Neutral Citation Number: [2020] EWCA Civ 156

Case No: C9/2018/1521

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) (Judge Rimington)
DA/00167/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2020

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BEAN
and
LADY JUSTICE ROSE

- -

Between :

ISMAIL HUSSEIN	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Eric Fripp and **Bojana Asanovic** (instructed by **Duncan Lewis & Co**) for the **Appellant**
Claire van Overdijk (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 23 January 2020

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Approved Judgment

Lord Justice Bean :

1. The Appellant was born in Somalia on 1 January 1984. In 1994, he travelled from Somalia to join his father in the Netherlands, where he and his father were naturalised as Dutch citizens. The Appellant's father came to the United Kingdom in 1997 and the Appellant joined him here in December 1998. The Appellant claims to have resided continuously in the United Kingdom since that date. He also claims to have developed substantial connections in the United Kingdom which, at the time of the First-Tier Tribunal hearing, included his ten year-old child with his ex-wife, his second wife and two stepchildren, and his father and other relatives.

2. The Appellant has been convicted of numerous criminal offences since 2000. These are set out in Schedule 1 to this judgment. As Upper Tribunal ("UT") Judge Rimington set out at paragraph [14] of her judgment:

> "The appellant has had three periods in custody. First, following a conviction for robbery on 4 December 2000, he was sentenced to three years' confinement in a youth offender's institution serving eighteen months in custody prior to release on 4 June 2002. Secondly, the appellant was sentenced to nineteen months in aggregate following conviction on 16 October 2012 and he served nine and a half months in custody before being detained under immigration powers for a further seven months. Thirdly on 10 June 2015 the appellant was convicted of possession of an offensive weapon in a public place and other offences and sentenced to thirteen months' imprisonment. In total he was in custody for seven months."

3. On 23 March 2016, the Respondent made a deportation order against the Appellant under Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). The Respondent accepted that the Appellant had "demonstrated five years residency in the UK" and was entitled to protection under Regulation 21(3) as a permanent resident. The Respondent considered that the deportation had to be justified on "serious grounds of public policy or public security", but concluded that this threshold had been satisfied on the evidence. The Respondent did not accept that the appellant had ten years continuous residence. This would have afforded the Appellant an enhanced level of protection, because his deportation would have had to be justified on "imperative grounds of public security" under Regulation 21(4).

4. The Appellant exercised his right of appeal to the First-Tier Tribunal (Immigration and Asylum Chamber) ("the FTT") under section 82(1) of the Nationality, Immigration and Asylum Act 2002. FTT Judge Cassel dismissed his appeal. The Appellant subsequently appealed to the UT but his appeal was dismissed by UT Judge Rimington on 13 December 2017. On 20 March 2019, Sir Stephen Silber granted permission to appeal to this court on the grounds that the FTT and UT had failed to address adequately the level of protection owed to the Appellant by virtue of his (a) permanent residence or (b) ten years continuous residence.

5. There were two issues before us. The first was whether the Appellant had ten years continuous residence to bring Regulation 21(4) into play, so that his deportation had to

be justified on "imperative grounds of public security". The Respondent disputed that the Appellant had established ten years continuous residence, but did not submit that if the Appellant had ten years residence there were "imperative grounds of public security" to justify his deportation. The second issue was whether deportation was justified on "serious grounds of public policy or public security" under Regulation 21(3), as it had to be in view of the Appellant's having acquired the status of permanent resident after five years. This was the basis on which the Respondent made its deportation decision.

The 2006 Regulations

6. At the UT hearing, there was some discussion about whether the 2006 or the 2016 Regulations applied. The Immigration (European Economic Area) Regulations 2016 came into force in February 2017, prior to the FTT hearing and the FTT Judge's decision. The UT Judge proceeded on the basis that the 2006 Regulations still applied because Schedule 4 to the Immigration (European Economic Area) (Amendment) Regulations 2017 (No.1) states that the 2006 Regulations apply to pending appeals. It was not in dispute before us that that conclusion was correct. There was also no suggestion by either party that the UK's withdrawal from the European Union and the EEA on 31 January 2020 could make any difference to the outcome of this appeal.

7. The 2006 Regulations were enacted to give effect to EU Directive 2004/38/EC. The relevant Articles in the Directive provide:

> "16. General Rule for Union Citizens and their family members
>
> 1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.
>
> 2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.
>
> 3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.
>
> 4. Once acquired, the right of permanent resident shall be lost only through absence from the host Member State for a period exceeding two consecutive years.
>
> …
>
> 27: General principles

> 1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public scrutiny or public health. These grounds shall not be invoked to serve economic ends.
>
> 2. Measures shall be taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
>
> …
>
> 28. Protection against expulsion.
>
> 1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
>
> 2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who the right of permanent residence on its territory, except on serious grounds of public policy or public security…..
>
> 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States if they:
>
> (a) have resided in the host Member State for the previous 10 years…"

8. Regulation 15(1) of the 2006 Regulations states that an EEA national has a permanent right of residence if he has resided in the United Kingdom for a continuous period of five years.

> "Permanent right of residence
>
> 15. (1) The following persons shall acquire the right to reside in the United Kingdom permanently—
>
> (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;"

9. Regulation 19(3) sets out the power to exclude and remove individuals currently residing in the United Kingdom on the grounds of "public policy, public security or public health".

