**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00717/2017 (V)

**THE IMMIGRATION ACTS**

**Heard at Bradford by skype for business**
**On 9 September 2020**

**Decision & Reasons Promulgated**
**On 24 September 2020**

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

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

Appellant

**and**

**MARIAN MADALIN PETRE**

Respondent

**Representation:**

For the Appellant: Ms Pettersen, Senior Home Office Presenting Officer
For the Respondent: Mr A. Khan, Counsel instructed on behalf of the respondent

**DECISION AND REASONS**

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal (Judge Khosla) promulgated on 12 March 2020. By its decision, the Tribunal allowed the Appellant's appeal against the Secretary of State's decision, dated, 14 November 2017 to deport him from the United Kingdom. The First-tier Tribunal did not make an anonymity order and Counsel did not seek to advance any grounds as to why such an order would be necessary.

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2. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Mr Petre as the appellant, reflecting their positions before the First-tier Tribunal.

3. The decision to deport was made under Regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The appellant's case was that the decision was not in accordance with Regulation 27 and Schedule 1 of the Regulations, and/or that it was incompatible with his rights under Article 8 of the Convention, and thus unlawful by reason of S.6 of the Human Rights Act 1998.

4. By a decision and reasons promulgated on the 13 March 2020, the FtTJ(Judge Khosla) allowed the appeal, holding that the decision was not in accordance with the Regulations as he did not find that the respondent had established that the appellant represented a genuine, present and sufficiently serious threat to public policy or security such that his deportation was justified. The judge did not need to, and did not, consider the Convention grounds.

5. The Secretary of State appealed and permission to appeal was granted by the First-tier Tribunal (Judge Saffer).

6. The hearing took place on 9 September 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court at Bradford IAC. The advocates attended remotely via video. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

7. I am grateful to Ms Pettersen and Mr Khan for their clear oral submissions.

Background:

**8.** The Appellant is a citizen of Romania. The key factual background is set out in the decision of the FtTJ, the decision letter and the witness statements filed on behalf of the appellant. He entered the United Kingdom in February 2011 to join his mother who had entered in 2009.

9. Between 2011 and 2017 he has committed criminal offences. Reference is made to them in the decision letter; that he received convictions for placing advertisements relating to prostitution, damage to property, shoplifting, two counts of drug possession and breaches of conditional discharge and a breach of a community order.

10. On 17 October 2017, the appellant was served notice that he was liable for deportation and invited to make any representations as to why this should not take place. Submissions were submitted on his behalf, by letter from his representatives,

dated 9 November 2017. Consideration was given to those representations, but the respondent refused those representations in a decision letter of 14 November 2017. He was removed from the United Kingdom on the 24 March 2018.

11. The decision letter set out the appellant's criminal history are set out above. It was considered that his convictions indicated an established pattern of acquisitive offending and that it indicated antisocial attitudes towards the public. The respondent was of the view that there was insufficient evidence that he had adequately addressed the reasons for his offending behaviour and abstained from drugs and that on the available evidence it indicated he had a propensity to reoffend and thus represented a genuine, present and sufficiently serious threat to the public to justify his deportation on grounds of public policy.

12. In terms of proportionality, the decision letter took into account his age and his nationality and that it was believed that he had spent his youth and formative years in Romania. He had provided no evidence that had been resident in the UK for significant periods of time and had not acquired a right to permanently reside in the UK. He had not provided evidence of social and cultural integration. Whilst it was noted that his mother had claimed that he was his sole carer, the claim not been substantiated with any documentary evidence although her medical history had not been disputed. However, it was considered that in his absence she would have sufficient care. In paragraph 34 – 40 the issue of rehabilitation was considered and that there had been no evidence it undertaken any rehabilitative work to address the issues that led to his offending.

13. It was concluded that there was a real risk that he may reoffend and therefore it was considered that his deportation was justified on grounds of public policy, public security, or public health in accordance the regulation 23 (6) (b).

14. At paragraphs 42 – 65 the decision letter addressed additional matters relevant to Article 8 of the ECHR.

The applicable legal framework:

15. The deportation of EEA nationals is subject to the regime set out in the Immigration (European Economic Area) Regulations 2016 ('The EEA Regulations') which were made under section 2 of the European Communities Act 1972 by way of implementation of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States. The Directive sets conditions that must be satisfied before a Member State can restrict the rights of free movement and residence provided for by EU law.

16. By virtue of Regulation 23(6) of the 2016 regulations an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if:

> (a) that person does not have or ceases to have a right to reside under these Regulations; or

(b) the Secretary of State has decided that the person's removal is justified on the grounds of public policy, public security, or public health in accordance with regulation 27; or

(c) the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3).

