



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/33578/2011

**THE IMMIGRATION ACTS**

Determined following a 'for mention'  
hearing at Nottingham.  
on 18<sup>th</sup> November 2013

Determination Promulgated  
on 7<sup>th</sup> February 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RASHID ALI HADI

Respondent

**DETERMINATION AND REASONS**

1. On the 12<sup>th</sup> September 2012 the determination of a Panel of the First-tier Tribunal, which allowed the appeal of Mr Hadi against the decision of the Secretary of State to deport him from the United Kingdom, was set aside for the following reasons:
  11. In a detailed determination the panel find that Mr Hadi, a Dutch national, has been in the United Kingdom for over five years and set out the correct test to be applied; namely that his removal is justified on the grounds of public policy, public security or public health in accordance with Regulation 21 of the 2006 Regulations and in particular that the 'serious threat' threshold is reached.
  12. The test for me to consider is whether the conclusions of the panel are ones reasonably open to them on the evidence.

13. In relation to those findings it is submitted that the panel misdirected themselves at paragraph 29, as stated in the grant of permission to appeal, as the relevant issue was to establish whether there is a pattern of offending and if so what this indicates about Mr Hadi's conduct. I find having considered all the evidence that this is a case in which there is a history of repeated criminal conduct from a very young age with the nature of the offences showing an escalation in violence. There also appears to be an underlying financial reason and the panel failed to give adequate reasons for why they concluded there was no pattern of offending as a result of which they possibly concluded they did not need to consider what this indicated about Mr Hadi's conduct.
14. There appears to be no recognition of, or adequate findings made, in relation to the assessment that the risk of offending was imminent if Mr Hadi found he could make financial gain which is a material error.
15. The conclusions at paragraph 29, where the panel set out the issues they took into account when assessing whether Mr Hadi was a person who has changed his ways, are quite selective and in some respects speculative and not supported by the evidence available to the panel. It is in this respect that the panel failed to make any findings on the fact Mr Hadi had been issued with a warning letter, referred to in paragraph 19 of the reasons for deportation letter, and that since 2009 he has been aware that further offending may result in deportation. He has in fact been convicted of three further offences since that date yet the factors referred to by the panel do not appear to have been issues that prevented reoffending and undermined Mr Hadi's claim to be genuinely remorseful.
16. I also note what appears to be a contradiction in that paragraph 40, when assessing the Secretary of State's view on public interest the panel state "we were referred to the seriousness of the appellant's offence and had we also find that there is a risk of reoffending, that risk is one facet of the public interest to be taken into account when assessing the consequences of a serious offence having been committed". In paragraph 52 the panel find that although he has committed criminal offences in the past it has not been established that he is a credible risk of further criminal activities.
17. It is not clear whether in paragraph 40 the panel are finding that there is a risk of reoffending or stating that had they found there was a risk of reoffending the following consequences would be relevant. If it was found there was a risk of reoffending the finding at paragraph 52 that there was no credible risk is a direct contradiction.
18. In any event having considered the case in detail, I find that Mr Mills has discharged the burden of proof upon him to the required standard to show that the panel made a material error of law for the reasons set out in the application for permission to appeal and the

grant of permission in relation to both their assessment of the deportation decision and Article 8. In respect of Article 8 although it is accepted that Mr Hadi has family and private life in the United Kingdom it was clearly material to the proportionality exercise conducted that the panel had found that he was able to succeed in his appeal against the deportation decision.

19. Accordingly I find that the determination of the panel must be set aside and the decision re-made. Other than the finding that Mr Hadi is a Dutch national who has a permanent right of residence in the United Kingdom, which is not challenged in the grounds, there shall be no preserved findings.

