UPPER TRIBUNAL **APPEAL NUMBER: UI-2022-001478**
(IMMIGRATION AND ASYLUM CHAMBER) **DA/00121/2021**

THE IMMIGRATION ACTS

Heard at Field House
On the 17 October 2022

Decision & Reasons Promulgated
On the 23 November 2022

Before

Upper Tribunal Judge Perkins
Deputy Upper Tribunal Judge Mailer

Between

MR WARSAME ABDIRAZAK WARSAME
NO ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: The appellant did not attend and was not represented.
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. We shall refer to the parties as they were before the First-tier Tribunal: Mr Warsame as the appellant, and the secretary of state as the respondent.

2. The respondent appeals with permission against the decision of First-tier Immigration Judge Neville, who allowed the appellant's appeal against the decision of the respondent dated 10 March 2021 to remove him from the United Kingdom, pursuant to regulation 23(6)(b) and regulation 27 of the Immigration (European Economic Area) Regulations 2016 – 'the 2016 Regulations'.

3. The appellant did not attend the hearing of the appeal on 17 October. We were informed that he was duly notified of the hearing. His former solicitors had asked to come off the record in an e-mail dated 4 October 2022. In the circumstances we were satisfied that the appellant had notice of the hearing. There has been no application by him to adjourn the hearing.

4. In the circumstances, as submitted by Ms Nolan, we consider that it is in the interests of justice to proceed with the hearing.

Background to the appeal

5. The appellant is a national of the Netherlands born on 10 April 1998. He claimed that he arrived in the United Kingdom in 1999.

6. On 26 April 2019 he was granted a permanent residence card under the provisions of the 2016 Regulations.

7. Between 26 September 2011 and 15 April 2020 he was convicted on four occasions for a total of thirteen offences, namely: three sexual offences (2011), two theft and kindred offences (2020), three public order offences (2020) and five drug offences (2020).

8. Following his conviction on 9 January 2020 at Nottingham Magistrates' Court on two counts of using abusive, insulting words or behaviour with the intent to cause fear or provocation of violence, he was sentenced to one day's detention within the courthouse.

9. On 14 January 2020 the respondent decided not to pursue deportation proceedings against him, but issued him a warning letter stating that deportation would be reconsidered if he engaged in any further behaviour contrary to the fundamental interests of society.

10. On 15 April 2020 he was convicted at the Leicester Crown Court on two counts of possession with intent to supply Class A drugs, (cocaine and heroin), possession of class B drugs (cannabis) and acquiring or using criminal property. He was sentenced by HHJ Dean QC to three years' imprisonment. That was his first conviction for dealing in drugs.

11. Judge Dean noted in his sentencing remarks that the appellant came from a good family and is an intelligent young man who is capable in time of achieving things and living a decent and normal life. He stated that he

would be justified in imposing a consecutive sentence for offending in October 2020 after he had been "caught in April". However, he kept the sentences to the lowest level that they could be in the circumstances, and sentenced the appellant to four and a half years' imprisonment.

12. Following the appellant's convictions, the respondent sought representations from him as to why he should not be removed pursuant to the 2016 Regulations. Following receipt of representations, the respondent decided to make a removal decision pursuant to Regulation 23(6)(b) and Regulation 27 of the 2016 regulations.

13. The appellant appealed to the First-tier Tribunal

The decision the First-tier Tribunal

14. First-tier Tribunal Judge Neville noted at [3(e)(i)], that the respondent accepted that the appellant had been resident in the UK in accordance with the Regulations for a continuous period of five years. This entitled him to protection against removal '….save on serious grounds of public policy or public security.'[1]

15. He stated at [3)e)(ii)] however, that 'unhelpfully' the respondent in deciding the level of protection, did not address whether he might benefit from the highest level of protection in the light of his claim to have resided in the United Kingdom for a period of at least 10 years. This is despite, under a later heading relating to proportionality, "…the respondent apparently accepting that the appellant may have arrived here at a young age and completed [his] education in the UK".

16. Accordingly, the removal decision only addressed "serious grounds" protection and not the highest possible level, which would have required justification on "imperative grounds" of public security.

17. No issue was taken by anyone in the appeal as to the correctness of the respondent's assessment regarding the harm that, in general, the trade in illegal drugs can cause to the fundamental interests of society as defined a Schedule 1 of the Regulations [3(e)(iii)].

18. The OASys report had concluded that the appellant posed a low risk of reoffending. However, as the respondent noted, it had nevertheless concluded that he posed a medium risk of serious harm. He had been threatening and abusive when arrested, which had to be considered in light of his convictions in 2011 for sexual assault and the information in the report that he had been involved in two incidents of fighting during his time in prison. He had disregarded warning letters sent in response to his further offending, which gave concern that he would continue to be a risk in the future - [3)e)(iii)].

