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

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **on 30 April 2014** | **on 16 May 2014** |

**Before**

**THE HONOURABLE MRS JUSTICE ANDREWS DBE**

**UPPER TRIBUNAL JUDGE PITT**

**Between**

**GM**
**(ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Ms Chapman, instructed by Wilson LLP
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

The Appeal

1. The appellant is a citizen of Cameroon and was born on 20 January 1978.

2. This is a re-making of the appellant's appeal against the respondent's decision dated 17 August 2011 to make a deportation order under the

Immigration (European Economic Area) Regulations 2006 (the EEA Regulations).

Background

3. The following matters are common ground. The appellant came to the UK on 25 February 2003 as a student with leave until 30 April 2007. In 2005 he met a French national, CG and they formed a relationship.

4. The appellant received a conviction on 12 December 2005 for driving with excess alcohol and was disqualified from driving for 16 months.

5. The appellant and CG began to cohabit in 2006. In the same year, the appellant was diagnosed with paranoid schizophrenia. He was sufficiently unwell to require a short period in hospital under s.2 of the Mental Health Act and was discharged to a Community Mental Health Team (CMHT) on amisulpride an anti-psychotic medication. CG was aware of his condition and supportive of him.

6. The appellant and CG married on 19 January 2007. On 9 August 2007 the appellant was issued with a residence card valid until 12 August 2012 recognising his status as a family member of an EEA national exercising Treaty rights.

7. At some point during 2007, the appellant discontinued his anti-psychotic medication after consulting the CMHT.

8. On 19 April 2008 the appellant received a caution for possession of cannabis. On 13 May 2008 he was convicted of driving with excess alcohol and was disqualified for 36 months.

9. On 15 July 2009 the appellant assaulted his wife. He was charged with assault occasional actual bodily harm (ABH) and bailed. In August 2009 he resumed taking his medication.

10. Whilst on bail for that offence he committed two offences of criminal damage, throwing a brick through the window of his wife's home and through the window of her car. He was sentenced to 6 weeks' imprisonment for those offences on 27 November 2009. On the same date, CG also obtained a restraining order against the appellant under the Protection from Harassment Act 1997. That order remains in force. In compliance with the terms of that order, there has been no direct or indirect contact between the appellant and CG since 27 November 2009. We were told that on 7 April 2011 she did make contact with prisoner location services to try to get in touch with the appellant, but she did not follow up her initial inquiries. There was no evidence before us as to her current whereabouts. Of course, the separation of the couple does not affect the appellant's status. There is no evidence that she has divorced him.

11. On 6 December 2010 the appellant pleaded guilty to the ABH

charge. On 7 March 2011 he was sentenced to 12 months' imprisonment. Whilst in prison, he engaged in rehabilitation courses and carried out relapse prevention work. This gave him a better understanding of his mental illness and of the need to continue taking his prescribed anti-psychotic mediation for the foreseeable future.

12. On 17 August 2011 the respondent made a decision to deport the appellant under the EEA Regulations. The appellant lodged an appeal on 23 August 2011.

13. On 1 September 2011 the appellant was released on immigration bail but was recalled under his criminal licence on 2 September 2011. The appellant was eventually released from detention on 9 July 2012 and placed in accommodation in Swansea. He suffered a heart attack on 28 July 2013. As well as being prescribed medication the Appellant undertook cardiac rehabilitation and made changes to his lifestyle, including giving up cigarettes and alcohol.

14. On 21 December 2011 the FTT promulgated a decision dismissing the appeal. Permission to appeal was granted on 8 February 2012. On 3 September 2012 the Upper Tribunal found an error on a point of law following a concession by the respondent regarding the FTT's failure to consider the period of cohabitation with CG prior to their marriage and the FTT not having taken the period of remand and imprisonment into account when assessing whether the appellant had obtained permanent residence. That concession was in line with legal thinking at the time.

15. The appeal was then stood down until the outcome of a reference to the Court of Justice of the European Union (CJEU) in Onuekwere (Case C-378/12) CJEU (Second Chamber), 16 January 2014 which considered the effect of a period of imprisonment on the establishment of permanent residence.

The Law

16. Where the respondent proposes to deport a family member of an EEA national, Directive 2004/38/EC provides a hierarchy of levels of protection against expulsion and those provisions are incorporated in domestic law by regulation 21 of the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations). Regulation 21 states:

> Decisions taken on public policy, public security and public health grounds
>
> (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 permanent right of residence under regulation 15 except on serious grounds of public policy or 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 necessary in his best interests, 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) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

Preliminary Issue – Permanent Residence

6. As indicated above, this appeal was adjourned for an extended period to await the reference to the CJEU in Onuekwere. That case was issued alongside MG (Case C-400/12) (Second Chamber) 16/1/14, both of which confirm that a period of imprisonment breaks continuity of residence when assessing whether permanent residence has been established.