### **Procedural history**

2. It emerged at the hearing on 12<sup>th</sup> September 2012 that Mr Hadi had been arrested for further drug offences although had not been charged at that time. Directions were given for a further hearing at which Mr Hadi was directed to bring with him any documents he received from the Police or Crown Prosecution Service.
3. On 29<sup>th</sup> April 2013 the Upper Tribunal issued further directions seeking details of Mr Hadi's representative or for his suggestions in relation to how he wishes to proceed with his appeal. The directions contain a clear statement that if he did not respond to the directions the Tribunal may assume he is unable or unwilling to assist and will arrange to determine the appeal in his absence.
4. The appeal next came before the Upper Tribunal sitting at Birmingham on 24<sup>th</sup> June 2013. There was no attendance by Mr Hadi nor a representative although Mr Mills was able to confirm that he had been placed on remand at Nottingham Prison following his being charged with the further drug related offences. No order had been made for his production and it was understood the Crown Court was due to pass sentence following a guilty plea. The appeal was adjourned to be relisted on 28<sup>th</sup> August 2013 at Nottingham Magistrates Court and directions were given for the production of all evidence the parties sought to rely upon in support of their respective cases.
5. On 2<sup>nd</sup> August 2013 the Tribunal received a letter from a Dr Andrew Bowen of the Wathwood Hospital RSU advising that Mr Hadi was currently detained there under Section 48/49 of the Mental Health Act 1983 following his transfer on 30<sup>th</sup> April 2013. The letter states Mr Hadi had developed a psychotic illness and was found to be unfit to instruct his legal team and, in Dr Bowen's opinion, was unfit to plea. His criminal case had been put back to 7<sup>th</sup> October 2013 in the hope he will respond to the antipsychotic medication he is receiving.
6. As a result of the above the appeal was adjourned on 28<sup>th</sup> August 2013 until 18<sup>th</sup> November 2013 with a further direction for the parties to file the evidence they

are seeking to rely upon and for Mr Hadi to file written statements if he is unable to attend. It was also directed that if he wishes to attend a hearing he must say so and file evidence from Dr Bowen that he is fit to attend and engage in such a hearing. It was also stated in the directions that the Tribunal shall consider if a further hearing was required or whether the matter can be disposed of without a hearing.

7. There was no response from Mr Hadi. At the further hearing on 18<sup>th</sup> November 2013 Mr Mills provided a letter from the CPS dated 18<sup>th</sup> November 2013 in the following terms:

Rashid HADI was charged last November with conspiracy to supply Class A (Crack Cocaine) in August 2012

In very brief terms the prosecution allege that HADI was an associated of a man called Eugene ROBINSON who was involved with HADI and others in supplying Class A controlled drugs (Crack Cocaine) from England (East and West Midlands) to the Scottish City of Aberdeen between May and August 2012.

HADI's involvement was limited to one conspiracy to supply Crack Cocaine.

On 10<sup>th</sup> August 2013 Rashid Hadi went into a Post Office in Derby with a significant quantity of Crack Cocaine (several thousand pounds worth) and posted the package to a male in Aberdeen (Steve FORBES). That package was intercepted by the Police and HADI was arrested shortly after he had left the Post Office.

Just prior to the Plea and Case management Hearing earlier this year the Prosecution were provided with a report indicating that Rashid HADI was not fit to plead. As a result he was not arraigned and did not stand trial with the other defendant's (most of whom pleaded guilty). His case was adjourned on a number of occasions for assessment to be undertaken.

On 7<sup>th</sup> October 2013 he appeared at Court and at that time was considered fit to plead. He entered a Guilty Plea to the charge and was adjourned to 15<sup>th</sup> November 2013 for sentence.

On Friday 15<sup>th</sup> November 2013 HADI was sentenced to a term of 2 and a half years imprisonment. Given the period of time he has spent in custody he will only have to serve a number of weeks before he will be released.

8. Notwithstanding Mr Hadi being deemed fit to plead there has been no response to the Tribunal's directions and after deliberation and in light of the content of the directions issued in this case it is considered fair and appropriate for the

matter to be determined on the basis of the available evidence without the need for a further hearing.

