**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00610/2016

**THE IMMIGRATION ACTS**

| **Heard at Royal Courts of Justice** | **Decision & Reasons Promulgated** |
|---|---|
| **On 12th June 2017** | **On 30th June 2017** |

**Before**

**UPPER TRIBUNAL JUDGE FRANCES**

**Between**

**SEBASTIAN LUKASZ STRASZEWSKI**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr T Bobb, Aylish Alexander Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Poland born on 15th November 1980. He appeals against the decision of First-tier Tribunal Judge L K Gibbs, dated 27th March 2017, dismissing his appeal against deportation under the Immigration (EEA) Regulations 2016.

2. The Appellant applied for permission to appeal on the grounds that the judge misdirected herself in applying the 2016 Regulations instead of the 2006 Regulations and in failing to apply enhanced protection under Regulation 21(4)(a) of the 2006 Regulations. Further, the judge erred in law in her assessment of whether the Appellant represented a 'genuine, present and sufficiently serious threat' and in her assessment of proportionality in relation to the Appellant's integrating links and prospects of rehabilitation.

3. Permission to appeal was granted by First-tier Tribunal Judge Ford on 5th May 2017 on the grounds that it was arguable the Tribunal may have erred in applying the Immigration (EEA) Regulations 2016, in particular Schedule 1. It was arguable that paragraph 3 of Schedule 4 applied to this appeal and consequently the 2006 Regulations as amended still applied. Judge Ford found there was no arguable error in the Tribunal's finding that the Appellant had not completed ten years' continuous residence in the UK whether cumulatively or prior to his first incarceration as an adult on the basis of integration or otherwise. Permission was granted only on ground 1.

4. In the Rule 24 response the Respondent stated: "The Appellant has been granted permission to appeal purely on the basis that the FTIJ was in error for determining the Appellant's appeal under the 2016 Regulations and not the 2006 Regulations. It is accepted that paragraph 3 of Schedule 4 as amended by the Immigration (European Economic Area) (Amendment) Regulations 2017 requires that the 2006 Regulations apply to an appeal pending on 31/7/17. It is however submitted, in light of permission to appeal being refused under grounds 2, 3 and 4, that the Appellant's complaint is not material. The Appellant has failed to particularise how the error has rendered the decision unsafe."

5. In a letter dated 7th June 2007 the Appellant's solicitors submitted that all the grounds in his application for permission were properly arguable and he should be permitted to rely on them at the appeal hearing because the points were *Robinson* obvious. Judge Ford had wrongly stated that the Appellant entered the UK in 2007 when in fact he entered in 1998. This error affected the assessment of the level of protection and proportionality.

## Submissions

6. Mr Bobb submitted that permission should be granted on all grounds because the Appellant had ten years' continuous residence and therefore was entitled to enhanced protection. He submitted that the judge had erred in law in applying Schedule 1 of the 2016 Regulations because she had taken into account a number of minor offences for possession of class B and class A drugs. These were not offences which could be said to harm the fundamental interests of society. The matters referred to in Schedule 1

and mentioned in Article 83(1) of the Treaty on the Functioning of the European Union were far more serious than the Appellant's previous convictions. The judge was looking at minor offences and under the 2006 Regulations it was not necessary for the judge to take these into account.

7. The Appellant had only one offence for supplying drugs and therefore it was unlikely to be repeated. The judge had erred in law in assessing the fundamental interests of society in accordance with Schedule 1, which was not applicable. Had she applied the 2006 Regulations, the offences would not have reached the threshold in order to show a genuine, present and sufficiently serious threat.

8. Additionally, the judge had erred in law at paragraph 21 of her decision in finding that the Appellant did not have ten years' continuous residence. The judge stated that she was aware of the length of the sentences, but this may not reflect the time served by the Appellant. Mr Bobb submitted that this was obvious from the skeleton argument before her. The Appellant had only served a term of imprisonment of eight months and therefore her finding that the imprisonment interrupted the continuity of residence was perverse. The judge was correct to count backwards for a ten year period, but she also had to look at the Appellant's integration and she was entitled to take into account his integration prior to the period of imprisonment.

9. Mr Bobb submitted that the judge misdirected herself in law at paragraph 21 and her finding was not open to her on the evidence before her. Judge Ford was incorrect in refusing permission on this ground because he had misunderstood the Appellant's length of residence in the UK. On the basis that there was an error in assessing ten years' continuous residence, then the further grounds of appeal were made out, namely that the Appellant was entitled to enhanced protection under the 2006 Regulations and his criminal behaviour did not reach the threshold of imperative public policy grounds.

