Upper Tribunal (Immigration and Asylum Chamber) **Appeal Number: DA/00549/2019**

THE IMMIGRATION ACTS

Heard at Field House on 17 June 2022	**Decision & Reasons Promulgated**
Written submissions on 12 & 21 July 2022	**On the 08 September 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

LIBERATO GALIZIA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ishtiyaq Ali, instructed by Lexton Law Solicitors
For the Respondent: Tony Melvin, Senior Presenting Officer

DECISION AND REASONS

1. I issued my first decision in this case during the pandemic, on 14 September 2020. A copy of that decision is appended to this one. I held that the First-tier Tribunal had erred in law in allowing Mr Galizia's appeal against the respondent's decision to deport him from the United Kingdom. I set aside the FtT's decision in part and directed that the decision on the appeal would be remade in the Upper Tribunal.

2. The resumed hearing was listed on 16 October 2020 but was adjourned pre-hearing because the appellant was unwell with Covid-19. There was then a significant delay in arranging a further listing, occasioned in large part by the fact that my first decision had been made on the papers and that the fairness of that procedure was under

challenge in litigation which began with *R (JCWI) v President Upper Tribunal (Immigration and Asylum) Chamber* [2020] EWHC 3103 (Admin) and ended (as matters presently stand) with *EP (Albania) and ors (Rule 34 decisions; setting aside)* [2021] UKUT 233 (IAC) and *Hussain v Secretary of State for the Home Department* [2022] EWCA Civ 145.

3. The appeal finally came before me for a resumed hearing on 17 June 2022. I heard oral evidence from the appellant and his partner and submissions from the advocates. It was agreed at that hearing that Mr Melvin would file and serve, by email, an up-to-date copy of the appellant's record on the Police National Computer ("PNC"). The record was filed by email after the conclusion of the hearing. It contained potentially relevant material upon which I had not been addressed and about which the appellant's representatives were apparently unaware.

4. I ordered that the hearing should be reconvened, subject to further submissions on this material in writing. On 12 July 2022, Mr Melvin filed further submissions in which he stated that no reliance was placed on that additional information and requesting that the relevant pages of the PNC be destroyed. The respondent considered there to be no need for a further hearing in those circumstances. On 21 July 2022, the appellant's representatives indicated in writing that they agreed that there should not be a further hearing. In the circumstances, I decided to vacate the hearing which had been listed on 25 August 2022 and proceeded to determine the appeal on the basis of the material previously adduced.

Background

5. There is a detailed account of the relevant background in my first decision but the following summary will suffice for the purpose of this decision.

6. The appellant is an Italian national who was born on 6 May 1989. He entered the United Kingdom with his family in 1996. After a delay due to his lack of English, he attended education in this country between 1998 and 2005. At around the time that he left education, he began committing criminal offences. As detailed in the PNC record, he has amassed a number of convictions since then, including convictions for weapons, drugs and violence. He has received custodial sentences as a youth and as an adult. He received and ignored warning letters sent to him by the respondent about his conduct. His most recent conviction was for an offence committed against his former partner on 19 December 2015. On 25 January 2018, he was convicted of Wounding, contrary to s20 of the Offences Against the Person Act 186. On 9 July 2018, he was sentenced to 11 months' imprisonment for that offence.

7. On 8 January 2019, the respondent indicated to the appellant in writing that she was minded to make a deportation order against him in light of his offending. On 4 February 2019, his solicitors responded to that indication, giving details of the appellant's life in the UK and stating that he was unlikely to reoffend. Some evidence was provided in support of these submissions.

8. On 6 November 2019, the respondent decided to deport the appellant. She wrote a detailed letter in which she explained the basis upon which she had decided to do so. She did not accept that the appellant had acquired anything more than the basic level of protection against deportation despite his length of residence in the UK. She assessed him as posing a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom. She was satisfied that it would be proportionate to deport the appellant, under both EU Law and the ECHR.

Appellate History

9. The appellant appealed. His appeal was heard by First-tier Tribunal Judge Ford and allowed in a decision which was sent to the parties on 20 February 2020.

