Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02301/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
on 17th July 2014	**On 24th September 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PE
(Anonymity order in force)

Respondent

Representation:

For the Appellant: Mr Smart – Senior Home Office Presenting Officer.
For the Respondent: Ms Harris of Dennings Solicitors.

DETERMINATION AND REASONS

1. On 14th May 2014, following a hearing at Birmingham, it was found that a panel of the First-tier Tribunal had materially erred in law in allowing PE's appeal against the order for his deportation from the United Kingdom for the reasons set out in the error of law finding and directions document of the same date. There are a number of findings of the First-tier Tribunal which are preserved. These include PE's Greek nationality, his date of entry into the United Kingdom in the year 2000, the existence of two children of which he is the father, the

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existence of family life recognised by Article 8 between PE and the children which is maintained by ongoing contact, and the finding that there is no family life recognised by Article 8 between PE and his former partner. PE's offending history is also accepted and set out below.

2. As stated, PE is a Greek national. Following his conviction at Ipswich Crown Court he has been made the subject of a deportation order pursuant to section 32 (4) of the UK Borders Act 2007. It is PE's case that he falls within one of the exceptions set out in section 33 of the 2007 Act, namely that his removal from the United Kingdom in pursuance of the deportation order will breach his rights under the European Community treaties .

3. PE's offending history is as follows:

	Date of conviction	Court	Nature of offence - charge	Sentence
1	6th June 2002	Dudley Magistrates	1. Possessing controlled drug – Class A on 02/06/02 Misuse of Drugs Act 1971 s.5 (2). 2. Possessing Controlled Drug – Class A on 02/06/02. Misuse of Drugs Act 1971 s.5 (2).	Community Rehabilitation Order – 6 mths. Costs 118.00 Forfeiture/confiscation Heroin and Crack Cocaine to be destroyed. Forfeiture/confiscation 3 spoons, 2 needles and bottle fitted with pipe ot be destroyed. Community Rehabilitation Order 6 mths.
2	28th August 2002	Dudley Magistrates	Theft – Shoplifting on 26/07/02. Theft Act 1968 s.1	Conditional Discharge 12 mths. Costs 75.00
3	18th October 2002	Dudley Magistrates	Theft – Shoplifting on 24/09/02. Theft Act 1968 s.1	Imprisonment 2 mths Consecutive, wholly suspended 1 mth.
4	18th October 2002	Dudley Magistrates	1. Failing to surrender to custody at appointed time On 14/06/02 Bail Act 1976 s.6 (1) 2. Stopping in	Imprisonment 1 mth wholly suspended 1 yr.

			pedestrian crossing controlled area On 14/06/02 Zebra Pelican and Puffin Pedestrian Crossing Regulations 1997 reg. 20 (2) 3. Breach of Conditional Discharge Powers of Criminal Courts Act 1973 s.1 (B)	No separate penalty. Imprisonment 1 mth Concurrent, wholly suspended 1 yr Resulting from original conviction of 28/08/02 at Dudley Mag Ct.
5	18th October 2002	Dudley Magistrates Court	Theft – shoplifting On 26/09/02 Theft Act 1968 s.1	Imprisonment 1 mth Concurrent, wholly suspended 1 yr.
6	14th March 2003	Dudley Magistrates	Possessing Listed False Instrument W/I to use On 01/06/02 Forgery and Counterfeiting Act 1981 s.5(1)	Community Rehabilitation Order 12 mths Costs 118.00
7	22nd October 2004	Halesowen Magistrates	1. Fraudulently using a vehicle licence/trade licence/registration mark/ registration document On 08/05/04 Vehicle Excise and Registration Act 1994 s.44 (1) and s.44 (3) 2. Using vehicle whilst uninsured On 08/05/04 Road Traffic Act 1988 s.143 (2)	Fine 150.00 Fine 100.00 Costs 150.00 Driving licence endorsed 6 points
8	5th August 2008	Warley Magistrates	Possess Cannabis A Class C controlled	Fine 100.00 Costs 15.00 victim

