Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00408/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 23rd April 2019	**On 02nd May 2019**

Before

UPPER TRIBUNAL JUDGE COKER

Between

GRACJAN [O]
(anonymity direction not made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Paramjorthy, instructed by ABN Solicitors
For the Respondent: Mr I Jarvis on 30th January and Mr E Tufan on 23rd April, Senior Home Office Presenting Officers

DETERMINATION AND REASONS

By a decision promulgated on 7th February 2019, the Upper Tribunal found an error of law by the First-tier Tribunal who had allowed the appeal by Mr [O] against the deportation decision of the Secretary of State made on 17th July 2017. The Upper Tribunal Panel (Lord Beckett and Upper Tribunal Judge Coker) found as follows:

1. Mr [O], a Polish national date of birth 19 December 1997, was served with a decision to deport on 17th July 2017 in accordance with regulation 23(6)(b) and regulation 27 of the Immigration European Economic Area)

Regulations 2016 ("2016 Regulations"), following his conviction and sentence of 28 months' imprisonment for drugs offences.

2. His appeal against the deportation decision was allowed by First-tier Tribunal Judge Ruth for reasons set out in a decision promulgated on 13th August 2018. The Secretary of State sought and was granted permission to appeal on the grounds that in concluding that Mr [O] could only be deported on imperative grounds, the judge had failed to properly apply the law in determining that Mr [O]'s continuity of residence and integration in the UK had not been broken by his period of imprisonment; that length of residence was different from integration.

3. Other grounds were set out but, very sensibly, not relied upon by Mr Jarvis.

Background

4. The SSHD does not dispute that Mr [O] has acquired a permanent right of residence. Mr [O]'s exact date of entry is not known but the SSHD acknowledges that there have been applications made by and on behalf of him since 14th November 2002. He was granted leave to remain under the EC Association Agreement; Poland acceded to the EEA on 1st May 2004 and it was acknowledged that he would only have had a right of free movement since then.

5. The SSHD, in the reasons for the decision, did not accept that Mr [O] had acquired 10 years residence, although he accepted that Mr [O] had acquired permanent residence. The decision gave reasons why, in the SSHD's opinion, Mr [O]'s deportation was justified on serious grounds of public policy or public security. In [42] to [53], the First-tier Tribunal judge set out the evidence relating to Mr [O]'s residence in the UK. He concluded, with adequate reasons, that Mr [O] had accrued some 12 years residence in the UK, prior to his first conviction, exercising Treaty Rights. Prior to conviction he had been in full time education. He has been resident in the UK since at least November 2002 (age 9). His offences were committed as an adult. The issue was whether his convictions and behaviour were such as to break the integrative links with the UK. If not, then Mr [O] is entitled to the highest level of protection and deportation is only justified on imperative grounds of public policy or security. Mr Jarvis acknowledged that if Mr [O] was entitled to the third, highest level of protection then it was unlikely that the threshold was crossed.

6. Mr [O]'s convictions:

22nd July 2016	convicted of possession of Class B (cannabis/cannabis resin), sentenced on 3rd October 2016 at the crown Court resulting in forfeiture and destruction.
30th September 2016	convicted of 4 counts supplying Class A (cocaine) and 2 counts of possession with intent to supply (Cocaine and heroin); sentenced to 28 months' imprisonment, victim surcharge, forfeiture and destruction, forfeiture of cash (£470,000) and a criminal behaviour order (which included a prohibition on association with his co-defendant) for 5 years. He was released on licence after serving 8 months.

2017	Recalled from licence following driving offences including driving without insurance, dangerous driving and assault on a police officer. He had borrowed the car form his former co-defendant.

7. The OASys assessment, completed on 14th November 2016 before his recall from licence, records, *inter alia*, information provided by Mr [O] to the interviewing officer. This includes his statement that he would not commit further offences, that he had, between 29th April 2016 and 18th June 2016, been making money in his spare time by travelling to Ruislip and selling drugs. The OASys report, in assessment risk of serious harm layer 1 records the risk to the public of illicit drugs and expresses the opinion that a return to association with those who helped him start selling drugs and frequenting areas where he had sold drugs would increase the risk. It goes on to state

> "It is unlikely that Mr [O] would choose to return to drug dealing. His offence is described by him as a stupid mistake and was out of character compared to any previous behaviour. He tried his hand at making some easy money and has been shocked by the result and is deeply regretful."

