



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00723/2018

THE IMMIGRATION ACTS

Heard at Field House
by Microsoft Teams
On 14 May 2021

Decision & Reasons Promulgated
On 20 May 2021

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ABUZAR MAHMOOD SHAUKAT
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Susana Cunha, Senior Home Office Presenting Officer

For the respondent: No appearance or representation.

DECISION AND REASONS

Decision and reasons

1. The Secretary of State appealed against the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 13 February 2018 to deport him to the Netherlands, of which he is a citizen.

2. **Mode of hearing.** The hearing today took place remotely by Microsoft Teams. There were no technical difficulties. I am satisfied that Ms Cunha was in a quiet and private place and that the hearing was completed fairly, with her cooperation.
3. **Procedural history.** On 16 February 2017, the claimant was convicted at Cardiff Crown Court of street supply of Class A drugs (cocaine and heroin) and breach of bail conditions. The claimant was sentenced to 54 months' imprisonment, credit being given for his previous lack of drug convictions and his late guilty plea. This was his first custodial sentence. He did not respond to the Secretary of State's notice of liability to deportation, but did appeal the deportation order. The First-tier Judge allowed the appeal on the basis that the claimant had been resident in the United Kingdom for more than 10 years but failed to consider whether his residence was 'in accordance with' the Immigration (European Economic Area) Regulations 2016.
4. On 2 October 2020, I set aside the decision of the First-tier Tribunal allowing the claimant's appeal, and directed that the decision in this appeal be remade in the Upper Tribunal. The claimant was present and represented himself. He admitted that he had lost his way when younger, but said that he had learned his lesson and tried to make the best of his time in prison. The claimant assured me that he had evidence to show that he had exercised Treaty rights in the United Kingdom for 10 years before the deportation decision, or at least, before his conviction. I made directions for disclosure of that evidence and consequential directions. The claimant has not complied with those directions and the consequential directions were not triggered.
5. The appeal was listed for a telephone case management review on 15 February 2021. The claimant did not join that hearing, nor was there any explanation for his absence. I considered that it was in the interests of justice to give the claimant an opportunity to attend a substantive remaking hearing and to provide the materials he said he possessed.
6. The appeal was therefore listed for substantive remaking today. The claimant did not attend, and there is again no explanation for his absence. Ms Cunha confirmed that the claimant was reporting regularly and that he resides still at his notified address for service. I am satisfied that he had adequate notice of this hearing and that he has been properly served.
7. I consider it appropriate, having regard to the overriding objective, and in the interests of justice, to proceed to remake the decision on the basis of the submissions of Ms Cunha for the Secretary of State, and the evidence already before the Tribunal. I have had regard to all of the evidence, hard copy and electronic, in this appeal, whether or not it is expressly mentioned in this decision.

Background

8. The claimant was born in the Netherlands on 13 June 1993 and came to the United Kingdom in 2004 or 2005, with his family. He would have been 11 or 12 then. Mr Walker accepts that evidence in the hearing bundle establishes his presence in the United Kingdom by 2005. The claimant has had all of his secondary education in the United Kingdom. His parents and siblings live in the United Kingdom.

