds of public policy, public security or public health. The decision dealt with these issues. It is not clear whether the appellant appealed against only one of these decisions or both of them; his grounds of appeal refer to human rights, but the decision attached to the grounds of appeal relates to the EEA settlement scheme. This was not clarified by the judge in the decision and on remittal it will be appropriate for the judge to clarify the position and decide whether it is appropriate to consider the appellant's deportation under the previous EEA framework. We do note of course that First-tier Judge Hussain was hampered by the lack of representation for either party.

Notice of Decision

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. The decision dismissing the appeal is set aside in its entirety with no findings preserved.

3. The appeal is remitted to the First-tier Tribunal for a de novo hearing in front of a judge other than First-tier Tribunal Judge Hussain.

4. We find that it is appropriate to make an anonymity order because social services have been involved with the appellant's former partner and his children and it is in their best interests to protect their identity which extends to protecting the identity of the appellant.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 January 2024