> "Exclusion and removal from the United Kingdom
>
> 19.—(3) Subject to paragraphs (4) and (5), a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if—
>
> (a) he does not have or ceases to have a right to reside under these Regulations; or
>
> (b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21."

10. Regulations 21(3) and 21(4) set out the protections afforded to individuals who have permanent residence or ten years continuous residence. Regulation 21(5) requires the deportation to be proportionate and sets out considerations which must not form the basis of the decision. Regulation 21(6) requires the decision-maker to take into account the personal circumstances of the individual.

> "Decisions taken on public policy, public security and public health grounds
>
> 21.—
>
> (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 service economic ends.
>
> (3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or 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 necessary in his best interests, 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(1).
>
> (5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with

> the preceding paragraphs of this regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
>
> (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.
>
> (6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."
>
> [subparagraph [7] concerns decisions on the grounds of public health and is not relevant for present purposes]

The CJEU jurisprudence

11. To obtain a permanent right of residence under Regulation 15, and thus obtain the protection of Regulation 21(3), an individual needs to be resident in the host state for a continuous period of five years. These need not be the five years immediately prior to the expulsion decision: *MG(Portugal) v Secretary of State for the Home Department* (Case C-400/12) [2014] 1 WLR 2441 at [24]. On the other hand, it is apparent from the wording of Regulation 21(4)(b) that the ten year period for obtaining enhanced protection must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned: see *MG(Portugal)* at [28].

12. That much is clear: but what of the effect of periods in custody? Logically the possibilities are to treat such periods as: (a) being "residence" in the host state just as much as any other; (b) interrupting the accrual of time in the sense of pressing a pause button; (c) interrupting the accrual of time in the sense of resetting the clock to zero; and (d) affecting the accrual of time in a way which requires some overall, non-mathematical assessment.

13. The jurisprudence of the CJEU seems to have led to the position that the effect of a term of imprisonment appears to be different depending on whether one is looking at

the five year or the ten year period. In *Onuekwere v Secretary of State for the Home Department* (Case C-378/12) [2014] 1 WLR 2420, a decision handed down on the same day and by the same panel as *MG (Portugal),* the CJEU held that in calculating five years residence under Article 16(1), periods before and after time spent in custody cannot be aggregated: in other words, the clock is reset to zero. The court said at [26]:-

> "The imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition by family members of a Union citizen who are not nationals of a Member State of the right of permanent residence for the purposes of Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence."

14. But for the ten year period under Article 28(3)(a) the position is more complicated. In *MG (Portugal)* the CJEU said that if an individual is imprisoned during the ten years prior to the expulsion decision, this will "in principle" interrupt continuity of residence and that an "overall assessment" is required. The Court set out the rationale behind that conclusion at [32] -[33]:

> "32. Since the degree of integration of the persons concerned is a vital consideration underpinning both the right of permanent residence and the system of protection against expulsion measures established by Directive 2004/38, the reasons making it justifiable for periods of imprisonment not to be taken into consideration for the purposes of granting a right of permanent residence or for such periods to be regarded as interrupting the continuity of the period of residence needed to acquire that right must also be borne in mind when interpreting Article 28(3)(a) of that Directive.
>
> 33. It follows that periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 and that, in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision."

(For a powerful analysis of the contradictions in these two paragraphs, see the judgment of the Upper Tribunal in the *MG(Portugal)* case when it returned to this jurisdiction: [2015] INLR 312.)

15. It remains unclear whether time in custody can be counted towards an individual's ten years residence. This was an issue raised in the *Vomero* case, in which a deportation decision taken in March 2007 was still being litigated 12 years later. It was heard the first time by the UK Supreme Court in 2016 (*FV (Italy) v Secretary of State for the Home Department* [2017] 1 All ER 999) where Lord Mance said at [20]:

> "In summary, the continuous period of five years' legal residence to which art 16(1) refers may have occurred at some time in the past. Once acquired from or after 30 April 2006, a right of permanent residence continues, unless lost under, or by analogy with, art 16(4). The residence referred to in art 28(3)(a) must, in contrast, have been 'for the previous ten years', previous that is to (here) the decision to deport. The calculations under arts 16(1) and 28(3)(a) are different: see *MG* para 37 and Advocate General Bot's opinion, para 28 in *Onuekwere*. But how different is not clear. The five-year period is expressly required to be continuous, and is (it seems) broken by any period of imprisonment, but will, once acquired, only be lost by absence (or, it may be, imprisonment) lasting two years. The ten-year previous period is, in contrast, only 'in principle' continuous, and may be non-continuous, where, for example, interrupted by a period of absence or imprisonment. Whether the ten years is to be counted by including or excluding any such period of interruption is however unclear."

16. The Supreme Court therefore referred (among others) the following question to the CJEU:

> "(2) whether the period of residence for the previous ten years, to which article 28(3)(a) refers, is (a) a simple calendar period looking back from the relevant date (here that of the decision to deport), including in it any periods of absence or imprisonment, (b) a potentially non-continuous period, derived by looking back from the relevant date and adding together period(s) when the relevant person was not absent or in prison, to arrive, if possible, at a total of ten years previous residence."