### Discussion

9. It is a preserved finding that Mr Hadi is a Dutch national who has a right of permanent residence in the UK. He was born on the 6<sup>th</sup> December 1991 in Somalia.
10. The original deportation decision was made as a result of his offending behaviour. He has twelve convictions and two reprimand/warning excluding the most recent offence, as follows:

	Date	Sentencing Court	Offence	Outcome/sentence
1	17/05/06	Derby Juvenile	Theft from Motor Vehicle on 8/03/06 (Plea: Guilty) Theft Act 1968 s.1(1)	Referral Order 6 months Compensation 150.00
2	17/05/06	Derby Magistrates	Taking a vehicle without consent on 9/04/06 (Plea: Guilty) Theft Act 1968 s.12 (1) ** Offence committed on bail**	Referral Order 6 months.
3	11/06/07	Derby Juvenile	Having article with a blade or which was sharply pointed in public place on 10/05/07 (Plea: Guilty) Criminal Justice Act 1988 s.139 (1)	Supervision order 6 months Forfeiture and destruction of silver flick knife Costs 40.00
4	19/09/07	Derby Juvenile	Being carried in a motor vehicle taken without consent on 19/08/07 -20/08/07 (Plea: Guilty) Theft Act 1968 s. 12 (1)	Supervision order 12 months Driving licence endorsed Disqualified from driving - obligatory 12 months Costs 43.00
5	21/11/07	Derby Juvenile	Resist or obstruct Constable on 26/09/07 (Plea: Guilty). Police Act 1996 s.89 (2)	Conditional discharge 1 yr Costs 40.00
6	06/04/09	Derby Juvenile	Use threatening abusive or insulting words/behaviour or disorderly behaviour to cause	Conditional discharge 10 months concurrent

	06/04/09		<p>harassment/ alarm/ distress. On 16/02/06 (Plea: Guilty) Public Order Act 1986 s. 4A(1) **Offence committed on bail**</p> <p>Failing to surrender to custody at appointed time On 24/03/09 (Plea: Guilty) Bail Act 1976 s.6 (1) **Offence committed on bail**</p>	<p>Conditional discharge      12 months</p>
7	05/05/09	South Derbyshire Juvenile	<p>Possessing controlled drug W/I to supply - Class A - other On 14/02/09 (Plea: Guilty) Misuse of Drugs Act 1971 s.5 (3)</p>	<p>Detention and Training Order 4 months Forfeiture and Destruction of 0.36 Grams of heroin.</p>
8	09/07/10	Derby Crown	<p>Affray On 29/07/09 (Plea: Guilty) Public Order Act 1986 s.3 **Offence Committed on bail**</p>	<p>Young offenders institution 12 months - 238 days to count towards sentence.</p>
9	03/03/11	South Derbyshire Magistrates.	<p>Use disorderly behaviour or threatening/abusive/insulting words likely to cause harassment alarm or distress. On 27/11/10 (Plea: Guilty) Public Order Act 1986 s.5 (1) (a)</p>	<p>Fine 34.00 Costs 85.00 Victim surcharge 15.00</p>
10	21/09/11	Derby Crown	<p>Robbery On 23/04/11 (Plea: Guilty) Theft Act 1968 s.8</p>	<p>Young Offenders Institution 12 months. 139 remand days to be taken into account.</p>
11	09/10/12	South Derbyshire Magistrates.	<p>Possessing controlled drug - Class B -other On 08/10/12 (Plea: Guilty) Misuse of Drugs Act 1971 s.5 (2) **Offence committed on bail**</p> <p>16/11/12 sentenced:</p>	<p>Remand on condition bail 12/10/12</p> <p>No separate penalty Forfeiture and destruction.</p>

