



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

Appeal Number: DA/00115/2015

**THE IMMIGRATION ACTS**

**Heard at: Field House  
On: 8<sup>th</sup> September 2015**

**Determination Promulgated  
On: 18<sup>th</sup> September 2015**

**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Kenadid Abokar**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

Representation:

For the Appellant: Mr Slatter, Counsel instructed by Richmond Chambers LLP

For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellant is a national of The Netherlands date of birth 27th September 1987. He appeals with permission<sup>1</sup> the decision of the First-tier Tribunal (Judge A. Cresswell) to dismiss his appeal against a decision to deport him from the United Kingdom.

**Background and Matters in Issue**

2. The Appellant claimed to have lived in the United Kingdom since

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<sup>1</sup> Permission granted on the 9<sup>th</sup> July 2015 by First-tier Tribunal Simpson

2000. In November 2009 he was convicted of a public order offence, and in the three years that followed was convicted a further ten times of various offences, most relating to the possession of cannabis or the failure to comply with the requirements of community orders already imposed. One of these convictions, on the 5<sup>th</sup> March 2012, resulted in the Appellant being sentenced to 14 weeks imprisonment. On the 28<sup>th</sup> July 2014 he was sentenced to 20 months' imprisonment upon a guilty plea being entered to the following charges: obstructing an officer searching for drugs, two counts of possession of cannabis with intent to supply and possession of the proceeds of the sale of drugs. It was following this latter conviction that the Respondent took a decision to deport him with reference to the Immigration (European Economic Area) Regulations 2006, Regulation 19(3)(b).

3. In the statement of reasons which accompanied the notice of decision to deport the Respondent does not accept that the Appellant has acquired a right to permanent residence. It is not accepted that he has been resident in the United Kingdom in accordance with the Regulations for a continuous period of five years. Pursuant to Regulation 21(5) the Appellant therefore fell to be deported on the grounds that his personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. That threat was identified as the Appellant's prolonged involvement with the trade in illicit drugs, and his propensity to re-offend: his OASYS assessment had placed him at a 74% risk of re-offending within a 2 year period.
4. On appeal the First-tier Tribunal found as fact that the Appellant had entered the United Kingdom on the 20<sup>th</sup> July 2000 and that he has lived here ever since. At paragraph 14 (vii) it is recorded that the Appellant conceded that had not acquired a permanent right of residence since there was not sufficient evidence that he or his mother, who had brought him here from Holland, had exercised treaty rights, or that any member of the family had had comprehensive sickness insurance. The Appellant had however maintained that the Respondent had to show 'imperative' grounds for his deportation because he had lived in the UK for a continuous period of ten years or more prior to the decision to deport him. Although he had been sent to prison in 2012 this had not interrupted his integration into the UK. The Tribunal considered this argument at paragraph 14 (viii):

"Mr Daouda maintained that the Appellant had resided in the UK for 10 years but this ignores the fact that the relevant 10 years is required to be a continuous period preceding the decision to deport (Regulation 21(4)). Here that period was broken by the Appellant's imprisonment on 5<sup>th</sup> March 2012 and 28<sup>th</sup> July 2014"
5. Having made that finding the Tribunal went on to find that the Appellant had not integrated into UK society: "he has never worked

beyond a single day and still appears to be avoiding work, preferring to earn his income from crime and the misery of others". The Tribunal determined the appeal on the basis that the Appellant had only attracted the lowest level of protection under Regulation 21. The Respondent had to show that the Appellant's removal was necessary on the grounds of public policy in accordance with Regulation 21(5)(c), and the Tribunal was satisfied that she had done so, finding at paragraph 17 that the Appellant's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

