Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01635/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th January 2016	**On 13th May 2016**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MURPHY BWALOP
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr T Bobb, Solicitor from Aylish Alexander Solicitors

DECISION AND REASONS

1. I see no need for, and do not make, any order restricting reporting about this case.

2. The respondent, hereinafter "the claimant", is a citizen of the Netherlands. He was born in August 1991 and so is now 24 years old. The appellant, hereinafter "the Secretary of State", appeals a decision of the First-tier Tribunal allowing his appeal against the decision of the Secretary of State to deport him from the United Kingdom following his conviction in July 2013 at the Crown Court sitting at Snaresbrook for offences of possession

of Class A and Class B controlled drugs with intent to supply. He was sent to prison for a total of 28 months.

3. The Secretary of State decided that deportation was justified on grounds of public policy, public security or public health notwithstanding the claimant being an EEA national.

4. At the risk of being trite, the deportation of EEA nationals is not subject to the ordinary Rules of immigration control but to the Immigration (European Economic Area) Regulations 2006 which impose restrictions on the deportation of any EEA national and make it still harder to deport an EEA national with five years' continuous lawful residence and harder again to deport an EEA national with ten years' lawful residence.

5. The Secretary of State decided that the claimant had established five years' lawful residence but not ten years' lawful residence and made her decision in a way that she considered appropriate for a person who could only be removed on "serious grounds" of public policy or public security. The First-tier Tribunal decided that this was the wrong approach and that the Secretary of State should have decided if there were "imperative grounds" because the claimant had resided in the United Kingdom for ten years.

6. I must at this point record my gratitude to First-tier Tribunal Judge Landes who gave permission to appeal in a particularly illuminating and careful way and her comments at paragraphs 2 and 7 of her grant have particularly assisted me.

7. For reasons that are very clearly explained and are clearly sound in law the First-tier Tribunal was satisfied that the claimant had lived in the United Kingdom for more than ten years. He has lived in the United Kingdom since 2001. He was then about 10 years old. The First-tier Tribunal, having found that the claimant had lived in the United Kingdom for more than ten years decided that he had established ten years' lawful residence and that was not disturbed by his having been sent to custody. Apparently the judge based this conclusion on a quotation from the decision in **Essa (EEA: rehabilitation/ integration) [2013] UKUT 00316**. Curiously, after citing **Essa** correctly and noting that it was reported in 2013, the judge recorded that **Essa** was decided after considering other cases decided in 2014. Clearly something had gone adrift.

8. More significantly, with the decision of the Court of Justice of the European Communities in **C-400/1200 Secretary of State v MG** which was considered by the Upper Tribunal in **MG (Prison – Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392 (IAC),** it is clear that a prison sentence can be expected to break a person's continuous residence and the decision maker must look at the person's degree of integration before deciding if he has retained the higher degree of protection.

9. Mr Bobb did not concede the point but said little to support the point. It is really impossible to argue sensibly that the judge applied the ratio in **MG**. The judge applied **Essa** without realising that he was applying old law.

10. I now have to decide if the error was material. This means that I have to decide if the appeal would necessarily have been allowed on the judge's findings even if this mistake had not been made. I have decided it he would.

11. As will be apparent from points that follow, it is clear to me that the judge would have allowed the appeal if he had decided that the claimant was only entitled to the level of protection appropriate for somebody with five years' residence. There are no serious grounds for removal

12. The judge should have asked himself if the applicant is sufficiently integrated to remain entitled to the benefit of the high level protection for a person with ten years' residence.

13. I am aware that the offence that led directly to the claimant being the subject of a deportation order was the last in a line of offences which show a particular disregard for the law, irresponsibility and inability or disinclination to comply with orders of the court and serious crime.

14. The claimant has a conviction for an offence of robbery which I regard as a serious offence. The claimant was one of a gang of boys who bullied another school boy into giving up his mobile phone as he walked out of school. School boys, like everyone else, are entitled to go about their lawful business without that sort of experience. I agree with the First-tier Tribunal Judge that it was "an unpleasant offence".