7. Ms Chapman accepted that the sentences of imprisonment in November 2009 and March 2011 precluded the appellant from having established permanent residence.

8. The appeal therefore proceeded on the basis that the appellant benefitted only from the basic level of protection from expulsion provided by the EEA Regulations and we must assess whether the appellant can be deported on grounds of public policy or public security, taking into account the factors set out in Regulation 21(5) and 21(6) of the EEA Regulations.

Our Decision

9. It was our judgment that on the basis of the evidence before us, this appellant's personal conduct does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society such that deportation under the EEA Regulations was justified or proportionate.

10. The main evidence against the appellant relied upon before us with regard to a current risk of offending was a National Offender Management Service (NOMS) report which was requested as long ago as August 2011.

11. The NOMS report found that there was a medium risk of reconviction and the appellant was found to require MAPPA level 2 management. He was also stated to pose a medium risk of serious harm. The risk factors were: non-compliance with his mental health medication, non-engagement with mental health services, alcohol dependency, and violence towards known females. The NOMS report also recorded that at that time the appellant was defensive, minimising his own behaviour and blaming the victim, although he did express some remorse.

12. It was our view that other evidence before us indicated that things had moved on since the NOMS report was prepared.

13. First, there is the basic fact that the appellant has not reoffended since his release from detention on 9 July 2012. There is also no dispute that (a) he has complied with the terms of the restraining order and has not attempted to contact his wife and (b) there has been no concern regarding his behaviour towards women since his release from detention.

14. Secondly, we had before us a psychiatric report dated 1 August 2012 from Dr Amlan Basu, consultant forensic psychiatrist at Broadmoor Hospital and a further psychiatric report dated 27 April 2014 from Dr Deborah Brooke, consultant forensic psychiatrist in the Oxleas NHS Foundation Trust.

15. Both psychiatric reports assessed the risk of reoffending and of serious harm arising to be lower than the NOMS report. Dr Basu found the appellant to be at a low risk of reoffending and at "low-medium" risk of

causing serious harm. It was also Dr Basu's opinion that the appellant had developed a proper understanding of his mental disorder and that there was no reason to believe that the appellant would not comply with psychiatric medication or continue to abstain from heavy alcohol abuse. Dr Basu's report was not the subject of any challenge by the respondent and we found that we could place weight on it.

16. Dr Brooke concurred in the assessment that the appellant was at a low risk of further violent reoffending and pointed out that he had been compliant with medication since his release from detention in July 2012. In addition, Dr Brooke's assessment was conducted after the appellant's heart attack in July 2013. He had abstained from alcohol and tobacco entirely since then. Dr Brooke found that to be additionally beneficial for his mental health, "markedly" reducing the risk of further offending.

17. Thirdly, we had further medical evidence before us by way of a letter dated 13 March 2014 from the appellant's GP and the GP records from August 2012 onwards which confirmed his compliance with antipsychotic medication from October 2012 onwards and his abstinence from alcohol and tobacco following his heart attack in July 2013.

18. Fourthly, there was consistent evidence before us from the appellant, his four family witnesses and two friends who all attended the hearing, that since his release from detention the appellant has been compliant with medication, initially reduced his alcohol consumption, has been entirely abstinent since July 2013 and has actively sought to remain well and refrain from further offending. They have all been supportive of him, although none of his family members lives nearby and contact between them is mainly telephonic.

19. Mr Melvin submitted that little weight should be placed on Dr Brooke's assessment of low risk of violent offending as it was based on a conclusion that the appellant would continue taking his medication and remain drug and alcohol free. Our view, given the various and consistent sources of evidence set out above, was that the appellant had shown a serious commitment to remaining compliant and drug and alcohol free and that we could therefore place weight on Dr Brooke's conclusions.

20. Mr Melvin also suggested that the NOMS report from 2011 should still carry weight as it was stated to be valid for 5 years. In the context of all of the evidence set out above concerning the reduction of risk, we did not find that the NOMS report could be determinative. Indeed, Dr Basu and Dr Brooke both specifically commented on the limitations of the NOMS assessment and applied a different test, the HCR-20 Structured Professional Judgement Risk Assessment tool in making their own independent professional assessments.