			drug On 24/07/04 Misuse of Drugs Act 1971 s.5 (2)	surcharge Costs 60.00 collection order made Forfeiture and destroy drugs
9	21st December 2009	Warley Magistrates	1. Possessing controlled drug – Class A- Heroin On 12/12/09 Misuse of Drugs Act 1971 s.5 (2) 2. Possess Controlled drug – Class B – cannabis/cannabis resin on 12/12/09 Misuse of drugs Act 1971 s.5 (2)	Fine 100.00 Costs 85.00 Victim surcharge 15.00 Forfeiture under s27 Misuse of Drugs Act 1971 Fine 65.00 Forfeiture under s 27 Misuse of Drugs Act 1971.
10	10th June 2010	Aldridge and Brownhills Magistrates	1. Theft on 10/11/09 Theft Act 1968 s.1 2. Theft on 10/11/09 Theft Act 1968 s.1 3. Theft on 10/11/09 Theft Act 1968 s.1 4. Theft on 10/11/09 Theft Act 1968 s.1 5. Theft on 10/11/09 Theft Act 1968 s.1	Suspended imprisonment 4 wks Suspended for 2 years Curfew requirement with Electronic tagging Costs 920.00 Suspended imprisonment 4 wks Suspended for 2 years Curfew requirement with Electronic tagging Imprisonment 4 wks Suspended for 2 years Curfew requirement Imprisonment 4 wks Suspended for 2 years Curfew requirement Suspended imprisonment 4 wks Suspended for 2 years Curfew requirement with Electronic tagging

			6. Theft On 10/11/09 Theft Act 1968 s.1	Suspended imprisonment 4 wks Suspended for 2 years Curfew requirement with Electronic tagging
11	23rd September 2010	Warley Magistrates	Possession cannabis controlled drug – Class B Cannabis/Cannabis Resin on 01/09/10 Misuse of Drugs Act 1971 s.5 (2) Using a vehicle whiles uninsured On 01/09/10 Road Traffic Act 1988 s.143	Fine 100 Victim surcharge 15.00 Costs 85.00 Sentence postponed
12	11th February 2013	Ipswich Crown Court	Assault occasioning actual bodily harm on 18/09/12 Offences Against the Persons Act 1861 s. 47	Imprisonment 2 yrs

4. The index offence arises from a serious assault. In his sentencing remarks HHJ Coffey stated:

> Whatever the background that took place prior to the events that took place in the early hours of the 18th September of last year, the picture that emerges in this case is that the victim was the sole occupant of a room in the lodging house in this town. In the early hours of the morning he was disturbed, assaulted and injured, and during the course of the attack a weapon described as a hockey stick was used. He sustained an unattractive injury by the use of that weapon, and it is fortunate that the injuries which he did sustain were not more serious than they were.
>
> In the course of the time that you three had entered that house a quantity of cash was stolen from him by you, the second defendant, [Mr S].
>
> The culpability of the first and third defendants - that is [PE] and you [SF] - in my view was significant given the circumstances in which this assault occurred: in the middle of the night, and in the home of the victim.

> Both you [PE] and you [SF] have significant criminal records….
>
> Had you not pleaded guilty, [PE] in the way you have this morning, the sentences imposed upon you and the others would have been greater: [PE] for you, the sentence would have been one of 27 months; and you [SF], would have received a sentence of 21 months imprisonment.
>
> In the event, the sentences that I impose on Count 2, so far as you are concerned [PE] is one of two years' imprisonment.

5. As with any case involving an EEA national who is the subject of a deportation order it is necessary to consider the status of that individual within the United Kingdom under Community law to ascertain the level of protection available to them.

6. By virtue of Regulation 19(3) of the Immigration (European Economic Area) Regulations 2006 (as amended), hereinafter referred to as 'the Regulations' a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if:
   (a) he does not have or ceases to have a right to reside under these Regulations; or
   (b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

7. For the Appellant to have acquired a permanent right of residence he must satisfy Regulation 15 which states:

> Regulation15.
>
> (1) The following persons shall acquire the right to reside in the United Kingdom permanently—
> (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
> (b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;
> (c) a worker or self-employed person who has ceased activity;
> (d) the family member of a worker or self-employed person who has ceased activity;

(e) a person who was the family member of a worker or self-employed person where—
  (i) the worker or self-employed person has died;
  (ii) the family member resided with him immediately before his death; and
  (iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was the result of an accident at work or an occupational disease;
(f) a person who—
  (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
  (ii) was, at the end of that period, a family member who has retained the right of residence.

(2) Once acquired, the right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.

(3) But this regulation is subject to regulation 19(3)(b).