10. Mr Duffy submitted that in applying Schedule 1 the judge had not made a material error of law. The judge found that the Appellant was a threat to the fundamental interests of society. His last conviction was recent, 28th September 2016, and his history of offences dated back to 2001. On the particular facts of this case it would have been perverse for the judge to find that the Appellant was not a genuine, present and sufficiently serious threat to one of the fundamental interests of society. He had been involved in illegal drug use and was still committing crimes to date. The situation would have been exactly the same had the judge applied the 2006 Regulations instead.

11. The First-tier Tribunal appeal hearing took place five months after the Appellant's last conviction and the judge was entitled to take into account the continuing use of cannabis. She gave adequate reasons for finding as she did. This case turns on the threshold to be applied. Mr Duffy submitted

that, if the Appellant cannot enlarge his grounds and rely on an enhanced threshold, then the appeal is doomed to fail.

12. In relation to paragraph 21 of the decision, Mr Duffy accepted that in assessing continuity of residence the judge could look at integration prior to the conviction. However, the Appellant had been committing crimes for a considerable amount of time and was not integrated. On any reading of these facts, the Appellant could not show that he was entitled to the higher threshold of protection. In fact, there was no evidence that the Appellant even met the serious grounds test because he did not have five years' permanent residence.

13. Integration must be undermined by the Appellant's offending behaviour and the lack of evidence that he was exercising treaty rights. Mr Duffy submitted that the error in applying the incorrect Regulations was not material. The Appellant cannot show that he is integrated.

14. Mr Duffy submitted that, having been refused permission by the First-tier Tribunal on grounds 2, 3 and 4, the Appellant should have appealed to the Upper Tribunal in order to obtain permission on those grounds and it was not sufficient to appear at the hearing and seek that permission. However, he acknowledged that it might be better to waive any refusal of permission and deal with all the grounds put forward by the Appellant. The first ground was not material and there was no error on ground 2. Grounds 3 and 4 were merely disagreements.

15. In response, Mr Bobb submitted that there was no authority which stated that the Appellant would have to show that he was entitled to the first enhanced level of protection before he was entitled to the highest level of protection. The Appellant did not have to show he had permanent residence (serious grounds of public policy) before he could show that he had ten years' continuous residence (imperative grounds of public policy).

16. In relation to integration, the Appellant's length of residence was particularly relevant and this was set out in the Directive. The length of residence was relevant irrespective of whether the Appellant was working. Although it was accepted in the skeleton argument that the Appellant did not have a permanent right of residence, this was because there was insufficient documentary evidence to show that he was exercising Treaty rights. However, the Appellant had been working continuously for five years and the sentencing judge had referred to his work history in his judgment. There was nothing in the EEA Regulations 2006 to show that the Appellant had to have a permanent right of residence to be entitled to enhanced protection.

17. Mr Bobb accepted that he did have to show ten years' continuous residence to be entitled to the highest form of protection and submitted that paragraph 21 was perverse because on the facts of this particular case the Appellant was entitled to enhanced protection.

18. Mr Bobb submitted that the last conviction for supply of amphetamine, a class B drug, did not reach the level of seriousness required to show that the Appellant's conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The judge referred to the index offence, but found that the Appellant was a threat to one of the fundamental interests of society because of his continued use of cannabis. The offences for possession of cannabis for personal use did not reach the lower threshold, and certainly did not reach the higher threshold. The judge was not required to look at the index offence in isolation, but she had put too much weight on the nature of the Appellant's offending over the last ten years. The vast bulk of the offences were for personal use and therefore this did not affect one of the fundamental interests of society. Mr Bobb submitted that possession of a class B drug for personal use did not harm society. The offences in Article 83(1) are very serious; trafficking in arms and people, and cross border drugs trading. These offences were far more serious than the personal use of cannabis. The Appellant was not a dealer in drugs; he was supplying amphetamine to his partner. This did not reach the threshold of a genuine, present and sufficiently serious threat.

## Discussion and Conclusions

19. I find that the judge misdirected herself in applying the Immigration (EEA) Regulations 2016 instead of the Immigration (EEA) Regulations 2006. The Respondent in the Rules 24 response properly conceded this point. The 2006 Regulations apply to appeals pending on 1st January 2017 and therefore the judge was incorrect to rely on Schedule 1 of the EEA Regulations 2016. Whether this is a material error depends on whether the Appellant's further grounds are made out.

20. The Appellant did not apply to the Upper Tribunal for permission to appeal on grounds 2, 3 and 4 after the First-tier Tribunal Judge refused permission. The application was made to me at the hearing and, whilst it is out of time, in the interests of the overriding objective, I grant permission to appeal on grounds 2, 3 and 4 so that the Appellant's appeal can be dealt with at one hearing.

21. The first point to deal with is ground 2. Mr Bobb submits that the Appellant has established ten years' continuous residence and the judge's finding at paragraph 21 is perverse. I am not persuaded by this submission. For the following reasons.