9. By 2008, the 15-year old claimant was in trouble. He was cautioned after being arrested for theft on 2 May 2008 and on 25 August 2011 was cautioned again for disorderly behaviour. On the second occasion, he was 18 years old and an adult. In 2011/2012, the claimant's parents separated. His father had a new relationship and was not very much in contact with the claimant; his mother also stopped communicating with the claimant after her separation, by reason of his criminality. The claimant got on well with his older brother, and sometimes worked in the brother's clinic or was given money to sustain his lifestyle.
10. Between 3 February 2012 and 16 February 2017, the claimant accrued 12 convictions for 19 offences, mostly theft and kindred offences, but also public order, police, courts and drug offences:
 - (1) On 3 February 2012, the claimant was convicted of shoplifting contrary to section 1 of the Theft Act 1968. There were further convictions for theft on 16 March 2012, for shoplifting on 23 August 2012, 22 October 2012, and on 25 November 2012 (some of these offences whilst on bail). On 14 March 2013, he was convicted of disorderly behaviour contrary to section 5(1)(a) of the Public Order Act.
 - (2) On 11 April 2013, he was convicted of failure to comply with the requirements of a community order, contrary to Schedule 8 of the Criminal Justice Act 2003, and on 10 September 2013, of resisting or obstructing a constable in the exercise of his duties contrary to section 89(2) of the Police Act 1996 and giving a false name and address contrary to the section 5(3)(c) of the Regulation of Railways Act 1889. On 21 October 2013, the claimant was convicted of travelling on a railway without paying the fare contrary to section 5 of the Regulation of Railways Act.
 - (3) On 18 March 2014, the claimant was convicted of going equipped for theft, other than theft of a motor vehicle, contrary to section 25 of the Theft Act and theft from the person contrary to section 1 of that Act. On 9 May 2014, the claimant was convicted again of going equipped for theft and also shoplifting.
 - (4) The index offence related to street drug dealing over the period 1 January 2016-15 May 2016 (or perhaps August 2016, per the OASys report). The claimant was convicted on 16 February 2017 of offences contrary to section 4(2) and 4(3) of the Misuse of Drugs Act 1971, and of failure to surrender to custody at the appointed time, contrary to section 6(1) of the Bail Act 1975.
11. When arrested for the index offence in August 2016, the claimant replied 'no comment' throughout his police interview and did not cooperate in unlocking his mobile phone so that the police could examine it: when they were able to access it, the phone was found to contain data consistent with dealing in drugs. He did not change his plea to guilty until the hearing.
12. On 16 February 2017, the claimant received a 54-month sentence for street dealing (heroin and cocaine) which triggered the decision under challenge. The sentencing judge accepted that the claimant was 'second in order of culpability' but found that his role in the dealing organisation was nevertheless a significant one. The decision

to deport him was taken on 13 February 2018. It was served on him on 27 February 2018, along with removal directions. The claimant resisted removal to the Netherlands on the basis that he is entitled to protection at the 'imperative grounds' level under Regulation 27(4) of the Immigration (European Economic Area) Regulations 2016.

First-tier Tribunal decision

13. The Secretary of State accepted before the First-tier Tribunal that the claimant had obtained permanent residence under Regulation 15 of the 2016 Regulations. On 13 February 2018, when the deportation order was made, the claimant had been in prison serving his 4-year sentence for just under a year.
14. The First-tier Judge found the claimant to be an impressive witness, who had expressed genuine remorse for his previous offending. His father was seriously ill and he had nobody in the Netherlands. His father and step-mother, and their children, would be instrumental in the claimant's rehabilitation.
15. At [85], the First-tier Judge considered whether the claimant had established that he had 10 years' continuous residence in the United Kingdom 'in accordance with the Regulations', the relevant period being from 13 February 2008 to 13 February 2018 when the removal decision was made. At [86]-[91], the First-tier Judge set out the evidence of the claimant's private life in the United Kingdom. At [93], the judge found that the claimant's offending behaviour had not displaced any genuine integration, taking into account that a period of imprisonment would not necessarily break a 10-year period of residence.
16. The First-tier Judge considered the decision of the Court of Appeal in *VP (Italy) v Secretary of State for the Home Department* [2010] EWCA Civ 806 and *Essa v Secretary of State for the Home Department* [2012] EWCA Civ 1718 and found that, if the imperative grounds test were applied, the public interest in the claimant's deportation was outweighed by his personal circumstances and that there was no significant public interest in his deportation, arising out of the drug dealing conviction in 2017. Removal to the Netherlands would greatly inhibit his continued rehabilitation.
17. The Secretary of State appealed to the Upper Tribunal.

OASys Report

18. An OASys report was carried out on 20 September 2018. It noted that as well as dealing in drugs, the claimant had his own substance misuse problem, which was costing him about £20 a day, which was a struggle, hence his shoplifting and theft offences. The work in street dealing was 'good money', but he had not thought through the consequences. He relied on handouts from his family as his wages were minimal. He had no debt when interviewed for the OASys assessment.
19. The OASys report recorded that the claimant had pleaded guilty to supplying heroin, a Class A drug, between 1 January 2016 and 15 August 2016. The victims were substance misusers on the streets of Cardiff. The claimant had accepted responsibility, saying that 'it was a silly thing to do'. At the time of committing the offence, he had a history of acquisitive related offending and was banned from going

to Westfields in Cardiff. The offence formed part of an established pattern of offending, but was an escalation.