8. In relation to self employment: in **R (on the application of Tilianu) v Secretary of State for Work and Pensions [2010] EWCA Civ 1397** the Romanian Claimant was refused jobseekers allowance. The Court of Appeal held that "self employment" did not come within the meaning of "employment" in Article 7(3)(b) and (c) of the Citizens Directive and accordingly the Claimant, as a self-employed worker who had ceased to be in work, could not retain his right of residence under the Citizens Directive and was not eligible to claim JSA (paras 20 – 22).

9. The Appellant entered the United Kingdom in 2000 for the purposes of seeking treatment for drug related problems. As such he did not enter for the purposes of being a worker and has not demonstrated he was able to satisfy the criteria as a self sufficient person. No claim is made on this basis and no evidence of adequate resources or comprehensive medical insurance being held by him has been provided.

10. The Appellant, however, claims he is a worker and has acquired a right to reside permanently in the United Kingdom on this basis. Whether the Appellant has established that he can satisfy this criterion has to be assessed against established criteria as illustrated in Begum (EEA – worker – jobseeker) Pakistan [2011] UKUT 00275 (IAC) and Ali v SSHD [2006] EWCA Civ 484.

11. In Begum the Tribunal held that when deciding whether an EEA national is a worker for the purposes of the EEA Regulations, regard must be had to the fact that the term has a meaning in EU law, that it must be interpreted broadly and that it is not conditioned by the type of employment or the amount of income derived. But a person who does not pursue effective and genuine activities, or

pursues activities on such a small scale as to be regarded as purely marginal and ancillary or which have no economic value to an employer, is not a worker. In this context, regard must be given to the nature of the employment relationship and the rights and duties of the person concerned to decide if work activities are effective and genuine.

12. In Ali the Court of Appeal said that a person need not be in employment at the relevant time to qualify as a worker under EC law, but there had to be evidence that he or she was seeking employment and had a genuine chance of being employed.

13. There is evidence of some employment being undertaken by the Appellant and benefits being claimed as follows:

i.	12 -09- 2004	Letter from DJ Transport	Offer of appointment as a driver from 14th September 2004. Three month trial period.
ii.	15-04-2005	Letter from DJ Transport	Notification to Appellant that he is being made redundant.
iii.	dates various	Letters to Appellant	Confirmation of payment of housing benefit – 1-11-05 to 1-01-06 (with evidence gaps during this period).
iv.	4-05-2005	Letter from DJ Transport	Regarding grievance meeting.
v.	12-05-2014	Masstemps Limited	Confirmation of placement of Appellant at Cradley Timbers Ltd for period March- August 2006.
vi.	22-05-2007	DWP	Letter regarding correspondence from Appellant to DWP regarding DLA claim.
vii.	16-07-2009	Dudley Magistrates Court	Summons regarding driving related offences committed on 23-09-2008.

viii.	16-11-2010	Jobcentreplus	Letter to Appellant regarding changes in Employment and Support Allowance rate payable to Appellant.
ix.	26-01-2011	Jobcentreplus	Letter to Appellant regarding imminent expiry of medical certificate provided to them regarding his inability to work.
x.	2-02-2011	Sandwell MDC	Letter to Appellant regarding payment of Housing Benefit.
xi.	19-04-2011	Jobcentreplus	Letter to Appellant regarding visit by Compliance Officer
xii.	18-11-2011	DWP	Letter to Appellant regarding repayment of social fund payment.
xiii.	5-12-2011	Jobcentreplus	Letter to Appellant advising changes to his Employment and Support Allowance rates and placement in Work Related Activity Group.
xiv.	13-12-2011	Jobcentreplus	Letter advising change in payment rates due to changes in family.
xv.	5-12-2011	Jobcentreplus	Letter to Appellant advising of back payment of Employment Support Allowance for period 9-01-10 to 6-07-11.
xvi.	various dates	Jobcentreplus and others	Correspondence regarding benefits claim and related payments.

xvii.	15-03-12	Dudley MBC	Letter to Appellant following cessation of payment of Employment and Support Allowance from 22-2-2012.
xviii.	21-03-12	DWP	Letter to Appellant regarding claim for DLA.
xx.	28-03-12	DWP	Letter to Appellant regarding overpayment of Employment Support Allowance.
xxi.	13-04-12	Dudley MDC	Letter to Appellant indicating Employment Support Allowance reinstated from 15-03-12.
xxii.	25-04-12	DWP	Letter of rejection of Appellants DLA claim.
xviii.	27-01-14	Pak Mecca Meats Ltd	Confirmation of employment of Appellant as a driver.