10. On appeal to the Upper Tribunal, I found that Judge Ford had erred in law in her decision. She had erred, I held, in finding that the appellant had acquired a right to reside permanently in the United Kingdom and I rejected Mr Ali's submission that the decision on the appeal would inevitably have been the same but for that error. I held that certain of Judge Ford's findings were untainted by her errors, however, and I preserved those findings, as listed at [20](i)-(vi) of my first decision:

(i) That the appellant had strong ties with the UK and had lost his ties to Italy. He regarded himself as British and whilst his understanding of Italian was reasonably good, his command of spoken and written Italian was not good: [50].

(ii) The appellant's offending had continued into adulthood and had been at its most serious between 2013 and 2016. He had been warned more than once about the risk of deportation. He had not offended for 4.5 years and this was 'good evidence that he is working well towards his rehabilitation in the UK'. He posed a low risk of harm within the community: [51].

(iii) He had made genuine efforts to behave responsibly, gather qualifications and to be a good role model for his daughter. He had a stable relationship wit his partner and had engaged in volunteering opportunities. He had made a genuine effort to integrate into British society and become a valued member of the community: [52].

(iv) His relationship was genuine and subsisting. Whilst it was arguable that the judge should attach limited weight to the relationship, she regarded it as an important protective factor which would not be present if the appellant were to be deported: [54].

(v) The appellant was intending to seek a review of the decision to prevent him from seeing his son: [56]. He had spent an 'inordinate amount of time in prison on remand'. His pattern of offending had been one of increasing seriousness. The fight with his girlfriend must have been quite serious because it led to him losing all contact with his son: [75]. He had made many mistakes

but he was trying hard to change his behaviour, including seeing his daughter every weekend: [58].

(vi) The appellant's chances of rehabilitation were not as good in Italy, given that he had the support of his family and his partner in the UK. He had now 'turned a corner' and was willing and able to participate in society as a responsible adult: [59]. His partner would not relocate to Italy with him. Without the support he had in the UK, he would be at significantly increased risk of reoffending in Italy: [60].

Resumed Hearing

11. I confirmed at the outset of the hearing that I had received skeleton arguments from both advocates. Mr Ali confirmed that the appellant sought to rely on the original bundle of 56 pages, a supplementary bundle of 8 pages and the additional statements which had been filed for the resumed hearing. Mr Melvin confirmed that the respondent did not seek (at that stage) to rely on anything over and above the respondent's bundle as originally filed for the FtT hearing. He did not have a copy of a letter to which the FtT had referred at [47] of its decision. I was able to locate that letter in the file and provided a copy to him.

12. Mr Ali confirmed that he did not seek to revisit an adjournment application which I had refused on the papers (made on the basis that the appellant's father was unable to attend the hearing). In the circumstances, he was not concerned about the absence of an Italian interpreter, who had been requested purely to enable the appellant's father to give oral evidence.

13. I then heard oral evidence from the appellant and his partner, both of whom gave their evidence in English. They adopted witness statements which they had made in February 2020 and June 2022 and were asked further questions in chief by Mr Ali before being cross-examined by Mr Melvin. I do not propose to rehearse the oral evidence in this decision and shall instead refer to it insofar as it is necessary to do so to explain my findings of fact.

Submissions

14. Mr Melvin relied on his skeleton argument and submitted that the appellant had not acquired permanent residence. There was insufficient evidence to show that his parents were qualified persons whilst he was their family member. The appellant had not had comprehensive sickness insurance cover ("CSIC") whilst he was a student. The decision of the Court of Justice of the European Union in *VI v Commissioners for HMRC* (Case C-247/20) did not establish that access to the NHS was to be equated with having CSIC. What had been said at [68]-[69] of that decision were 'ad hoc comments' and merely being able to access a local GP could not be equated with having CSIC. There was no policy from the respondent stating that this was her position on the issue although Mr Melvin had tried and failed to elicit a policy position.