17. The CJEU held that it was unnecessary to answer this question in the light of its conclusion on a different question. Hence the continuing uncertainty. As to whether time in custody can count towards the ten year period. Mr Fripp, counsel for the Appellant, conceded before the FTT and UT that it does not count, but submits that in the light of recent jurisprudence of the CJEU that concession is no longer correct. On the view I take of the other issues before us (see below) this point would not affect the result in any event, and it is therefore unnecessary to decide whether to allow the concession to be withdrawn.

18. However, what does emerge clearly from *MG (Portugal)* is that whether or not a period of imprisonment can count towards the ten years, an individual claiming enhanced protection who has served time in custody must prove *both* that he had ten years' continuous residence ending with the date of the decision on a mathematical basis *and* that he was sufficiently integrated within the host state during that ten year period. After all, if the calculation were simply an arithmetical exercise the phrase "overall assessment" would be inappropriate. As the CJEU had held in *Land Baden-Wurttemberg v Tsakouridis* (Case C-145/09) [2011] INLR 415, the question is whether the individual's "integrative links" within the host state have been broken by the interruption. The factors to be taken into account in this "overall assessment" were set out at paragraphs [33] to [34] of the court's judgment in *Tsakouridis*:

> "33. The national authorities responsible for applying Article 28(3) of Directive 2004/38 are required to take all the relevant factors into consideration in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State. It must be ascertained whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned.
>
> 34. The fact that the person in question has been the subject of a forced return to the host Member State in order to serve a term of imprisonment there and the time spent in prison may, together with the factors listed in the preceding paragraph, be taken into account as part of the overall assessment required for determining whether the integrating links previously forged with the host Member State have been broken."

19. In *MG (Portugal)* the CJEU applied these factors to interruptions caused by custody as opposed to absence:

> "35. As for the question of the extent to which the non-continuous nature of the period of residence during the 10 years preceding the decision to expel the person concerned prevents him from enjoying enhanced protection, an overall assessment must be made of that person's situation on each occasion at the precise time when the question of expulsion arises (see, to that effect, *Tsakouridis*, paragraph 32).
>
> 36. In that regard, given that, in principle, periods of imprisonment interrupt the continuity of the period of residence for the purposes of Article 28(3)(a) of Directive 2004/38, such periods may – together with the other factors going to make up the entirety of relevant considerations in each individual case – be taken into account by the national authorities responsible for applying Article 28(3) of that directive as part of the overall assessment required for determining 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 that provision will be granted (see, to that effect, *Tsakouridis*, paragraph 34)."

20. This approach was recently confirmed by the CJEU in the joined references in *B v Land Baden-Württemberg* (C-316/16) and the *Vomero* case (C-424/16) [2019] QB 126. At paragraph [70], the Court considered the effect of periods of imprisonment:

> "70. As to whether periods of imprisonment may, by themselves and irrespective of periods of absence from the host Member State, also lead, where appropriate, to a severing of the link with that State and to the discontinuity of the period of residence in that State, the Court has held that although, in principle, such

> periods of imprisonment interrupt the continuity of the period of residence, for the purpose of Article 28(3)(a) of Directive 2004/38, it is nevertheless necessary — in order to determine whether those periods of imprisonment have broken the integrative links previously forged with the host Member State with the result that the person concerned is no longer entitled to the enhanced protection provided for in that provision — to carry out an overall assessment of the situation of that person at the precise time when the question of expulsion arises. In the context of that overall assessment, periods of imprisonment must be taken into consideration together with all the relevant factors in each individual case, including, as the case may be, the circumstance that the person concerned resided in the host Member State for the 10 years preceding his imprisonment (see, to that effect, judgment of 16 January 2014 [in *MG*] at paragraphs 33 to 38)."

21. The CJEU went on to consider the factors relevant in the "overall assessment":

> "72. As part of the overall assessment, mentioned in paragraph 70 above, which, in this case, is for the referring court to carry out, it is necessary to take into account, as regards the integrative links forged by B with the host Member State during the period of residence before his detention, the fact that, the more those integrative links with that State are solid — including from a social, cultural and family perspective, to the point where, for example, the person concerned is genuinely rooted in the society of that State, as found by the referring court in the main proceedings — the lower the probability that a period of detention could have resulted in those links being broken and, consequently, a discontinuity of the 10-year period of residence referred to in Article 28(3)(a) of Directive 2004/38.
>
> 73. Other relevant factors in that overall assessment may include, as observed by the Advocate General in points 123 to 125 of his Opinion, first, the nature of the offence that resulted in the period of imprisonment in question and the circumstances in which that offence was committed, and, secondly, all the relevant factors as regards the behaviour of the person concerned during the period of imprisonment.
>
> 74. While the nature of the offence and the circumstances in which it was committed shed light on the extent to which the person concerned has, as the case may be, become disconnected from the society of the host Member State, the attitude of the person concerned during his detention may, in turn, reinforce that disconnection or, conversely, help to maintain or restore links previously forged with the host Member State with a view to his future social reintegration in that State.
>
> …….

> 83. In the light of all the foregoing, the answer to the first three questions in Case C:316/16 is that 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. Those aspects include, inter alia, the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed and the conduct of the person concerned throughout the period of detention."

