IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001374

First-tier Tribunal No: HU/01247/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19th of October 2023

Before

UPPER TRIBUNAL JUDGE BRUCE
DEPUTRY UPPER TRIBUNAL JUDGE SILLS

Between

MR DORIAN LUC BELL MBOGOS
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Timson
For the Respondent: Mr Tan

Heard at Manchester Civil Justice Centre on 13 September 2023

DECISION AND REASONS

Introduction

1. The Respondent appeals against the decision (the Decision) of First-tier Judge Galloway dated 20 March 2023 allowing the Appellant's appeal.

Factual Background

2. The Appellant is a Dutch national born in December 1996. The Respondent summarises the Appellant's immigration history as follows in the decision under appeal:

“Immigration history
8. You claim to have arrived in the United Kingdom aged 12 years old (approximately 2009). As an EEA national you would have freedom of movement within the EU and be able to enter the United Kingdom freely.

9. You first came to the attention of the Immigration authorities on 22 January 2020 when you were remanded in custody at HMP Forest Bank charged with multiple drugs and motoring offences.

10. On 1 July 2020 at Minshull Street Crown Court you were convicted of conspire/supplying controlled drug - Class A – heroin, of conspire/supplying controlled drug - Class A – MDMA, conspire/supplying controlled drug - Class A – cocaine and dangerous driving for which you received a total custodial sentence of 9 years imprisonment.

11. In light of your conviction, on 23 April 2021 you were issued with a notice that you may be liable to deportation pursuant to the Immigration (European Economic Area) Regulations 2016.

12. In response you submitted representations received 5 May 2021 in the form of a handwritten letter stating why you felt you should not be deported.

13. On 10 December 2021 following a review of your case you were served with a combined (Stage 1) notice of liability to deportation pursuant to the Immigration (European Economic Area) Regulations 2016 AND a decision to deport pursuant to the Immigration Act 1971 and the UK Borders Act 2007.

14. You did not respond to this notice/decision letter and have not provided any further submissions.

Criminal history
15. On 29 May 2015 at Oldham Magistrates, you were convicted of battery for which on 19 June 2015 at the same location you were sentenced to 12-month community order, unpaid work requirement, rehabilitation activity requirement, £85 costs, £50 compensation, £60 victim surcharge, £150 criminal courts charge; and of failing to surrender to custody at appointed time for which there was no separate penalty.

16. On 6 January 2016 at Oldham Magistrates, you were convicted of fail to comply with the requirements of a community order for which you were sentenced to order varied - unpaid work requirement extended.

17. On 13 June 2016 at Minshull Street Crown Court you were convicted of burglary and theft - dwelling for which you were sentenced to 18-month community order, unpaid work requirement, rehabilitation activity requirement, £60 victim surcharge.

18. On 14 March 2017 at Minshull Street Crown Court you were convicted of fail to comply with the requirements of a community order for which you were sentenced to order varied - curfew requirement without electronic tagging added to order.

19. On 9 May 2017 at Greater Manchester Magistrates, you were convicted of 2 counts of battery for which you were sentenced to 12-month community order, programme requirement, curfew requirement with electronic tagging, rehabilitation activity requirement, £100 compensation on both counts, £85 costs, £85 victim surcharge.

20. On 1 July 2020 at Minshull Street Crown Court you were convicted of dangerous driving for which on 23 December 2020 at the same location you were sentenced to

> 6 months imprisonment consecutive, disqualified from driving - obligatory 66 months, disqualified from driving - until ordinary test passed; and of conspire/supplying controlled drug - Class A - heroin for which
> on 23 December 2020 at the same location you were sentenced to 91 months imprisonment concurrent; and of conspire/supplying controlled drug - Class A - MDMA for which on 23 December 2020 at the same location you were sentenced to 102 months imprisonment; and of conspire/supplying controlled drug - Class A - cocaine for which on 23 December 2020 at the same location you were sentenced to 91 months imprisonment concurrent. This is a total
> sentence of 9 years imprisonment."

3. As the above chronology shows, the Respondent initially considered taking deportation action against the Appellant under the Immigration (European Economic Area) Regulations 2016 (the 2016 Regs), giving the Appellant notice of this on 23 April 2021. On 8 December 2021, the Respondent wrote to the Appellant asking him to provide evidence that he had either been granted leave under the EUSS or that he had made such an application, amongst other matters, and if he did so his appeal would be considered under the 2016 Regs. The Appellant was also given the opportunity to submit more evidence in relation to his human rights claim.