8. The overall conclusion of the OASys report was that the evidence before the interviewing officer was that Mr [O] was at low risk of serious harm; current evidence did not indicate likelihood of serious harm.

Error of law

9. Before the First-tier Tribunal the SSHD submitted that Mr [O] was a persistent offender whose criminality had broken and ended his academic studies; he appeared to have no work or study plans, no family life, no partner and no particularly strong ties to the UK. Mr Paramjorthy who appeared for Mr [O] before the First-tier Tribunal submitted that Mr [O] was not a persistent offender, the offences for which he had been recalled on license were not drug related and that there was insufficient evidence to suggest that the original crimes and the much less serious crimes which had led to his recall from license represented a break in integrative links. He was not a prolific offender, had completed various course to address his offending behaviour including courses on consequential thinking.

10. The First-tier Tribunal judge referred to *Vomero* and set out [70] to [74] and [80] in his decision. The judge identified that he was required to undertake

> "an overall assessment of all the circumstances in deciding whether he is entitled to the highest level of protection from expulsion".

11. The First-tier Tribunal judge set out his decision with subheadings but some of the findings under the heading *EEA Regulation 27* were of relevance to the findings made under the heading *the overall assessment – is the continuity of 10 years residence broken.* The First-tier Tribunal judge found:

> 61. While the appellant's serious criminality and the fact that he committed further, albeit less serious, crimes while on licence, does suggest he has severed his links to the community, I take the view his behaviour in detention as set out by those who knew of him intimately while in prison, is indicative of a person who has made the best possible efforts [sic] to re-

> forge his connections and prepare to return to the community in which he was previously, undoubtedly embedded.
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> 62. I look at all of these matters in the round as required by *Vomero,* within the context of the appellant's thirteen years of lawful residence as an EEA national before his conviction. Having regard to the circumstances of his offending and reoffending, the view of the probation service in the OASys report that he represents a low risk of future offending, the excellent testimonials from those who knew him best in prison, his age now and the fact that for most of his life in the UK he has been in education and living with his nuclear family, I conclude that, notwithstanding his re-offending on licence, his period of imprisonment does not break the continuity of his residence.
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> 67. It is difficult to imagine more foolish behaviour from a young man on licence after the commission of serious drug offences and although the probation service state in the OASys report that the appellant represents a low risk of reoffending, that report was prepared before the appellant actually did reoffend. While the documents before me show that he has completed some relevant courses which might be taken to address aspects of his propensity to reoffend, including a course on consequential thinking, and has been working hard with his case manager to prepare for release, as set out in her letter of 17 July 2018, the fact remains that he failed to have insight to avoid placing himself in a situation where he was involved in further criminality on licence.
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> 68. … One of his conditions on licence was not to associate with that person [his former co-defendant] in public. Although it is not clear whether he did associate with that person in breach of his licence, the fact of his involvement in any way with that individual, including by borrowing his car, represents a complete failure of the appellant to understand the seriousness of his situation, to amend his behaviour and to avoid placing himself in circumstances which could lead to further criminality.
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> …
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> 70. … I take the view he does pose some continuing risk to the public, albeit very likely not in relation to offences of similar gravity to those leading to his imprisonment in 2016.

12. The sentencing remarks of the judge at Isleworth Crown Court considered Mr [O]'s relative youth, that he pleaded guilty at the first opportunity, that he had good educational qualifications and that although he played a significant role in the commission of the offences there were some aspects which indicated he played a lesser role. The Criminal Behaviour Order required him not to, *inter alia*, associate with his former co-defendant in public.