17. Regulation 27 of the EEA Regulations provides as follows: -

' **27.** - (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security, or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who-"

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles-"

(a) the decision must comply with the principle of proportionality.

(b) the decision must be based exclusively on the personal conduct of the person concerned.

(c) the personal conduct of the person concerned must represent a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society.

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United

Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

...

(8) A court or Tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security, and the fundamental interests of society etc.).

SCHEDULE 1

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

**Considerations of public policy and public security**

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

**Application of paragraph 1 to the United Kingdom**

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

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

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

(a) the commission of a criminal offence;

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

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

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

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

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

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

**The fundamental interests of society**

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

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

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

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

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

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

(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;

(j) protecting the public;

(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);

(l) countering terrorism and extremism and protecting shared values."

<u>The appeal:</u>

19. In the light of the COVID-19 pandemic the Upper Tribunal issued directions, inter alia, indicating that it was provisionally of the view that the error of law issue could

be determined without a face to face hearing and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.

20. Before the Upper Tribunal, the Secretary of State was represented by Ms Pettersen and the appellant represented by Mr Khan of Counsel. Ms Pettersen relied upon the grounds as drafted. It is not necessary to set out the submissions of each of the parties as I will set out the relevant aspects of those submissions when dealing with the grounds advanced on behalf of the Secretary of State and my consideration of those issues.

Discussion:

21. I am grateful for the submissions made by each of the advocates. I confirm that I have taken them into account and have done so in the light of the decision of the FtTJ and the material that was before him.

22. The grounds relied upon by the Secretary of State set out under the heading "failing to give reasons or any adequate reasons for findings on material matters, failing to take into account and/or resolve conflicts of fact or opinion on material matters."

23. The first ground relates to the position of the appellant and whether he was a "qualified person". Ms Pettersen relied upon the grounds in which it is submitted that the FtTJ failed to adequately explain how the appellant was dependent upon his mother and for what period.

24. In the decision letter, the respondent had referred to the lack of evidence to show the appellant's date of arrival in the UK but beyond this, the decision letter only made reference to the failure to show continuous residence for a period of five years to demonstrate a permanent right of residence.

25. The FtTJ addressed this issue at paragraphs [45] – [48] of the decision having earlier set out the relevant legal framework.

26. As Mr Khan submitted the FtTJ had the advantage of hearing the oral evidence of the appellant, his mother and sister during the appeal and having done so reach the overall conclusion that they had all given "truthful accounts on material matters". He found them all to be "credible witnesses" (at [45]). This included as a "material matter" the nature of the appellant's residence in the UK. As the FtTJ observed at [45] there was no dispute that the appellant's mother had been exercising treaty rights since her arrival in the UK. As set out in her evidence before the FtTJ she had entered the UK in 2009 at and continued to work until February 2018 due to ill health.

27. Whilst the respondent did not accept the appellant's date of arrival as February 2011, the FtTJ considered the appellant had given credible evidence as to his history and background and therefore he accepted that the appellant entered the UK in February 2011 as set out in his evidence and corroborated by his mother. The judge also accepted his evidence as to his history which included the dependency upon

his mother following his arrival and entry into the United Kingdom in 2011 and of his work history (see paragraph 19 of witness statement).

28. In light of the judge's acceptance of their evidence, it was open to the FtTJ to reach the conclusion that the appellant fell into the category as a "family member" who was dependent upon his mother when she had supported him and also alongside this he accepted the appellant's evidence as to his work history which was described at [46], as having worked in a car wash.

29. Ms Pettersen relied upon the written grounds where an extract of the guidance sets out a case example of someone who claims to be a "worker" by washing cars for a relative, and submitted that the appellant's work was similar to this, and therefore was "marginal and ancillary" and was not characterised as "a worker". However, as Mr Khan submits, at paragraph [46] the FtTJ set out that the appellant's evidence as to his employment was not challenged by the respondent at the hearing nor was it submitted that his employment was "not genuine or effective". It is therefore plain that the respondent had not sought to challenge his evidence or the nature of that evidence during the hearing on the basis now asserted by the respondent. Consequently it was open to the FtTJ to conclude on what was unchallenged evidence that the appellant had enjoyed the right under EU treaties as a result of his dependency on his mother in conjunction with his own work history and that, whilst he could not demonstrate a permanent right of residence, the appeal concerned the "bottom tier" of protection and whether the decision to deport the appellant was justified "on grounds of public policy, public security or public health in accordance with Regulation 27".