22. The decision of this court in *Secretary of State for the Home Department v Viscu* [2019] EWCA Civ 1052 was given after the FTT and UT had given their decisions in the present case. Flaux LJ summarized the principles established by the CJEU jurisprudence in relation to custodial sentences as including:

> "44. … (i) that the degree of protection against expulsion to which a Union national resident in another member state is entitled under the Directive is dependent upon the degree of integration of that individual in the member state; (ii) that, in general, a custodial sentence is indicative of a rejection of societal values and thus of a severing of integrative links with the member state; but (iii) that the extent to which there is such a severing of integrative links will depend upon an overall assessment of the individual's situation at the time of the expulsion decision."

The FTT judgment

23. FTT Judge Cassel summarised the Respondent's original expulsion decision at paragraphs [5] to [7] of his judgment:

> "5. It was accepted that he had been resident in the UK in accordance with the regulations although he had had not applied nor held a permanent right of residence card. Consideration was then given as to whether his deportation was justified on serious grounds of public policy or public security and it was concluded that by reason of the periods of imprisonment any residency accrued in the UK had been broken. It was decided that consideration was not required as to whether his deportation was justified on imperative grounds of public security.
>
> 6. Under Regulation 21(5) consideration was given to the assessment of threat and it was concluded that in the absence of

> any improvement in his personal circumstances that he had failed to address the issues that had prompted him to offend and it was considered reasonable to conclude that there remains a risk of re-offending and that he continued to pose a risk of harm to the public and that the evidence showed that he had a propensity to re-offend.
>
> 7. Proportionality was taken into account under Regulation 21(5)(a) and consideration was given to his personal circumstances. Reference was made to his age, that he had a UK born child who was in the care of his ex-wife, that he suffered from mental health illness, was partially blind and was receiving medications for his condition. Consideration was also given to a relationship he had with a British national who is also in the UK and the fact that most of his family members are in the UK. It was concluded that there had been no evidence to substantiate his claim that there is a degree of emotional dependency between him and his family members beyond the normal emotional ties and that he continued to pose a significant threat and that should he re-offend it would be of a similar or more serious nature and that his deportation is justified on grounds of public policy."

24. FTT Judge Cassel said at paragraph [24] of his judgment:-

> "24. The appellant as a citizen of the Netherlands is an EEA national. The deportation of an EEA national exercising treaty rights is subject to specific rules which provide both procedural safeguards and a more rigorous justification for deportation. The relevant Council Directive 2004/3H/EC has been transposed into domestic law by the 2006 Regulations. These provide that those EEA Nationals who would otherwise be entitled to enter or remain in the United Kingdom under the 2006 Regulations may only be removed on the grounds of public policy, public security or public health in accordance with regulation 19 (3) (b) o the 2006 Regulations. Regulation 24 (3) provides that such persons are to be treated as if they are persons to who s3 (5) (a) of the Immigration Act 1971 applies."

25. After citing Regulation 19(3) of the 2006 Regulations the judge continued at [26]:-

> "26. The Respondent maintains that the Appellant's continued presence in the United Kingdom poses a genuine, present and sufficiently serious threat to the interest of public policy that his deportation is justified under Regulation 21 which insofar as relevant to this appeal is as follows."

26. The judge went on to set out the text of Regulation 21 (1) – (6) except that instead of setting out the text of Regulation 21 (4) he simply put "n/a".

27. At [27] - [28] the judge continued :

"27. As a first step I have to decide if the Appellant is resident in the United Kingdom as a "qualified person" in accordance with regulation 6 of the 2006 Regulations or has acquired permanent residence under regulation 15. He has to establish his status on the balance of probabilities. The Appellant claims to have resided in the United Kingdom for some time. The Respondent maintains that he is unable to show 10 years continuous residence, and that no precise details in evidence have been provided. The onus is upon him on the balance of probabilities to establish that to be the case. Documents have been produced that show periods of residence and court appearances, and indeed professional appointments referred to in reports and correspondence and in other documents which appear to show that he has been in the UK for substantial periods. However, there is simply no credible evidence to show that period of time as continuous as required under the regulations.

28. In giving evidence the Appellant accepts that all of the convictions are correctly recorded in the decision letter save that which is recorded for 27 September 2000 at Southwark Crown Court for common assault and for threatening behaviour and 27 February 2004 at Tower Bridge Magistrates Court for public order offences. I am prepared to accept his evidence but that still leaves very many criminal offences covering a range of offences, many of which involve possession of controlled drugs or offences linked to serious breaches of public order, and include the possession of weapons. The Appellant relies on *MG (prison-Article 28(3)(a) of Citizens Directive) Portugal* [2014] UKUT 00392 (IAC) and that time that he has spent in prison does not necessarily prevent him from acquiring the highest protection counted back from the date of assessment in March 2017. At paragraph 48 of that judgment is the following comment ".. the fact that the Court specifies that "in principle" periods of imprisonment interrupt the continuity of residence for the purposes of meeting the 10 year requirement can only mean that so far as establishing integrative links is concerned such period must have a negative impact." In the Appellant's case there are two periods of imprisonment. The first was imposed by Woolwich Crown Court on 16 October 2012 when he was sentenced to 12 months for affray, 6 months consecutive for offensive weapon in a public place, 3 months for destroying or damaging property, to run consecutively and a further one month for failing to comply with an earlier suspended sentence. The second period of imprisonment was imposed by Inner London Crown Court on 10 June 2015 when for possession of controlled drugs and offensive weapons he was sentenced to 13 months imprisonment. As part of the overall assessment, and I accept that the periods of imprisonment do not automatically disqualify him from enhanced protection under the regulations, and that he