15. Whether or not the appellant had permanent residence, the Tribunal needed to consider whether he presented a genuine, present and sufficiently serious risk to the fundamental interests of the United Kingdom. Although it was accepted that he had not been convicted of any offences since 2018, and had not committed any offences since 2016, it was clear that he had no respect for the law. There had been an escalation in his offending and the full extent of his criminality was set out in the papers. There was no issue about his relationship with his partner. There had been some differences in the evidence as regards their contact with the appellant's son, however. The appellant represented a threat, however, and his deportation would be a proportionate course in the circumstances.

16. Mr Ai relied on his skeleton argument and submitted that there were three parts to his argument. He submitted, firstly, that the appellant had acquired permanent residence. He had clearly been a student in the UK and *VI v HMRC* showed that he was not required to have CSIC whilst he was studying in order to become a qualified person in his own right. It made no difference that the parents in VI were themselves working but it was quite clear that the appellant's parents had worked. The parents' earnings were shown in the bundle, although it might properly be said that there were limitations in the evidence. Some flexibility might properly be shown because the events in question had occurred around twenty years ago.

17. Mr Ali submitted, secondly, that the appellant did not represent a genuine, present and sufficiently serious threat to the fundamental interests of the UK. The last offence was in 2016. The appellant had clearly taken a decision to stay on the right side of the law and had impressed the FtT with his evidence in that regard. He had been assessed as presenting a low risk of reoffending three years ago. Whilst it might have been correct to say in the past that he had little regard for the law, that was not the position at the date of hearing.

18. Mr Ali submitted, thirdly, that it would be disproportionate to deport the appellant. This question had been addressed in part by the FtT, which had found the appellant to have rehabilitated. He had entered the UK when he was seven and had been in the UK for two decades. He had no remaining connection to Italy and he viewed the UK as his home. His family and his long-term partner were in the UK. The evidence he had given about his son was plausible even though it had been given belatedly. The relationship with his partner was serious and was a steadying influence on the appellant. His rehabilitation would be prejudiced by his deportation, which would be a disproportionate course in all the circumstances.

19. I reserved my decision at the conclusion of the submissions.

Analysis

20. Despite the logical (and conventional) way in which Mr Melvin and Mr Ali structured their excellent submissions, I propose to consider first the question posed by regulation 27(5)(c). That part of the Immigration (EEA) Regulations 2016 requires the respondent to establish that:

> 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;

21. I turn to consider that question first because it is dispositive of the appeal if it is resolved in the appellant's favour: *MC (Essa principles recast) Portugal* [2015] UKUT 520 (IAC); [2016] Imm AR 114. So much is clear from the imperative 'must' in the opening words of regulation 27(5)(c).

22. It is for the respondent to establish on the balance of probabilities that the appellant presents such a risk: *SSHD v Straszewski* [2015] EWCA Civ 1245; [2016] 2 CMLR 3 and *Arranz (EEA Regulations - deportation - test)* [2017] UKUT 294 (IAC).

23. At [17] of his judgment in *SSHD v Straszewski*, Moore-Bick LJ (with whom Davis and Sharp LJJ agreed) emphasised that there was a need in such cases to look to the future and to emphasise the importance of the right to free movement. The only caveat to that observation was with reference to cases such as *R v Bouchereau* (Case 30/77) [1978] 1 QB 732 and there was quite properly no suggestion on the part of Mr Melvin that this was such an exceptional case.

24. I take account of the appellant's past conduct. I have only provided an outline of that conduct in the opening paragraphs of this decision and it is appropriate at this stage to set it out in full. I take the record of convictions which follows from the PNC record filed by Mr Melvin, who did not seek to rely on any other aspect of that record as bearing on the question posed by regulation 27(5)(c). In the interests of concision, I have omitted the details of the court, the date of the offence, the appellant's plea (guilty but for the final two offences) and the relevant statute.