6. The determination goes on to address human rights. It is found that the Appellant no longer has a family life in the UK since he is an adult. In respect of his private life any interference is found to be proportionate. The factors set out in sections 117A-D of the Nationality, Immigration and Asylum Act 2002 are not addressed.
7. The Appellant drafted his own grounds of appeal. These were amplified, with permission, by Mr Slatter. The alleged errors are as follows:
  - i) The First-tier Tribunal has misunderstood or miscalculated the Appellant's period of residence in the UK prior to his ever having been convicted, and so applied the wrong test under the Regulations. The fact that he had been sent to prison in 2012 did not automatically prevent the Appellant from qualifying for enhanced protection: MG (prison- Article 28(3)(a) of the Citizens' Directive) Portugal [2014] UKUT 00392 (IAC). Insofar as the determination purports to carry out a proper assessment of whether the Appellant is integrated, such an assessment is flawed for a failure to take relevant factors into account.
  - ii) The determination contains an error in respect of the claim that the Appellant had accrued five years permanent residence in the UK prior to the relevant decision. His representative on the day had not withdrawn the claim: he had simply conceded that there was not sufficient documentary evidence to establish that the Appellant's mother had been a worker during the relevant period.
  - iii) The First-tier Tribunal erred in its approach to Article 8. The factors set out in Badewa (ss117A-D and EEA Regulations) [2015] UKUT 00329 (IAC) should have been applied. It is arguable that the Appellant fell under Exception 1 in s117C(4), he having been lawfully resident in the UK for most of his life, being socially and culturally integrated in the UK and there being very significant obstacles to his reintegration in the Netherlands.
  - iv) In respect of the factual question of whether or not the Appellant is rehabilitated the determination is flawed for failure

to take relevant factors into account, such as the fact that the Appellant had never been offered any therapy or other assistance to deal with his cannabis addiction. Further it is submitted that in its assessment of whether there is a present threat the Tribunal erred in impermissibly placing weight on the fact that the Appellant had convictions prior to that which prompted the decision to deport him.

8. Mr Kandola opposed each of these grounds. His submissions can be summarised as follows:

- i) The First-tier Tribunal was entitled to find that the Appellant did not qualify for enhanced protection on the basis of ten years continuous residence. The period had to be calculated backwards from the relevant date in 2015 and whilst the periods of imprisonment in 2014 and 2012 could not conclusively establish that there was a break in continuity of residence, they were strong indications of a lack of integration: see MG. The Tribunal had in any event gone on to consider the factual background and had made a sustainable finding that the Appellant was not integrated into the UK. Read as a whole it is clear that the Tribunal took all relevant factors into account.
- ii) In respect of the purported right of permanent residence arising from five years of residence in accordance with the Regulations, the Secretary of State places reliance on the clear concession made by the Appellant's representative and recorded in the determination. Even if that concession had not been made, there was not the evidence to support such a claim. The Appellant had accrued two periods of two years in education but had not had comprehensive sickness insurance during that time. The evidence that his mother, or he, had been jobseekers or workers at any other time was scant and not sufficient to justify a finding that the five years had been accrued.
- iii) Mr Kandola accepted that the First-tier Tribunal did not address ss117A-D, or make express findings on Exception 1 as set out at s117C(4), but he submitted that it was clear from the findings that the Tribunal had considered the test therein not to be met.
- iv) As to the Appellant's lack of rehabilitation and propensity to reoffend the Secretary of State submits that the findings of the Tribunal were open to it on the evidence available. It had been the Appellant's evidence that he had not sought any help for his alleged addiction to cannabis.

### **Ground 1: Ten Years Continuous Residence**

9. Mr Slatter accepted that the Appellant had to show ten years of

continuous residence *immediately preceding* the relevant decision, that being the decision to deport taken on the 9<sup>th</sup> February 2015. Although the Regulations do not stipulate that the ten year period must be calculated by counting backwards from the decision, that is the suggestion in the Directive<sup>2</sup> in the form of words used at Article 28(3): “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... have resided in the host member state for the *previous* ten years” (emphasis added). This interpretation finds support in the decisions of the Court of Justice in Onuekwere<sup>3</sup> and MG<sup>4</sup>:

“It follows that, unlike the requisite period for acquiring the right of permanent residence, which begins when the person concerned commences lawful residence in the host member state, the 10 year period of residence necessary for the grant of enhanced protection provided for in Article 28(3)(a) of the Directive 2004/38 must be calculated by counting back from the date of decision ordering that person’s expulsion”.