4. The decision under appeal is dated 13 April 2022. The decision states that the Respondent had concluded that the Appellant was not a person to whom the 2016 Regs as saved applied, as he had not submitted evidence that he was lawfully in the UK immediately prior to 31 December 2020 and that he had an outstanding EU Settlement Scheme application. The Respondent therefore pursued deportation by way of the UK Borders Act 2007. In view of the length of the Appellant's sentence, the Respondent found that the Appellant had not established that there were very compelling circumstances such that he should not be deported.

5. The appeal came before Judge Galloway on 14 March 2023. At [5] she records that both representatives agreed that the 2016 Regs applied and that the appeal should be determined on that basis. The Judge found that the Appellant had been resident in the UK on a permanent basis since 2009 until he was remanded in custody in January 2020, which was over a 10 year period. The Judge then found that the Respondent had not established that imperative grounds of public security warranted the Appellant's deportation. As a result, the Judge found that the decision breached the Appellant's ECHR Article 8 rights in line with the decision of Charles (human rights appeal: scope) [2018] UKUT 89 (IAC).

6. The Respondent applied for permission to appeal on 29 March 2023. The grounds are as follows. First, the Judge erred in considering the appeal under the 2016 Regs, there being no decision under these regulations under appeal. Second, there was no finding that the Appellant was a relevant person under s3(5A) of the Immigration Act 1971, or the Citizens' Rights (Application Deadline and Temporary Protections) (EU Exit) Regulations 2020 (the Application Deadline Regs). The Judge failed to consider whether the Appellant had been lawfully resident in the UK for the purposes of the 2016 Regs, or whether the Appellant had made an in time EUSS application by 30 June 2021. Third, the Judge erred in the consideration of the 2016 Regs by failing to find that the Appellant had acquired permanent residence under the 2016 Regs. Fourth, the Judge erred in considering whether the Appellant had 10 years residence by failing to consider whether the Appellant's integrative links had been broken. Even if the imperative grounds threshold applied, the Judge had erred in considering whether this threshold was met.

7. Judge Chohan granted permission to appeal on 21 April 2023. He considered that the matters raised in the grounds must be explored further.

8. The Appellant lodged a Rule 24 response on 9 June 2023. The Response suggested that permission to appeal may have been granted on grounds 1 and 2 only. The Response argued that on the basis of the Judge's findings the Appellant's deportation must be disproportionate. The Presenting Officer gave consent for the appeal to be considered under the 2016 Regs. There was a statutory right of appeal under the 2016 Regs. The grounds challenging the Judge's application of the 2016 Regs amounted to disagreement.

The Hearing

9. We heard submissions from Mr Tan for the Respondent and Mr Timson for the Appellant on both the question of whether the Judge had made an error of law, and whether we should remake the decision or remit the appeal if we were to find an error. We reserved our decision.

Error of Law

10. We reject at the outset the submissions that permission to appeal was granted on limited grounds. Nowhere in the grant of permission is there any suggestion that the grant is limited in any way.

11. We deal with Ground 2 first. The Judge at [4] states that the 'legal position may be relatively complex'. At [5] the Judge records the Respondent's representative Mr Ogbewe 'agreed that – without making any concessions as to residence – the 2016 Regulations applied'. We note that a concession as to law is of no effect: neither the HOPO nor the Tribunal could create a right of appeal where none existed. Given the legal complexity and the parties' uncertainty as to the legal position , we set out the relevant legal provisions in some detail below.

Legal Framework

12. We start with the Withdrawal Agreement (WA). Articles 18 and 20 state:

> "Article 18
>
> Issuance of residence documents
>
> 1. The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.
>
> Applying for such a residence status shall be subject to the following conditions:
> (a) the purpose of the application procedure shall be to verify whether the applicant is entitled to the residence rights set out in this Title. Where that is the case, the applicant shall have a right to be granted the residence status and the document evidencing that status;

(b) the deadline for submitting the application shall not be less than 6 months from the end of the transition period, for persons residing in the host State before the end of the transition period.

Article 20

Restrictions of the rights of residence and entry

1. The conduct of Union citizens or United Kingdom nationals, their family members, and other persons, who exercise rights under this Title, where that conduct occurred before the end of the transition period, shall be considered in accordance with Chapter VI of Directive 2004/38/EC.