> has lived in the UK for many years beforehand, I find that although in themselves the criminal convictions do not determine the issue, the Crown Courts having found that the nature of the offences are serious ones which merited periods of imprisonment which are not insubstantial they do have a negative impact, do interrupt the continuity of residence and he is not entitled to enhanced protection."
>
> 29. The Respondent accepts that the Appellant has resided in the United Kingdom in accordance with the Regulations for a "continuous period of 5 years" as required by regulation 15(1)(a). It is well established law that that protection once acquired is not be subsequent periods of imprisonment. I have to consider his case in accordance with regulation 21 and in particular whether the decision is proportionate. In doing so I have to consider if the Appellant is rehabilitated or making good progress with his rehabilitation and if so whether that rehabilitation is or is likely on present evidence to be durable."

28. The judge then referred to the judgment of this court in *R (Essa) v Upper Tribunal (Asylum and Immigration Chamber) and another* [2012] EWCA 1718, and continued:

> 30. If an offender's rehabilitation is incomplete, it is relevant to consider the offender's prospects of future rehabilitation (a) if he is deported to his home state and (b) if he remains in the host state. The prospects of rehabilitation are relevant even if the offender does not have a permanent right of residence…. In *SSHD v Dumliauskas & others* [2015] EWCA Civ 145, the Court of Appeal made it clear that in the case of an offender with no permanent right of residence "substantial weight" should not be given to rehabilitation as "the whole point of deportation is to remove from this country someone whose offending renders him a risk to the public".
>
> 31. In every case the personal conduct of the person involved and in particular the indications of future risk or threats to public policy must be assessed. Criminal convictions are never enough by themselves. The exclusion or deportation of an EEA national cannot be justified on the grounds of general deterrence.
>
> 32. The Appellant has repeatedly failed to comply with court orders. He has reoffended with regrettable regularity, notwithstanding the support he has received from his father, among others and state and other agencies. I find there is every likelihood the Appellant will persist in his criminal behaviour if he is allowed to remain in the United Kingdom and that therefore his conduct represents a threat to society… Apart from some course work in prison, there is little by way of credible evidence that he has undertaken rehabilitative work. I consider he poses a threat. He will be able to continue to work towards rehabilitation when he returns to the Netherlands."

29. Judge Cassel's conclusion on the appeal under the 2006 Regulations was as follows (at [36]-[37]):-

> "36. There is nothing to suggest the Appellant's removal from the United Kingdom would be disproportionate in all the circumstances. His criminality suggests that he is prone to aggression. I do not consider that it would be unreasonable to expect him to return to reside in the Netherlands or that conditions for him would be unduly harsh.
>
> 37. Accordingly, the precondition for his removal, regulation 19(3) is satisfied. The Respondent *has satisfied the test of proportionality on the balance of probabilities*. The absence of any evidence that a rehabilitative programme for him would be available in the Netherlands is not a matter that carries much in the issue of proportionality. I dismiss this part of his appeal."

The decision of the Upper Tribunal

30. The appeal to the Upper Tribunal was heard by UT Judge Rimington, whose decision was given on 13 December 2017. She found no error of law in the decision of FTT Judge Cassel and dismissed the appeal. It is therefore primarily the reasoning of the FTT which has been the subject of argument and scrutiny in this court. Nevertheless, I will set out some of Judge Rimington's conclusions. On the issue of whether the Appellant had proved continuous residence she said:-

> "43. I do not accept that the judge's resistance to the appellant showing that he had sent sufficient documents to show periods of residence, demonstrated that the judge did not accept that the appellant had achieved permanent residence. That was part and parcel of the assessment of integration as I have alluded to above. That said the permanent residence was said to have been acquired between 2006 and 2011.
>
> 44. Further from the assessment of the limited evidence prior to 2006, the judge did not accept that the appellant had indeed proved with documentary evidence his continuous residence in the UK. Even the Directive requires the requisite residence. The Secretary of State accepted the evidence in relation to the period 2007 to 2011 for the purposes of 5 years residence. The judge's view of the evidence was more with a view to the integrative links that the appellant had rather than to conclude whether he had permanent residence or not, but the fact remains that the judge found there was scant evidence that the appellant had resided in the UK between his release in 2002 and 2007 from when the appellant provided documentary evidence. …
>
> 45. Exploring the position with regard the second level of protection or 'serious grounds', at paragraph 29 the judge realised that the appellant had been deemed to have permanent residence and indeed at paragraph 26 identified that relevant decision

> could not be taken in respect of a person with permanent residence except on serious grounds of public policy. Particularly at paragraph 30 the judge addressed the issue of rehabilitation, identifying that in the case of an offender with no permanent right of residence 'substantial weight' should not be given to rehabilitation: *SSHD v Dumliauskas* [2015] EWCA Civ 145. In this instances, the judge nonetheless proceeded to assess the prospects of rehabilitation, an exercise, as he directed himself, he would undertake when applying the 'serious grounds' test. I accept that the judge had the test of 'serious grounds' in mind.
>
> …
>
> 48. It is clear that the judge, although referring at paragraph 27, to there being no credible evidence to show that the appellant had spent a period of time continuous as required under the Regulation, nonetheless accepted that the respondent had considered the appellant had achieved a continuous period of five years, that is permanent residence, as required by Regulation 15(1)(a)."

