IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001069

First-tier Tribunal No: DA/00036/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 25th of October 2024

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ANTONIO GERMANO ALMADA GOMES MONTEIRO

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Turnbull, Counsel instructed by Turpin & Miller Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on Monday 14 October 2024

DECISION AND REASONS

BACKGROUND

1. By a decision promulgated on 25 July 2024, the Tribunal (myself sitting with Mrs Justice Williams) found an error of law in the decision of First-tier Tribunal Judge Brannan itself promulgated on 8 February 2023 dismissing the Appellant's appeal against the Respondent's decision dated 27 January 2022 making a deportation order against him under

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The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. The background facts in this case are set out at [2] to [5] of the error of law decision and I do not need to repeat those.

3. The Tribunal found an error of law in Judge Brannan's conclusion that the Appellant is not entitled to the benefit of the highest level of protection against deportation. The Respondent had conceded in the supplementary decision here under appeal that she had to show that there are imperative grounds for deporting the Appellant to Portugal ([5] of the error of law decision). Although she sought to resile from that concession in her review based on the Appellant's subsequent offending, the Tribunal rejected the argument that the review formed part of the decision under appeal (whilst accepting that it would be open to the Respondent to make a further decision to deport based on that subsequent offending) ([36] and [37] of the error of law decision).

4. As confirmed at [43] of the error of law decision, the only issue which remains for me to consider therefore is whether the Appellant poses a threat to public security and whether that threat is made out on imperative grounds, the burden of proof in that regard lying on the Respondent.

5. Despite what I say above in relation to the relevance of the Appellant's offending since the index offences, Ms Turnbull accepted that, when considering the threat which the Appellant poses as at date of hearing, it is appropriate for me to take into account the more recent criminal conviction. As Ms Turnbull also confirmed, it is only if I find that the Appellant poses a sufficient threat that I need to move on to consider the proportionality of deportation.

6. In addition to the error of law decision, I had before me the bundle prepared for the error of law hearing running to 492 pages (pdf) to which I refer below as [B/xx]. In addition, at the start of the hearing, Ms Turnbull produced a very short email dated November 2023 from the Appellant's probation officer to which I refer briefly below. I also had a skeleton argument from Ms Turnbull and Mr Melvin.

7. As there was no supplementary witness statement from either the Appellant or any other witness, it was not necessary to take oral evidence. The Appellant has now been released from prison following his latest criminal conviction but remains in immigration detention. He wished to be present at the hearing remotely. There were some delays in obtaining the remote link (due in large part to the late notification that the Appellant wished to join in that way). However, it was eventually possible for the Appellant to join. He did so however only as an observer and took no active part.

8. Following submissions by both parties, I indicated that I would reserve my decision and provide that in writing which I now turn to do.

LEGAL FRAMEWORK

9. The relevant provisions of the EEA Regulations are set out at [11] of the error of law decision. The relevant provisions of EU Council Directive 2004/38 are set out at [12] of the error of law decision. There is therefore no need to repeat those provisions which are uncontroversial.

10. The principles which govern the assessment of risk/threat are also uncontroversial and were not in dispute. Those are as follows:

    (a) The burden of proof of establishing that deportation is justified lies with the Respondent on the balance of probabilities: Arranz (EEA Regulations – deportation – test) [2017] UKUT 00294 (IAC) at [43].

    (b) Deportation "must be both appropriate and necessary for the attainment of the public policy objective sought – the containment of the threat – and also must not impose an excessive burden on the individual, the deportee": B v Secretary of State for the Home Department [2000] EWCA Civ 158 at [45].

    (c) The threat must be "present"; a past record is not in itself sufficient: Bulale v Secretary of State for the Home Department [2009] QB 536 at [16].

    (d) General considerations of deterrence or public revulsion have no part to play under the EEA Regulations: Straszewski v Secretary of State for the Home Department [2016] 1 WLR 1173 at [14].

    (e) Evidence as to risk and proportionality is to be considered at date of hearing: MG (prison: article 28(3)(a) of Citizens Directive: Portugal) [2014] UKUT 392 (IAC).

11. The focus of the dispute between the parties about the legal framework is what is meant by "imperative grounds" and the type and level of risk or threat encompassed in the threshold.

