Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00049/2018**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 16 May 2019	**On 10 June 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DANIEL [J]

Respondent

Representation:
For the appellant: Mr Diwnycz, Senior Home Office Presenting Officer
For the respondent: None

DECISION

Introduction

1. This is a 're-making' decision. In an 'error of law' decision sent on 13 November 2018, I gave reasons why the First-tier Tribunal ('FTT') made errors of law in allowing Mr [J]'s appeal, such that the decision must be remade.

2. Mr [J] is a citizen of Germany, and therefore an EEA citizen. He was born in Germany in 1997, and is 22 years old. He entered the United

Kingdom ('UK') with his parents in 1998, when he was a baby. He has remained in the UK since this time.

3. Mr [J] was convicted of offences involving Class A drugs and sentenced to 40 months imprisonment on 26 June 2016. In his decision dated 11 January 2018 to make a deportation order, the SSHD did not accept that Mr [J] had acquired a permanent right of residence and did not consider that he had lawfully resided in the UK for a continuous period of 10 years. The SSHD's position at the time of his decision was therefore that Mr [J]'s deportation only needed to be justified on grounds of public policy or public security, and he did not need to make out serious or imperative grounds. The SSHD's position has now changed and will be explained in more detail below.

Procedural history

4. Mr [J] appealed against the SSHD's decision to deport him, to the FTT. The FTT accepted that Mr [J] was entitled to enhanced protection on imperative grounds, and as such the SSHD needed to demonstrate imperative grounds for his removal. The FTT found that the SSHD was unable to do so and allowed the appeal.

5. The SSHD appealed against FTT's decision, in which it allowed the appeal under the Immigration (EEA) Regulations 2016 ('the 2016 Regulations). I allowed that appeal for reasons set out in my 'error of law' decision.

6. Mr [J] has not had the benefit of legal representation throughout the appeal proceedings before the Tribunal. The relevant evidence available to the Tribunal has been limited as a result of this. There have also been indicators that Mr [J]'s mental health has been an on-going concern. He has attended his GP regarding this and been referred to a psychiatrist. It is with these matters in mind that I made directions to both parties at the 'error of law' hearing. Mr [J] was directed to provide: (i) a letter / report from the probation service outlining his behaviour in prison and since leaving prison and an update on his risk assessment in light of his behaviour and completion of offence related coursework; (ii) a letter written by him explaining what he did from the beginning of 2009 to his conviction together with any evidence that his parents were working or looking for work in the UK when he was a child.

7. The SSHD was directed to submit a position statement that addressed: (i) whether it was accepted that Mr [J] was entitled to permanent residence in light of all the evidence, including his length of residence as accepted by the FTT, and if not, why not; (ii) whether the evidence from probation was accepted; (iii) what level of protection from deportation Mr [J] was entitled to, in all the circumstances.

8. The matter was listed for a 're-making' hearing on 14 December 2019, when [J]'s application for an adjournment was unopposed by the SSHD. At that hearing Mr [J] explained that since the last hearing in November 2018 he had moved, with the permission of the probation service, away from the Doncaster area and various gang links, to Rotherham. He therefore had a new probation officer who has assisted him in attending his GP. Mr [J] explained that he had been urgently referred to a psychiatrist because he felt mentally and emotionally very unwell. The SSHD's representative agreed that in these circumstances it was very important to have up to date evidence regarding Mr [J]'s circumstances, and she was content to do what she could to assist as Mr [J] was not legally represented. I gave further directions to the effect that it would be helpful for Rotherham Probation Service to provide a letter / report addressing: Mr [J]'s behaviour in prison and since leaving prison; his compliance with licence conditions and probation; an updated risk assessment in the light of behaviour, current circumstances and completion of offence related coursework; prospects of rehabilitation in the UK in contrast to his prospects of rehabilitation if deported to Germany. I also directed Mr [J] to provide any medical evidence and referrals.

9. I once again directed the SSHD to submit a position statement addressing the updated evidence and providing an updated legal position in light of it, including whether Mr [J] was entitled to enhanced protection.

Hearing

10. Mr [J] attended the hearing. He was surprised to hear that his probation officer had not sent a letter to the SSHD or the Tribunal. Enquiries were made and it was confirmed that a letter had been sent, but to the wrong address. A comprehensive letter dated 6 March 2019 from Ms Baldwin, a probation officer, was emailed to the Tribunal. Mr Diwnycz was given time to consider this together with a file of papers Mr [J] had brought with him concerning his family's residence in the UK, his medical records and his interactions with the probation service.