10. Mr Slatter further accepted that the Appellant’s periods of imprisonment in both 2012 and 2015 were relevant factors in determining whether there had been any break in the continuity of the Appellant’s ten years of residence. In accordance with MG he accepted that such periods of imprisonment must have a negative impact insofar as establishing integration is concerned. As such the First-tier Tribunal was entitled to place weight on these sentences. What it was not entitled to do was to treat those sentences of imprisonment as determinative of the question of integration. That had to be determined with reference to all relevant factors, taking into account matters such as length of residence in the UK, his age, state of health, family and economic situation, social and cultural integration into the host member state and the extent of his links to the Netherlands. The question is whether that is in fact the approach taken in this determination.
11. At paragraph 14 of the determination the First-tier Tribunal makes clear that the findings have been reached after consideration of all of the evidence taken in the round: “I emphasise that I have come to my findings after considering the evidence as whole and that the order of findings in this determination does not indicate the order in which I came to my findings”. The determination then goes on to set out the Appellant’s lengthy list of offences and convictions, his own evidence that he had only ever worked for one day, having left school with no qualifications bar a Key stage 3 graduation diploma, his problems with cannabis addiction, his length of residence in the UK and away from the Netherlands. As to the latter the Tribunal

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<sup>2</sup> Directive 2004/38/EC

<sup>3</sup> C-378/12

<sup>4</sup> C-400/12

acknowledges that there would be a need to “readjust to life in Holland after such a length of time away”. At paragraph 18 the Tribunal concludes as follows:

“I have concluded that this Appellant has not integrated into UK society. Whilst he has had some study, he has never worked beyond a single day and still appears to be avoiding work, preferring to earn his income from crime and the misery of others....”

12. I am not satisfied that the First-tier Tribunal did here fail to take relevant factors into account. Mr Slatter suggested that there was a failure to consider the Appellant’s age and the length of time he has spent in the UK, but it is apparent from paragraph 14 (xvi) that this is not so: “I do bear in mind and place in the balance the time that the Appellant has been in the UK and the fact that he has lived here now for nearly 15 of his nearly 28 years”. The same paragraph recognises that after such an absence ties to Holland would have to be re-established; pertinent to that was the fact that his sister continues to regularly visit that country and that it would not be difficult for other family members to do the same. Whilst paragraph 14 (viii), read in isolation, might indicate an impermissibly narrow assessment of whether the Appellant has attracted an enhanced level of protection, it is clear from the remaining sub-sections of that paragraph that the Judge has turned his mind to all of the relevant factors, and in particular the question of whether the Appellant is “integrated”. He need not make express findings on whether the periods of imprisonment disrupted the Appellant’s integration if he never accepted that he was integrated in the first place.

## **Ground 2: Permanent Right of Residence**

13. There was a clear concession recorded in the determination that the Appellant would not be pursuing any claim to have accrued five years continuous residence in accordance with the Regulations: this is recorded at paragraph 14(vii). Mr Slatter informed me that he had spoken to the Appellant’s previous representative and that issue was taken with the way that the concession was recorded. Mr Slatter submitted that Mr Daouda had only indicated that he had not the documentary evidence to establish that the Appellant’s mother had been working.
14. If issue were to be taken with the way that the matter is recorded in the determination, then evidence to that effect from Mr Daouda should have been tendered. The determination is unambiguous and there is nothing in the record of proceedings to support Mr Slatter’s submission. It is apparent from the record that Mr Daouda made no submissions at all on the permanent residence point and that the HOPO on the day had noted that there had been a “withdrawal of all of the 5 year claim”.