2. The conduct of Union citizens or United Kingdom nationals, their family members, and other persons, who exercise rights under this Title, where that conduct occurred after the end of the transition period, may constitute grounds for restricting the right of residence by the host State or the right of entry in the State of work in accordance with national legislation…"

13. The relevant domestic legislation in relation to these matters is as follows. S7 of the European Union (Withdrawal Agreement) Act 2020 states:

"7 Rights related to residence: application deadline and temporary protection
(1) A Minister of the Crown may by regulations make such provision as the Minister considers
appropriate for any of the following purposes—(a) specifying the deadline that applies for the purposes of—
(i) the first sub-paragraph of Article 18(1)(b) of the withdrawal agreement (deadline for the submission of applications for the new residence status described in Article 18(1));"

14. The Application Deadline Regs state:

"2. Deadline for applications
The end of 30 June 2021 is the deadline for submission of an application for residence status
("application deadline") that applies for the purposes of the following provisions—
(a) the first sub-paragraph of Article 18(1)(b) of the withdrawal agreement;

3.— Grace period
(1) This regulation has effect if the EEA Regulations 2016 are revoked on IP completion day (with
or without savings).
(2) The provisions of the EEA Regulations 2016 specified in regulations 5 to 10 continue to have
effect (despite the revocation of those Regulations) with the modifications specified in those
regulations in relation to a relevant person during the grace period….
(5) For the purposes of this regulation—
(a) the grace period is the period beginning immediately after IP completion day and ending
with the application deadline;
(b) a person is to be treated as residing in the United Kingdom at any time which would
be taken into account for the purposes of calculating periods when the person was
continuously resident for the purposes of the EEA Regulations 2016 (see regulation 3);…

4.— Applications which have not been finally determined by the application deadline
(1) This regulation has effect if the EEA Regulations 2016 are revoked on IP completion day (with
or without savings).
(2) This regulation applies to a person ("the applicant") who—
(a) has made an in-time application (see paragraph (6)), and
(b) immediately before IP completion day—
(i) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or
(ii) had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15).
(3) The provisions of the EEA Regulations 2016 specified in regulations 5 to 10 continue to have
effect (despite the revocation of those Regulations) with the modifications specified in those
regulations in relation to the applicant during the relevant period…
(6) For the purposes of this regulation—
(a) an in-time application is an application for leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules which—
(i) is valid under residence scheme immigration rules;
(ii) is made on or before the application deadline, and
(iii) has not been withdrawn;
(b) the relevant period begins immediately after the application deadline and ends —
(i) if the applicant is, by virtue of the in-time application, granted leave to enter or remain in the United Kingdom, on the day on which that leave is granted;
(ii) if a decision is taken not to grant any leave to enter or remain in the United Kingdom in response to the applicant's application and the applicant does not appeal
against that decision, on the first day on which the applicant is no longer entitled to appeal against that decision (ignoring any possibility of an appeal out of time with permission);
(iii) if a decision is taken not to grant any leave to enter or remain in the United Kingdom in response to the applicant's application and the applicant brings an appeal
against that decision, on the day on which that appeal is finally determined, withdrawn or abandoned, or lapses under paragraph 3 of Schedule 1 to the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020;…

7.— Provisions relating to powers of refusal of admission and removal etc.
(1) Subject to paragraph (2), the following provisions of Part 4 of the EEA Regulations 2016
(provisions relating to refusal of admission and removal etc.) with the modifications set out below
are specified for the purposes of regulations 3 and 4—
(a) regulation 23 (exclusion and removal from the United Kingdom) with the modifications
that—
(i) in each of paragraphs (1), (5) and (6)(b), after "regulation 27", there were inserted
"or on conducive grounds in accordance with regulation 27A or if the person is subject to a deportation order by virtue of section 32 of the UK Borders Act 2007";
(ii) in paragraph (7)(b), after "regulation 27", there were inserted ", on conducive grounds in accordance with regulation 27A or if the person is subject to a deportation

order by virtue of section 32 of the UK Borders Act 2007";"