	Convicted	**Offence(s)**	**Sentence**
1	15.11.04	Interfering with vehicle	Referral order 3 months
2	10.12.04	Aggravated vehicle taking	Referral order 6 months Driving licence endorsed Disqualification from driving 12 months
3	08.05.07	Using vehicle whilst uninsured Driving otherwise than in accordance with a licence Using vehicle with no MOT Failing to stop Driving without due care and attention	Fine £140 Driving licence endorsed Disqualified from driving 6 months
4	31.07.07	Failing to surrender	Fine £100

			Costs £60
5	31.07.07	Resisting a constable Driving whilst disqualified Using vehicle whilst uninsured	Community Order 12 months Driving licence endorsed
6	02.11.07	Driving whilst disqualified Using vehicle with no MOT Using vehicle whilst uninsured Driving whilst disqualified	Imprisonment 12 weeks Suspended imprisonment 12 months Unpaid work requirement 140 hours Supervision order (suspended sentence) 12 months Driving licence endorsed Disqualified from driving – 2 years Costs £300
7	19.06.08	Destroy or damage property	Young Offenders Institution 2 weeks plus 12 weeks detention activated from suspended sentence
8	10.12.08	Fail to attend for drug test	Fine £100 Costs £60
9	28.09.09	Possessing offensive weapon in public place	Young Offenders Institution 60 days – 152 days on remand to count Forfeiture of lock knife
10	30.09.10	Using threatening words or behaviour to cause fear (etc)	Community order 10.12.10 Costs £150 Compensation £50 Curfew requirement 10 weeks with electronic tagging
11	21.01.13	Handling stolen goods	12 months imprisonment
12	08.10.13	Possession of class B drug (cannabis)	Fine £110 One day detention (court house) Victim surcharge £20 Forfeiture and destruction
1	18.11.16	Use threatening words or	Fine £200

3		behaviour to cause fear (etc)	Costs £230 Victim surcharge £30
1 4	25.01.18	Wounding	Imprisonment 11 months Victim surcharge £100

25. Although the appellant has only received comparatively short sentences of immediate custody on five occasions, I take the view that his offending was reasonably serious and protracted. He was only fifteen when he committed the first offence in July 2004 and, as Mr Melvin noted before me, there was some escalation in his offending, as reflected in the increasingly serious sentences imposed. I also accept Mr Melvin's submission that the appellant's conduct over the period in question showed a certain disregard for the law of the United Kingdom, and that he ignored warning letters which he was sent by the Home Office, stating that deportation would be considered in the event of further offending. These valid points were made at [31]-[40] of Mr Melvin's skeleton argument.

26. In assessing whether the appellant presents a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom, I have also taken into account paragraph 3 of Schedule 1 to the Immigration (EEA) Regulations 2016, which provides as follows:

> Where an EEA national or the family member of an EEA national has received a custodial sentence or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

27. I also take into account the wide definition of the fundamental interests of society in the United Kingdom, as set out in paragraph 7 of Schedule 1. As Mr Melvin helpfully highlighted at pages 5 and 6 of his skeleton, the fundamental interests at stake in this appeal are said to be maintaining public order, preventing social harm, maintaining public confidence in the authorities to take appropriate action, and protecting the public.

28. The fact remains, however, that the appellant has not committed an offence since 12 July 2016. That was the date on which he committed the penultimate offence in the list above. The most serious offence (wounding) was committed on 19 December 2015. Some six years have passed without the appellant committing any further offences, therefore, and I am bound to ask why that is the case.

29. In his oral evidence, the appellant gave an account of his childhood and his maturing into adulthood. He said that he had been in a remedial class at school, called class EO3. This was a class of children who were 'prone to messing around'. He was involved with a group of children who stole cars and got involved in other such offending. He was, he said, a product of his environment. As he had grown older, his thought processes had changed and he now thought that his past behaviour was stupid.

30. Mr Ali asked the appellant in re-examination how he felt about his past offending. He said that he wished he could go back and start again. He would tell himself to do better in school and that what he had done hadn't helped him. He observed that he still had 'plenty of time' left and that his partner was a supportive influence. He just wanted, he said, to be around her and his family and he was no longer interested in behaving as he had in the past. I found the appellant to be sincere in what he said. I considered his evidence to be cogently supported by the fact that he has not committed any offences for six years.