13. The First-tier Tribunal judge, in his decision at [60], refers to the evidence being suggestive of severed links and the re-forging of connections. When this is read with the subsequent paragraphs in the context of the recall to prison whilst he was on licence and that there is a Criminal Behaviour

> Order in force which suggests continuing risk and that the finding of the First-tier Tribunal judge that there is a continuing risk to the public he will commit further offences, there is a contradiction in the findings by the judge that the offences have not broken the integrative links. It may well be that the offences which led to his recall were not of the same magnitude as those for which he was convicted and sentenced in October 2016, but they are nevertheless offences committed whilst on licence. In the First-tier Tribunal judge's words, the evidence is suggestive of Mr [O] having 'severed his links to the community' albeit he is making 'the best possible efforts to re-forge his connections'.
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> 14. The wording used by the Judge is itself an acknowledgement that such integrative links as there are have been severed. We are satisfied that the First-tier Tribunal judge has erred in law in finding Mr [O] is entitled to the highest level of protection from deportation such that the decision is set aside to be remade. The judge has provided contradictory reasoning for his conclusion that integrative links have not been broken given the finding in [60] that they have, that he continues to be a risk to the public and that he was recalled from licence.

1. Although provision had been made for oral evidence from the appellant and his mother, Mr Tufan confirmed he did not seek to cross-examine either possible witness; there was no dispute as to the underlying facts and the issues were firstly whether the appellant had integrative links with the UK and if so had he lost them and secondly if he was only entitled to the 'serious grounds' level of protection, did he meet that threshold.

Integrative links

2. Mr [O] has been resident in the UK since at least November 2002, aged 4. He attended school in the UK and, prior to conviction had been in full time education. He had no offending record prior to the offences, which were committed when he was an adult. His criminal offending history is set out above; he was crime-free for 14 years and there is no suggestion that he was unruly at school or displayed any anti-social behaviour prior to arrest. He obtained GCSEs and completed a first year at college studying 'electricals'; it was during his second year, just prior to taking some exams, that he was arrested for the drugs offences. He speaks English and Polish but cannot read or write Polish. His close family (parents and younger brother) are in the UK and have been since he arrived; his father arriving a year earlier. None have returned to Poland for any length of time. There was a period of time when his parents separated but they are now together. Mr [O]'s Probation officer, in a short report dated 4th April 2019 said that Mr [O]'s parents continued to be "a strong supportive factor". The sentencing judge referred to the family problems at the time of sentence. It is accepted by the SSHD that Mr [O] has acquired permanent residence.

3. The sentencing judge took the view that Mr [O] played "a significant role" in the drug dealing but that there were some aspects which indicated that he "played a lesser role". Neither of these aspects is amplified in the sentencing remarks but the judge sentenced Mr [O] within the Category 3 guidelines – street dealing. He was not sentenced as a gang member or as a possible gang member. Mr Tufan in submissions did not assert the appellant had been a gang member but said that he was "not sure" whether the offences indicated gang membership and that gang membership was an aggravating feature. There is no indication that there is a "gang

membership" aspect to the appellant's criminality and I reject that submission, in so far as it impacts upon my decision.

4. The OASys report in November 2016 assessed him as being at low risk of serious harm to the public in the future. It concludes that circumstances that might increase risk include association with those who helped him to start selling drugs and frequenting areas of his former offending. The writer says it

> "is unlikely Mr [O] would return to drug dealing. His offence is described by him as a stupid mistake and was out of character compared to any previous behaviour. He tried his hand at making easy money and has been shocked by the result and is deeply regretful."

The factors that are likely to reduce future risk are described in the report as full-time employment, a positive law-abiding peer group, family support and continuing studies in electrical installation.

5. Mr Tufan submitted that the committing of crime was such as to sever links. The criminal activity had been of increasing seriousness, he had breached his licence and been recalled; this was highly suggestive of the severance of any integrative links that may have been forged and he could not therefore benefit from the highest threshold. Mr [O] was, he submitted a persistent offender.

6. In addition to drawing my attention to the lengthy period of time the appellant had been in the UK, crime-free, and that the centre of the appellant's life could not be anywhere other than the UK, Mr Paramjorthy submitted that the OASys report, the sentencing remarks and the appellant's life during his imprisonment and upon release were indicative of the fact that the integrative links had not been broken.