1 Regulation 27(3) in fact states that 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.

19. As to proportionality, the consideration of which is required by regulation 27(5)(a), the respondent accepted that he had family in the UK, but not that there was a degree of dependency that goes beyond normal emotional ties between adult family members. It was not accepted that he was socially and culturally integrated in the UK as he provided no evidence that he had made any positive contribution to society or that he had significant ties to the community. He had committed offences and spent time excluded from society in prison. There would be no apparent very significant obstacles to integration in the Netherlands – [3)e)(iv)].

20. First-tier Tribunal Judge Neville set out in great detail the relevant legal provisions which informed the appeal [8-11].

21. He accepted that the appellant arrived in or around February 2011 as he claimed [16]. It was unlikely that he decamped to the Netherlands or elsewhere for any significant period of time [17]. He concluded that at the date of the removal decision on 10 March 2021, the appellant had physically resided in the UK for just over 20 years.

22. He then proceeded to assess "residence" in accordance with the 2016 Regulations - [19 et seq]. He noted at [25] that any time spent in prison must be deducted from the time spent in the UK. He found that the appellant "comfortably" has over 10 years' physical residence, in purely arithmetical terms [25].

23. He noted at [27] that the appellant adduced very little evidence specifically pointing to "participation in communal activities". Nonetheless, a very strong degree of cultural and social integration is inevitable given the time he came here at the age of two years, received primary and secondary education here and some further education. He found that the formation of his social identity took place entirely within the UK and Leicester in particular. There were very few ties to the Netherlands. He noted that his criminal offending and imprisonment reduces social and cultural integration [29].

24. He concluded at [30] that his offending could not be ignored. Whilst his previous offending was not so serious as that for which he was imprisoned, it nonetheless operates to weaken his integration somewhat. Nonetheless, whilst paying attention to all the adverse factors and giving them due weight, he could not find that they are sufficient to outweigh the strength carried by the appellant's integration in the UK.

25. He held that the appellant's conduct is "insufficiently disintegrative" and "his exclusion from society too short, to possibly break his powerful links to the UK" - [31].

26. His conclusion at [43] was that the appellant's removal can only be justified on imperative grounds of public security. However, those grounds did not exist. His removal was therefore contrary to the Regulations and

his rights under the EU Treaties in respect of entry to or residence in the United Kingdom. His removal would likewise be contrary to s.6 of the Human Rights Act 1998, by reference to Article 8 - [44].

27. He accordingly allowed the appeal “on the EU ground” and on human rights grounds.

Appeal to the Upper Tribunal

28. On 20 July 2022 Upper Tribunal Judge Kebede granted the respondent permission to appeal to the Upper Tribunal. It was arguable that the First-tier Judge had erred by omitting from his consideration of the appellant's integration in United Kingdom the period of three years prior to his imprisonment in 2019, after ceasing his studies and during which he was committing offences. That period was arguably material to the overall consideration of whether or not he had broken his integrative links to the UK such that he could not benefit from the higher threshold. His conclusion that the appellant benefited from the highest level of protection, namely “imperative grounds” arguably materially affected his findings on the level of threat posed to the public, irrespective of his finding at [42], such that the decision as a whole is unsustainable.

The error of law hearing

29. Ms Nolan on behalf of the respondent adopted the reasons for appealing. She submitted that the Judge failed to consider whether the appellant’s convictions and behaviour in custody had weakened or broken his integrative links. He erred in finding that the appellant's conduct is insufficiently disintegrative and his exclusion from society too short, to break his links to the UK. Those links had been weakened and broken contrary to his finding at [31].

30. She referred to the appellant’s numerous convictions between 2011 and 2020, including the proven adjudications recorded against him whilst in custody between December 2019 and November 2020. There has been no proper consideration of his behaviour whilst he was in prison. This was referred to in detail at paragraph 26 of the reasons for refusal.

31. The appellant could accordingly not rely on imperative protection under Regulation 27(1)(4)(a) of the 2016 Regulations. The determination should be set aside and remitted to the First-tier Tribunal for a fresh decision to be made.