21. Mr Melvin also questioned the appellant's compliance with medication as the letter dated 13 March 2014 from the GP stated that when he moved to Swansea he failed to attend for hospital appointments for his mental health and was discharged from specialist mental health services as a

result. We did not find that this comment in the GP letter was an indication of material non-compliance. Firstly, the appellant provided a credible explanation for the failure to attend hospital for a mental health consultation, the appointment having been sent to him at the time that he moved to Swansea and whilst he was changing his address there. He was unaware of the appointments because the letters were sent to his old address. His evidence on initially obtaining medication from a health centre there, subsequently registering with a GP was equally credible. Secondly, if his failure to attend and consequent discharge from specialist services was of any importance to the treatment of his mental disorder, his GP could have been expected to say so, but does not. On the contrary, the GP records suggested to us that his treatment via his GP was medically uncontentious and sufficient. Dr Brookes comments specifically at 7.16 and 7.21 of her report that "general practitioner care is appropriate for his mental health needs" and that the appellant is "fully engaged with appropriate treatment."

22. We noted the comments in a Parole Board recommendation dated 26 October 2011 and Probation Service parole assessment dated 28 November 2011 that the appellant did not have his medication with him when released on bail on 1 September 2011 and did not attend a Probation Service appointment on 2 September 2011, leading to a recall. The respondent's reasons letter dated 12 September 2011 maintained that these matters indicated that he was likely to reoffend and become non-compliant with his anti-psychotic medication. It appeared to us that his conduct since then has been sufficient to put to rest any concerns arising from the circumstances of his release and recall in September 2011, some 4 years ago. We also accepted that there was some evidence, at the very least, of confusion concerning what happened to his medication when he left prison on 1 September 2011 (at pages 82 and 83 and 89 of the appellant's bundle) and concerning the need to report to the Probation Service (page 79 of the appellant's bundle).

23. In summary, we accepted that the appellant is committed to remaining highly compliant with his various medications, to maintaining his physical and mental health and to abstaining entirely from alcohol and any illicit drugs. The appellant has therefore addressed the factors that give risk to a risk of reoffending.

24. Where that is so, and where there has been no question of any reoffending since release from detention in July 2012, it is our view that the current risk of reoffending is sufficiently low that the appellant's personal conduct cannot be said to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society such that he can be deported under the EEA Regulations.

25. Where the appeal under the EEA Regulations succeeds, it is unnecessary to address Article 8 of the ECHR, an appeal on EEA grounds necessarily bringing with it a consideration of identical principles under article 7 of the Charter of Fundamental Rights of the European Union.

26. We feel it appropriate to indicate, however, that although both parties put forward their case on the basis of the decision to deport the appellant under the EEA Regulations, there was some discussion as to whether the appellant retained a right of residence under those Regulations. Although so far as we are aware CG has not yet divorced him, there was no evidence as to whether she is still exercising her Treaty rights within the United Kingdom. The appeal proceeded on an assumption that she is. That assumption also underlies the respondent's decision to deport the appellant. Bearing in mind the difficulties facing the appellant in ascertaining the position because of the restraining order and in the absence of any evidence from the Home Office to the contrary, and having given both parties' representatives the opportunity to make submissions about it, we were persuaded to deal with the matter on that assumption.

27. Had the appeal come before us to be decided under Article 8 of the ECHR, it was our view that it would be unlikely to succeed. We did not consider that that the appellant could show that he has a family life for the purposes of Article 8 with his adult siblings in the UK. They have all, including the appellant in the past, established families and lives of their own. The appellant does not live with or near his family and although they offer support, his relationship with them is within the range of normal emotional dependency between adult siblings. Much of the support that he receives, including limited financial support, could continue if he were in Cameroon. The evidence also indicated that the appellant spent some years of his childhood with the mother of his half-sister P and that she remains in Cameroon. There was evidence from a friend, F O, of concern from a female in Cameroon who telephoned the hospital when he visited the appellant there after the appellant suffered his heart attack in 2013.

28. It was also our view that any private life that the appellant has established would be outweighed by the importance of the public interest in deportation acting as a deterrent and expressing society's concern at offending by foreign nationals even where the risk of reoffending is low. That is particularly so where he retains some links to Cameroon and has support from relatives in the UK, The evidence was insufficient to show that he would be unable to receive some treatment for his medical conditions in Cameroon,

Decision

29. The decision of the First-tier Tribunal disclosed an error on a point of law and was set aside to be re-made.

30. We re-make the appeal as allowed under the EEA Regulations 2006.

Signed:  Date: 6 May 2014

Upper Tribunal Judge Pitt

Anonymity

We make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, his wife or other members of his family for the reason of the appellant's medical issues.