14. The evidence of periods of work appears to total months only and there is evidence of benefits being claimed until mid 2012 in the bundle too. The Appellant was imprisoned in 2013 and only commenced his current job on release in January 2014. In relation to the benefit payments these have been made by the Jobcentreplus. Most are described as being Employment Support Allowance which is ordinarily paid if a person is ill or disabled and which offers financial support if a claimant is unable to work and personalised help so they can work if they are able to. The issue in this case is that insufficient evidence has been provided to explain the nature of the illness and why this disqualified the Appellant from having to seek employment or, if relevant, what efforts he was in fact making to secure employment, which is at a time he was taking drugs and committing related offences.

15. Regulation 6 defines a "Qualified person" as:

> (1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as—
>
> (a) a jobseeker;
> (b) a worker;

(c) a self-employed person;
(d) a self-sufficient person; or
(e) a student.

(2) Subject to regulation 7A(4), a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

(a) he is temporarily unable to work as the result of an illness or accident;
(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and—

(i) he was employed for one year or more before becoming unemployed;
(ii) he has been unemployed for no more than six months; or
(iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;

(c) he is involuntarily unemployed and has embarked on vocational training; or
(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(3) A person who is no longer in self-employment shall not cease to be treated as a self-employed person for the purpose of paragraph (1)(c) if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident.

(4) For the purpose of paragraph (1)(a), "jobseeker" means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged.

16. The relevant qualifying period does not have to be continuous but the evidence of actual employment is well below the five years requirement indicating the Appellant is dependant upon it being accepted he can qualify as a jobseeker for the remaining period. An issue for the Appellant in this regard is the fact he did not enter the United Kingdom to seek employment but for rehabilitation. In Begum (EEA – worker – jobseeker) Pakistan [2011] UKUT 00275 (IAC) the Tribunal held that when considering whether an EEA national is a jobseeker for the purposes of EU law, regard must be had to whether the person entered the United Kingdom to seek employment and, if so, whether that person can provide evidence that they have a genuine chance of being engaged. If a person does not or cannot provide relevant evidence, then an appeal is bound to fail on this ground.

17. In AG and others (EEA – jobseeker - self-sufficient person - proof) Germany [2007] UKAIT 00075 the Tribunal held that '(i) To qualify as a "jobseeker" under reg 6(1)(a) of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) an EEA national must meet all three requirements set out at reg 6(4), including that he be a person who entered the United Kingdom in order to seek employment. (ii) A person who is a jobseeker can also qualify as a "worker"

under reg 6(1)(b) but the requirements applied by ECJ case law in respect of workers-as-jobseekers are essentially the same as those set out in reg 6(1)(a). (iii) In considering what period of time a jobseeker has to find work, 6 months may be a general rule of thumb, but there is no fixed time limit. The ECJ in Antonissen [1991] ECR I-745, Case C-344/95 decided that the period must be a "reasonable period" and the assessment of what is "reasonable" must be made in the context of each individual case. Thus it may sometimes be less, sometimes more, than 6 months. In all cases, however, the period in question must start from the date of the person's arrival in the United Kingdom. (iv) To satisfy the self-sufficiency requirement of the EEA Regulations, under reg 4(4) the resources of a family member cannot be aggregated with those of the EEA national where those resources are derived from past employment of that family member: **W(China) and X(China) [2006] EWCA Civ 1494**, **GM and AM [2006] UKAIT 00059** and **MA and others [2006] UKAIT 00090** applied. (v) The burden of proof is on the applicant/appellant to establish any EEA right of admission or residence. A failure to substantiate any such right - for example by failing to produce relevant evidence – is likely to mean that the claim/appeal will fail.

18. Without prejudice to the primary position that as the Appellant did not enter the UK for work he is unable to satisfy the conditions set out in the Regulations in this regard, the period of dependency upon benefits is in the region of seven years. There is mention of a medical certificate in the papers but no detailed explanation of the reasons for such a long period of claim or what efforts were being made to find work at this time, or to show the Appellant was genuinely seeking and available for work. It was during this period he was using drugs and there is little evidence of proper integration or compliance with the principle of the Free Movement Directive which relate to the right of an EU national to seek work in another Member State. In RP (Italy) [2006] UKAIT 00025 (Storey) the Tribunal held that a person who has been a worker within the meaning of Community law does not cease to be a worker simply by virtue of falling unemployed, but he must be able to show that he has been genuinely seeking work and has not effectively abandoned the labour market. In assessing whether a person has satisfied the condition that he is or has remained a worker, the national court must base its examination on objective criteria and assess as a whole all the circumstances of the case relating to the nature of both that person's activities whilst in the member state and any employment relationships at issue.