22. The Appellant was convicted of burglary of a dwelling and sentenced to 30 months imprisonment on 21st September 2006. He was convicted of possession with intent to supply amphetamine and cannabis on 28th September 2016 and sentenced to 12 months imprisonment. The judge concluded that since the Appellant had served a custodial term within the

last ten years, this interrupted continuity of residence and the Appellant was not entitled to enhanced protection. Continuity of residence is broken when a person serves a term of imprisonment (Onuekwere [2014] EUECJ C378/12). Mr Bobb accepted that the Appellant had served a term of imprisonment of eight months within the ten year period.

23. The Appellant came to the UK in 1998 when he was 16 years old. He soon became addicted to heroin and his first criminal conviction was in 1999. He was first imprisoned in 2001. The Appellant has 17 criminal convictions for 29 offences including theft, burglary and handling stolen goods. The Appellant has breached community orders and other alternatives to custodial sentences. It is clear from the Appellant's offending behaviour that he been continually involved in criminal activity, committing offences prior to and throughout the ten year period. On the facts asserted by the Appellant, his integrating links are clearly weak.

24. The judge properly directed herself following Warsame v The Secretary of State for the Home Department [2016] EWCA Civ 16 and she was entitled to take into account the factors that she set out at paragraph 21. Her findings were open to her on the evidence before her.

25. Accordingly, the Appellant was not entitled to enhanced protection in the form of imperative grounds of public policy because he has failed to establish ten years' continuous residence. It is accepted in the skeleton argument that he did not have permanent residence in the UK and therefore serious grounds of public policy did not apply. The threshold which was applicable was that of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

26. Grounds 3 and 4 as set out in the grounds of appeal can be subsumed within ground 1. The submission that is made is that the Appellant's offending behaviour was not so serious so as to reach the threshold of a genuine, present and serious threat because the Appellant's offending behaviour did not harm one of the fundamental interests of society in that his drug use was largely personal. The judge dealt with this at paragraphs 22 and 23. She states:-

> "22. Schedule 1, Paragraph 7 sets out what is included in the concept '*fundamental interests of society'*. I find that the Appellant is a person who has committed numerous offences, the majority of which have occurred because of his drug addiction. Although I accept his evidence that he is no longer addicted to heroin the fact remains that his evidence is that he continues to use cannabis on a daily basis, as does his partner. Whilst the Appellant and Ms Terry are to be commended for their honesty their evidence is nonetheless an admission that they continue to use illegal drugs, the possession of which is a criminal offence. I and (sic) therefore satisfied that the Appellant's past and present

conduct is such that it is consistent with the definitions at Paragraph 7(g) and (h) of Schedule 1.

23. I find that because of the Appellant's admission regarding his cannabis use he continues to represent a threat to the fundamental interests of society and that on release this behaviour would continue, aided and abetted by Ms Terry who is herself a cannabis user. In assessing whether this is a sufficiently serious threat I remind myself that the Appellant's most recent conviction arose because of possession of cannabis, and even if I accept his evidence that the only person who he intended to supply was Ms Terry the fact remains that the evidence before me is that he/they will continue to purchase cannabis which I consider represents a sufficiently serious threat to society."

27. Whilst it is accepted that Schedule 1 does not apply and therefore the judge erred in law in finding that the Appellant's criminal behaviour satisfied paragraph 7(g) and (h) of Schedule 1, I find that this error was not material because the judge would have reached the same decision for the same reasons had she applied the 2006 Regulations. The possession of drugs for personal use does affect one of the fundamental interests of society. The Appellant also had convictions for theft and burglary. The judge found that Appellant's most recent conviction arose because of his possession of cannabis.

28. It is quite clear that the judge considered the whole of the Appellant's criminal record and offending behaviour and she took into account his lifestyle and all the matters which are referred to in Regulation 21 of the 2006 Regulations which are preserved in Regulation 27 of the 2016 Regulations.

29. The judge's decision complied with the principle of proportionality. It was based exclusively on the conduct of the person concerned and not just his previous convictions and the judge also took into account his integration into the UK at paragraphs 24 and 25. She assessed rehabilitation at paragraph 28 and found that the Appellant still engages in illegal behaviour. On these facts it was open to the judge to conclude that the Appellant did represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

30. The judge's findings were open to her on the material before her. Her application of the 2016 Regulations was not a material error given the facts on which the judge relied and set out at paragraphs 22 to 31. The decision would have been the same had the judge applied the 2006 Regulations.

31. I find there was no material error of law in the decision dated 27th March 2017 and I dismiss the Appellant's appeal.

**Notice of Decision**

**Appeal dismissed.**

**No anonymity direction is made.**

J Frances

Signed Date: 30th June 2017

Upper Tribunal Judge Frances

**TO THE RESPONDENT**
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 30th June 2017

Upper Tribunal Judge Frances