7. In *B v Land Baden-Wurttemberg* (C-316/16) and *Secretary of State for the Home Department v Vomero* (C-424/16) the ECJ gave a preliminary ruling on 17th April 2018 and held, in response to the three questions before it:

> **Was it a prerequisite of eligibility for the protection against expulsion provided for in Directive 2004/38 art.28(3)(a) that the person concerned have a right of permanent residence?** Yes. The court noted that the protection against expulsion provided for in the directive gradually increased in proportion to the degree of integration of the EU citizen concerned in the host Member State. Thus, whereas a citizen with a permanent right of residence may only be expelled on 'serious grounds of public policy or public security', a citizen who had resided in the host Member State for the previous ten years may only be expelled on 'imperative grounds of public security'. Accordingly, the enhanced protection linked to a 10-year period of residence was available to an EU citizen only if he first satisfied the eligibility condition for the lower level of protection, namely having a right of permanent residence after residing legally in the host Member State for a continuous period of five years.
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> **How should the period corresponding to the 'previous ten years' within the meaning of Directive 2004/38 art.28(3)(a) be calculated?** The 10-year period of residence must be calculated by counting back and that period must, in principle, be continuous. The court observed, however, that Directive 2004/38 did not specify the circumstances which were capable of interrupting the 10-year period of residence for the purposes of the acquisition of enhanced protection. The court therefore held that an overall assessment must systematically be made of the situation of the person concerned at the time when the question of

expulsion arose. In that assessment, the national authorities had to take all the relevant factors into consideration in each individual case and must ascertain whether the periods of absence from the host Member State involved the transfer to another State of the centre of the personal, family or occupational interests of the person concerned.

Did periods of imprisonment automatically deprive a person of the enhanced protection in Directive 2004/38 art.28(3)(a)? No. To determine whether detention periods had broken the integrative links previously forged with the host Member State, it was necessary to carry out an overall assessment of the situation of the person concerned at the precise time when the question of expulsion arose. Thus, periods of detention did not automatically deprive a person of the enhanced protection. The court also pointed out that the overall assessment of the situation of the person concerned must take into account the strength of the integrative links forged with the host Member State before his detention as well as the nature of the offence, the circumstances in which that offence was committed and the behaviour of the person concerned during the period of imprisonment.

At what point in time should compliance with the condition of having 'resided in the host Member State for the previous ten years' be assessed? At the date on which the initial expulsion decision was adopted. However, where an expulsion decision was adopted but its enforcement was deferred for a certain period of time, it may be necessary to carry out a fresh assessment of whether the person concerned represented a genuine, present threat to public security.

8. In *Land Baden-Wurttemberg v Tsakourides* (C145/09) in a preliminary ruling given on 23rd November 2010, the ECJ held

(1) Article 28(3)(a) was silent as to the circumstances capable of interrupting the 10-year residence period. Starting from the premise that, like the right of permanent residence, art.28(3)(a) protection was acquired after a certain length of residence in the host Member State and could subsequently be lost, it could be possible to apply the criteria in art.16(4) by analogy. The national authority had to take into account all the relevant factors in each individual case, in particular: the duration of each period of absence; the cumulative duration and the frequency of those absences; the reasons for them; and whether they involved the transfer of the individual's centre of personal, family or occupational interests to another state. The fact that an individual had been forced to return to the host Member State in order to serve a term of imprisonment could, together with the time spent in prison and with the factors listed above, be taken into account as part of the overall assessment. It was for the national court to assess, in the main proceedings, whether the integrating links with the host Member State had been broken. Were it to conclude that T's absence did not prevent him from enjoying art.28(3)(a) protection, it would then have to examine whether the expulsion decision was based on "imperative grounds of public security" (see paras 22, 29-30, 32-35, 37-38 of judgment).