31. I heard what I regarded as compelling evidence from the appellant's partner, Ms Gallagher. She is a dental nurse. She has been with the appellant for six years and she said that they see each other every day. They have talked about marriage and children and the relationship is clearly a serious one. She said that she and the appellant had spoken about his past. He had 'opened up' about it and had said that he regretted the stupid things he had done in the past. Ms Gallagher clearly feels that the appellant has changed. I take account of the fact that they have been together throughout the time that he has committed no offences. She struck me as a career-minded, mature and level-headed young woman who has had a lasting, positive influence on the appellant. I accept that their relationship is a committed one and I conclude that it is more likely than not that she will continue to exert that influence on the appellant.

32. Ms Gallagher was pressed about the appellant's plans for the future. Like the appellant, she made reference to the work he has undertaken for his father, who is in the building trade. They both explained that this work was rather occasional, arising as and when the appellant's father had a need for another pair of hands. She nevertheless thought that the appellant might be able to set up his own business using the skills which he has learned whilst working alongside his father. I note that the appellant took various courses following his release from prison, some of which relate to the building trade.

33. The plans are nevertheless rather embryonic at present, and the appellant was quite vague in his own evidence about when and how he might become a regular part of the labour market. In many cases, the absence of concrete employment prospects might represent a source for concern that a person will lapse into their previous offending behaviour. I do not consider that concern to arise in this case; the appellant is settled, in my judgment, into a pattern of behaviour which does not include offending. He settled into that pattern without regular work and the absence of regular work in the future does not enhance the risk of his committing further offences. I accept that his focus for the present is his relationship with his partner and his young daughter (as considered below) and that both relationships have played an important role in the appellant's rehabilitation.

34. There is no OASys report or similar in this case. What I do have is a letter from the appellant's Probation Officer dated 13 January 2021. That states that the appellant was assessed as being a medium risk of harm to the general public and a medium risk of reoffending when he started his sentence in July 2018. He had complied well with his

Probation supervision, however, and the level of risk of reoffending had been reduced to low at the time of his sentence ending.

35. There is also a letter from the Coventry Muslim Association dated 13 February 2020 which records that the appellant had undertaken voluntary work there, helping young people to engage in positive activities rather than participating in gangs. The appellant had given talks to young people at the organisation. The judge in the FtT took this as 'some evidence of a contribution on the appellant's part to his local community and an indication of a change in his attitude and behaviour towards others in the community.' I agree.

36. More than two years have passed since the experienced judge in the First-tier Tribunal heard the appellant's evidence. She apparently took a positive view of his remorse and his evidence as a whole. All of the evidence before me serves to confirm the correctness of her view. Taking account of the appellant's antecedents as a whole, and taking full account of the considerations in schedule 1 to the EEA Regulations, I come to the clear conclusion that the appellant does not pose a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom. That suffices to dispose of the appeal in his favour, regardless of the conclusions which I reach on the remaining issues.

37. As I recorded in my first decision, there was previously a good deal of argument in this case about the appellant's acquisition of permanent residence. There has since then been some further evidence adduced in an attempt to establish that the appellant's parents were qualified persons whilst he was their family member as defined in regulation 7 of the EEA Regulations. In my judgment, the evidence remains insufficient to show that the appellant's mother or father were qualified persons for five continuous years when the appellant was their family member.

38. I reach that conclusion for essentially the reasons set out at [15]-[19] of Mr Melvin's skeleton argument. The National Insurance records show periods of earning punctuated by significant gaps. Between 2000 and 2008, Mr Galizia's record states 'No employers or benefits recorded', as it does between 2009 and 2021. Mr Galizia earned comparatively modest sums in the tax years 1997/1998 to 1999/2000, followed by a period of two years or more in which he received Incapacity Benefit and Jobseekers Allowance, before returning to modestly paid employment in the tax year 2002/2003 and 2003/2004. He then returned to surviving on public funds until taking a very small amount of work in 2010/2011.