30. As the appellant has not exercised treaty rights for a continuous period of five years, the Regulations give only the lowest level of protection against removal. Nevertheless, the appellant cannot be deported unless his personal conduct represents "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. This is set out at Regulation 27(5)(c).

31. In this context, the grounds also challenge the FtTJ's assessment of the appellant's criminal history. The grounds identify a number of paragraphs but in particular paragraph 59, in relation to the appellant's criminal history in Romania and the judge's assessment that it amounted to "no more than rebellious behaviour". It is submitted on behalf of the respondent that the FtTJ gave no consideration to the appellant's evidence of having been the subject of extradition and that it must follow that the Romanian authorities did not treat this as "rebellious behaviour".

32. To address that submission, it is important to consider the finding at [59] in the context of the evidence before the Tribunal. The FtTJ accepted that prior to entering the UK and when a minor, he had been involved in offences of theft. In the decision letter, the particular circumstances of the offences were said to be "unknown" although elsewhere in the decision letter they were referred to as "street robberies" (see paragraph 6 of the decision of the FtTJ). However, the FtTJ referred to the appellant's evidence that he and some friends had stolen a bicycle from a garden

and had broken into a restaurant and stolen alcohol. The judge recorded that the presenting officer was "unable to direct me to any evidence of street robberies" (see paragraph 6).

33. As to the circumstances which gave rise to the arrest warrant, it related to an event which occurred in Romania for which the appellant had already been sentenced to a suspended sentence for what was said to be theft of a bike alongside other co-defendants. The FtTJ set out the appellant's evidence at [11] and that the appellant had been made the subject of an arrest warrant for an earlier offence committed in Romania and that "it was not altogether clear and the respondent had not furnished any information in relation to this" but that it appeared that the authorities in Romania imposed a custodial sentence on the appellant in relation to an offence which he previously received a non-custodial sentence. The evidence of the appellant's mother was consistent with the appellant's evidence and that an appeal had led to his recall at a time when the appellant had been working in Spain and he was arrested. It appears that he was released by judge in Spain on the basis that had been a minor when the offence was committed but that the decision was then reversed (see paragraph 18).

34. Against that background, and the lack of challenge to the appellant's account which the judge accepted and the lack of any supporting evidence from the respondent as to the offences, it was open to the FtTJ to prefer the evidence of the appellant and to reach the conclusion that the nature of the appellant's offending, seen in the context of his age and the nature of them was properly considered to be "rebellious behaviour". This was not considered in a vacuum as the judge accepted the appellant's mother's evidence concerning his upbringing which had given rise to his "rebellious behaviour" in her witness statement. The FtTJ also observed the appellant's evidence concerning the nature of his previous evidence was "unchallenged evidence". The judge found the last offence in Romania took place in 2002 (although he was sentenced in 2006) and that there was a nine-year gap between his last offence in Romania and the commission of the offences in the UK.

35. In my judgement, the respondent has not demonstrated that the judge's characterisation of his previous offending as "rebellious behaviour" was a finding that that was not reasonably open to him on the evidence before the Tribunal. Whilst reference is made to the view taken by the Romanian authorities, as the FtTJ made plain, the respondent provided no factual evidence as to the circumstances of the offence nor any evidence from the authorities themselves and therefore their view cannot be known solely by the respondents reference to the sentence subsequently imposed.

36. The grounds also seek to challenge other paragraphs of the decision (paragraphs 59, 60, 61,62) in the context of the FtTJ's assessment of whether the appellant's offending represented a "genuine, present and sufficiently serious threat."

37. Ms Pettersen submitted that the FtTJ did not engage with the appellant's persistent offending when addressing his criminal history and that he had found no connection wrongly between the offences in Romania and those in the UK and therefore his reasoning was "inadequate" on this issue.

38. Mr Khan in response submits that the FtTJ gave careful consideration to the issue of the appellant's offending and the issue of risk and that the judge had analysed the appellant's criminality both in Romania and the UK and did so in the context of his efforts to change his behaviour. He submitted that the FtTJ had given adequate reasons which were sustainable on the evidence.

39. I have considered those submissions in the context of the evidence before the FtTJ and his assessment of that evidence. The FtTJ set out the relevant legal framework at paragraphs 34-42 and referred to the legal authorities that had been placed before him. He reminded himself of the general principles which were applicable and that he must decide the case on the individual circumstances of the appellant. No criticisms have been advanced on behalf of the respondent as to his self -directions in law. In particular at [54], the FTT J observed that he had "no doubt" that the appellant's conduct would be sufficient justification for the respondent to satisfy the burden on her that public policy and public security considerations are at play and that the decision would be potentially justifiable on those grounds.