19. I accept that for the purposes of reg 6(2)(a) of the Immigration (European Economic Area) Regulations 2006, a person whose inability to work as a result of illness or accident is not permanent is temporarily unable to work, but that must be substantiated by relevant evidence.

20. The above required test has not been adequately addressed by the Appellant who has therefore not established he is able to satisfy the requirements of Regulation 6 or that during the period he claims to have been a jobseeker that he

provided evidence that he was seeking employment and had a genuine chance of being engaged. I find the Appellant has not substantiated his claim to have been exercising treaty rights in the United Kingdom for the requisite period of five years such as to acquire a right of permanent residence.

21. The Appellant claims also that he has acquired a right to benefit from the highest level of protection as he has been in the United Kingdom for more than ten years.

22. The expulsion decision, the deportation order, is dated 8th October 2013, and ten years prior to this is therefore 8th October 2003. It is accepted the Appellant has been in the United Kingdom since 2000 which is more than ten years but he has been imprisoned for some of that time.

23. In the recent decision in SSHD v MG Case no c-400/12 CJEU the second chamber held that unlike the requisite period for acquiring a right of permanent residence which began when the person concerned commenced lawful residence in the host Member State, the 10 year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) must be calculated by counting back from the date of the decision ordering that person's expulsion. All relevant factors should be taken into account when considering the calculation of the 10 year period including the duration of each period of absence from the host Member State, the cumulative duration and the frequency of absences. A period of imprisonment was in principle capable both of interrupting the continuity of the period of residence needed and of affecting the decision regarding the grant of enhanced protection provided there under, even where the person concerned had resided in the host member state for 10 years prior to imprisonment albeit that the fact that the person had been in the member state 10 years prior to imprisonment was a factor to be taken into account.

24. It is said the above decision contains a tension in relation to the meaning of "enhanced protection" which has been clarified by the Upper Tribunal in MG (prison-Article 28 (3)(a) of Citizens Directive) Portugal [2014] UKUT 00392 to mean that a period of imprisonment during those 10 years does not necessarily prevent a person from qualifying for enhanced protection if that person is sufficiently integrated. However, according to the same judgment, a period of imprisonment must have a negative impact in so far as establishing integration is concerned.

25. In this case the Appellant has not demonstrated that he has a right of permanent residence as all he has established is that he entered the United Kingdom for rehabilitation purposes and not for work, has only worked for a limited period of time, and thereafter relied upon state benefits for the majority of this time in the UK without providing adequate evidence to prove he satisfied the definition of a jobseeker or as a person temporarily unable to work.

26. **DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004,** the Free Movement Directive, was incorporated into UK domestic law by the Immigration (European Economic Area) Regulations 2006 (as amended). Of relevance to this issue is Article 28 (3) which provides that an expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or
(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

27. Regulation 21(4) of the 2006 Regulations states:

(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.

28. The debate in relation to these issues is not to the actual wording but what they mean in practice and how they should be applied. In Secretary of State for the Home Department v FV (Italy) [2012] EWCA Civ 1199 the Court considered that Article 28(3)(a) was essentially an integration test. In Regulation 24 there is a need for a continuous period of at least 10 years residence prior to the relevant decision whereas in MG the CJEU appears to contemplate that someone with 'non-continuous' residence can qualify for enhanced protection under Rules, raising the issue of whether Regulation 24 is inconsistent with European law in this regard. Onuekwere (Judgment of the Court) [2014] EUECJ C-378/12 (16 January 2014) also considered.

29. If the correct test is that of integration the Appellant fails as on the facts the evidence of integration is not that great after such a period of time. There is little evidence of integration within the UK job market. The right of permanent residence is a key element in promoting social cohesion and was provided for by that directive in order to strengthen the feeling of Union citizenship. The EU legislature accordingly made the acquisition of the right of permanent residence pursuant to Article 16(1) of Directive 2004/38 subject to the integration of the citizen of the Union in the host Member State (see Case C-162/09 *Lassal* [2010]

ECR I-9217, paragraphs 32 and 37). Such integration has not been proved. It 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.