15. The Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020/1210 (the Restriction of Rights Regs) states:

> "2.— Continued application of the EEA Regulations 2016
> (1) Notwithstanding the revocation of the EEA Regulations 2016, the provisions of the EEA Regulations 2016 specified in the Schedule continue to have effect, but with the modifications set out in the Schedule, for the purpose of removing a person who is protected by the citizens' rights provisions.
> (2) For the purposes of paragraph (1), a person is protected by the citizens' rights provisions if that person—
> (a) has leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules;
> (b) is in the United Kingdom (whether or not they have entered within the meaning of section 11(1) of the Immigration Act 19712) having arrived with entry clearance granted by virtue of relevant entry clearance immigration rules;
> (c) is in the United Kingdom (whether or not they have entered within the meaning of section 11(1) of the Immigration Act 1971) having arrived with entry clearance granted by virtue of Article 23 of the Swiss citizens' rights agreement; or
> (d) may be granted leave to enter or remain in the United Kingdom as a person who has a right to enter the United Kingdom by virtue of—
> (i) Article 32(1)(b) of the withdrawal agreement;
> (ii) Article 31(1)(b) of the EEA EFTA separation agreement; or
> (iii) Article 26a(1)(b) of the Swiss citizens' rights agreement,
> whether or not the person has been granted such leave.
> (3) For the purposes of these Regulations, a person is also protected by the citizens' rights provisions if that person was protected by the citizens' rights provisions at the time that they became subject to a decision to remove them under regulation 23(6) (b) of the EEA Regulations 2016, including as those Regulations continue to have effect by virtue of these Regulations."

16. In relation to Article 20, s3(5)-(5A) Immigration Act 1971 state:

> "(5) A person who is not a British citizen is liable to deportation from the United Kingdom if—
> (a) the Secretary of State deems his deportation to be conducive to the public good; or
> (b) another person to whose family he belongs is or has been ordered to be deported.
>
> (5A) The Secretary of State may not deem a relevant person's deportation to be conducive to the public good under subsection (5) if the person's deportation—
> (a) would be in breach of the obligations of the United Kingdom under [Article 20 of the EU withdrawal agreement]11 , [Article 19 of the EEA EFTA separation agreement]12 , or Article 17 or 20(3) of the Swiss citizens' rights agreement, or
> (b) would be in breach of those obligations if the provision in question mentioned in paragraph (a) applied in relation to the person."

17. The Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020 (the Appeals Regs) give a right of appeal to individuals with leave under the EUSS against a decision to make a deportation order under s5 of the 1971 Act:

> "6.— Right of appeal against decisions to make a deportation order in respect of a person other than a person claiming to be a frontier worker[or a person with a healthcare right of entry]2
> (1) A person to whom paragraph (2) applies may appeal against a decision, made on or after exit day, to make a deportation order under section 5(1) of the 1971 Act in respect of them.
> (2) This paragraph applies to a person who—
> (a) has leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules, or
> (b) is in the United Kingdom (whether or not the person has entered within the meaning of section 11(1) of the 1971 Act3) having arrived with scheme entry clearance.
> (3) But paragraph (2) does not apply to a person if the decision to remove that person was taken—
> (a) under regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 20165 ("the 2016 Regulations"), where the decision to remove was taken before the revocation of the 2016 Regulations, or
> (b) otherwise, under regulation 23(6)(b) of the 2016 Regulations as it continues to have effect by virtue of the Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020 or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020."

18. As per Reg 8, there are two grounds of appeal:

> "(2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of—
> (a)Chapter 1, or Article 24(2), 24(3), 25(2) or 25(3) of Chapter 2 , of Title II, or Article 32(1)(b) of Title III, of Part 2 of the withdrawal agreement,…
> (3) The second ground of appeal is that—
> (d) where the decision is mentioned in regulation 6, it is not in accordance with section 3(5) or (6) of the 1971 Act (as the case may be);"

19. We summarise the position as follows. Article 18 WA provides that the UK may require Union citizens to apply for a new residence status which confers the rights under Title II of the WA. The UK has adopted this constitutive approach and established the European Union Settlement Scheme to achieve this (see e.g., Celik [2023] EWCA Civ 921 at [29-30]). Article 20 WA provides that conduct of Union citizens and their family members, where that occurred before the end of the transition period, namely 31 December 2020, shall be considered in accordance with the provisions of Directive 2004/38/EC, incorporated into domestic law by the 2016 Regs. However, for an individual to have this right under Article 20, they must obtain the status required by the UK under Article 18.