20. The claimant had been living in his family home: his parents, a sister and two brothers lived there as well and it would be his release address. He would be unemployed on release. He had no qualifications. He had worked for his brother at the brother's private clinic for a time, and could do this on release, but he did not consider the family business to be a real job and would like to work elsewhere on release.
21. The claimant had completed secondary education and obtained a number of GCSE examinations but dropped out of school after the first year of his 'A' level study due to his offending and personal circumstances. The claimant was studying in prison: he had completed an access course in Law, but was not interested to pursue the subject further. He hoped to attend college on release and to work in his brother's clinic to get enough money to cover college.
22. The claimant had been trying to repair his relationship with his mother, which had been damaged by his offending behaviour. His father had a new relationship and by the time the appeal was heard before the First-tier Tribunal, the evidence was that the claimant's relationship with his father and the father's new family had improved. His father attended the hearing. The claimant had no relationship of his own. Previous relationships had ended amicably and there was no domestic violence.
23. The claimant's brother has been supportive, both with employment and financial handouts, but the claimant's evidence was that he was reluctant to engage seriously in his brother's business.
24. The claimant was not always of good behaviour in prison: when interviewed in September 2018, he had 5 adjudications in 4 months, one for violence, one for refusal to comply with orders, two for having an unauthorised USB stick, and one for testing positive for the drug Spice. The OASys report identified that after release he would need to embark on structured activities to keep him away from negative peer groups.
25. While in prison, the claimant worked on stress management, substance misuse and improving his employability skills. His attitude towards the community was considered to be a concern and was linked to his offending behaviour. He was considered to have poor thinking and behaviour, impulsivity, and problems caused by mixing with bad company.
26. The claimant was considered to present a medium (61%) risk of reoffending overall, with a 56% percent (medium) risk of non-violent reoffending and a 22%(low) risk of violent reoffending.

The Immigration (European Economic Area) Regulations 2016

27. As a Dutch citizen, the claimant is an EEA citizen and the Immigration (European Economic Area) Regulations 2016 apply to this appeal. Regulation 23(6) of the EEA Regulations sets out the circumstances in which an EEA citizen may be removed from the United Kingdom. Regulation 27 defines the ambit of a 'relevant decision':

“Decisions taken on grounds of public policy, public security and public health

27. – (1) In this regulation, a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health. ...

(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...

(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 must represent 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;
- (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 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. ...”

MC (*Essa principles recast*) [2015] UKUT 520 (IAC) (11 September 2015)

28. In MC (*Essa principles recast*) the Upper Tribunal gave the following guidance:

1. *Essa* rehabilitation principles are specific to decisions taken on public policy, public security and public health grounds under regulation 21 of the 2006 EEA Regulations.
2. It is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (regulation 21(5)(c)) that it becomes relevant to consider whether the decision is proportionate taking into account all the considerations identified in regulation 21(5)-(6).
3. There is no specific reference in the expulsion provisions of either Directive 2004/38/EC or the 2006 EEA Regulations to rehabilitation, but it has been seen by the

Court of Justice as an aspect of integration, which is one of the factors referred to in Article 28(1) and regulation 21(6) (Essa (2013) at [23]).

4. *Rehabilitation is not an issue to be addressed in every EEA deportation or removal decision taken under regulation 21; it will not be relevant, for example, if rehabilitation has already been completed (Essa (2013) at [32]-[33]).*

5. *Reference to prospects of rehabilitation concerns reasonable prospects of a person ceasing to commit crime (Essa (2013) at [35]), not the mere possibility of rehabilitation. Mere capability of rehabilitation is not to be equated with reasonable prospect of rehabilitation.*

6. *Where relevant (see (4) above) such prospects are a factor to be taken into account in the proportionality assessment required by regulation 21(5) and (6) ((Dumliauskas [41]).*

7. *Such prospects are to be taken into account even if not raised by the offender (Dumliauskas [52]).*