30. If the test is 'time served' only in the host state the Appellant may succeed in his claim to be entitled to the enhanced level of protection. In this regard, if Article 28 is the correct interpretation: 'to have resided in the host Member State for the previous ten years' the Appellant must be found to have satisfied the same as it is accepted he has lived in the UK since 2000 and the decision for his removal is dated 8th October 2013. If the wording of Regulation 24 is the relevant one there is a need for ten years continuous residence to have occurred prior to the expulsion decision, even though the quality of his integration is poor.

31. The Appellant has established that he has resided in the UK for a continuous period of ten years. He was imprisoned in 2013 which broke the continuity of the period of residence, and so whether entitled to the enhanced level of protection will depend upon an assessment of all relevant facts. In relation to the integration issue, the Appellant admits to drug use but claims this ended on 6th October 2008. He claims to have been in a relationship with his ex-partner since March 2001 which he states lasted for eight years. Their first child was born in July 2002 and a second child in May 2008. The claim that it was during this relationship the Appellant became a drug user is contradicted by the fact he came to the UK for rehabilitation from his drug usage in Greece. What is clear from his evidence, however, is that his return to drug addiction had a material effect upon his lifestyle. This relationship ended and it is a preserved finding that there is no family life with his ex-partner.

32. The two children are British citizens and live with their mother.

33. In 2009 the Appellant formed a relationship with his current partner. They co-habitted from October 2010. It is said the relationship will breakdown if he is deported. The Appellant accepts in paragraph 12 of his witness statement that he has received various sentences to attempt to rehabilitate him which appear to have failed. He claims the custodial sentence has now had this effect as he claims he cannot be without his partner and children. The Appellant claims to have complied with all licence conditions and to have worked with his probation officer.

34. Against this assertion is the fact the offence for which the Appellant was sentenced represents an escalation in his offending. His continual acts of criminality indicate he has never truly integrated into British society as such integration requires more than setting up a home and fathering children in a Member State. It involves integration into the society of that State which can be demonstrated by matters such as work, the establishment of a settled and secure home base, and respecting and honouring the laws of that State. Living on the edge of a society, taking from it by way of benefits and not showing a proper

contribution being made, without just cause, militates against the same. The co-existence with a common bond of living as the expected norm within UK society has not been demonstrated by the Appellant in this case, even after over ten years residence.

35. Having considered all the elements of this case with the degree of care required in an appeal of this nature, that of anxious scrutiny, I find the Appellant has failed to establish that he is entitled to the higher degree of protection, that of imperative grounds of public security.

Discussion

36. As he has not established his entitlement to the higher level of protection or to have established a right of permanent residence in the UK on the facts, the Appellant is only entitled to the lower level of protection; on the grounds of public policy, public security or public health of which the latter is not applicable on the facts.

37. Regulation 21(5) states that, 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.

38. Regulation 21(6) states that 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.

39. The Appellant was born on the 9th March 1974, is in good health, has a family and children in the UK, as noted above, has been reliant of benefits but now claims to be in employment, has resided in the UK since 2000 when he entered aged 26, and not establish that he has no remaining links with Greece. The decision to deport has been taken solely as a result of the commission of a

serious offence of violence by the Appellant and it has been established it is a decision based exclusively on his personal conduct.

40. In relation to whether the personal conduct of PE represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society; In GW (EEA reg 21: 'fundamental interests') Netherlands [2009] UKAIT 00050 the Tribunal said that the 'fundamental interests' of a society within the meaning of reg 21 (a threat to which may justify the exclusion of an EEA national) is a question to be determined by reference to the legal rules governing the society in question, for it is unlikely that conduct that is subject to no prohibition can be regarded as threatening those interests.

41. In this appeal the issue is one of re-offending. Although PE claims he presents no risk of re-offending this was not the view of the National Probation Service when preparing a report at the request of the Respondent. That report is dated 10th September 2013. The First-tier Tribunal noted that the account of the index offence was not as PE had claimed before them and the author of the report records that it was in fact PE who initially approached the victim in his room asking him where the location of a named individual was and then beating him with a 'wooden stick' on his head, shins, left hip, and on the arm. The victim then stated that the attackers took his car keys and escorted him to a car with PE driving the vehicle. The police were eventually called and discovered what was described as a hockey stick and that PE was arrested driving the victim's car. PE was initially charged with Robbery, Kidnap, and Theft of a Motor Vehicle. Although he was convicted and sentenced for AOABH and the Kidnap and Theft charges dismissed, the Robbery charge has been left to lie on the file.