20. The requirement to have leave under the EUSS to enjoy the protection on Article 20 is set out in the Restriction of Rights Regs. As per those Regs and subject to the grace period provisions, after 30 June 2021 the provisions of the 2016 Regs only apply to those who have been granted leave to remain under the EUSS or have a right to entry under that scheme. The Application Deadline Regs provide for a grace period between IP completion date, namely 31 December 2020, and ending with the application deadline date, namely 30 June 2021, during which the 2016 Regs continue to apply to those lawfully in the UK in accordance with the 2016 Regs immediately prior to 31 December 2020. They also continue to apply while any EUSS application made before 30 June 2021 from such a person is outstanding and before any appeal rights are exhausted.

21. Where an individual has leave under the EUSS, if SSHD makes a decision under that their presence is not conducive to the public good under s3(5) of the Immigration Act 1971, they have a right of appeal to the First-tier Tribunal on the basis that the decision breaches their rights under the WA or is not in accordance with s5 of the 1971 Act, most likely on the basis that the conduct took on or before 31 December 2020.

The Appellant

22. We now turn to consider the particular circumstances of the Appellant. In relation to the Appellant's criminal offending, the conduct took place prior to the end of 31 December 2020, given that he was sentenced to 9 years' imprisonment earlier in 2020. This means that if the Appellant obtained or applied for leave under EUSS prior to the 30 June 2021, his case must be considered under the provisions of the 2016 Regs. If not, domestic legal provisions apply.

23. The Appellant has not been granted leave under the EUSS. The only correspondence from the Appellant to the Respondent before the end of 30 June 2021 is the Appellant's letter at RB 45-47 date stamped 5 May 2021 in which the Appellant set out reasons why he wishes to remain in the UK. This is presumably in response to the Notice of Liability for Deportation, which was served on the Appellant on 23 April 2021, but which is not before the Tribunal.

24. We do not consider this letter amounts to a valid application under the EUSS for the following reasons. Reg 4(6) of the Application Deadline Regs confirms that an in-time application must be valid under the residence scheme immigration rules, namely EUSS. Rule EU9 of Appendix EU states as follows:

> "EU9. A valid application has been made under this Appendix where:
> (a) It has been made using the required application process;
> (b) The required proof of identity and nationality has been provided, where the application is made within the UK;
> (c) The required proof of entitlement to apply from outside the UK has been provided, where the application is made outside the UK;
> (d) The required biometrics have been provided;
> (e) It has been made by the required date, where the date of application is on or after 9 August 2023; and
> (f) The applicant, if they rely on being a joining family member of a relevant sponsor and where the date of application is on or after 9 August 2023, is not an illegal entrant."

25. Required application process is a defined term, defined as follows:

> "required application process
> (a) (unless sub-paragraph (b) or (c) applies) the relevant on-line application form and a relevant process set out in that form for:
> (i) providing the required proof of identity and nationality or (as the case may be) the required proof of entitlement to apply from outside the UK; and
> (ii) providing the required biometrics; or
> (b) the required paper application form where this is mandated on gov.uk and a relevant process set out in that form for:
> (i) providing the required proof of identity and nationality or (as the case may be) the required proof of entitlement to apply from outside the UK; and
> (ii) providing the required biometrics; or

> (c) a paper application form where this has been issued individually to the applicant by the Secretary of State, via the relevant process for this set out on gov.uk, and a relevant process set out in that form for:
>
> (i) providing the required proof of identity and nationality or (as the case may be) the required proof of entitlement to apply from outside the UK; and
>
> (ii) providing the required biometrics
>
> in addition, where a paper application form is used under sub-paragraph (b) or (c) above, it must be sent by pre-paid post or courier to the Home Office address specified on the form (where one is specified), or by e-mail to the Home Office email address specified on the form (where one is specified)"

As the Appellant did not submit an application form, whether paper or online, he did not make a valid application under the EUSS.

26. It follows that as the Appellant did not apply for leave to remain under the EUSS by 30 June 2021, the 2016 Regs do not apply to the Appellant, and the Respondent was entitled to consider the Appellant's deportation exclusively under domestic legal provisions.