12. I did not understand Mr Melvin to disagree that the threshold is a very high one and stricter than "serious grounds". The Grand Chamber of the CJEU described the threshold in Land Baden-Wurttemberg v Tsakouridis (Case C-145/09) [2011] 2 CMLR 11 ("Tsakouridis") at [40] of the judgment as "a concept which is considerably stricter than that of 'serious grounds' within the meaning of Article 28(2), the European Union legislature clearly intended to limit measures based on Article 28(3) to 'exceptional circumstances', as set out in recital 24 in the

preamble to that directive". As Ms Turnbull pointed out, that statement has been adopted by UK domestic courts more recently, notably by the Court of Appeal in Hafeez v Secretary of State for the Home Department [2020] EWCA Civ 406 ("Hafeez") at [46].

13. Ms Turnbull relied heavily on the Court of Appeal's judgment in LG ((Italy) v Secretary of State for the Home Department [2008] EWCA Civ 190 ("LG (Italy)") and the Tribunal's subsequent guidance in LG and CC (EEA Regs: residence, imprisonment, removal) Italy [2009] UKAIT 00024.

14. The key principles of the "imperative grounds" test were set out by Carnwath LJ (as he then was) in LG (Italy) (when considering also the Respondent's manual providing guidance to caseworkers) as follows:

> "32. The following points should be taken into account:
>
> 1) Weight must be given to different tests within the new hierarchy. The words 'imperative grounds of public security' at the third level are clearly intended to embody a test which is both more stringent and narrower in scope than 'serious grounds of public policy or public security' at the second level.
>
> 2) 'Public security' is a familiar expression, but it does not appear to have been subject of judicial definition. I see no reason to equate it with 'national security'. That expression was discussed in *Secretary of State v Rehman* [2001] UKHL 47, where Lord Slynn said:
>
> > 'There must be some possibility of risk or danger to the security or well-being of the nation which the Secretary of State considers makes it desirable for the public good that the individual should be deported…' (para 15)
>
> 'Public security' to my mind is a broader concept. The earlier version of the manual referred in this connection to –
>
> > '… national security matters, or crimes that pose a particularly serious risk to the safety of the public or a section of the public'.
>
> The words 'risk to the safety of the public or a section of the public' seem to me reasonably consistent with the ordinary understanding of 'public security'. In the latest version of the manual, the utility of that description is reduced, because it is used for the second level, 'public policy or public security', without distinction between the two parts.
>
> 3) The word 'imperative', as a distinguishing feature of the third level, seems to me to connote a very high threshold. The earlier version of the manual treats it as equivalent to 'particularly serious'. In the latest version, the expression 'particularly serious risk' is used for the second level. The difference between the two levels, that is, between 'serious' and 'imperative', is said to be 'one of severity', but there is no indication why the severity of the offence in itself is enough to make removal 'imperative'.
>
> 4) The same thinking is reflected in the examples of offences given in the manual. Both levels require a serious offence linked to a propensity to

re-offend. The second ‘serious’ level encompasses ‘a violent offence carrying a maximum penalty of 10 years’; the third ‘imperative’ level requires not only a maximum penalty of 10 years but also an actual sentence of at least five years. It is not clear why the mere fact that a five year sentence has been imposed should make removal ‘imperative’.

5) Neither version of the Manual seems to me to give adequate weight to the distinction between levels two and three, or to the force of the word ‘imperative’. To my mind there is not simply a difference of degree, but a qualitative difference: in other words, level three requires, not simply a serious matter of public policy, but an actual risk to public security, so compelling that it justifies the exceptional course of removing someone who (in the language of the Preamble to the Directive) has become ‘integrated’ by ‘many years’ residence in the host state.”