31. On the issue of integration UT Judge Rimington said:-

> "40. That the appellant was not sentenced for two years does not undermine the finding of the judge that in his view the overall convictions and sentences of imprisonment - that is two spells of imprisonment in the four years prior to the deportation order - undermined the claim of integration and thus the continuity of residence was broken. That was sufficiently reasoned on the part of the judge.
>
> 41. It was argued that a period of imprisonment of less than two years did not break continuity and even cumulatively the applicant's two periods of imprisonment did not meet this length of sentence. I do not accept that *Vomero* lays down a hard and fast rule and it is open to the judge to decide on both whether the sentence is capable of breaking continuity of residence and integration. *Vomero* refers to the loss of permanent residence through the absence from the host member state. That is not the position here and mere absence is wholly different from being imprisoned.
>
> 42. Nor do I accept that *MG* is authority for the proposition that less than one year sentence should not be taken into account. As that authority emphasised any decision was fact sensitive. It is not the case that the judge merely concluded that the periods of imprisonment excluded the appellant from claiming the enhanced protection outright. Although it was argued that two years of imprisonment and an absence of two years could be taken into account it is quite clear that there needed to be an

> overall assessment as to whether it was still possible for the appellant to qualify for enhanced protection and in the circumstances clearly the judge did not accept that it could. The judge did address the criteria under Regulation 21(4) and overall gave cogent reasoning for finding that the prison sentences had indeed broken the continuity of residence.
>
> …
>
> Further and overall the judge gave an adequate assessment as to whether the appellant was integrated and concluded on grounds which were open to him that the appellant was not.
>
> 48. … The judge explored the criminal offending of the appellant and found every likelihood the appellant would persist in his criminal behaviour, which included violent behaviour, if allowed to remain in the United Kingdom. The judge found that the appellant remained a threat to society. It is implicit that the judge found the appellant's removal justified overall on 'serious grounds' having explored his personal circumstances and his offending (the reasons which I refer to below). The judge's reasoning was in parts intertwined but this does not undermine his conclusions overall.

The appeal to this court

Ground 1: ten years' residence

The parties' submissions

32. Mr Fripp made two submissions on behalf of the Appellant. First, he submitted that at paragraph [27] of his judgment, the FTT Judge assumed that in order to establish ten years' residence, the Appellant had to reside as a "qualified person in accordance with Regulation 6 of the 2006 Regulations" throughout the ten year period. This assumption was erroneous because the Appellant only had to show that (a) he had resided in the United Kingdom for ten years prior to the expulsion decision in March 2016 and (b) he had qualified for permanent residence. Mr Fripp criticised the FTT's apparent conclusion that the claim to ten years' continuous residence failed even as a matter of arithmetic. The Respondent's decision letter of 23 March 2016 stated at paragraph 52 that "we are aware……that you have been in the UK since 1999 when you enrolled at school".

33. Secondly, Mr Fripp submitted that the FTT Judge failed to properly carry out an "overall assessment" of the Appellant's integrative links. At paragraph [28], the FTT Judge concluded that the appellant was not entitled to enhanced protection because of the nature of his offending. Mr Fripp submitted that in doing so the Judge failed to consider other relevant factors, such as the length of time which the appellant had spent in the Netherlands (four years) compared to the United Kingdom (18 years), the fact that the Appellant's periods of imprisonment represented a small proportion of his time in the United Kingdom, or the Appellant's family links here: he told us that when in custody Mr Hussein was visited regularly by members of his family.

34. Ms Van Overdijk, for the Respondent, submitted that the FTT Judge was not considering whether the Appellant was a "qualified person". He was considering the issue of continuous residence. The last sentence of paragraph [27], in which FTT Judge concluded that "there is simply no credible evidence to show that period of time as continuous as required under the regulations", indicates that the Judge's mind was focused on the question of whether there was insufficient evidence of residence before 2006. Ms Van Overdijk submitted that it was necessary to consider the Appellant's pre-2006 residence because time in custody cannot be counted towards the ten year period, so the Appellant had to prove residence prior to 2006 to establish ten years residence. Ms Van Overdijk further submitted that even if the FTT Judge was considering whether the Appellant was exercising Treaty rights during this period, it was immaterial to the Judge's conclusion that the Appellant had not proved ten years continuous residence.

35. In relation to the FTT's "overall assessment", Ms Van Overdijk submitted that the judge did assess all the relevant factors. At paragraphs [33] to [36] of his judgment, the judge considered issues such as the Appellant's connections in the United Kingdom and the length of his residence in the United Kingdom compared to the Netherlands. Ms Van Overdijk submitted that any disagreement with the FTT Judge's assessment amounts to a disagreement with his factual findings.

Discussion

36. There is force in the submission that the findings of the FTT on the question of whether the Appellant had in fact been continuously resident in the UK for ten years prior to the deportation decision are not entirely clear. But even if it is right that Mr Hussein qualified on what I have called the mathematical basis, that would still leave the vital question of assessing whether his integrative links to the UK as his host state were broken by his repeated offending.

