Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00327/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 28th October 2020	**On 3rd November 2020**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Walid [R]
(no anonymity direction made)

Respondent

For the Appellant: **Mr McVeety, Senior Home Office Presenting Officer**
For the Respondent: **Ms Blair, Counsel instructed by Wesley Gryk Sols**

DECISION AND REASONS

1. The Respondent is a national of France born on the 16th November 1993. Although he has lived in this country since he was a child, the Secretary of State now wishes to deport him, pursuant to Regulation 27 of the Immigration (European Economic Area) Regulations 2016. That is because the Respondent was, between November 2010 and September 2016, convicted 16 times for 23 offences.

2. On the 5th February the First-tier Tribunal (Judge R. Cassell) allowed the Respondent's appeal against the decision to deport him. The decision was made on two alternative bases. First the Tribunal found that the Respondent qualified under Reg 27(4) for the highest level of protection against expulsion because he has accrued well over ten years' continuous residence in the United Kingdom, so that the Secretary of State would be required to show that there were imperative grounds for his expulsion: this the Secretary of State frankly conceded, she could not do. In the alternative the Tribunal was not satisfied that the Secretary of State had shown, pursuant to Reg 27(5), that the Respondent's behaviour represented a genuine, present and sufficiently serious threat to one of the fundamental interests of society, or that it would be proportionate to remove him today.

3. The Secretary of State has sought, and been granted, permission to appeal against that decision. Grounds are advanced against both of the Tribunal's alternative findings.

The Legal Framework

4. Regulation 27 of the Immigration (European Economic Area) Regulations 2016 reads:

> **27.**—(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> (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, unless the relevant decision is in the best interests of the person concerned, 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.**
>
> (5) The **public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is**

taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(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;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) **Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.**

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010(18); or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

(8) **A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).**

5. The relevant part of Schedule 1 is paragraph 7:

> **7.** For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—
>
> (a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;
>
> (b) maintaining public order;
>
> (c) preventing social harm;
>
> (d) preventing the evasion of taxes and duties;
>
> (e) protecting public services;
>
> (f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;
>
> (g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);
>
> (h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);
>
> (i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;
>
> (j) protecting the public;
>
> (k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);
>
> (l) countering terrorism and extremism and protecting shared values.

6. Before me the parties agreed that of the three levels of protection against expulsion set out in Regulation 27, I only need be directly concerned with two.

That is because of the effect of the decision in Vomero[1]: the Respondent will only be entitled to the highest level of protection under Reg 27 (4) if he can show that he already met the requirements for permanent residence alluded to at Reg 27(3). If he cannot, then the operative tests are those set out at Reg 27(5).

7. The principles to be applied calculating whether the Respondent "has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision" are these:

    i) The "relevant decision" is the decision to deport. The period must be calculated by counting back from then.

    ii) The Respondent would have to show that during that time frame he qualified for permanent residence, that is to say there was a period of five years in which he was either a qualified person himself, or the family member of one

    iii) Any period of imprisonment will not necessarily break integrative links but it is a factor that must be taken into account.

Error of Law: Discussion and Findings

8. As to principle (i) as outlined above the First-tier Tribunal found that the Appellant had lived in this country since 1999 on the basis of a concession made by the HOPO at the hearing. Before me Mr McVeety maintained that concession. The decision to deport was taken on the 7th December 2017. It is therefore the case that the Appellant lived in this country for a continuous period of ten years between the 7th December 2007 and the 7th December 2017. Although the First-tier Tribunal itself did not identify that as the operative ten-year period, it is a matter that is uncontrovertibly resolved in the Respondent's favour.

9. In respect of (ii) the First-tier Tribunal properly directed itself that the burden of proof lay on the Respondent, and that the standard of proof was the balance of probabilities. The Tribunal then gave consideration to the evidence relating to the Respondent's childhood in this country. It had before it evidence from a community organisation who supported the family during that period (the Haringey Migrant Support Centre) to the effect that the Respondent's mother suffered from some kind of brain condition or injury which meant that she was volatile. It was a very difficult time for the Respondent who ended up being taken into care. The writer of the letter noted that the Respondent's mother had

[1] B v Land Badem-Wurtemburg and Secretary of State for the Home Department v Vomero (Directive 2004/38/EC) Joined cases C-316/16 and C-424/16

become too unwell to work. She had been in receipt of Disability Living Allowance and the writer had deduced from this that she was being treated as a qualified person: she would not otherwise have been entitled to that benefit. The Tribunal directed itself that there is no prescribed format by which an entitlement to permanent residence may be established and found, having regard to the letter from the community group, that it was sufficient to discharge the burden of proof. Having made that finding, the Judge proceeded to determine the matters arising under Regulation 27 on the basis that the Secretary of State had to show 'imperative grounds' for the deportation of the Respondent. Unsurprisingly the Tribunal was not satisfied that this test was made out and the appeal was allowed.

10. The Secretary of State submits that the First-tier Tribunal erred in so doing. The writer of the letter from Haringey Migrant Support Centre was not qualified to speak to whether the Respondent's mother was a qualified person at the relevant time. There was before the Tribunal no objectively verifiable evidence that she had ever worked (i.e. from HMRC, payslips etc). Nor was there any evidence – beyond the supposition of the unqualified community worker - that the lady's receipt of DLA meant that she had been "temporarily unable to work as a result of illness of accident" as stipulated in Regulation 6.