15. As well as accepting that the claimant arrived in the United Kingdom in July 2001, having visited briefly in July 2000, the judge also accepted that he had never left the United Kingdom since he arrived. This was explained at paragraph 20. The judge also accepted that the claimant had been educated in the United Kingdom. Most recently he attended Havering College and obtained certificates relating to his competence as a decorator. Further at paragraph 39 the judge found expressly that he had "no hesitation in finding that the [claimant] is integrated in the UK". This is because the claimant had never left the United Kingdom since his arrival, that he had not spoken Dutch since soon after arriving in the United Kingdom and that he had no family in the Netherlands. His father returned to Congo when the claimant was 14 years old and had had no involvement with the family since that date. Clearly a person is not integrated into the United Kingdom by reason of not being integrated anywhere else. The point is that the claimant was educated in the United Kingdom, has acquired trade qualifications there and has family there. He also has a serious girlfriend. The finding that the claimant integrated in the United Kingdom was open to the judge.

16. There is another point here that needs to be considered carefully. It was part of the Secretary of State's case that the claimant has been suspected of involvement in other offences that have not resulted in prosecution.

17. The approach to the Nexus evidence requires specific consideration. It may have been before me in a rather disorganised way. A properly organised copy was not made available to me until after the hearing. I am satisfied the necessary material was available to the claimant.

18. I have still not been able to locate copy of the statement of DC Lee. I note that it is DC Lee who has helped to produce the bundle of Nexus material and I have to assume that his statement added nothing particular to it. All the material in that bundle predates the claimant's offences in July 2013. It clearly adds to the picture of his reprehensible behaviour but when read carefully is slightly less serious than it first seems. For example it includes reference to an incident when the claimant was the victim of crime and on another occasion when he was thought to have been an attacker he may well have been helping the victim after an attack. The judge found that the claimant was not prosecuted because there was not sufficient evidence to support a conviction. He was not satisfied that there was anything to link him with a particular gang or any gang. Nevertheless the frequent brushes with the law, and unwillingness to help the police when he may have been victim of crime suggest that he was living on the fringes of legality.

19. The judge would have been wrong if it had been his view that there had to be a conviction before there was any concern about the claimant's general suitability to remain but I do not think that was the judge's point. His point was that although suspected of further offences the claimant did not have more convictions recorded against him because there was no evidence to support a conviction and mere suspicion of being involved in a criminal offence cannot amount to an imperative reason. Whether that is right as a statement of law I am doubtful but there is nothing in this case that would begin to show that his removal was imperative because of things he might have done.

20. It is right to note that the claimant's integration is not always with the desirable elements in British society. However there is very clear evidence accepted by the First-tier Tribunal Judge that the claimant responded well to opportunities given him when he was in prison to address his antisocial attitudes. He particularly benefited from work with the support groups known as "Chaos Theory" and "Spark2Life". The judge approached that evidence carefully, even sceptically, and explained carefully his reasons for finding it impressive. This part of the evidence is important. This is not a case of criminal who has had the wit to mouth a possibly insincere apology but of a person who has persuaded someone experienced in the rehabilitation of criminals that he really has turned his life around. Only time will see if these hopes are well founded but there is no reason to doubt the findings.

21. It is also right to note that although sentenced to 28 months' imprisonment the claimant only served twelve months' detention. The point here is that the time away from the beneficial influence of his family is much less than might be suggested by the length of sentence.

22. The claimant's numerous criminal convictions are to his discredit and point to his not being well integrated into the United Kingdom. A sentence of imprisonment clearly has a negative impact on integration. However even when full weight is given to these factors this is a case of a young man who has lived in the United Kingdom for most of his life and who has no links with his country of nationality. Following **MG (Prison – Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392 (IAC)** I am satisfied that this is a case where the sentence of imprisonment does not prevent the claimant from qualifying for the enhanced protection of a person integrated into the United Kingdom after ten years' residence. The judge was entitled to regard him as a person who was integrated into British society and I reach the same conclusion.