37. The question of whether periods in custody break the integrative links between the offender and the host state is in my view a much narrower question than that of whether there are imperative grounds of public security, or serious grounds of public policy or security, justifying deportation, let alone the question of whether deportation can be challenged on ECHR Article 8 grounds. I note the wording used by the CJEU in paragraph 83 of *Vomero*. The aspects of the case that must be taken into account in deciding whether, notwithstanding the detention, the integrative links with the host State have not been broken include "the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed and the conduct of the person concerned throughout the period of detention". Except for the first, all these listed factors focus on the offending and the custodial sentence. Whether the offender was visited regularly or at all while in custody seems to me of little if any importance in the overall assessment.

38. On this issue, I consider that the conclusions of the FTT Judge were ones which he was fully entitled to reach. He rightly accepted that the criminal convictions and periods of imprisonment do not automatically disqualify an individual from enhanced protection, but they do have a negative effect. As Flaux LJ said in *Viscu*, a custodial sentence is in general indicative of a rejection of societal values and thus of a severing of integrative links with the host state. Repeated offending attracting a series of custodial sentences of more than trivial length is even more indicative of the same thing. These propositions

are not inconsistent with the principle that an EEA national cannot be deported on the basis of criminal offending simply to deter others.

39. I would accordingly dismiss the appeal on Ground 1.

Ground 2: serious grounds of public policy or public security

The parties' submissions

40. Mr Fripp submitted that the FTT correctly recognised that the Appellant had acquired permanent residence under Regulation 15(1)(a), but failed to set out and apply the appropriate test for deportation under Regulation 21(3). At paragraph [32] of his judgment, the judge incorrectly framed the test as whether the Appellant's conduct "represents a present threat to society" and concluded that the Appellant "poses such a threat". Mr Fripp reminded us that the test is whether there are "serious grounds of public policy or public security" for removing the Appellant as a result of his conduct. The UT Judge concluded that the FTT Judge must have had in mind the "serious grounds" test because the FTT Judge went on to consider the Appellant's rehabilitation - an exercise which would be undertaken when applying the "serious grounds" test. Mr Fripp submitted that this interpretation is flawed because the FTT Judge himself stated at paragraph [30] that "the prospects of rehabilitation are relevant even if the offender does not have a permanent right of residence".

41. Ms Van Overdijk submitted that the FTT Judge addressed and applied the correct test from Regulation 21(3). At paragraph [26] of his judgment, the FTT Judge noted the Respondent's submission "that the Appellant's continued presence in the United Kingdom poses a genuine, present and sufficiently serious threat". At [29] he expressly referred to Regulation 21 when considering the impact of the Appellant's five years residence. The FTT Judge then considered at [30] and [32] the Appellant's behaviour and his risk to society.

Discussion

42. It is unfortunately not clear whether the FTT Judge considered and applied the "serious grounds of public policy or public security" test required by Regulation 21(3). The Regulation itself is set out at paragraph [26] of the judgment, which also notes the Respondent's contention that the Appellant's continued presence in the UK represents a "genuine, present and sufficiently serious threat to the interest of public policy that his deportation is justified". But after that the "serious grounds of public policy or public security" test disappears from view. In paragraph [29] the judge says that he has to consider the case in accordance with Regulation 21 "and in particular whether the decision is proportionate". He then refers to *Essa* and the requirement for the deportation of any EEA national, irrespective of whether permanent residence has been achieved, that the claimant must represent "a present threat to public policy". In paragraph [32] he finds that it is likely that the Appellant will persist in offending if allowed to remain in the UK "and that therefore his conduct represents a present threat to society". In paragraph [36] he finds that there is nothing to suggest that removal from the UK would be disproportionate; and in paragraph [37] concludes:

> "Accordingly the precondition for his removal, regulation 19(3), is satisfied. The Respondent has satisfied the test of proportionality on the balance of probabilities".

43. In view of all these passages, in particular the last, I cannot be satisfied that the FTT Judge, in rejecting Mr Hussein's appeal based on his status as a permanent resident, was applying the "serious grounds of public policy or public security" test laid down by Regulation 21(3) of the 2006 Regulations.

44. In many appeals from tribunals where a decision below is found to have been flawed in law this court can remake the decision itself. But in a case of this type we have to have regard to the observations of the CJEU in *B v Land Baden-Württemburg.* The starting point is that it is for the authority which initially adopts the expulsion decision (in this case, the respondent) to make the assessment of whether there are grounds of public policy or public security justifying the expulsion at the time it adopts that decision. The court continued at [91]:

> "However, that does not preclude the possibility that, where the actual enforcement of that decision is deferred for a certain period of time, it may be necessary to carry out a fresh, updated assessment of whether the appropriate test (in this case serious grounds of public policy or public security) remains applicable."

45. This passage was cited by Lord Reed DPSC on the second appearance of the *Vomero* case in the UK Supreme Court: [2020] 1 All ER 287. The court remitted the case to the Upper Tribunal to be reconsidered. Although the delay in the present case since the deportation decision of 23 March 2016 – almost 4 years - is nothing like as long as the 12 year delay in Mr Vomero's case, it would be wrong in my view not to give Mr Hussein the opportunity of arguing before the Upper Tribunal that the grounds for deportation required in his case are no longer applicable.