11. I then invited Mr [J] to provide an oral update on his circumstances. He said that he had successfully completed a course on victim awareness and been asked to be a mentor on courses for other young men. He continued to regularly see his probation officer. He has taken steps, with the assistance of the probation service, to obtain paid employment and was hopeful of a job with [~], which was employing ex-offenders in Rotherham. He has lived in the same accommodation since his move to Rotherham and had the daily support of his friend's step-mother. In addition, his family regularly drove to visit him on a weekly basis. He felt much better emotionally.

He was unable to attend an appointment with the psychiatrist as it clashed with a reporting condition in his licence but steps were being taken with the assistance of probation to rearrange this appointment.

12. Mr Diwnycz apologised for the SSHD's failure to comply with directions on two occasions, and the failure to provide an updated written position statement on the applicable legal test. Mr Diwnycz acknowledged that Mr [J] had provided cogent oral and documentary evidence and in the circumstances he did not need to cross-examine him. He accepted that Mr [J] "*is a changed young man*" who "*appreciates the gravity of his offending*". Mr Diwnycz confirmed that the SSHD now had a fuller picture of Mr [J]'s circumstances in the UK, and he was able to update the SSHD's position. The SSHD no longer disputed Mr [J]'s claim that: (i) he acquired permanent residence in the UK, and (ii) he was lawfully resident for a continuous period of 10 years in the UK counting back from the date of the deportation decision, notwithstanding his imprisonment between 2016 and 2018.

13. Mr Diwnycz finally confirmed that the only issue for me to determine is whether Mr [J]'s particular circumstances (which are not disputed by the SSHD) are such that the SSHD is able to displace the burden of establishing that there are imperative grounds for his removal. Mr Diwnycz acknowledged that this is a high test to meet but did not offer any substantive submissions on how the test was met in this case.

14. After hearing from Mr [J] and Mr Diwnycz, I indicated that I would be allowing the appeal, for the reasons I now provide. Given the limited nature of the issues that remain in dispute, the reasons provided are relatively brief.

Legal framework

15. The relevant law, set out in the 2016 Regulations and decisions of the Court of Justice of the European Union (CJEU), was not a matter of dispute between the parties. The appellant is an EEA national and his deportation must, therefore, comply with EU law as set out in regulation 27 and Schedule 1 of the 2016 Regulations.

16. It is for the SSHD to establish the justification for the deportation of an EEA national under the 2016 Regulations. B v Land Baden-Wurttemberg; SSHD v Vomero (Cases C-316/16 and C-424/16) [2018] Imm AR 1145 make it clear that in the case of an EEA national who has been continuously resident in the UK for at least ten years prior to the deportation decision (and that is the relevant date from which to count back), deportation can only be justified on the most serious ground namely 'imperative grounds of public security'. In order to rely on this most serious ground the individual must first establish that they have a permanent right of residence (see, B and Vomero at [49]

and [61]). In establishing these grounds, the individual conduct must represent a "*genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*". That, in general, requires that it be established that the individual has a propensity to reoffend in the future. However, in exceptionally serious cases, it may be that past conduct (which in general alone cannot establish a "present" threat) may suffice (see SSHD v Robinson (Jamaica) [2018] EWCA Civ 85 at [80] - [86] per Singh LJ). It was not however suggested by the SSHD in this appeal that the appellant's offending was an 'extreme case' where his past conduct alone might, even under the 'serious grounds' basis for deportation, suffice.

17. In reaching any assessment, in particularly in relation to proportionality, all the relevant circumstances including the individual's age, state of health, family and economic situation, length of residence in the UK and social and cultural integration in the UK, rehabilitation prospects in both countries and any links with his or her own country, must be taken into account. Regard must be had to the considerations set out in Schedule 1 in the same way as in a non-EEA removal or deportation appeal the considerations in s.117B and s.117C respectively of the Nationality, Immigration and Asylum Act 2002 must be taken into account.

18. The social rehabilitation of the Union Citizen in the State in which he has become genuinely integrated is not only in his interests but also that of the European Union in general – see Tsakouridis, C-145/09, EU: C: 2010.

Re-making the appeal

Matters not in dispute

19. The relevant legal framework is complex. However, Mr Diwnycz has clarified on behalf of the SSHD that it is no longer necessary for there to be an examination of whether Mr [J] acquired permanent residence or can be said to have been continuously lawfully resident for a period of 10 years. This is because the SSHD has conceded these matters in Mr [J]'s favour. I am satisfied that the SSHD was correct to make these concessions. The evidence that is now available clearly supports Mr [J] having accrued permanent residence.

20. In addition, whilst Mr [J] was in prison for a significant period of some two years for a very serious offence, that period of imprisonment during the relevant 10 years does not necessarily prevent him from qualifying for enhanced protection if he is sufficiently integrated, albeit a period of imprisonment must have a negative impact in so far as establishing integration is concerned. Mr [J]'s integrative links to the UK (both before and after his imprisonment) are extensive, strong and deep-rooted. Mr [J] has never left the UK since he was a baby.