Assessment

32. Between 26 September 2011 and 15 April 2020 the appellant was convicted on four occasions of a total of thirteen offences, including sexual offences; theft and kindred offences; three public disorder offences and five drug offences. In addition to his frequent involvement in serious

criminality since 2011, he has had six proven adjudications recorded against him whilst in custody, as follows:

(i) On 30 December 2019 he 'imitated an assault' against another prisoner of punching him in the head and continuing to throw punches after the initial punch;

(ii) On 13 January 2020 whilst a female member of staff was conducting duties, he became threatening and abusive towards her calling her a "fucking bitch" and told her that if she did not move he would move her. The officer and staff were thereupon called to put him behind the door;

(iii) On 26 January 2020 an Officer gave him a direct order to return to his cell, which he disobeyed and he then became threatening and abusive towards the officer stating that they would "black my other eye" and called him a "little bitch";

(iv) On 5 February 2020 he was abusive and argued with an officer, stating that they would "smack" the officer and that "I don't give a shit, I'll hit you";

(v) On 14 June 2020 he fought with another prisoner;

(vi) On 2 November 2020 he refused to locate in a shared cell.

33. At [30] of his Decision and Reasons the Judge found that these adverse factors were not sufficient to outweigh "the strength carried by the appellant's integration into the UK". He took into account an extract from MG (Portugal) v SHD (Case C-40/12 [2014] 1 WLR 2441 in the assessment of whether the integrating links previously forged with the Host Member State have been broken, and thus for determining whether the enhanced protection provided for in the section will be granted.

34. He concluded that the appellant's conduct is 'insufficiently disintegrative' and his exclusion form society too short, to possibly break his powerful links to the UK [31]. He accordingly concluded at [32] that the appellant's removal can only be justified on imperative grounds of security.

35. We accept the respondent's contention, that in arriving at that conclusion, the Judge did not consider the appellant's integration into the UK for the period when he ceased studying, in 2016 [15] and his subsequent imprisonment in 2019, a period of three years. No proper assessment was made as to whether or not his integrative links to the UK had been broken, such that he could not benefit from the higher threshold.

36. Moreover, no adequate consideration was given as to the potential disintegrative effect of his conduct in prison, which was only dealt with briefly at [30] where the Judge accepted that the appellant could not point

to activity in prison that might mitigate its disintegrative effect, but that on the contrary, he had been disciplined for fighting.

37. We have considered the decision in LG and CC (EEA Regs: residence; imprisonment; removal) Italy [2009] UKAIT 00024. We do not understand how the First-tier Tribunal was able to conclude that the appellant had resided in the United Kingdom for a *continuous* period of 10 years prior to the relevant decision, as is required by regulation 27(4)(a) of the Regulations for a person to be entitled to "imperative grounds" protection, when so much of that residence was in prison. We are doubtful that such a conclusion could be supported by the evidence. The conclusion is not explained adequately and that failure is a material error of law at the heart of the decision.

38. Having concluded at [32] that the level of protection enjoyed meant that the appellant's removal could only be justified on imperative grounds of public security, he did not adequately consider the lower "serious grounds" threshold. He stated at [41], that were he dealing with the lower 'serious grounds' threshold, then the arguments made as to the precise level of rehabilitation achieved and the existence or otherwise of the various protective factors claimed by the appellant, might require detailed resolution.

39. He found that 'resolution' to be unnecessary. He stated that taking the evidence of risk at either its highest or lowest advantageousness to the appellant, he still does not pose the required risk to public security such as could constitute "imperative" grounds of public security. He considered on balance that it likely that the OASys report is correct, and the appellant presents a low risk of reoffending. While a low risk may still be enough if the criminality would be sufficiently severe, the risk in this case would not meet the threshold even if it were as serious as that for which the appellant was imprisoned. There was no basis for finding that it would be more serious than that [42].

40. We find, as noted by Upper Tribunal Judge Kebede, that the Judge's conclusion that the appellant benefited from the higher level of protection of imperative grounds, affected his findings on the level of threat posed to the public, irrespective of his finding at [42].

41. As submitted on behalf of the respondent, the appellant had a propensity to reoffend with potentially serious consequences Kamki [2017] EWCA Civ 1715. This included his involvement in the supply of drugs which has an adverse effect on society as highlighted in Tsakouridis C145/09, where it was held that the provision must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is covered by the concept of "serious grounds of public policy or public security".

42. For all these reasons we find that the decision of the First-tier Tribunal involved the making of material errors of law. We accordingly set it aside. Ms Nolan submitted that this is an appropriate case for remitting to the First-tier Tribunal for a fresh decision to be made.

43. We find that the nature and extent of judicial fact finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside and is remitted to the First-tier Tribunal (Taylor House) for a fresh decision to be made by another Judge.

No anonymity direction made.

Signed Date 1 November 2022

Deputy Upper Tribunal Judge Mailer