27. Therefore, the Judge was wrong in law to find that the 2016 Regs had any, even indirect, application. As is plain from [20], the Judge allowed the appeal on the basis that there were no imperative grounds of public security justifying his expulsion. However, as explained above, the 2016 Regs do not apply and so the Respondent was not required to establish such imperative grounds. We therefore find that the Judge erred in finding that the 2016 Regs applied to the Appellant. For this reason alone, the Decision must be set aside.

28. We deal briefly with the other grounds of appeal for completeness. Having found that the 2016 Regs do not apply, ground 1 falls away. We deal shortly with grounds 3 and 4. We find that the Judge erred in her approach to the 2016 Regs, even though they did not apply in any event. It is clear that the Judge did not direct herself correctly in considering whether the Appellant had permanent residence under the 2016 Regs. We say this because the Judge found that she was satisfied that the Appellant was resident on a permanent basis from 2009 onwards. The Appellant's case is that he arrived in the UK in 2009. There is no consideration of the Reg 15 requirements for permanent residence. The Appellant does not appear to be the family member of a worker or self-employed person who ceased activity or who died, which would be the only ways the Appellant could obtain permanent residence without 5 years continuous residence in accordance with the Regs. Further, the Judge considers only whether the Appellant has been continuously resident without considering whether the Appellant had resided in accordance with the 2016 Regs. We are satisfied that the Judge erred in law in considering whether the Appellant had acquired permanent residence under the 2016 Regs for these reasons.

29. We also consider that the Judge erred in deciding that the highest 'imperative grounds' threshold applied. The grounds cite the case of Vomero v SSHD C-424/16:

> "2 Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that, in the case of a Union citizen who is serving a custodial sentence and against whom an expulsion decision is adopted, the condition of having 'resided in the host Member State for the previous ten years' laid down in that provision may be satisfied where an overall assessment of the person's situation, taking into account all the relevant

> aspects, leads to the conclusion that, notwithstanding that detention, the integrative links between the person concerned and the host Member State have not been broken."

30. The Judge did not carry out this 'overall assessment' and proceeded on the basis that the fact that the Appellant has resided in the UK for 10 years on its own was sufficient to establish the highest level of protection. This is an error of law.

31. Finally, we consider that the Judge gave inadequate reasons and erred in law in finding that imperative grounds had not been made out. The Judge made the distinction that while the Appellant had been involved in high level drug dealing, he had not been involved in drug trafficking. However, in making that distinction and while referring to the case, the Judge fails to note that the CJEU in Land Baden-Württemberg v Panagiotis Tsakouridis C-145/09 held:

> "2. Should the referring court conclude that the Union citizen concerned enjoys the protection of Article 28(3) of Directive 2004/38, that provision must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of 'imperative grounds of public security' which may justify a measure expelling a Union citizen who has resided in the host Member State for the preceding 10 years."

32. Further, at [17] the Judge states:

> "Having considered the sentencing remarks in full in line with all the evidence in the round, there is no suggestion that the Appellant was part of an organised gang, involved in trafficking or any criminal organisations."

33. We do not consider that this statement can be reconciled with the following statement in the sentencing remarks:

> "The prosecution have submitted that you had a leading role in this criminal enterprise and that is undoubtedly correct. You were involved in directing or organising buying or selling on a commercial scale. You had substantial links to and influence on others in a chain and you had an expectation of substantial financial gain."

34. It is clear from the sentencing remarks that the Appellant was 'dealing in narcotics as part of an organised group' and that as per Tsakouridis, such conduct is capable of being covered by the concept of imperative grounds of public security. The Judge erred by failing to take this into account.

Conclusion

35. As set out above, we have found that the Decision contains a material error of law and must be set aside. Both representatives agreed that if the Tribunal found an error of law the appeal should be remitted to the First-tier and we agree with that. The principle legal error by the Judge was to determine the appeal on the basis of legal provisions that do not apply and so the appeal was determined on the wrong basis. In these circumstances it is appropriate that the appeal is determined afresh by the First-tier Tribunal with no findings preserved.

36. We provide the following further guidance to the First-tier. The First-tier should determine the appeal on the basis that the 2016 Regs do not apply. The relevance

of any previous residence in accordance with the 2016 Regs would be limited to being a relevant factor in assessing the Appellant's private life under ECHR Article 8.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law and is set aside.

The appeal is remitted to the First-tier Tribunal sitting at Manchester to be considered afresh with no findings preserved by a judge other than First-tier Tribunal Judge Galloway.

Judge Sills

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 October 2023