11. Before me Ms Blair candidly admitted that the evidence from Haringey Migrant Support Centre was all she had to establish the Respondent's position prior to his imprisonment in 2016. Although he has since his release been in continual employment, before that he was a student, who without comprehensive sickness insurance or his own means could not be deemed to be a qualified person. As to his mother the evidence was difficult. Her illness meant that her lifestyle had been chaotic and it had been difficult to pinpoint what she had been doing and when. It was correct to say that there was no evidence at all of her ever having worked, and to that extent it was supposition on the part of the community worker that because she was in receipt of DLA she must have been 'qualifying' at some point. I am accordingly satisfied that the Secretary of State's ground is here made out. No matter how helpful Haringey Migrant Support Centre might have tried to be, the reality was that that letter was not capable of discharging the burden of proof. The writer had, frankly speaking, little idea of what the Respondent's mother might have been doing since 1999. It follows that the First-tier Tribunal erred in finding that the Appellant had accrued the highest level of protection, since he could not demonstrate that he had acquired permanent residence at any time in the many years that he has spent here.

12. I now turn to address the alternative basis upon which the appeal was allowed. In addressing matters arising under Reg 27(5) the Tribunal considered the Respondent's integrative links, work since he was released from prison and the evidence of his rehabilitation. Directing itself that the burden lies on the Secretary of State to show that the Respondent's conduct represents a genuine,

present and sufficiently serious threat to one of the fundamental interests of society, the Tribunal noted that this must involve an assessment of the Respondent's propensity to reoffend. Having regard to the most recent evidence from the probation service, the Tribunal was satisfied that the risk was not made out.

13. The grounds challenge that finding on the basis that the multi-agency evidence relating to his offending was "strongly indicative" that he would continue to offend in the future. The ground also refer to the Appellant's "potential" rehabilitation.

14. It is correct to say that the decision nowhere recognises that the Respondent was at the relevant time placed under the supervision of 'Multi-agency Protection Arrangements'. It is also true that at the date of the original 'OASys' report, dated November 2017, revealed the Respondent to be recalcitrant, and to the extent that he was in denial, unrepentant: the officer conducting it concluded that the risk of reoffending remained high. That report was not however the only evidence before the Tribunal.

15. The Respondent's life trajectory can be separated into three phases. Brought to the United Kingdom as a child with his mother, he experienced a difficult and chaotic childhood. His mother was obviously unwell and not able to give him the care, and the guidance, that he required. At the age of sixteen he entered the care system, and within a short time embarked on a six-year spree of criminality. Some of his many offences are indisputably low level, such as possession of cannabis. Some are very serious indeed, such as the robbery which sent him to prison in 2016. In between committing crimes and being caught, the Respondent fell out of the care system and onto the streets: Haringey Migrant Support Centre's records show he ended up homeless during that time. The OASys report, and the decision to place him in the MAPPA framework, come at the end of that phase. The third phase began when the rehabilitation plan set out in the OASys report is set in motion, and the Respondent released from his sentence. We are now almost four years into that phase. The word that appears most frequently in the evidence, and the First-tier Tribunal decision, to describe this phase is "stable". The Respondent has worked almost continually since his release from prison, and has ceased contacts with his former associates. He has got somewhere to live, and is treating this as a new beginning. He has, importantly, not committed any further crimes. It was in this context that the First-tier Tribunal made its assessment of that OASys report, and had regard to the latest evidence of the probation service, which confirmed that the Respondent has successfully completed his licence period and all requirements, has secured stable employment and accommodation and is "open" and "engaged" with measures designed to prevent him falling backwards.

16. I am not satisfied that, having regard to that context and the totality of the evidence before it, the Tribunal can be said to have taken an irrational or otherwise unlawful approach to the question of risk. The OASys report is expressly addressed in the report, but the Tribunal quite properly refused to view it in isolation.

17. Finally the Secretary of State submits that in reaching its finding that the Respondent is "fully integrated" into British society the Tribunal has failed to have regard to the Court of Appeal authority in Binbuga v Secretary of State for the Home Department [2019] EWCA Civ 551 to the effect that social and cultural integration can be expected to be legitimate, and being involved in criminality is not. I am not satisfied that this ground is made out. Firstly Binbuga should in this context be viewed with caution. This Respondent is an EEA national who has been exercising treaty rights in this country for over twenty years. Binbuga was a career criminal from a non-EEA state who relied upon his associations with other gang members to establish that he was 'integrated' here. The Court of Appeal rightly rejected that contention. The case is not however authority for the proposition for which it is cited here: that any criminal activity demonstrates that you are not integrated. Indeed in the context of the Regulations that would be expressly prohibited by Reg 27(5)(e). Furthermore the criticism made in the grounds is not borne out by the decision itself: the Tribunal expressly refers itself to the guidance in Essa v Secretary of State for the Home Department [2012] EWCA Civ 1718 to the effect that "recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes" may fail to meet the test.

18. Whilst I am satisfied that the First-tier Tribunal did err in concluding that the Respondent attracted the highest level of protection under the Immigration (European Economic Area) Regulations 2016, I am satisfied that on the central matter in issue – whether the Respondent could be deported under Reg 27(5) – the decision is free of error. The Tribunal properly directed itself to the relevant principles and made a decision open to it on the evidence.

Decisions

19. The decision of the First-tier Tribunal is upheld, and the Secretary of State's appeal is dismissed.

20. I make no order for anonymity.

Upper Tribunal Judge Bruce
28th October 2020