**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Gheorghiu ( reg 24AA EEA Regs – relevant factors) [2016] UKUT 00024 (IAC)

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 18 November 2015** | ..... |

**Before**

**THE HON MR JUSTICE BLAKE**

**UPPER TRIBUNAL JUDGE GOLDSTEIN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MIRCEA GHEORGHIU**

Respondent

**Representation :**

For the Appellant: Ms A Fijiwala, Home Office Presenting Officer

For the Respondent: Mrs B Hamid counsel instructed by SBG Solicitors

When considering whether or not to suspend certification of EEA appeals pursuant to regulation 24AA of the Immigration (European Economic Area) Regulations 2006, the decision-maker should take into account inter alia:(i) the status of the EEA national; (ii) the impact of removal on family members; (iii) evidence of continuing risk to the public; and (iv) the role oral evidence may play.

**DECISION AND REASONS**

1.
This is the Secretary of State's appeal from a decision of FtT Judge Trevaskis promulgated on 27 April 2015. He allowed the respondent's appeal from a decision of the S ecretary of State to deport him pursuant to the Immigration (EEA) Regulations 2006.

2.

Mr G h eorghiu is a citizen of Romania who was born on 9 December 1968 and is now aged 46. He married Mihaela G h eorghiu on 14 February 1995. The couple have three children now aged 20, 19 and 15.

3.
Mrs G h eorghiu gave evidence before the FtT and was accepted as a reliable witness. She stated that her husband first came to the United Kingdom in August 2002. It is common ground that he entered illegally and remained without leave. On 1 st January 2007, Romania became part of the EU and transitional arrangements were made for workers. Mrs G h eorghiu states that her husband was legally working as a builder for various contractors on a self employed basis since January 2007 and supported the family back in Romania as the sole breadwinner.

4.
In her witness statement prepared for the appeal she states that she will do her best to obtain documentary evidence of this, in her husband's absence. On the 18 April 2015 Mr Gh eorghiu's solicitors submitt ed a bundle of self assessment tax returns for the Tax Years from 4 April 2010 to 2014 and the provisional figures for 2015. The judge accepted the evidence that he was working and supporting his family, although we observe that since that was bas ed on Mrs G h eorghiu's evidence this could only have been a reference to the period from January 2007 onwards.

5.
Mrs Gheorg h iu and the three children of the family came to the United Kingdom to live with their h usband/father between 2013 and September 2014. The family l ive in rented accommodation in the UK . Mrs G h eorghiu is in employment as is the eldest daughter; the younger two children are at college and school .

6.
In November 2007, Mr G h eorghiu was convicted of driving a motor vehicle with excess alcohol, was fined and disqualified from driving for 20 months. There have been no subsequent convictions.

7.
It se ems that in June 2014 the S ecretary of State became aware that Mr G h eorghiu had a criminal record in Romania . In 1990 he was convicted of the offence of rape and sentenced to 6 years imprisonment. Between 2001 and March 2002 he was convicted on three occasions of forestry offences, cutting timber without a licence, and received custodial sentences on the last two occasions.

8.
On 28 January 2015, the Secretary of State made the decision to deport Mr Gheorghiu , essentially because of the serious nature of his overseas convictions, notably the conviction for rape. It was assessed that he posed a present threat to public policy and his deportation was proportionate under regulation 21. It was also decided to certify his case under regulation 24AA of the Immigration (EEA) Regulations 2006 (the Regulations) . He was detained and subsequently removed in March 2015.

9.
An application that was made to the Secretary of State under regulation 29AA of the Regulations to attend the appeal was unsuccessful. The appeal accordingly proceeded i n his absence with Mrs G h eorghiu giving evidence. The case for the Secretary of S tate was that the rape conviction meant that the respondent's presence in the UK represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The case for Mr Gheorghiu was that his presence in the UK did not represent such a threat; his criminal conduct was long ago; he had since married

and supported his family; he had led a law abiding life in the UK since 2002 with the exception of the drink drive conviction and that was not sufficiently serious in itself to engage public policy grounds for removal or suggest recidivism.

10.
The judge noted that he had no information from Romania about the nature of the offence, or rehabilitation in prison. He concluded that as the offence of rape was committed 25 years ago and there was no evidence of subsequent violent or sexual offending, he represented at worst a very low risk of re - offending. He was not satisfied that the drink drive conviction was a persuasive indicator of a propensity to reoffend in a sexual or violent manner.

