



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

Appeal Number: DA/00122/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 17 January 2020**

**Decision & Reasons Promulgated
On 23 January 2020**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

**ABDIRAHIM ABDULLAHI ELMI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Bandegani, Counsel, instructed by Duncan Lewis Solicitors

For the Respondent: Mr. S. Walker, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Belgium. He was born in Mogadishu, Somalia, on 5 July 1997 and is presently aged 22.
2. He appeals against a decision of the respondent to deport him to Belgium, dated 2 February 2018. His appeal is under regulation 36 of the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations'). The respondent has not issued a section 120 notice to date and so no human rights appeal arises: *Munday (EEA decision: grounds of appeal)* [2019] UKUT 00091 (IAC)
3. This matter was initially considered by JFtT Cameron, who dismissed the appeal by a decision dated 21 March 2019. By means of a decision promulgated on 23 August 2019 I found the Judge had materially erred in law and so set aside his decision, though for the purposes of reconsideration the Judge's findings of fact identified at [54], [55] and [65] continued to stand:

"54. Given my acceptance that Mrs Hamid was a qualified person from 2005 she clearly meets the requirements of regulation 15 in that she has resided in this country for a continuous period of five years in accordance with the regulations and was therefore entitled to permanent residence. The appellant as her EEA national dependent and being a minor would also therefore be entitled to permanent residence as the five-year period clearly was completed prior to his first period of detention on 23 October 2014.

55. It is not disputed that the appellant has been in this country in excess of 10 years and in view of my above findings I accept that his mother has been exercising Treaty rights since 2005. This is evidence that she has worked or been in receipt of jobseeker's allowance throughout the period up until 2018.

...

65 I am therefore satisfied on the evidence available that the appellant can meet the continuity of residence.

4. The latter finding is concerned with a period of time the appellant was absent from this country between 2011 and 2012.
5. This matter was listed before me on 17 January 2020 for the resumed hearing.

Background

6. The appellant's parents travelled to Belgium in 1998 and the family were subsequently granted refugee status in that country. After the death of his father he entered the United Kingdom in 2003 and resided here with his mother and siblings, attending local schools.
7. Since 2011 he has accumulated thirteen convictions for twenty-five offences. These include five convictions for offences against the person, two for theft and kindred offences and one for a public order offence.
8. Whilst a minor the appellant was absent from this country on two occasions, the first being from December 2011 to March 2012 when he travelled to Kenya. He was aged 14 at this time. He returned to this country and underwent an operation. The second period was in 2012 where for approximately six months he initially resided in Sweden and then in Kenya. During this time, he was recovering from his operation. JFtT Cameron accepted that these periods of absence did not exceed twelve months in total and did not adversely impact upon his continuity of residence. This is a preserved finding of fact consequent to my decision of 23 August 2019.
9. The appellant was sentenced to a four-month detention and training order on 23 October 2014 for possession of a bladed article and for a failure to comply with a youth rehabilitation order.

Index offence

10. Between 8 July 2015 and 27 October 2015, a time when the appellant was aged 18, there was a well organised system of the supply of class A drugs to drug users in Hastings and nearby towns on the south coast of England. Along with the appellant there were twelve other persons involved in the conspiracy to deal drugs on the streets. During the period of the conspiracy, undercover test purchase officers made contact with the conspirators and made no fewer than 30 test purchases from a number of different premises where wraps of small quantities of class A drugs were supplied both for cash and in other cases property in lieu of cash. Officers who observed this activity also saw numerous other occasions of supply of drugs to others. A telephone line called the 'Bugsy' line was used to order drugs and a rendezvous was arranged in some place in town or a location where the drugs could be collected in one form or another.
11. During the arrest phase police officers searched houses connected to the conspiracy. A number of wraps of class A drugs were located: 22.6 grams of cocaine, 52.28 grams of crack cocaine, and 38.9 grams of heroin. They were also found to be of high purity: the cocaine was 73%;

the crack cocaine varied between 70 to 75%; and the heroin, 63 to 69%. A number of the other wraps that had been supplied during the period of the conspiracy had also been found to be of higher than normal purity for street supply.