23. It follows therefore that although the judge got there by the wrong route and I have had to look at that part of the decision again, I am satisfied that the judge was right to treat the claimant as a person qualifying for ten years' protection and the judge was clearly right to find that there are no imperative reasons for his removal.

24. That essentially is my decision.

25. I am reluctant to make decisions on an alternative basis because, in my experience, it tends to indicate uncertainty amounting to error. Nevertheless, it is my decision that even if the claimant were entitled only to the lower measure of protection appropriate for a person with five years continuous residence, he should not be deported. If it were only necessary to show that there were serious grounds the Secretary of State could not establish her case. Drugs offences are often very serious not necessarily because of the particular criminality of the particular criminal but because they are part of an evil force in society which corrupts many and causes others to fall into the temptation of criminal activity to finance their illicit habits. Nevertheless, this case does not concern a drug baron. He was described by the sentencing judge as a street level dealer. He was a lieutenant playing a significant role in a not particularly large operation. This kind of behaviour is entirely consistent with the gloomy view of the Nexis evidence pointing to his being associated with a gang and that activity adds to reasons for removing him.

26. Whilst recognising that involvement in drugs offences is capable of being sufficient reason itself to justify the deportation even of an EEA national, I do not see this as such a case. Even if it might have been such a case before the claimant was detained the findings about the propensity to reoffend mean that it is not such a case now. The judge was clearly impressed with the support of Spark2Life and particularly the caseworker Mr Dayes and was entitled to be.

27. I do not agree that the judge failed to explain why the views in the NOMS and OASys Report did not prevail. The judge conspicuously had regard to evidence of intervening events and attempts to rehabilitate the claimant.

28. There is another important point. Even if the claimant were not entitled to the benefit of the "serious grounds" protection, which is not the

Respondent's case, I do not accept that his remaining in the United Kingdom represents "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" as required by Regulation(5)(c). The claimant has been convicted of criminal offence but it is plain from Regulation 21(5)(e) that the previous criminal convictions do not themselves justify the decision. Having accepted the evidence that the claimant is a reformed character I cannot agree that his remaining is a "genuine, present and sufficiently serious threat".

29. It may be the First-tier Tribunal Judge has misdirected himself by not making a clear finding on whether there was a genuine, present and sufficiently serious threat but that is no longer important. I make it clear that this claimant's removal is not proportionate in this case.

30. This is not a **Maslov** case. The claimant succeeds because he is an EEA national settled in the United Kingdom.

31. The First-tier Tribunal did explain adequately why he was not unduly concerned by the claimant's criminal behaviour. As I have explained above, this is not about a drug baron and, in my judgment, is not sufficiently serious to justify the deportation of an EEA national.

32. The judge was wrong in his approach to "imperative grounds" and I have sought to correct that error.

33. I do not find that ground 5 "approach to rehabilitation" adds anything significant. The judge was wrong in his approach to the decision in **Essa**. His findings about any propensity to reoffend and integration in the United Kingdom were not infected by any error arising from that misunderstanding.

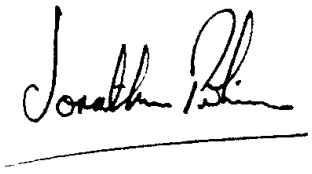
Notice of Decision

34. The First-tier Tribunal erred but the error was not material to the decision.

35. For the avoidance of doubt I remake the decision for the reasons given. I dismiss the Secretary of State's appeal against the First-tier Tribunal's decision and I uphold the decision to allow claimant's appeal against the First-tier Tribunal's decision.

Signed

Jonathan Perkins

Judge of the Upper Tribunal  Dated 13 May 2016