Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00542/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 October 2018	**On 27 November 2018**

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BURHAN HASSAN

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer.
For the Respondent: No Appearance.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State. The respondent, whom I shall call "the claimant", did not appear by himself or any representative. Notice of the hearing had been served on him in good time and in the circumstances, I decided it was appropriate to proceed in his absence, which I therefore did. Mr Lindsay made oral submissions and I reserved my judgment. Mr Lindsay has since sent me submissions dated 24 October 2018, headed 'Secretary of State's Written Submissions for Continuance Hearing Held at Field House on 23 October 2018'. I have no idea what a "continuance hearing" is, but there is no doubt that these submissions post-dated the hearing of the appeal before me, which was the hearing to which the claimant was invited. It would be quite wrong for me to take any notice of the submissions subsequently sent by Mr Lindsay, and I have not done so.

2. The claimant is a national of the Netherlands, born in 1998. His history is not entirely clear, but it is claimed that he came to the United Kingdom in 2001. Certainly, there are numerous references to his being here in the succeeding years, and it is clear that much of his schooling took place in the United Kingdom. It appears that he was away from the United Kingdom between about October 2013 and October 2015: he went with his mother to Kenya to study. The assertion appears to be that the claimant's father has been working in the United Kingdom continuously since at least 2008 as a taxi driver, but it is not easy to see that any continuous occupation of that sort is supported by his HMRC records.

3. In the summer of 2016, relatively shortly after his return from his absence in Kenya, the claimant appears to have begun a life of crime. There are so many offences and Court appearances within the next eighteen months that it is not easy to provide a coherent statement of them. There are, altogether, eight drugs offences, including, on the most recent conviction, three offences of possession of cannabis, a class B drug, within intent to supply; there are two offences of having a bladed article in a public place; and there are altogether twenty offences, the subject of convictions on six separate occasions between 27 October 2016 and 6 November 2017 inclusive. What is of note is that amongst those offences are offences of breach of bail, and that a number of the offences were committed while the claimant was either on bail or subject to a community order. He was also convicted of the offence of obstructing a search for drugs. There were two substantial prison sentences, of six months and eight months in a young offenders' institution; there were also shorter prison sentences.

4. Following a formal notice of intent, a deportation order was signed against the claimant on 9 June 2017. He appealed against it.

5. There was a case management hearing, at which preparations were made for the full hearing, including indications that Counsel would be instructed, and the booking of an interpreter in the Somali language, which the claimant said he would need. When the matter came before Judge Cockrill on 8 August 2018, however, there was no appearance by or on behalf of the claimant. He proceeded in the claimant's absence. By his decision, signed on 13 August 2018, he allowed the claimant's appeal. The Secretary of State now appeals to this Tribunal, with permission, against that decision.

6. As the claimant is a national of a Member State, his deportation or expulsion is governed by articles 27 – 28 of the Citizens Directive, 2004/38/EC, implemented in the United Kingdom, so far as is relevant for the purposes of this appeal, by Regs 23(6)(b) and 27(1)(2)(3) and (4) of the Immigration (European Economic Area) Regulations 2016. The overriding rule is that the basis for the decision must be "grounds of public policy, public security or public health"; a decision taken on such grounds is a "relevant decision" for the purposes of Reg 27.

7. Regulation 27(3) and (4) read as follows:

> "(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA National who –
>
> (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
> (b) is under the age of 18…."

8. Article 15 provides that an EEA National who has resided in the United Kingdom in accordance with these regulations for a continuous period of five years acquires a permanent right of residence, but by Reg 15(3), "the right of permanent residence under this regulation is lost through absence from the United Kingdom for a period exceeding two years."

9. Having reminded himself of those provisions, Judge Cockerill proceeded to determination of the appeal before him. He remarked, twice, that for that purpose it was crucial to determine whether the claimant had either of the levels of protection afforded by Reg 27. His primary and principal conclusion was that the claimant had the highest level of protection, and could therefore be removed only on imperative grounds of public security, which, the judge concluded, clearly did not apply in the present case. In the alternative, the judge concluded that the claimant had the middle level of protection, deriving from a permanent right of residence, but that even if he were entitled only to that level of protection, there were no serious grounds of public policy or public security which merited his deportation. It would appear clear from his recognition that it was crucial to determine whether either of the levels of protection did apply, that if neither of them had applied, the judge would have dismissed the appeal.