12. One of the conspirators, Abid Rizaq Hussein ('Hussein') was identified by the prosecution as the senior figure in this conspiracy, and the appellant was his immediate subordinate lieutenant. Under the definitive guidelines for drug offences, their roles were, however, described by the prosecution as 'significant', rather than 'leading', because there were undoubtedly others higher up the chain who ensured that the drugs that were to be distributed on the south coast were being supplied to Hussein. Both Hussein and the appellant came from London to sell drugs in the Hastings area.
13. The appellant was sentenced on 24 June 2016 by HHJ Tait, sitting at Lewes Crown Court, on two counts of conspiracy to supply respectively heroin and cocaine, to which he had earlier pleaded guilty. He was sentenced to seven and a half years' detention in a young offender institution. His sentence was reduced to six years concurrent by the Court of Appeal on 3 March 2017: [2017] EWCA Crim 230.

Decision to deport

14. On 2 February 2018 the respondent issued a deportation order under the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations') and the Immigration Acts 1971 and 1988, providing reasons for this decision by way of a letter of the same date.

Hearing before this Tribunal

15. The appellant attended the resumed hearing and was accompanied by family members. I was informed by the representatives that it was agreed that the matter could proceed by means of brief submissions.
16. In his usual fair and careful manner, Mr. Walker accepted on behalf of the respondent that on the particular facts arising in this matter the period of imprisonment following the appellant's conviction in 2016 did not break the appellant's integrative links with this country and so he enjoyed the higher level of protection rights, namely imperative grounds of public security. Mr. Walker confirmed that though the respondent was not conceding this appeal, it was accepted that she had 'quite a high hurdle' to cross in light of the evidence and relevant facts that arise in this matter.

Decision

17. Whilst the appellant's conviction in 2016 means that he is a 'foreign criminal' in terms of sections 32 and 33 of the UK Borders' Act 2007, as an EEA national his position is very different to a non-EEA foreign criminal. Directive 2004/38, the citizens' rights directive, as transposed into domestic law by the 2016 Regulations, provides additional protections against expulsion where an EEA national has long residence in a host state. By virtue of regulation 23(6) of the 2016 Regulations an EEA national who has entered the United Kingdom may be removed if the respondent has decided that such removal is justified on the grounds of public policy, public security or public health in accordance with regulation 27.
18. The present hierarchy of levels of protection, based on criteria of increasing stringency, is identifiable as:
 - 1) a general criterion that removal may be justified 'on the grounds of public policy, public security or public health';
 - 2) a more specific criterion, applicable to those with permanent rights of residence, that they may not be removed 'except on serious grounds of public policy or public security';
 - 3) the most stringent criterion, applicable to a person 'who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision', who may not be removed except on 'imperative grounds of public security'.
19. Regulation 27(4)(a) of the 2016 Regulations provides that a decision to deport may not be taken except on imperative grounds of public security in respect of an EEA national who has a right of permanent residence under regulation 15 and who has resided in the United Kingdom for a continuous period of at least ten years prior to the decision. This is the 'imperative grounds' threshold. A step below this protection, regulation 27(3) establishes that a relevant decision to deport 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 security: 'serious grounds threshold'.
20. Regulation 27(5)(c) requires that the decision to expel the appellant must be based exclusively on his personal conduct and his personal conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The onus is placed on the respondent to establish such serious threat: Arranz (EEA Regulations- deportation - test) [2017] UKUT 00294 (IAC) at [81].
21. JFtT Cameron found that both the appellant and his mother secured permanent residence on an unknown date in 2010 and further that the appellant's sojourns in Kenya and Sweden when aged 14 and 15 did not

break his continuity of residence in this country. The respondent did not contest before me that the appellant's detention in October 2014 failed to break his integrative links with this country. The respondent's position was appropriate as by this date the appellant had been in this country for some 11 years, since the age of 5, and served no more than 2 months in detention.

22. By the time the decision to deport was issued, the respondent accepts that the appellant had been present in this country for some 15 years. In order to decide whether the appellant enjoys the most stringent level of protection, the Tribunal is required to decide as to whether his three-year period of imprisonment from 2015 to 2018 interrupts the continuous nature of his residence so as to deny him such protection. In C-400/12 Secretary of State for the Home Department v. MG (Portugal) EU:C:2014:9, [2014] 1 W.L.R. 2441 the CJEU observed that a period of imprisonment has the effect of interrupting the continuity of residence for the relevant purpose; but that in order to decide whether the non-continuous nature of the period of 10 years preceding the decision prevents the person concerned from enjoying the highest level of protection, it is necessary to carry out an overall assessment of the person's situation at the time when the question of expulsion arose, see [33]-[35]. The Court added, at [36], that although periods of imprisonment interrupted the continuity of residence:

'... such periods may - together with the other factors going to make up the entirety of relevant considerations in each individual case - to be taken into account by the national authorities responsible for applying article 28(3) of that directive as part of the overall assessment required for determining whether the integrating links previously forged with the host Member State have broken, and this determining whether the enhanced protection provided for in that provision will be granted.'