42. Having examined other relevant matters in section 5 of the report PE is assessed as presenting a medium risk of harm to the public and a medium likelihood of reconviction. It is noted within the body of the report that the previous offending and drugs and employability issues are not linked to offending behaviour as PE informed the officer he was a signed off as being unfit to work although not working which decreased his access to income.

43. PE is noted to have become addicted to heroin whilst living in Greece and was sent to a rehabilitation centre in England in 2000 where he remained for six months and then remained 'clean' for a further 12 months after leaving. He then began to use Crack Cocaine which he misused on a long-term basis leading to an overdose in 2008 and hospitalisation. It is noted that the drug use prior to the index offence and previous convictions of possession and theft to fund his drug use means a link to both offending behaviour and risk of serious harm. It also noted that from what PE told an interviewing officer, he does have the opportunity to live a 'pro-social lifestyle with this partner and to care for his children although the continued association with his co-defendants and possible involvement with associates involved in any criminal activity may lead him to

return to drug misuse and being implicated in the problems and settling of grudges in their lives.

44. In relation to thinking behaviour the author of the report records;

> The OASys indicated that PE describes some issues with temper control as he said that during the current offence he 'just snapped' which resulted in him hitting the victim. He even admitted that during the course of the offence he hit the victim on the leg he used to accelerate and therefore would be unable to escape by driving.
>
> PE has reportedly shown a poor ability to recognise some problems in that he wants to distance himself from negative associations, and yet fully intends to remain in contact with his co-defendant Mr S and even put forward his address for HDC purposes.
>
> PE stated that he believed that his index offence was impulsive and he regretted committing it, however more because of the consequences to himself and his family rather than the victim's concerns. It was assessed however that the offence itself was premeditated especially seeing as he and his co-defendants had all agreed to go together and had driven from Birmingham to Ipswich giving them a significant amount of time to rethink their impending actions.

45. Not only has PE, in the opinion of the author of the report, failed to disassociated himself with those of a negative influence, which could lead to further convictions and repeat factors such as those that led to the index and other offending, there appears no evidence of any consideration of the consequences of his actions and no work that he has undertaken to understand what lead to such action or how to prevent a recurrence in the future. The available evidence indicates that PE has a real propensity to reoffend. The nature of such offending shows that PE accordingly presents a genuine, present and sufficiently serious threat to the public.

46. It cannot be in accordance with the doctrine of public policy to permit an individual to remain who presents such a risk. In Bulale (HB) v SSHD [2008] EWCA Civ 806 the Court of Appeal held that protecting members of society from violent crime was clearly a fundamental interest of society which the appellant by his propensity to commit robbery threatened. The Tribunal was entitled to conclude that he represented a genuine and sufficiently serious risk to the public to deport him. Whilst the thrust of the Directive was that it should be difficult to expel EU citizens for crimes of dishonesty, violence was a different matter. The level of violence was not laid down and member States were given a certain amount of judgement in deciding what their nationals had to put up with.

47. In addition to the above matters any decision to deport must also comply with the principles of proportionality. PE's circumstances are set out above and proportionality in this respect is not that relating to family or private life under Article 8 ECHR but in relation to the principles of free movement. In this respect PE has a partner in the United Kingdom who he lives with and two children who he has contact with. His evidence of integration into the United Kingdom is very poor although he now claims to be free of drugs, not to be offending, and to have secured employment. One element of the proportionality assessment requires an examination of the prospects of rehabilitation/reintegration. In **Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC)** the Tribunal said that what is likely to be valuable to a judge in the immigration jurisdiction who is considering risk factors is the extent of any progress made by a person during the sentence and licence period, and any material shift in OASys assessment of that person.