15. The Respondent’s manual was also considered by the Court of Appeal more recently in Hafeez which cited with approval [110] of the judgment in LG (Italy) as follows:

> “47. In *LG and CC*, Carnwath LJ set out the following guidance about the meaning of imperative grounds of public security, emphasising that the focus must be on the individual's present and future risk to the public, rather than on the seriousness of the individual's offending:
>
> > ‘110. …[We] cannot accept the elevation of offences to ‘imperative grounds’ purely on the basis of a custodial sentence of five years or more being imposed… [T]here is no indication why the severity of the offence in itself is enough to make the removal ‘imperative’ in the interests of public security. Such an offence may be the starting point for consideration, but there must be something more, in scale or kind, to justify the conclusion that the individual poses ‘a particularly serious risk to the safety of the public or a section of the public’. Terrorism offences or threats to national security are obvious examples, but not exclusive. Serial or targeted criminality of a sufficiently serious kind may also meet the test. However, there needs to be some threat to the public or a definable section of the public sufficiently serious to make expulsion ‘imperative’ and not merely desirable as a matter of policy, in order to ensure the necessary differentiation from the second level.’"

16. I observe that in this case the Respondent does not rely on the length of sentence for either of the Appellant’s main criminal convictions – in any event, neither is of five years. However, the point made by the Court of Appeal in LG (Italy) as endorsed in Hafeez is that the level of threat requires something more than a public policy desirability to deport. There needs to be an actual and sufficiently serious risk to the public or a section of it.

17. Mr Melvin for his part relies on Tsakouridis. At [49] and [50] of the CJEU judgment, the Grand Chamber made the following comment as regards imperative grounds:

> “49 Consequently, an expulsion measure must be based on an individual examination of the specific case (see, inter alia, *Metock and Others*,

paragraph 74), and can be justified on imperative grounds of public security within the meaning of Article 28(3) of Directive 2004/38 only if, having regard to the exceptional seriousness of the threat, such a measure is necessary for the protection of the interests it aims to secure, provided that that objective cannot be attained by less strict means, having regard to the length of residence of the Union citizen in the host Member State and in particular to the serious negative consequences such a measure may have for Union citizens who have become genuinely integrated into the host Member State.

50 In the application of Directive 2004/38, a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made (see, inter alia, Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraphs 77 to 79), by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity, and, if appropriate, the risk of reoffending (see, to that effect, inter alia, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 29), on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which, as the Advocate General observes in point 95 of his Opinion, is not only in his interest but also in that of the European Union in general."

18. As Mr Melvin pointed out, Tsakouridis was concerned with offences relating to drugs. Whilst leaving it to the national court to determine whether Mr Tsakouridis could be deported on imperative grounds, the Court accepted at [56] of the judgment 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".

19. Whilst I understood both Ms Turnbull and Mr Melvin to accept that whether the test of "imperative grounds" is met does not depend on whether it was found to be met or not met in other cases on similar facts, both made submissions regarding the similarity or otherwise of the Appellant's case with other cases.

THE EVIDENCE

20. The main evidence relevant to level of risk/threat is as follows:
    - Sentencing remarks 2021 – [B/243-248]
    - Letter from Sophia Young, Case Manager, Building Futures 20 September 2021 – [B/130-131]
    - Appellant's witness statement 17 November 2021 – [B/385-388]
    - OASys report 13 January 2022 [B/339-341]
    - Sentencing remarks 2023 – [B/214-219]
    - PNC report 2023 – [B/220-223]
    - OASys report 25 July 2023 -[B/63-129]
    - Appellant's witness statement 27 July 2023 – [B/53-56]

- Witness statement of Appellant's mother 25 July 2023 – [B/58-61]
- Email from Probation Service dated November 2023 (see above)
- Respondent's decisions and review 27 January 2022, 7 February 2022 and undated -[B/447-470], [B/482-485],[B/486-491]
- OASys guidance – [B/443-445]

21. I have considered all the relevant evidence but refer only to that which is central to my findings.

22. The PNC report details the Appellant's offending. He was first convicted in 2018 and last convicted in May 2023. His first offence was for possessing an offensive weapon in a public place. His criminality escalated to offences of possession with intent to supply of Class A drugs and dangerous driving (the index offences) and robbery. It includes also more minor offences relating to driving. His last offence committed whilst on release on licence was also for supply and possession with intent to supply Class A drugs. It is of note that the index offences were committed whilst the Appellant was subject to a suspended sentence.