23. The Grand Chamber of the CJEU held in C-316/16 B v. Land Baden-Württemberg; Vomero v. Secretary of State for the Home Department EU:C:2018:256; [2019] QB 126, at [70 and operative part, paragraph 2] that article 28(3)(a) must be interpreted as meaning that, in the case of an EEA citizen who has served a custodial sentence and against whom an expulsion decision is adopted, the condition of having 'resided in the host Member State for the previous ten years' laid down in that provision may be satisfied where an overall assessment of the person's situation, taking into account all the relevant aspects, leads to the conclusion that, notwithstanding that detention, the integrative links between the person concerned and the host Member State have not been broken. Those aspects were identified at [72]: *'It is necessary to take into account, as regards the integrative links forged by B with the*

host Member State during the period of residence before his detention, the fact that, the more those integrative links with that State are solid — including from a social, cultural and family perspective, to the point where, for example, the person concerned is genuinely rooted in the society of that State, as found by the referring court in the main proceedings — the lower the probability that a period of detention could have resulted in those links being broken and, consequently, a discontinuity of the 10-year period of residence.’ The more solid the integrative links to a host state, including from a social, cultural and family perspective, the lower the probability those are broken by imprisonment. At [73] the Grand Chamber observed: ‘*Relevant factors in that overall assessment may include, as observed by the Advocate General in points 123 to 125 of his Opinion, first, the nature of the offence that resulted in the period of imprisonment in question and the circumstances in which that offence was committed, and, secondly, all the relevant factors as regards the behaviour of the person concerned during the period of imprisonment.*’

24. The Upper Tribunal held in *Essa (EEA - Rehabilitation/Integration)* [2013] UKUT 00316 (IAC); [2013] Imm AR 980, at [28] that the longer the residence the greater the degree of integration was likely to be.
25. By working backwards from the date of the notice of expulsion in February 2018, when the appellant was aged 20, the Tribunal is required to consider the relevant period of imprisonment over the preceding 10 years and to evaluate whether the integrative links between the appellant and this country have been broken. This is an evaluative assessment. The appellant was born in Somalia and lived in Belgium for a limited period of time before relocating to this country when aged 5. He attended primary and secondary school in this country and his primary social influences are British. At the time of his arrest in 2015 he was aged 18. I observe the conspiracy commenced days after he turned 18 and I am satisfied that he was previously engaged in criminality as a minor. I am further satisfied that he was subject to adverse adult criminal influences whilst a vulnerable minor, observing that Hussein, who was aged approximately 26 when arrested, was directing the appellant in the conspiracy. I am satisfied to the requisite standard that Hussein was directing the appellant in criminal enterprises before he turned 18. The appellant accepted during his OASys assessment that at the time of his arrest in 2015 he was using cocaine and such use was causing significant problems. Therefore, the appellant was engaged in serious criminality, but such behaviour was in significant part influenced by adult criminals targeting his vulnerability as a minor.

26. In considering as to whether the appellant's integrative links have been broken by his time in prison, I commence with the length of his sentence. Three years is a significant period of time, but not so significant that contact with society is automatically diminished or lost. I further note the seriousness of the offences. However, though such criminality is not excused by the appellant's young age, I do factor into my assessment the fact that the appellant had just reached majority and was significantly influenced by adult criminals. Whilst in prison he enjoyed enhanced status, earned privileges and undertook several vocational courses. Upon considering the evidence in the round I am satisfied that whilst the appellant's integrative links with this country may have been under some strain for a period of time, adversely influenced by adult criminals whilst he was a vulnerable minor, they did not break. I note the improvement in behaviour whilst in custody and away from adverse adult influences, such behaviour underpinning his present pro-social attitude. I also observe the significant strength of his connection to this country, his home since the age of 5, as well as the continued support he received from his family who visited him regularly whilst he was in prison. In such circumstances, the continuous nature of his residence was not interrupted by his being placed on remand in 2015 and sentenced to a term of imprisonment in 2016 so as to deny him the most stringent level of protection.
27. In *C-348/09 PI v. Oberbürgermeisterin der Stadt Remscheid* [2012] QB 799 the Grand Chamber confirmed the concept of 'imperative grounds of public security' presupposed not only the existence of a threat to public security, but also that such a threat was of a particularly high degree of seriousness. The Grand Chamber confirmed that although Member States retain the freedom to determine the requirements of public policy and public security in accordance with their varying national needs, these requirements are to be interpreted strictly, particularly where it is sought to justify a derogation from the principle of free movement of persons. The issue of any expulsion measure is conditional on the requirement that the personal conduct of the individual concerned represents a genuine, present threat affecting one of the fundamental interests of society or of the host Member State. That generally implies the existence of a propensity to act in the same way in future. The host Member State also has to take account of considerations such as the length of residence of the individual and his age, state of health, family and economic situation, social and cultural integration into the host state and the extent of his links with the country of origin.
28. Imperative grounds of public security presuppose not only the existence of a threat to public security, but also that such threat is of a particularly