Conclusion

46. On Ground 2, I would allow the appeal and remit the case to the Upper Tribunal for a new judge to reach a decision on whether the Appellant's removal can still be justified on serious grounds of public policy or public security under Regulation 21(3).

Footnote

47. After this judgment was sent to counsel in draft Mr Fripp sought an anonymity direction, so that his client would be described as IH (Netherlands), "not for any reason of his interests, but because identifying him may by extension allow the identification of his minor child and stepchildren and prejudice the children or any of them, and it is in their best interests that the risk of this be averted". I would decline to make such an order: the FTT and UT judgments were published giving the Appellant's full name, the hearing before us was listed and heard in open court under his name, and there are no exceptional circumstances (such as a risk on return in an asylum case) justifying a direction for anonymity.

Lady Justice Rose:

48. I agree.

Lord Justice Lewison:

49. I also agree.

Schedule 1

Date	Offence and sentence
27/09/2000	Offence: common assault Sentence: 12-month probation order
27/09/2000	Offence: threatening behaviour Sentence: 12-month probation order
04/12/2000	Offence: robbery Sentence: 3 years detention in a young offenders institution
04/12/2000	Offence: robbery Sentence: 3 years detention in a young offenders institution (to run concurrently)
21/02/2004	Offence: failing to surrender to custody Sentence: £100 fine
27/02/2004	Offence: disorderly behaviour or threatening/abusive/insulting words likely to cause harassment, alarm or distress Sentence: £50 fine
24/06/2004	Offence: affray and damage to property Sentence: £50 fine
23/05/2006	Offence: possession of Class C controlled drug Sentence: conditional discharge (24 months)
08/03/2007	Offence: possession of Class C controlled drug Sentence: community order and unpaid work requirement (80 hours)
08/03/2007	Offence: breach of conditional discharge Sentence: community order supervision (12 months) and unpaid work requirement (80 hours)
17/02/2011	Offence: possession of Class B controlled drug (Cannabis) Sentence: £65 fine, and forfeiture and destruction of Cannabis
15/08/2011	Offence: possession of Class B controlled drug (Cannabis) Sentence: forfeiture and destruction of Cannabis
15/08/2011	Offence: possession of knife blade or sharp pointed article in a public place Sentence: imprisonment of 10 weeks, suspended for 12 months, and a 90 day unpaid work requirement (100 hours)
15/08/2011	Offence: failure to surrender to custody at appointed time Sentence: suspended sentence (2 weeks' consecutive), 12 months supervision order, 12 months activity requirement, 90 days unpaid work requirement (100 hours)
19/03/2012	Offence: possession of Class B controlled drug (Cannabis) Sentence: £65 fine
19/03/2012	Offence: breach of suspended sentence

	Sentence: suspended imprisonment's operational period is extended from 12 months to 15 months
16/10/2012	Offence: possession of an offensive weapon in a public place Sentence: 6 months consecutive imprisonment, and forfeiture and destruction of baseball bat
16/10/2012	Offence: destroying or damaging property Sentence: imprisonment of 3 months consecutive
16/10/2012	Offence: affray Sentence: 12 months imprisonment
16/10/2012	Offence: failure to comply with the community requirements of a suspended sentence order Sentence: imprisonment for 1 month consecutive, suspended sentence activated
10/06/2015	Offence: possession of an offensive weapon in a public place Sentence: 12 months imprisonment
10/06/2015	Offence: possession of an article with a pointed blade in a public place Sentence: 12 months imprisonment to run concurrent
10/06/2015	Offence: possession of Class A controlled drug (Cocaine) Sentence: sentenced to 1 month imprisonment to run consecutive
10/06/2015	Offence: possession of Class B controlled drug (Cannabis) Sentence: sentenced to 1 month imprisonment to run concurrent

IN THE COURT OF APPEAL **Ref C9/2018/1521**
CIVIL DIVISION
IN THE MATTER OF AN APPEAL FROM
THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

12 February 2020

B E T W E E N :

ISMAIL HUSSEIN

Appellant

v

SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent

ORDER

Upon hearing Mr Eric Fripp and Ms Bojana Asanovic of Counsel for the Appellant and Miss Claire van Overdijk of Counsel for the Respondent:

1. **The appeal from the decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 13 December 2017 be allowed as regards Ground 2, relating to application of Regulation 21(3) Immigration (EEA) Regulations 2006, and the appeal be remitted to the Upper Tribunal for re-making on this basis;**

2. **The appeal be dismissed on Ground 1, relating to application of Regulation 21(4) Immigration (EEA) Regulations 2006, and the Appellant's related application for permission to appeal to the UK Supreme Court be refused;**

3. **The Respondent do pay 50% of the Appellant's reasonable costs of the appeal, to be subject to detailed assessment if not agreed.**

4. As to the remaining costs the Appellant shall filed and serve written submissions not exceeding 4 pages in length by 1600 on Monday 17 February 2020, the Respondent shall serve submissions not exceeding that length by 1600 on Friday 21 February 2020, and any brief final reply by the Appellant must be filed by 1600 on Tuesday 25 February 2020, the matter thereafter to be passed to a Lord or Lady Justice of Appeal so that a decision may be taken on the papers.

5. The Appellant shall as necessary have detailed assessment under the relevant Civil Legal Aid regulations.

BY THE COURT