(2) The fight against drug dealing by organised groups was capable of being covered by "imperative grounds of public security" within the meaning of art.28(3) and "serious grounds of public policy or public security" within the meaning of art.28(2). The EU legislature had clearly intended to limit art.28(3) expulsions to exceptional circumstances, which presupposed a very serious threat to public security. Public security covered a Member State's internal and external security, and threats might include threats to the functioning of institutions, essential public services or the survival of the population; the risk of a serious disturbance to foreign relations or the peaceful coexistence of nations; or a risk to military

> interests. Organised drug dealing was a crime with impressive economic and operational resources and often had trans-national connections. It posed a threat to the health, safety and quality of life of EU citizens as well as to the legal economy, stability and security of Member States. Drug addiction was a serious evil fraught with social and economic danger, and organised drug trafficking could reach a level of intensity that might directly threaten the calm and physical security of the population (paras 39-47). Still, expulsion could be justified only if it was necessary for the protection of the interests it aimed to secure, and a balance had to be struck between, on the one hand, the exceptional nature of the threat to public security activity and the risk of reoffending and, on the other hand, the risk of compromising the individual's social rehabilitation in the host Member State. Account had to be taken of the nature and seriousness of the offence; the length of the individual's residence; the length of time since the commission of the offence; the individual's conduct during that time; and the solidity of his ties with the host Member State. There had to be very good reasons justifying the expulsion of an individual who had spent most of his childhood in the host Member State (paras 49-56).

9. Mr [O] had been resident in the UK for more than 10 years prior to committing the offences which led to the expulsion. He came as a child, completed his childhood in the UK, undertook the whole of his education in the UK, and has not spent any significant period of time in his country of origin. His whole family is in the UK. There is no suggestion of any criminality, disorderly or unruly behaviour or other anti-social behaviour prior to him reaching adulthood. There can be no doubt that at the date of his first arrest he was fully integrated in the UK. The question is whether those integrative links have been broken. The fact and nature of his offences and his subsequent imprisonment, including his recall on licence, are factors that are required to be considered in making that assessment.

10. Both *Tsakourides* and *Vomero* refer to the possibility of integrative links being lost. At the time of the expulsion decision, the appellant had been convicted of drug dealing Class A drugs. The expulsion decision was taken on 10th July 2017; the sentencing took place on 30th September 2016 and the offences which led to the sentencing occurred earlier that year. There is no doubt but that dealing in drugs is very serious. He has been convicted of street dealing; there is no gang membership suspicion. During his imprisonment he undertook courses which have been of benefit to his development. The OASys report and his probation officer are positive as to his behaviour. The prison reports reflect his participation as thoughtful and positive.

11. I do not find the appellant to be a persistent offender. He has accrued drugs offences over a short period of time and has been sentenced to the minimum applicable. There is no suggestion in the sentencing remarks or the OASys report of a possibility of increasing criminality.

12. Since his release from prison, Mr [O] has started work; he remains living at home where he has strong relationships with his parents whose shock at his conviction and their determination to provide him with support in the future was apparent from their witness statements. He has committed no further offences and there is no indication of any unruly or anti-social behaviour since his release from prison. This reflects not only his dismay and remorse at the offences he committed but also that the offending was a period of time in his life that was out of character.

13. Without in any way condoning or minimising the seriousness of the offences committed I am satisfied that the integrative links established by Mr [O] prior to the commission of his offending behaviour have not been broken by his behaviour.

14. As acknowledged by Mr Jarvis on 30th January it would be difficult to sustain a submission that the convictions of Mr [O] were sufficient to meet the threshold required where integrative links are held to exist. Nevertheless, Mr Tufan did submit that, as per *Tsakourides*, 'drug pushers could meet that high threshold. This appellant does not fall into the category of gang related drug pushing. He was sentenced at the very lowest level of the lowest guideline. Furthermore, the appellant has been categorised as being at low risk of further drug offences, he is not a persistent offender, the ties he has with the UK are strong and established during his childhood of which all but the first four years have been spent in the UK and his behaviour both in prison and on release has not given rise to suspicion of further offences. The recall from licence was for non-drugs offences albeit for offences that were themselves serious. But taking those into account in the context of the evidence as a whole I am satisfied that the criminality does not reach the threshold required of 'imperative grounds'.

15. The decision of the First-tier Tribunal is set aside for legal error. The appeal against the decision giving rise to the appeal in the First-tier Tribunal is allowed.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and is set aside.

I re-make the decision in the appeal by allowing it.

Date 30th April 2019

Upper Tribunal Judge Coker