10. As argued in the grounds of appeal and orally before me by Mr Lindsay, it is clear that the judge made a number of errors of law in reaching the conclusions he did.

11. It is convenient to begin with the acquisition of the permanent right of residence. As I have already indicated, and as was apparent from the materials before the judge, which he mentions in his determination, the claimant had been absent from the United Kingdom from about October 2013 to October 2015. The exact dates were not specified, and it is clear that that period, as so described, could have exceeded two years. It was for the appellant before the judge to show that he had acquired, and had not lost, a permanent right of residence. There was, in my judgment, no sound evidential basis upon which the judge could properly conclude that any permanent right of residence which the claimant had acquired before October 2013 had not been lost by his absence. The judge therefore erred in law by concluding that the claimant had, at the date of the expulsion decision, a permanent right of residence. Under those circumstances he could not have the intermediate level of protection, which depends on a permanent right of residence.

12. In relation to the highest level of protection, the judge wrote this at [33]:

> "What I should emphasise, is that in calculating a 10 year period, it is not necessary to calculate back a 10 year period from the date when the deportation decision was taken. Any 10 year period would be sufficient."

13. That, in my judgment, is not correct either. Although the words used in the regulation, which I have set out above, are potentially ambiguous, the ambiguity is wholly removed by reference to the directive which they implement. Article 28.3(a) refers to a person who has "resided in the host Member State for the previous ten years". In those circumstances, it does not appear to me that there is any real scope for suggesting that the potential ambiguity in the United Kingdom's implementation of the directive is to be resolved in the sense indicated by the judge. The CJEU has held in its judgment in G (C – 400/12) at [35] that the period of ten years specified in article 28.3(A) is to be calculated back from the date of the expulsion decision.

14. Secondly, and crucially, the CJEU held in its judgments in B and Vomero (C – 316/16 and C – 424/16), that the highest level of protection could be enjoyed only by a person who had a permanent right of residence in the host Member State. Thus, in this case as in any other, the claimant's failure to establish his entitlement to the middle level of protection shows equally that he is not entitled to the highest level of protection.

15. The First-tier Tribunal's decision was evidently motivated by its erroneous application of the law to the facts and the evidence in the case before it. I set Judge Cockrill's decision aside. I proceed to remake the decision on the claimant's appeal. The claimant has made no submissions to this Tribunal. As I have already indicated, the First-tier Tribunal Judge, to whom submissions were made in writing but not personally, evidently took the view that without either of the higher levels of protection the claimant would have been liable to deportation. The Secretary of State's decision, made before the claimant's most recent convictions, points out that:

> "Your convictions indicate an established pattern of repeated offending within a relatively short period of time. The fact that you have continued to offend without being deterred by previous convictions or sentences indicates that you have a lack of regard for the law, a lack of remorse for your offending behaviour, and a lack of understanding of the negative impact your offending behaviour has on others."

16. I agree. It further seems to me that a lack of regard for the law is shown by the claimant's bail offences, commission of offences whilst subject to community orders, and the offence in relation to searching for drugs. I can see no basis for saying that the claimant is a person whose removal is not justified on grounds of public policy and public security.

17. Looking separately at the issue of proportionality, I note that the claimant's removal will be to the Netherlands, the country of which he is a national. Although he does not speak Dutch, he has grown up and been

educated in the United Kingdom, and (despite his request for a Somali interpreter at the hearing) I must assume that he speaks English, the language spoken by the vast majority of people in the Netherlands. There is no reason to suppose that he would not readily establish himself there. Although he has been in the United Kingdom for much of his childhood, he recently spent an extended period of time in Kenya, a country of which he is not a national, and evidently was able to conduct his life there. On the basis of all the material before me the Secretary of State's decision to deport the claimant appears to me to be both justified and proportionate.

18. I therefore substitute a decision dismissing the claimant's appeal.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 19 November 2018.