high degree of seriousness: C-145/09 Land Baden-Wurttemberg v Tsakouridis EU:C:2010:708, [2011] 2 C.M.L.R. 11

29. The Upper Tribunal confirmed in GW (EEA reg 21: 'fundamental interests') Netherlands [2009] UKAIT 00050; [2010] Imm AR 269 that the 'fundamental interests' of a society is a question to be determined by reference to the legal rules governing the society in question, for it is unlikely that conduct which is subject to no prohibition can be regarded as threatening those interests. The 2016 Regulations, Schedule 1, paragraph 7 sets out what the fundamental interests of society are in the United Kingdom.
30. Deterrence, in the sense of measures designed to deter others from committing similar offences, has of itself no part to play in a decision to remove an individual offender and does not fall to be considered in the proportionality assessment.
31. The appellant relies upon two psychological assessments. The first is authored by Deborah Kelland, BSc (Hons), MSc, C.Psychol, registered consultant forensic psychologist, dated 3 September 2018. The second is authored by Elaine Deighton B.SC. MSc. C.Psychol, chartered psychologist and dated 29 September 2019. The respondent did not object to the appellant relying upon the second report and made no adverse observations upon either report. Ms. Kelland observes that the appellant has demonstrated a sustained period of positive behaviour and self-control. He has worked on addressing substance misuse. She opines at [6.3.6 - 6.3.7]:

'Risk scenarios are hypothetical situations for consideration of risk management and intervention needs. For [the appellant] a key risk situation would be if he were to have no money to look after his needs or wants. In such a situation he might be at risk of an acquisitive crime such as robbery. This would equate to a risk of instrumental aggression. An example of a scenario for risk of reactive aggression would be if he felt physically threatened, e.g. by someone being in his space.

I assess that the risk of serious physical harm from [the appellant] is low. In the community the risk of imminent violence would be low. While he is still in a young offender's institution the risk of imminent violence is moderate as he is amongst other criminally minded young men in a volatile environment. However, with the information available there is no evidence of him having engaged in violence in the past nine months.'
32. Ms. Deighton opines that the appellant presents at the current time with a low level of risk, detailing, *inter alia*:

'It is extremely positive that [the appellant] has made a commitment to manage his risk since his release in November 2018. Looking to the future, it is my clinical opinion that Mr. Elmi's risk remains manageable in the community and that his risk would remain low if he was to remain residing in the UK.'

33. I further note that the appellant is presently in the early stages of running his own business. He has received support from the Princes Trust and is investigating the development of another business. He enjoys close support from his immediate family.
34. The appellant is therefore assessed to be of low risk of offending and such risk is manageable in the community. He has been proactive in the community for over 12 months and has commenced self-employment. He has addressed the issue of drug consumption. He has removed himself from peer pressure and the group of people he previously spent time with. His present pro-social behaviour strongly suggests that he does not have a propensity to sell drugs or use violence in the same way in the future.
35. Having conducted an overall assessment I find that that the appellant throughout the relevant period enjoyed, and continues to enjoy, solid links to the United Kingdom through his social, cultural and family life and the continuity of the appellant's 10-year residence at the date of decision was not broken by his imprisonment. Therefore, he enjoys imperative grounds protection. The index offence, though concerned with the sale of drugs, is not such as to give rise to the present existence of a high degree of serious threat to public security affecting one of the fundamental interests of society. The respondent has not been able to satisfy the burden placed upon her to establish that the conduct of the appellant meets the relevant imperative grounds threshold. The appellant therefore succeeds on his appeal against the decision to deport.

Notice of decision

36. By means of a decision dated 23 August 2019 this Tribunal set aside the Judge's decision promulgated on 21 March 2019 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007 ('TCE').
37. The decision is re-made, and the appellant's appeal is allowed.

Signed: **D O'Callaghan**
Upper Tribunal Judge O'Callaghan

Date: 20 January 2020

To the Respondent
Fee Award

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

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 20 January 2020