11.
He considered the requirements of regulation 21 and made a proportionality evaluation on the evidence before him. He concluded at [49] as follows:

“ The fact that the appellant has committed previous offences is not a matter which can solely justify deportation; there is no evidence which leads me to find that he is a genuine, present and sufficiently serious threat to one of the fundamental interests of society ; his present conduct in the last seven years, has been that of a law abiding and working member of United Kingdom society, exercising treaty rights as a worker. I do not find that deportation is justified on imperative grounds of public security, because there is no evidence which shows that he represents a genuine, present and sufficiently serious threat to public security. The threshold of imperative grounds is a high level of justification for deportation, and I find that the decision made by the respondent in this case has not reached that level ”.

(emphasis supplied)

12.
The Secretary of State appeals with leave of the FtT judge on the grounds that the judge fell into error in the reference made to imperative grounds in the pass a ge highlighted above.

13.
We agree that the judge fell into error in this respect. He may have been misle d by reading the words of regulation 21 (4) (a) (‘has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision’) as meaning that any such residence counted regardless of its quality. The skeleton argument filed below for Mr Gheorg h iu invited him to take such a course. That invitation was misconceived . C uriously his legal team had submitted a bundle of legal materials including the decision of this Tribunal in Vassallo (Qualifying residence; pre-UK accession ) [2014] UKUT 313 (IAC) which would have demonstrated the falsity of the proposition.

14.
This authority recites the case law of the C ourt of Justice to the effect that residence in a host state prior to the coming into force of the Citizens Directive that the EEA Regulations were designed to implement , can count as residence towards the ten year period , provided that it is legal residence for a purpose contemplated by EU law: see Case C-424/10 Ziolkowski [2011] ECR. It also draws attention to the words of former Schedule 4 paragraph 6 (3) of the Regulations (inserted to deal with transitional provisions tha t have now expired) reflecting this case law . It states that residence before the coming into force of these regulations counts where the claimant:

‘(a) had leave to enter or remain in the United Kingdom

(b) would have been carrying out (the relevant EU) activity or residing in the United Kingdom in accordance with these Regulations had the relevant state been an EEA State at that time and had these Regulations at that time been in force.'

15.
A period of ten years before the decision was taken in the present case starts in January 2005. It was common ground that Mr Gheorghiu entered the UK in breach of domestic immigration law in 2002, and did not have leave to enter or remain. Romania was not then a member of the EU and he could have had no Treaty rights to remain at that time . There was no evidence before the judge that he had entered into lawful employment before January 2007. He could not have been lawfully resident for the purpose of EU law and the EEA regulations between January 2005 and January 2007.

16.
The position is different for the period from January 2007 onwards. There was evidence accepted by the judge that Mr Gheorg h iu had worked continuously from the first date that he was entitled to do so. For most of the period in the five years before the decision in January 2015, there was documentary evidence of self-employed status for tax purposes, but in any event there was the evidence of the wife that she was supported by her husband's earnings that the judge accepted. We pointed out to Ms Fi j i wala that the implication of this was that the respondent had acquired a permanent right of residence under regulation 15 (1)(a) of the R egulations , as he had resided lawfully in the United Kingdom for a purpose (employment) t hat was in accordance with the R egulations. Having considered the evidence she agreed.

17.
The consequence was that although the judge fell into error in referring to imperative grounds of public policy, he should have referred to 'serious grounds of p ublic policy or public security' in accordance with regulation 21 (3).

Conclusions

18.
Although there was an error by the judge in referring to imperative grounds, it made no difference to the outcome of the appeal. The first part of paragraph 49 of the decision quoted above, was sufficient to al low the appeal even at the basic level of protection from expulsion for EU citizens. In fact Mr Gheorghiu could only have been removed on the basis that a higher threshold of serious grounds was met. In the light of the judge's primary conclusions of fact there were no such grounds.

19.
We accordingly dismiss the Secretary of State's appeal.

20.
We are conscious that Mr Gheorghiu was removed from the United Kingdom and his wife and family in March 2015, pursuant to the Secretary of State's certification. We note that this decision may have been influenced by the fact that he failed to respond to the pre - decision inquiry into his personal circumstances. We further note that his legal team failed to apply to a judge of the First-tier Tribunal to suspend the certification pursuant to regulation 24AA (4) of the R egulations.