12	09/10/12	South Derbyshire Magistrates.	Assault a Constable On 08/10/12 (Plea: Guilty) Police Act 1996 s.89 (1)  16/11/12 sentenced:	Remand on conditional bail 12/10/12  Supervision requirement Suspended imprisonment 4 months wholly suspended 12 months Costs 85.00 Compensation 75.00 Victim surcharge 80.00 Forfeiture and destruction
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11. The warning/reprimand given on 10/01/05 was for an offence of criminal damage and on 04/04/09 for possession of a controlled drug - Class B - cannabis/cannabis resin.
12. The deportation of EU nationals is covered by Directive 2004/38/EC which is implemented by the Immigration (European Economic Area) Regulations 2006. In LG (Italy) v SSHD [2008] EWCA Civ 190 the Court of Appeal said that the 2006 Regulations had to be interpreted so far as possible to have the same meaning as the equivalent words in the Directive.
13. By virtue of Regulation 26, an EEA national may only be removed if his removal is justified "*on the grounds of public policy, public security or public health.*" Regulations 21(5) to 21(6) provide guidance on the proper approach to making decisions on public policy and public security. 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.
14. 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.
  15. By virtue of Regulation 21(3) a decision to remove may not be taken in respect of a person with a permanent right of residence under regulation 15 except on *serious grounds of public policy or public security*.
  16. The general approach is in two stages (i) does the Appellant's conduct satisfy the applicable "public policy" criterion (whether the general one or the more or most stringent one); and (ii) if it does, is the decision to remove a "proportionate" one in all the circumstances.
  17. The Respondent's reasons for deportation letter dated 15<sup>th</sup> December 2011 considered Mr Hadi's immigration history and all relevant factors. He claims to have entered the UK in 2003 using his own passport with the intention of living and working here but there is insufficient evidence to establish that Mr Hadi has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision which was taken in 2011 and accounting for periods of imprisonment.
  18. In relation to his personal conduct and the threat he poses to society in general , in MG and VC (Ireland) [2006] UKAIT 00053 the Tribunal said that "where regulation 21(3) applies to an individual (because he is an EEA national with a permanent right of residence but not a minor or along term resident) he may be removed as previously on the grounds that there is a risk of his committing further offences, with the proviso that the risk of harm must constitute serious grounds of public policy for his removal."
  19. In BF (Portugal) v SSHD [2009] EWCA Civ 923 the Appellant, a citizen of Portugal, arrived in the UK and had acquired a right of permanent residence. He was convicted of battery against his partner and sentenced to 42 months imprisonment. He could only be removed on serious grounds of public policy or public security. The Tribunal first had to determine the claimant's relevant personal conduct; secondly whether the conduct represented a genuine present



and sufficiently serious threat; thirdly whether that threat affected one of the fundamental interests of society; and fourthly whether deportation would be disproportionate in all the circumstances. The Tribunal noted the evidence that the claimant had a high propensity to re-offend against the same victim and any new partner, but went on to find that the SSHD had failed to prove that there were serious grounds of public policy or security which made deportation proportionate. In remitting the appeal, the Court of Appeal said the Tribunal should have reached a conclusion as to whether the threat, which was clearly present at the time of the offence, was still present at the hearing. The Tribunal had to decide whether there was a present serious threat and if so the extent of that threat.

20. The first question for this Tribunal is to determine Mr Hadi's personal conduct which is amply demonstrated by his criminal record set out above.
21. The second question is whether such conduct represents a genuine and sufficiently serious threat. In this regard the further recent offending demonstrates the fact Mr Hadi does represent such a threat as he has in fact offended on more than one occasion since the decision to deport him was taken in 2011. The OASys Report dated 26<sup>th</sup> September 2011 assessed Mr Hadi as presenting a high risk of reoffending. The term "high" meaning there are identifiable indicators of risk of serious harm. The potential event could happen at any time and the impact would be serious.
22. There are no up-to-date reports and it is noted that the offending has occurred despite Mr Hadi being warned in 2009 that further offending could lead to his deportation. As stated, the more recent offence involving drugs were committed after his previous sentence was served and he was aware of the intention to deport him. This illustrates a propensity to re-offend that corroborates the assessment in the OASys report. This is not a decision that has been made based upon his previous convictions although in Commission v the Netherlands Case C-50/06 the Commission said that under article 3(1) of the Directive 64/221 measures taken on the grounds of public policy or public security were to be based exclusively on the conduct of the person concerned. Article 3(2) specified that previous criminal convictions were not in themselves to constitute grounds for taking such measures. They could be taken into Account only in so far as the circumstances which had given rise to that conviction were evidence of personal conduct constituting a present threat to the requirement of public policy.
23. In relation to whether that threat affected one of the fundamental interests of society; there is a pattern of escalating offending involving crimes of violence and drugs. In view of the devastating effects of crimes linked to drug trafficking, Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ 2004 L 335, p. 8) states in recital 1 that illicit drug trafficking poses a threat to health, safety and the quality of life of