40. The judge then addressed the respondent reliance on the appellant's offending history. In Arranz (EEA regulations - deportation -test) *[2017] UKUT 294* the Upper Tribunal held that the burden of proof lay on the SSHD to prove that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. That the burden of proof lies on the SSHD has recently been accepted by the Inner House of the Court of Session in *SA v SSHD [2018] CSIH 28*. The person concerned must also be a present threat, Orphanopoulos and Oliveri v Verwaltungsgericht Stuttgart, [2004] ECR 1999 and previous convictions are relevant:

    "*Only insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy*".

41. Contrary to the grounds the FtTJ did take into account that the appellant had convictions for breaches of orders made by the court (see paragraph [56]). The judge set out his history of 13 offences resulting in 11 convictions and that there were no further convictions since September 2017 (at [57] and [62]). At [62] the judge took into account the period in immigration detention and found that "it leaves a period of approaching two years during which the appellant had not been convicted of any crime."

42. As to the offences in Romania, the FtTJ addressed them at [59] and for the reasons set out earlier in this decision, the judge described those earlier offences committed whilst a minor as "rebellious behaviour"; a conclusion open to him on the evidence.

43. The judge also took into account those previous offences were committed whilst minor and that the last offence took place in 2002 and that there had been a nine year gap between the offences in Romania and the commencement of his offending in the UK (at [57]).

44. Whilst the grounds challenge the FtTJ's factual finding that there was no connection between his offending in Romania and that in the UK, the FtTJ addressed this at [59] by taking into account the reasons for the offences committed in the UK which

the judge found to be as a result of his addiction to drugs and that this had not been the cause of his offending in Romania. That was a finding reasonably open to him on the evidence before him. The FtTJ then addressed the appellant's offending in the UK at [60] and again took into account that these were "low-level offences including offences of theft and possession of class A drugs and that there were breaches of failing to comply with court orders but that none of the offences resulted in a custodial sentence.

45. I accept the submission made by Mr Khan that the FtTJ's analysis of the appellant's offending was based on the evidence before him and that the factual findings made an assessment was one that was reasonably open to the judge to make. There is no lack of reasoning nor as the grounds assert was there any failure to consider any aspects of the appellant's offending history.

46. Ms Pettersen in her oral submissions also relied upon paragraph 6 of the written grounds which stated as follows; "In assessing risk of reoffending the FtTJ's conclusion that the appellant's acknowledged relapse was not indicative of a "permanent relapse" (para 62) fails to engage with the fact that the "risk" does not need to be "imminent" and that even a "temporary relapse" may pose unacceptable risk (see paragraph 32 HOPO submissions) ".

47. That paragraph does not set out what error of law the judge made however I read it to mean that the judge had not properly addressed the issue of risk of reoffending in the light of the accepted relapse made in September 2019.

48. The issue of risk of reoffending was addressed by the judge at paragraphs[62]-[69] of his decision. When reading the FtTJ's analysis of the evidence, it is plain that he took into account a number of relevant factors before reaching his overall conclusion. In that assessment, in my view it was open to the judge to take into account that he had not been convicted of any offences from September 2017 and this was a significant period of nearly 2 years. The judge did take into account that the appellant's offending in the UK had been as a result of his own drug habit and therefore his relapse in September 2019 was relevant. However, the judge gave sustainable reasons firmly based on the evidence that the relapse in September 2019 (when he attempted to take his own life by taking an overdose) had to be seen in the context of what was happening at that time. At [62] the FtTJ reached the conclusion that this was not evidence of a permanent relapse but that it was specific to the facts appertaining at that the time when the appellant had been told that he would not, has he been expecting been able to come to the UK to attend his appeal hearing. The judge had accepted the appellant's evidence as to the effect of this upon him and it was therefore open to him to reach the conclusion that it was not a permanent relapse.

49. Furthermore, the judge took into account other factors in support. He identified that the appellant had been abstinent from illegal drugs since September 2017 ( at [67]), he had engaged with a programme of prescription methadone to overcome his addiction and since the overdose in 2019 had been compliant (at [64]), the appellant had resisted the temptation to take drugs despite them being available both in Romania and the UK ( at [65]) and that there had been "no challenge to the

truthfulness of both the appellant's and his mothers and sisters witness evidence that he had abstained from drugs" (at [66]).