His entire education has been in the UK. All of his immediate family members are in the UK. English is his first language.

21. However Mr [J]'s involvement in gang activities, conviction and imprisonment militate against his integration. Nonetheless, Mr [J] has demonstrated a sustained period of good behaviour and ambition to rehabilitate in the long term during his imprisonment and upon his release. His has successfully participated in every form of rehabilitative activity available to him. He has successfully moved away from past criminal associates and demonstrated resilience in setting up home in a new area, albeit with the assistance of the probation service, his family and friends, upon whom he continues to place a great deal of reliance. He has an outstanding appointment with a psychiatrist but has demonstrated recent improvements in his confidence and mental health. The whole focus of his life is centred on the UK. In all the circumstances, Mr Diwnycz was correct to concede the period of imprisonment has not had the effect of breaking the integrative links with the UK (when counting back from January 2018).

Application of accepted facts to the enhanced protection test

22. Mr [J] used 'spice' daily and sold drugs to finance this. This led to his drugs conviction and sentence of 40 months imprisonment. This is a very serious offence and led to a significant period of imprisonment. The nature and extent of Mr [J]'s past drug habit and his involvement in the supply of class A drugs are matters the UK and the EU are entitled to and do take particularly seriously, as do I.

23. On the other hand, Mr [J] has been consistently remorseful since his imprisonment. He has worked hard in prison and since his release to improve himself, and has been broadly successful. The 2017 OASYS report describes his risk of reoffending because of his involvement in class A drugs as medium. In her letter dated 6 March 2019, Ms Baldwin describes the risk of re-offending as low. This must be at the higher end of the spectrum of 'low' because the risk of reconviction within one year is assessed at 25% and within two years at 40%. I note that the risk of harm is assessed as medium because of Mr [J]'s past involvement with a gang from Mexborough which are known to use weapons. However, Ms Baldwin states that the risk will be reduced if he is able to sustain a period of time with no association with the gang and complying positively with his licence conditions. Since his release from custody on 30 July 2018, Mr [J] has been pro-active in relation to these two issues. He removed himself away from Mexborough and has demonstrated an ability to start a new life without the gang but with the support of probation, friends and family in the UK. Since moving to Rotherham, Ms Baldwin states that Mr [J] has engaged "*really well*" with probation, offending behaviour coursework, the police and 'Inspiring Intelligence'. In all the

circumstances, I agree with Ms Baldwin that the risk of re-offending is low.

24. I entirely accept Ms Baldwin's assessment that Mr [J]'s rehabilitation prospects are far greater in the UK than in Germany. Ms Baldwin was wrong to state that Mr [J] does not speak German. The FTT found that he does. However, I accept his entire support structure (in terms of probation, stable accommodation, family contacts, healthy friendships, potential employment opportunities, community support) is in the UK. I accept that the absence of this structure will adversely impact Mr [J]'s mental health and ability to sustain his rehabilitation. Further, Mr [J] has already been referred to a psychiatrist in the UK to assist in his rehabilitation. The entire process would have to start from the beginning in Germany, when in the UK Mr [J] is well on the way to ensuring that the short-term rehabilitation thus far, translates (with the assistance of his support structure) into something that lasts into the medium and long-term.

25. Mr [J] has resided in the UK from his arrival as a baby in 1998 continuously up until his imprisonment and then after his release in July 2018 i.e. for a period in excess of 19 years and for the vast majority of his life. He has a comprehensive support structure in place in the UK and his rehabilitation will be adversely impacted if he is deported to Germany.

26. Consequently, while I acknowledge the significance and abhorrence of a risk (albeit low risk) of serious re-offending in relation to Class A drugs and involvement in gang violence (capable of causing medium harm), that risk does not amount to either serious or imperative grounds of public policy.

Conclusion

27. It has been accepted that Mr [J] has both a permanent right of residence and was, at the date of the SSHD's decision to deport him, able to establish the ten years' continuous residence such that his deportation could only be justified on 'imperative grounds of public security' under regulation 27(4)(a) of the 2016 Regulations. For the reasons I have set out above this threshold has not been met in this case.

28. It follows that it is not necessary for me to make further findings on the proportionality of Mr [J]'s deportation under the 2016 Regulations. Suffice it to say that the factors weighing in Mr [J]'s favour, would, in my judgment, carry considerable force and his appeal succeeds on this alternative basis.

Decision

29. I re-make the decision by allowing Mr [J]'s appeal under the Immigration (EEA) Regulations 2016.

Signed: *UTJ Plimmer*
Ms M. Plimmer
Judge of the Upper Tribunal

Date:
3 June 2019