23. In his most recent statement, the Appellant blames his offending on being unable to find a job (when he failed to move into professional football from an academy) and associating with the wrong people. He says that he had every intention of keeping out of trouble on his release from the criminal sentence which followed the index offences but he "was again surrounded by the same people, which made [his] situation a lot harder". He claims that they sought repayment of debts due from before he went to prison. He feared for his own safety and that of his family if he did not become involved with them again. He says the following about his future intentions ([55]):

> "15. I know that I made a really big mistake, but I was desperate and found myself stuck, not knowing what I could do. I was afraid and thought that this was my only option, which I know is not the case. I deeply regret what happen [sic] and I am focus [sic] on using my time in prison to build a better path for me for once I am released [sic], so I don't find myself in this situation again."

24. The sentencing remarks for the index offences make the point that the Appellant was subject to a suspended sentence at the time that he committed the index offences which were for both possession with intent to supply Class A drugs and dangerous driving. The Appellant is described by the Judge as "a professional drug dealer" albeit "a classic street dealer" but one with "some scale". The dangerous driving offence was committed when the Appellant sought to evade arrest by the police. The description of that offence shows that the Appellant put other road users and pedestrians at serious risk from his actions. The Judge observed that the Appellant was simply lucky that he had not killed somebody. The Judge took account when sentencing of the Appellant's young age and that it was his first custodial sentence.

25. The offences for which the Appellant was sentenced in 2023 were both drugs-related offences. The sentencing Judge described the Appellant's role as "significant"; the Appellant had "operational involvement as a busy street dealer". The Appellant's plea in mitigation was essentially as the evidence in his most recent statement – that he was pressured into returning to drug dealing by those to whom he owed money, and he feared for his and his family's safety. The Judge also took account of the Appellant's young age. However, the Judge noted that the Appellant's previous motivation was said to be financial to fund the lifestyle which he sought.

26. The OASys guidance explains how risk is evaluated in OASys reports. The Offender Group Reconviction Scale (OGRS) assesses the likelihood of reoffending for a recordable offence within one and two years based on static factors, such as age, gender and previous offences. The Offender General Predictor (OGP) and Offender Violence Predictor (OVP) take into account dynamic factors relating to the offender's personal situation which can therefore change over time. The risk of serious harm assumes an appropriate level of control, restriction and intervention following release. It looks at the likelihood of a harmful offence occurring and the impact of the harm that may be caused to enable management of the risk. However, the accuracy of assessment of that risk depends on controls being in place and monitoring of compliance with those controls.

27. The OASys report of January 2022 ("the First OASys Report") following the index offences provides an OGRS score of 36% within one year and 53% within two years. Those scores are low for the first year and medium within two years. The likelihood of serious reoffending within two years is 1.56% (risk of serious recidivism) and therefore low. The author of the report was unable to calculate a dynamic score due to lack of information about the Appellant's current relationship.

28. The author of the First OASys Report believed that the Appellant had good insight into his offending. The offending was noted to be motivated by financial gain. However, his association with the "wrong people" was said to be due in part to poor family relationships particularly with his mother.

29. The Appellant's mother's statement is dated over two years after the First OASys Report but does not reflect what is said in the report about her relationship with her son which she describes as "very close". The Appellant's mother did not attend the hearing before me to give evidence and I can give her evidence about the relationship with her son only limited weight in consequence. In any event, the author of the First OASys Report notes that although the Appellant's relationship with his mother had improved, the prospect of him returning to live with her on release created a risk due to her home being in the same

area as the Appellant's former associates. As it transpired, that prediction of risk was borne out.

30. The author of the First OASys Report also expresses some scepticism about the Appellant's motivation not to reoffend. Again, the prediction of risk of reoffending is borne out by the Appellant's later offences. That is despite the Appellant's rehabilitation work in custody and his stated intention not to return to drug dealing. The report also records an adjudication whilst the Appellant was in prison on this occasion for fighting. This is described in feedback by "Time 4 change" as a "temporary blip" which should not "overshadow his improvements over the past few months".

31. Having taken account of the personal factors relevant to the Appellant, he was assessed in the First OASys Report as of medium risk of violent offending (21% in first year and 33% in second year).

32. In terms of overall risk of serious harm, the Appellant was assessed as medium risk of harm to the public on release and otherwise low risk.

33. The second OASys report is dated 25 July 2023 ("the Second OASys Report") but, as Mr Melvin pointed out, does not take account of the conviction for the offences committed when the Appellant was released on licence as it was signed on 27 March 2023 (prior to the conviction). Unsurprisingly, therefore, the OGRS scores (based on static factors) are unchanged at 36% within one year and 53% within two years. The likelihood of serious offending (risk of serious recidivism) is however increased to 2.19% albeit still low.