15. The point was conceded and there was no error in the Tribunal's approach.

**Ground 3: ss117A-D NIAA 2002**

16. Mr Kandola concedes that the determination does not address ss117A-D of the Nationality, Immigration and Asylum Act 2002. He points out however, that given the clear findings on the Appellant's lack of integration, this can hardly be material. I agree. Section 117C(4) provides that a foreign criminal can successfully resist deportation where he has been lawfully resident in the UK for most of his life, he has socially and culturally integrated into the UK and there would be very significant obstacles to his reintegration into, in this case, Dutch society. Quite apart from the merits or otherwise of the Tribunal's assessment of the Appellant's level of integration in the UK there was no evidence to suggest that the Appellant would face "very significant obstacles" to his reintegration in the Netherlands. The finding at paragraph 30 was one that was open to the First-tier Tribunal:

"He would be returning to a country whose culture he was familiar with, having lived here for some 8 years to an age of weeks short of 13. I do not imagine it will be easy for him to re-establish himself as he will need to remember the language, but I know that English is widely spoken by many Dutch people and the Appellant spent his early formative years in Dutch-speaking schooling...he can take advantage of a resettlement grant to ease his re-establishment".

17. There being no challenge to these factual findings, there can realistically be no challenge to the overall conclusion: although it will "not be easy" for the Appellant to return to Holland there are not "very significant obstacles to his reintegration".

**Ground 4: Rehabilitation and the Propensity to Reoffend**

18. As can be seen from the foregoing, the First-tier Tribunal rejected the Appellant's claim to have gained enhanced protection by virtue of his long residence in the UK, and the Appellant himself conceded that he had not acquired permanent residence. It was therefore for the Respondent to show that the conduct of the Appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
19. In considering this question the Tribunal identified three interconnected factors as significant: the Appellant's addiction to drugs, his propensity to commit crime and the seriousness of the offence for which prompted this deportation action.
20. As to the first, the grounds complain that the Tribunal failed to give appropriate weight to the fact that the Appellant was not offered any professional help in dealing with his addiction to cannabis. That

is in fact noted at paragraph 14(xii). The determination recognises that the Appellant was moved around too often in detention so was unable to avail himself of any courses, but it is also found that he has done nothing to try and address his addictions himself, nor did he take the opportunity to do so whilst under any of the various Community Orders he has been subject to.

21. In respect of the Appellant's criminality, the grounds correctly note that the OASYS report was found not to be satisfactory and for that reason the Tribunal declined to place weight on it. However that was not the only evidence before the Tribunal concerning future risk. The determination sets out in detail the sentencing remarks of Mr Recorder Malins who described the offence of possession with intent to supply as "very serious". It is noted that Judge Malins considered the offence all the more serious because of the Appellant's apparent inability to learn from his mistakes and co-operate with the Community Sentences imposed on him thus far. The First-tier Tribunal agrees that this history was an aggravating feature of the offence in question: "he spurned the chances given by financial penalty and suspended imprisonment, conditional discharge and community order. Even sentences of imprisonment did not cause him to stop his offending...the Appellant has wilfully wasted chance after chance". The Tribunal continues at 14 (xv):

"I know that those involved in the supply of Class B drugs contribute to illness and financial loss for many citizens in this country. Anybody reading serious articles regularly appearing in the media knows that to be the case. The use of Class B drugs, uncontrolled by medical guidance, presents a substantial danger to the health of users and a significant threat to the economies of the state and individuals, and destroys many families. That the Appellant has been involved in the supply of such drugs can only mean that he was willing to contribute to incalculable harm not only through health issues and to the victims of the acquisitive crime that goes hand in hand with a user's need to make money to buy their drugs. It is common knowledge that addicts can cause untold harm to family relationships, even where there is not serious harm for the individual. The Appellant's own personal and family circumstances show the point in issue. He has continued to commit offences relating to the use and supply of cannabis; he became addicted to cannabis; he committed offences relating to supply partly to feed his own habit; he contributed to others having a supply of the drug; he causes distress to his own family. Not surprisingly, the Respondent takes a very serious view of those who cause these problems by ensuring that there is a ready supply of such drugs. I share her concern".

22. These were all legitimate findings open to the Tribunal on the evidence before it. The Tribunal did not reach the conclusion that it did on the basis of the OASYS report, but with reference to the "very serious" offence committed by the Appellant and the aggravating circumstances surrounding it. There is no identifiable



error of law in the approach the First-tier Tribunal took.

**Decision**

23. The determination of the First-tier Tribunal contains no error of law and it is upheld.

Upper Tribunal Judge Bruce  
17<sup>th</sup> September 2015