8. *Gauging such prospects requires assessing the relative prospects of rehabilitation in the host Member State as compared with those in the Member State of origin, but, in the absence of evidence, it is not to be assumed that prospects are materially different in that other Member State (Dumliauskas [46], [52]-[53] and [59]).*

9. *Matters that are relevant when examining the prospects of the rehabilitation of offenders include family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like (Essa (2013) at [34]). However, lack of access to a Probation Officer or equivalent in the other Member State should not, in general, preclude deportation (Dumliauskas [55]).*

10. *In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (Dumliauskas [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide-ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (Dumliauskas at [46] and [54]).*

Terzaghi v Secretary of State for the Home Department [2019] EWCA Civ 2017

29. In *Terzaghi v Secretary of State for the Home Department [2019] EWCA Civ 2017*, Lord Justice Dingemans, with whom Lord Justice Underhill and Lord Justice Moylan agreed, set out the relevant legal principles at [11]-[12]:

“Relevant legal principles relating to integration for the purposes of the 2006 Regulations

11. The effect of imprisonment on whether a citizen of the European Union has acquired enhanced regulation 21(4) status has been considered by the Court of Justice of the European Union when considering the 2004 Directive in a number of cases including *Onuekwere v Secretary of State for the Home Department (Case C-2014/13) [2014] 1 WLR 2420* ; *Secretary of State for the Home Department v MG (Portugal) (Case C400/12) [2014] 1 WLR 2441*; *FV (Italy) v Secretary of State for the Home Department (Cases C-424/16 and C-316-16) [2019] QB 126*; and *K v Staatssecretaris van Veiligheid en Justitie ; F v Kingdom of Belgium (Cases C-331/16 and C-366/16) [2019] 1 WLR 1877* . Relevant domestic decisions include a decision of the Court of Appeal in *Warsame v Secretary of State for the Home Department [2016]*

EWCA Civ 16; [2016] 4 WLR 77 and a decision of the Upper Tribunal in *Arranz v Secretary of State for the Home Department* [2017] UKUT 294 .

12. The following propositions were common ground before us:

(1) the 10 year period referred to in regulation 21(4) is counted back from the date of the decision to deport, see *MG (Portugal)* at paragraph 24, *Warsame* at paragraph 10 and *FV (Italy)* at paragraph 65;

(2) the 10 year period has to be a continuous period of residence in the United Kingdom, see *MG (Portugal)* at paragraph 25 although this does not prevent some absences provided that there has not been a transfer of "the centre of the personal, family or occupational interests of the person concerned";

(3) periods of imprisonment will, in principle, interrupt the continuity of residence for the 10 year period, see *MG (Portugal)* at paragraph 36 and *FV (Italy)* at paragraph 70. This is because the imposition of a prison sentence showed non-compliance with the values expressed by the society of the host member state in its criminal law, see *Onuekwere* at paragraph 26; but

(4) if a citizen of the European Union has resided for 10 years in the relevant state before the period of imprisonment the earlier period "together with the other factors going to make up the entirety of the relevant considerations in each individual case" may be taken into account in determining whether the person has regulation 21(4) status, see *MG (Portugal)* at paragraph 36 and *FV (Italy)* at paragraph 71;

(5) integration is based not only on "territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host member state", see paragraph 25 of *Onuekwere* and account should be taken of the following criteria to consider whether integrative links have been broken including "how the penalty is enforced; consideration of the offence committed; general behaviour while in detention; acceptance and completion of treatment; work; participation in educational and vocational programmes; participation in the enforcement of the sentence; and maintenance of personal and family ties in the host member state", see paragraph 123 of the Advocate General's opinion as approved by the judgment of the Court at paragraph 73 in *FV (Italy)*; and

(6) the cases where there has been a prior period of 10 years residence and then a period of imprisonment in the lead up to the decision to deport have, for purposes of regulation 21(4) status, been referred to as "a maybe category of cases", see *Warsame* at paragraph 9."