34. Although the author of the Second OASys Report notes the Appellant's motivation to change and rehabilitative work, the analysis of issues contributing to the risk of offending and harm is troubling. This finishes with the following assessment:

> "Mr Monteiro's previous offences, the index offence [the 2021 conviction] and the recent offence he has been charged with raise concerns of an established pattern of similar offending. Also, there are concerns with his engagement with negative peers which contributes to his offending behaviour. I have therefore assessed that Mr Monteiro's lifestyle which encourages county line drugs supply would make the risk no longer manageable in the community."

35. The assessment of attitudes contributing to risk is also concerning. The author of the Second OASys Report observed "some concerning attitudes about violence and using violence" albeit expressing "some hope of improvement". Whilst recording some positive efforts made by the Appellant in prison, in particular partaking in the Time 4 Change programme, the report also notes some negative behaviours in terms of fights with other inmates.

36. In relation to the nature of the Appellant’s offending and risks associated with his offences, the author of the Second OASys report expands on this as follows:

> “Mr. Monteiro’s offending behaviour is linked to serious harm, as per the robbery and offensive weapon convictions. Moreover, I suspect that the drug supply itself is also linked to risk of serious harm, as Mr. Monteiro was more likely to be in situations where violence was likely. Or in the case of the index offence, other risky behaviour such as driving.
>
> Some of his offending behaviour could be explained by immaturity and lack of pro-social influences. However, it is my assessment that the issues run deeper. Mr. Monteiro advised that his brother was involved in Serious Group Offending, and as such that reputation carried through to Mr. Monteiro himself. Mr. Monteiro stated in our interview he ‘would have had a much more peaceful life’ if his brother had not been involved in serious group offending. Moreover, outside of this Mr. Monteiro reports that he always had a lot of fights. Mr. Monteiro would freely admit that these were largely due to a sense of pride and ego. Obviously violent behaviour is linked to offending. It is also likely that he and his friends would always feel the need to back each other up rather than trying to calm down the situation. Mr. Monteiro mentioned that there was an altercation which led to someone being stabbed, happened in the same way, a group of young men had problems with Mr. Monteiro, so his friends and other associates backed him up.
>
> Mr. Monteiro’s risky behaviour continued into his time in custody, where he had proven adjudications for fighting (in a large group 27/6/21) and for an assault (on another prisoner 24/12/21). Mr Monteiro was also candid in interview and said that he 'would have to defend myself' if threatened by individuals he had previously known due to him supplying drugs following his release.”

37. Notwithstanding the comments made in the Second OASys Report, the OVP score on this occasion is slightly reduced (20% in first year and 32% in second) but still a medium risk. The Appellant remains assessed as a medium risk of serious harm to the public and still a low risk of serious harm otherwise. A medium risk is assessed to be “potential to cause serious harm but …unlikely to do so unless there is a change in circumstances”.

38. The email from Joseph Nii-quaye of the National Probation Service dated 20 November 2023 is that the Appellant “is still assessed as Medium risk of serious harm” and that there were no changes to the previous assessment (the Second OASys Report was completed by Mr Nii-quaye).

39. Ms Turnbull in her skeleton argument referred to the letter from Sophia Young dated 20 September 2021 as evidence of the Appellant’s propensity to change. Ms Young is a programme leader with Building Futures. The Appellant engaged with that programme as well as Time 4 Change during his incarceration for the index offences.

40. I am unable to give weight to Ms Young's views, positive though they are about the Appellant's engagement with the programme and intention to rehabilitate. Her evidence is undermined by the Appellant's reoffending when released on licence.

41. The Respondent's initial decision was not based on there being imperative grounds for deportation. Nevertheless, the threat which the Appellant is assessed to pose as there relied upon remains relevant. The Respondent relies on the Appellant being a medium risk as assessed in the First OASys Report, based not only on the index offences but also the Appellant's adjudications for fights in custody.