citizens of the Union, and to the legal economy, stability and security of the Member States....Since drug addiction represents a serious evil for the individual and is fraught with social and economic danger to mankind, trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it (in terms of an imperative threat to public security). The ECJ have held that a Member State may, in the interests of public policy, consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs and dealing in narcotics as part of an organised group is a fortiori covered by the concept of 'public policy' for the purposes of Article 28(2) of Directive 2004/38.

24. In relation to fundamental interests of a 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 regulation 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.
25. I find it proved that there is a plausible high risk of Mr Hadi committing further offences and that such risk through acts of violence or the effect of drug use constitutes serious grounds of public policy for his removal
26. The forth question is whether deportation would be disproportionate in all the circumstances. In this regard it is not a proportionality exercise such as that conducted when considering Article 8 ECHR as the public policy ground for removal is an exception to the fundamental principle of the free exercise of EU rights. It is the proportionality of the decision in relation to the right of free movement which is relevant.
27. There is also the issue of rehabilitation. In R (on the application of Essa) [2012] EWCA Civ 1718 the Dutch appellant had been sentenced to 5 years for robbery. 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.
28. The First-tier Panel had the benefit of hearing evidence from Mr Hadi and his family members. It accepted Mr Hadi was living with his family prior to his imprisonment for the offence of robbery and wished to return there on release.

They also note the relationship he has with a girlfriend who was due to give birth to a child. The effect of such ties to the family in the UK should have been to deter Mr Hadi from further offending and to facilitate his rehabilitation, yet this is not the case. The index offence was committed on 23/04/11 and is entry number 10 on the above schedule. Since that offence he committed the offences numbered 11 and 12 above and the recent drug related offences for which he was sentenced on 15<sup>th</sup> November 2013.

29. The Kingdom of the Netherlands has a probation service which has been developed over a number of years and which is comparable with that available in the UK. It has not been shown that Mr Hadi's circumstances and the respective probation services of the relevant Member States make his chances of rehabilitation greater in the UK than in The Netherlands or visa versa. On the material available to the Upper Tribunal it has not been shown to be disproportionate to deport Mr Hadi who, as a fit, healthy, not unintelligent and resourceful young man, has not shown that he will not be able to survive and re-adapt to life in the Netherlands. The Secretary of State has discharged the burden upon her to prove the decision is proportionate in terms of EU law.
30. In relation to Article 8 ECHR, even if family life exists, the risk posed to the wider society by Mr Hadi as a result of his re-offending and the nature of his criminality make the decision proportionate when considering the legitimate aim relied upon by the Secretary of State.
31. The appeal of Mr Hadi against the decision to deport him is dismissed on all grounds.
32. I note however the date of the decision is the 15<sup>th</sup> December 2011 which is over two years ago. Regulation 24 (5) states:
  - (5) Where such a deportation order is made against a person but he is not removed under the order during the two year period beginning on the date on which the order is made, the Secretary of State shall only take action to remove the person under the order after the end of that period if, having assessed whether there has been any material change in circumstances since the deportation order was made, he considers that the removal continues to be justified on the grounds of public policy, public security or public health.
33. The Secretary of State is therefore required to undertake a further assessment before removal.

## Decision

34. **The First-tier Tribunal Panel materially erred in law. The decision of the Panel has been set aside. I remake the decision as follows. The appeal of Mr Hadi is dismissed.**

Anonymity.

35. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed.....  
Upper Tribunal Judge Hanson

Dated the 5<sup>th</sup> February 2014