Analysis

30. It is now settled that the relevant period of 10 years residence in accordance with the Regulations required for 'imperative grounds' protection under Regulation 27(4) runs backwards from the decision to deport, in this case, from 13 February 2008 to 13 February 2018. The claimant was a minor for the first three years, so he needs to show that one or both of his parents were exercising Treaty rights between 2008 and 2011. In her supplementary letter of October 2018, the Secretary of State accepted that she had seen evidence that the claimant's father worked from 2006-2009, when he became medically unfit to work. In 2009, the claimant was 16 years old. There is some evidence that the claimant's mother worked for Beauty Forever Cosmetics

Limited in 2009, and that she paid National Insurance contributions as a self-employed person in 2011.

31. I am not satisfied that the evidence before me shows that during the whole period of his minority (2005 to 2011) the claimant has demonstrated that his parents were exercising Treaty rights in the United Kingdom and that therefore he also was here 'in accordance with the Regulations' for all of those years.
32. The claimant reached the age of 18 on 13 June 2011 and thereafter he needs to show that he personally was in the United Kingdom exercising Treaty rights as an EEA national. The claimant had a drug use problem, using cannabis every day at a cost of about £20, and tested positive for Spice in prison. He needed to finance his drug use, either by family handouts or criminality. His criminal history does not suggest that he was economically active continuously after that date, or exercising Treaty rights in some different fashion. His evidence is that sometimes he worked in his brother's clinic, and sometimes his brother just gave him money.
33. The claimant has not satisfied me that before his conviction in 2017, he can show that he was in the United Kingdom 'in accordance with the Regulations' for a period of 10 continuous years. My primary finding is that the integration requirement of Regulation 27(4) is not made out.
34. In the alternative, if the claimant had resided in the United Kingdom for 10 years 'in accordance with the Regulations' at the date of conviction, the period of one year between conviction and the deportation order would normally break that integration. I am required to consider the offence committed; his general behaviour while in detention; his acceptance and completion of treatment; work (or its absence); participation in educational and vocational programmes; participation in the enforcement of the sentence; and maintenance of personal and family ties in the host member state.
35. The offence in this case was a serious one: street drug trafficking causes significant harm in the community and was punished by a long sentence with only a small discount for his late guilty plea. The claimant did take the educational opportunities offered in detention. However, he was not well behaved in prison. He had a total of five adjudications, two for having an unauthorised USB stick, one for violence, one for refusing to follow orders by a prison officer, and one for failing a drug test.
36. The claimant has no employment history apart from working occasionally in his brother's clinic. His family ties have been weakened by his offending behaviour. His brother has been a loyal supporter, his relationship with his father and step-mother have improved with time, but his relationship with his mother remains fragile. His family ties did not prevent him offending before he went to prison and there is nothing which satisfies me that they would do so now.
37. The claimant did accrue 10 years' residence in the United Kingdom before the offence of which he was convicted, putting him in the 'maybe category' case: see *Warsame*. However, the evidence that such residence was 'in accordance with the Regulations' is weak and discontinuous.

38. On the facts of this appeal, I am satisfied that whatever integration the claimant had achieved between 2005 and 2015 was broken by his imprisonment in 2017. Applying the decision of the Court of Appeal in *Terzaghi*, the claimant is therefore not entitled to claim 'imperative grounds' protection under Regulation 27(4), but only the lesser protection in Regulation 27(3).
39. The Upper Tribunal's guidance in *MC (Essa principles recast)* [2015] UKUT 520 (IAC) (11 September 2015) is relevant to whether the claimant's removal to the Netherlands is disproportionate. The claimant's family ties did not prevent him from committing all of the offences set out in the history above, nor is there any evidence that the support of a probation officer would not be available to him in the Netherlands.
40. Having regard to all of the matters set out in Regulation 27(5), I do find that the claimant continues to present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct and that the threat does not need to be imminent. I have regard to the OASys assessment that he presents a 61% risk of reoffending. Protection of the public from drug dealing, particularly a Class A drug such as heroin, unarguably qualifies as 'serious grounds of public policy and public security'.
41. On the totality of the evidence before me, I consider that the claimant's removal to the Netherlands is not disproportionate and that the Secretary of State was entitled to make a deportation order, in order to protect the fundamental interests of United Kingdom society.
42. The Secretary of State's appeal is allowed and I substitute a decision dismissing the claimant's appeal.

DECISION

43. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the claimant's appeal.

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson

Date: 19 May 2021