48. In this case PE, a Greek national, came to the United Kingdom in 2000 to seek rehabilitation from his drug addiction which proved to be unsuccessful. In R (on the application of Essa) [2012] EWCA Civ 1718 It was held that a decision to deport a union citizen had a European dimension which widened the consideration beyond the interests of the expelling Member State and the foreign criminal. The decision maker had to consider whether the deportation decision could prejudice the prospects of rehabilitation from offending in the host country and then weigh that risk in the balance when assessing proportionality. In most cases it entailed a comparison with the prospects of rehabilitation in the receiving country. The European dimension was part of the proportionality exercise in respect of an EU deportee. In **Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC)** it was held that for those who at the time of determination are or remain a present threat to public policy but where the factors relevant to integration suggest that there are reasonable prospects of rehabilitation, those prospects can be a substantial relevant factor in the proportionality balance as to whether deportation is justified. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation. At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, it cannot be seen how the prospects of rehabilitation could constitute a significant factor in the balance. Thus, recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with propensity to commit sexual or violent offences and the like may well fall into this category.

49. In this appeal the author of the report referred to above records the fact PE continued to associate with his co-accused and potentially others of bad influence and has a long history of criminal offending for drug related reasons. The report clearly illustrates the serious nature of the index offence, and failed

attempts in the past to avoid drug addiction which necessitated PE's entry to the United Kingdom in the opinion of others, his relapsed 12 months thereafter, and further offending. PE claimed to be drug-free from 2008 yet the offence for which he was convicted occurred on 18 September 2012 indicating a propensity to reoffend that cannot be associated with drug addiction.

50. PE has been under the care of the probation services in the United Kingdom and at pages 11-12 of the Upper Tribunal appeal bundle is a letter from the National Offender Management Service dated 29th January 2014 confirming compliance with licence condition pending release, no reports of substance misuse, an assertion by PE that he has managed to avoid contact with old associates, and obtained paid employment. The letter itself appears to be a two-page document but for reasons that are not known to this Tribunal only one page was disclosed and little weight can be placed upon an incomplete document.

51. PE also failed to obtain information regarding services that would be available to him in Greece and has not been shown that they do not have a sufficiently robust probation or support services available in that country if the same was required by him. If PE remains drug free his chances of associating with those who he refers to in the United Kingdom is zero, unless they moved Greece, indicating that there may be a better chance of rehabilitation and a lesser risk of reoffending in Greece rather than if PE remains in the United Kingdom.

52. Although PE has now obtained employment this is only during the course of this year and does not represent a stable pattern of employment, although it may indicate an argument in his favour for suggesting removal is disproportionate as will the presence of his partner.

53. I do not find it has been established on the evidence that the removal of PE from the United Kingdom pursuant to the deportation order will result in a breach of any of the Secretary of State's obligations under Community Law.

54. In relation to the Article 8 ECHR claim: In VB (deportation of EEA national: human rights?) Lithuania [2008] UKAIT 00087 the Tribunal said that (i) the respondent's power to deport an EEA national is governed by the EEA Regulations 2006 and is much more restricted than in an 'ordinary' conducive case. Only if satisfied that deportation is required on grounds of public policy or public security should the Tribunal go on to consider whether deportation would contravene the Human Rights Convention.

55. The Immigration Rules contain provisions relating to Article 8 ECHR and deportation. Those in force at the date of the making of the deportation decision are:

Deportation and Article 8

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
(b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
(c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or
(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
(a) it would not be reasonable to expect the child to leave the UK; and
(b) there is no other family member who is able to care for the child in the UK; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration

decision (discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or

(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

56. The sentence PE received falls within paragraph 398(b) and so paragraph 399 applies. PE has not demonstrated he is able to succeed under this provision for even though he has two children in the UK who are stated to be British citizens they live with their mother – 399 (a) (ii) (b). In relation to the partner route, his current partner is a Latvian national who entered the UK in 2009 and no insurmountable obstacles have been established to show why the family life they have cannot be continued in Greece on the evidence.

57. PE cannot succeed under 399A as he has not lived in the UK for 20 years and has not shown he has no ties to Greece. He is over 25.

58. The Rules relating to deportation are a complete code, but even if it was necessary to consider Article 8 as a freestanding issue and that question was that of proportionality the Secretary of State has established that the decision is proportionate. The family life relied upon partner fails for the reasons the Rules are not met. PE has contact with his children and this will have to continue on an indirect basis unless they are able to holiday in Greece. It has not been shown that the removal of PE will result in unjustifiable harsh consequences for any family member such as to make the decision disproportionate. The legitimate aim of the protection of the public and deterrent element of deportation weigh strongly in a case in which a crime of violence was used for personal gain which is not tolerated by the law or society in general.

59. PE's appeal fails on all grounds.

Decision

60. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

61. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 22nd September 2014