21.
We are aware that the certification power is a novel one, and no case law on its application in appeals under the EEA Regulations exists. Since the hearing our attention has been drawn t o the recent

decision of the Court of Appeal in R (ota Kiarie and others) [2015] EWCA Civ 1020 handed down on 13 October 2015 and concerned with the app lication of a similar power in A rticle 8 deport ation appeals. That decision upheld certification decisions made on the facts of the particular cases; and noted that in Article 8 cases, appeals from abroad can be an effective remedy, but much depends on the assessment of the requirements of justice in the particular case reached by specialist immigration judges ( see per Richards LJ at [64] to [67] ) .

22.
We have no doubt that if an application to suspend certification enabling pre -appeal removal were made in an EEA case, the judge would take due account of the following factors:-

(i)
that the status of an EEA national exercising Treaty rights of employment an d residence in the host state a t the time of the expulsion decision are significantly different fro m those of aliens generally; interference with the right of residence is not permitted in the absence of a sufficiently serious and present threat to the requirements of public policy, that cannot include in an EU case general deterrence or the interest of maintaining purely domestic immigration control;

(ii)
t hat the removal pending appeal from the communal ho usehold of the principal wa ge earner of the family who (as here) is both a spouse and a parent of a minor child involved in the child's daily life is itself an interfe re nce with both the right to respect for family life under Article 8 and the EU Charter of Fundamental rights and the EU right of residence afforded by the Citizens Directive;

(iii)
that in cases of serious criminality, if there is no evidence of continuing risk to the public, the case for expulsion may not be a strong one; where there is some evidence of risk that is being addressed and rehabilitation of the offender is promoted by the family and employment circumstances in the host state, then, at least in the case of people entitled to permanent residence in that state, substantial weight may be afforded to the duty to promote rehabilitation (see Essa (EEA rehabilitation/ integration) [2013] UKUT 316 (IAC) as corrected by the Court of Appeal in SSHD v Dumliauskas and othe rs [2015] EWCA Civ 145 at [46] and [54]; see also MC (Portugal) [2015] UKUT 00520 (IAC). Interference with the factors that promot e such rehabilitation may not be readily justified.

(iv)
that in cases where the central issue is whether the offender has sufficiently been rehabilitated to diminish the risk to the public from his behaviour, the experience of immigration judges has been that hearing and seeing the offender give live evidence and the enhanced ability to assess the sincerity of that evidence i s an important part of the fact- finding process (see for example the observations of this Tribunal as to the benefits of having heard the offender in Masih (Pakistan) [2012] UKUT 46 (IAC) at [18] ; see also Lord Bingham in Huang [2007] 2 AC 167 at [15] [1] ).

23.
In any event, we consider it is of importance that Mr G h eorghiu is reunited with his family as quickly as possible and the necessary arrangements are made to give effect to this decision within 28 days of its promulgation. His enforced absence from the UK since March 2015 was not voluntary; for reasons found by the judge as corrected by this Tribunal it was not justified, and should not be treated as breaking the continuity of any residence relevant for the acquisition in due course of the right of permanent residence by his wife and children. As noted above, it is accepted that Mr Gheorghiu

himself is entitled to a permanent residence on his return and the residence card issued to him will reflect that.

24.
The FtT judge directed anonymity. We can see no basis to depart from the principle of open justice in this case. The direction is revoked.

**Notice of Decision**

The Secretary of State's appeal is dismissed.

The decision of the FtT judge allowing the respondent's appeal from the decision to deport stands.

The Secretary of state is directed to arrange for the return of the respondent to the United Kingdom within 28 days of the promulgation of this decision

No anonymity direction is made.

No fee is paid or payable and therefore there can be no fee award.

Signed 

Date 20 November 2015

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[1] 'The first task of the appellate immigration authority is to establish the relevant facts. These may well have changed since the original decision was made. In any event, particularly where the applicant has not been interviewed, the authority will be much better placed to investigate the facts, test the evidence, assess the sincerity of the applicant's evidence and the genuineness of his or her concerns and evaluate the nature and strength of the family bond in the particular case. It is important that the facts are explored, and summarised in the decision, with care, since they will always be important and often decisive'.