50. On that evidence, the FtTJ concluded that he accepted the appellant's evidence and found that the appellant had abstained from illicit drugs for a sustained period and that this was evidence of the appellant having made "significant progress towards overcoming his addiction and rehabilitating" (at 66]). The judge found that this was "strongly indicative of the appellant's desire to remain drug-free" and that the judge found that he would "abstain from drugs for the foreseeable future."

51. The FtTJ had the advantage of hearing the oral evidence of the appellant and his mother and half-sister alongside the documentary evidence both in the appellant's bundle and that of the respondent. It is plain from reading the decision as a whole that the judge was impressed by his evidence and found the appellant's evidence to have been credible and truthful. The judge accepted the appellant's evidence that he was "remorseful for his actions" and went on to state "I am satisfied that the appellant wants to improve his life so that he can be a support to his mother who suffers from various illnesses as was evident both from her medical documentation enclosing the appellant's bundle and her presentation at the appeal hearing. It is also clear that the appellant's most recent offending was a result of the appellant addiction to drugs and there is no evidence to indicate that if the appellant were to continue to abstain, he would engage in offending behaviour. It is clear that the appellant's offending behaviour has been centred around his substance misuse."

52. Whilst it is argued on behalf of the respondent that the risk did not need to be "imminent" and that even a temporary relapse may pose an unacceptable risk, I am satisfied that the judge did give clear reasons as to why he did not find the appellant to pose an unacceptable risk and this was plain from his omnibus conclusion at [69] and [70] of his decision.

53. In his decision, the FTT J was plainly aware that the decision to deport the appellant may not be taken except on grounds of public policy or security and that as a consequence he was required to identify those relevant factors and evaluate them as to their seriousness. He properly analysed the offences in detail and the FtTJ observed that a person's previous convictions do not in themselves justify the decision to deport (at [58]).

54. In carrying out his assessment, in my judgement the FtTJ properly had regard to the offences themselves and the appellant's conduct including his failure to comply with court orders, his abstinence from drugtaking which had been the catalyst for his offending and addressed and assessed the risks of reoffending in the light of the evidence as a whole.

55. In summary, the public policy grounds for removal are an exception to the fundamental principles of the free exercise of EU rights and as such an EU citizen should not be expelled as a deterrent to others without the personal conduct of the person concerned giving rise to consider that he will commit other offences that are against the public policy of the state.

56. It must be established that the Appellant represents "a genuine, present or sufficiently serious threat affecting one of the fundamental interests of society". In this context the FtTJ properly considered the future risk of reoffending and did so in the light of all the evidence before him.

57. As set out in the decision of SSHD v Straszewski [2015] EWCA Civ 1245 at paragraph [25], it required an evaluation to be made of the likelihood that a person concerned would offend again and the consequences if he did so. In addition, the need for the conduct of the person concerned to represent a "sufficiently serious" threat to one of the fundamental interests of society required the decision maker to balance the risk of future harm against the need to give effect to the right of free movement. This was the evaluation carried out by the FtTJ.

58. A finding as to whether the conduct of the appellant represents a genuine, present, and sufficiently serious threat is a prerequisite for the adoption of an expulsion measure and it is only upon such a threat being established, that the issue of proportionality arises ( see grounds relating to rehabilitation). Here, the judge concluded at paragraphs [69-70]that there was insufficient evidence before him to conclude that the appellant presents a genuine and sufficiently serious threat affecting one of the fundamental interests of society. In view of the FtTJ's assessment, he was not required to consider Article 8 of the ECHR and therefore the submissions made by the respondent in relation to Article 8 have no relevance.

59. I remind myself I can only interfere with the decision of a judge if it has been demonstrated that there was an error of law and in this case, the judge had the opportunity to hear the oral evidence of the Appellant and for this to be the subject of cross-examination.

60. As set out in the well-known case of Piglowska v Piglowski [1999] UKHL 27, Lord Hoffmann said this:

> "...the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. ..."

Then there is a quotation from his own decision in Biogen Inc v Medeva Ltd [1997]

> "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

61. As stated in the decision of Straszewski, in any given case an evaluative exercise of this kind may admit of more than one answer. If so, provided all the appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in a sense of falling outside the range of permissible decisions. It has not been advanced on behalf of the Secretary of State that the decision of the judge or his findings of fact were either irrational or perverse and in light of the foregoing, the judge properly considered the appropriate factors and made findings of fact based on the evidence before him. It may well be that this was not the only outcome possible on the facts in this particular appeal but the FtTJ directed himself correctly in law and that his conclusion, even if properly characterised as one that might be thought to be a generous one, does not disclose any legal error.

## Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal to allow the appeal stands.

Signed *Upper Tribunal Judge Reeds*
Dated: 21 September 2020