39. Even taking into account Mr Ali's valid submission that some of the period in question is twenty years ago, the evidence is insufficient to show either that the appellant's parents were in continuous work for any five year period, or that one or both of them retained their status as a worker for one or more of the reasons in regulation 5(7) (inactivity not of their own making; inactivity due to illness or accident; or involuntary unemployment duly recorded by the relevant employment office).

40. The judge in the First-tier Tribunal concluded that the appellant had acquired permanent residence in his own right, by virtue of the fact that he had studied in the UK between 1998 and 2005. The error in that conclusion, as I explained in my first decision, was that the judge concluded that the appellant was not required to show that he had Comprehensive Sickness Insurance Cover at that time in order to meet the definition of a student. As the law stood at that time, that conclusion was in error and the appellant was not entitled to submit that access to the NHS sufficed to satisfy the requirement in regulation 4(1)(d)(ii): *Ahmad v SSHD (AIRE Centre Intervening)* [2014] EWCA Civ 988; [2014] 3 CMLR 45.

41. Mr Ali submitted before me at the resumed hearing, however, that the decision of the CJEU in *VI v HMRC* had reversed that in *Ahmad v SSHD* and that access to the NHS sufficed to satisfy the requirement in regulation 4(1)(d)(ii). The passages in the judgment which he relied upon in support of that submission are these:

> [68] In the present case, it is apparent from the documents before the Court that VI and her son were affiliated during the period in question, namely from 1 May 2006 to 20 August 2006, to the United Kingdom's public sickness insurance system offered free of charge by the National Health Service.
>
> [69] In that regard, it must be recalled that, although the host Member State may, subject to compliance with the principle of proportionality, make affiliation to its public sickness insurance system of an economically inactive Union citizen, residing in its territory on the basis of Article 7(1)(b) of Directive 2004/38, subject to conditions intended to ensure that that citizen does not become an unreasonable burden on the public finances of that Member State, such as the conclusion or maintaining, by that citizen, of comprehensive private sickness insurance enabling the reimbursement to that Member State of the health expenses it has incurred for that citizen's benefit, or the payment, by that citizen, of a contribution to that Member State's public sickness insurance system (judgment of 15 July 2021, *A (Public health care)*, C-535/19, EU:C:2021:595, paragraph 59), the fact remains that, once a Union citizen is affiliated to such a public sickness insurance system in the host Member State, he or she has comprehensive sickness insurance within the meaning of Article 7(1)(b).

42. Given that the outcome of this appeal is resolved by my conclusion that the appellant does not represent a threat to the fundamental interests of the UK, I do not propose to dwell on this point. Given the potential importance of a finding that the appellant has or has not acquired permanent residence, however, I feel that it is necessary to express a conclusion on the arguments advanced before me.

43. VI was a Pakistani national who lived in Northern Ireland with her husband and children. One of their children was an Irish national, having been born there and acquired Irish nationality by *jus soli* in 2004. It was common ground before the CJEU that he had acquired

permanent residence in 2011. What was at issue was VI's entitlement to receive child benefit for two periods, in 2006 and 2014, as his parent. What was said at [68]-[69] related to the first of those periods, during which time VI's son claimed to be a self-sufficient person who had a right to remain in the United Kingdom as such. In common with a student, a self-sufficient person is required by the 2016 Regulations to have CSIC for themselves and their family members in order to be a qualified person.

44. The CJEU's conclusion at [68]-[69] is, in my judgment, quite clear. It decided that VI and her son were not required to have private health insurance because they were 'affiliated' to the NHS in the period May to August 2006. These were not what Mr Melvin described as 'ad hoc' comments on the part of the CJEU; they were conclusions of law in answer to the reformulated questions which had been referred by the Social Security Appeal Tribunal of Northern Ireland.

45. It is unfortunate that the CJEU did not take the opportunity to state in terms whether it agreed with the central conclusion of the Court of Appeal in *Ahmad v SSHD*. That decision was cited before the CJEU, as is clear from [31](3) and [73] of its judgment. The question referred to the CJEU about *Ahmad v SSHD*, however, concerned a possibility considered at [53]-[57] of the judgment of Arden LJ (as she then was), regarding the existence of a reciprocal healthcare arrangement between two states. The CJEU found that the question about reciprocal healthcare arrangements was insufficiently particularised and declined to answer it: [73]-[77]. It was not asked to, and did not, state in terms whether it agreed with the fundamental conclusion reached by Arden LJ at [59], that the availability of free NHS treatment did not satisfy the requirement for CSIC.

46. Although the CJEU did not go so far as to state in terms that *Ahmad v SSHD* was wrongly decided on that point, I consider that to be the effect of the judgment. I consider that I am bound, therefore, to accept that 'affiliation' to the NHS suffices to satisfy a requirement for a CSIC. I heard no submissions on what it means to be affiliated to the NHS. I cannot readily understand the choice of that particular verb in this context, and I do not know of any relevant legislative provision in which it appears. As presently advised, however, I do not consider it necessary to consider precisely what is meant by 'affiliated'. The real question is whether the appellant was entitled to free treatment on the NHS at the time that he was found by the FtT to be studying in the United Kingdom (which is between 1998 and 2005). As a minor European national who was enrolled in state education, I cannot see any basis upon which he would not have been entitled to that treatment, and Mr Melvin certainly did not attempt to point to one.

47. It is accepted by Mr Melvin, at [20] of his skeleton argument, that the appellant was in state education in the United Kingdom between 1998 and 2005. That concession replicates the FtT's conclusion and is fairly and properly based on evidence from the appellant's primary and secondary schools, which confirm his full-time attendance between May 1998 and July 2005.

48. For the reasons I have given immediately above, I find that the appellant was affiliated to the NHS at that time and that he was therefore to be treated as a person who had CSIC. He was therefore a qualified person in his own right in those years and he acquired a permanent right reside before he started committed criminal offences.

49. Mr Melvin did not suggest that any such right would have been lost in the intervening period and it is difficult to see how any such submission could have been made in light of the observations I made at [79] of my first decision. I therefore conclude that the appellant had the right to reside permanently in the United Kingdom at the time of the UK's withdrawal from the European Union. Whether he is entitled to apply for leave to remain, or whether he is entitled to it as a result of that conclusion is a matter beyond the scope of this appeal.

50. I have not yet made any reference to the appellant's children. It has not been necessary for me to do so in order to resolve the two issues above and it is not necessary, as a result of the conclusion I reached at [36] above, for me to undertake a full consideration of proportionality with reference to the matters set out in regulation 27(6). The conclusions I have reached may therefore be stated very shortly indeed.

51. The judge in the First-tier Tribunal was persuaded that the appellant was seeing his daughter regularly and I reach the same finding. I am satisfied that he is seeing her twice a week, as claimed, as the evidence of the appellant and his partner supported the claims previously made. I am unable to make a similar finding in relation to the appellant's son. Prior to the resumed hearing before me, the appellant had always maintained that he was not in contact with his son. When he came to give oral evidence, however, he stated that he had recently rekindled the relationship through his nephew, who is of a similar age. There was no hint of this relationship having been rekindled in the appellant's witness statement, nor was there any other evidence in support of it. Although the appellant and his partner gave essentially consistent evidence on the point, the evidence is insufficient to persuade me on the balance of probabilities that the appellant has a genuine and subsisting relationship with his son.

52. I have made findings about the appellant's relationship with his partner and his children should they become relevant in the future. My finding that the appellant does not present a risk to the UK is determinative of the appeal, however, and I will not consider in the alternative whether it would be proportionate to deport the appellant, whether under the EEA Regulations or the ECHR. There would be no benefit in undertaking such an exercise, as it would involve an attempt to balance considerations which weigh in the appellant's favour against a purely hypothetical and therefore unquantifiable risk of him committing further offences in the United Kingdom.

53. In the circumstances, the appeal will be allowed because the respondent's decision breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020 on the basis that the appellant presents no genuine, present and

sufficiently serious threat to the fundamental interests of the United Kingdom.

Notice of Decision

The decision of the First-tier Tribunal having been set aside, I remake the decision on the appeal by allowing it on EU Law grounds.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 August 2022