42. The Respondent relies also on the "severe and negative impact on society" of drug trading. The Appellant is said to have played "a significant role in the supply of drugs" based on the sentence imposed. The Appellant had repeated his offending within a short period and had not been deterred by convictions. There had also been a clear escalation in the seriousness of offending as well as incidents of violence whilst in custody. The Respondent concluded that the Appellant posed "a significant threat to the safety and security of the public of the United Kingdom", that re-offending would be "of a similar or more serious nature" and therefore that deportation was justified on serious grounds of public policy or public security.

43. The Respondent's second letter, having applied "the integration criteria" accepted that the Appellant met those criteria and therefore that imperative grounds of public security were required for deportation. In support of her conclusion that such grounds existed, the Respondent relied on a further adjudication for fighting whilst in custody and a lack of rehabilitation such that the Appellant would still pose a serious risk to the public. The Respondent repeated in summary the reasons relied upon in the initial decision for concluding that the Appellant's deportation is justified on imperative grounds.

44. In her review, the Respondent sought to resile from the conclusion that imperative grounds were required to deport the Appellant. For the reasons set out at [36] of the error of law decision, the Tribunal did not accept that it was open to the Respondent to change her mind about this issue based on later offending unless that were done by a further expulsion decision. It of course remains open to the Respondent to make a further expulsion decision based on the later offending if she considers that justified (see [37] of the error of law decision).

45. In terms of the substance of the review, that largely repeats what was said previously but takes into account the Appellant's recall to prison (albeit that the review would appear to pre-date the 2023 conviction). It also points out that whilst the Appellant has a relationship with his mother, she was unable to prevent the Appellant's resort to criminality in the past. It is said that the Appellant "has failed to demonstrate any

substantial rehabilitation". It is not enough to voice a motivation to change if that is not supported by actions to do so.

DISCUSSION AND FINDINGS

46. I begin by rejecting the submission made in Ms Turnbull's skeleton argument that, by reason of the nature of the Appellant's offending, imperative grounds cannot apply. She suggests that the Appellant's drugs offences are not "drug dealing as part of an organised group" as referred to in the Home Office's own guidance (and as referred to by the CJEU in Tsakouridis).

47. Even if it is right that the Appellant's drugs offences are in the nature of street dealing rather than as part of an organised trade in illicit drugs, the submission misses the point. As was said by the Court of Appeal in LG (Italy) and repeated in Hafeez, it is the nature and quality of the risk which is relevant and not the nature and quality of the offence itself or the sentence passed for it. The offence may be a starting point but is no more than that.

48. In any event, the Appellant's offending is not limited to the drugs offences but also includes behaviour as part of the index offences which creates a risk to the public (namely the dangerous driving which would, but for luck, have killed members of the public). As is made clear in the Second OASys Report, the Appellant's past drugs offending has itself led to incidents of violence. The Appellant has also exhibited violent behaviour in prison which is relied upon by the Respondent as indicating the Appellant's propensity to reoffend and cause serious harm.

49. I accept however Ms Turnbull's submission that what the Respondent has to show is that the Appellant poses a particularly serious risk to the safety of the public or a section of the public that is so compelling that it justifies the exceptional course of deportation of an individual who is accepted to have integrated in the UK by reason of his long residence here. That test emerges from Tsakouridis, LG (Italy) and Hafeez.

50. I do not understand the section of Tsakouridis relied upon by Mr Melvin to say anything different save that it makes clear that the assessment of risk is to be based on an examination of the individual case. For that reason, I did not find particularly helpful the references by both advocates to other cases.

51. I accept that the nature and seriousness of the Appellant's offending is not on all fours with any of the case-law relied upon. The closest is that in Tsakouridis. However, leaving aside Ms Turnbull's point that the level of drugs offending in that case is different from the Appellant's, the CJEU held only that offences involving dealing in drugs were capable of reaching the threshold for imperative grounds. Whether they did so in that particular case depended first on the referring court deciding whether the integration test for imperative grounds was made

out but also on that court's assessment of risk. That case therefore does no more than indicate that drugs offences could meet the test of imperative grounds in an appropriate case.

52. Turning then to the risk in this case, I accept that the evidence shows that the Appellant's risk of causing serious harm to the public is assessed as medium. Against that, there has been no substantive reassessment of risk since the Second OASys Report. That report appears to have been written with a view to informing sentencing for the offences post-dating the index offences. The author of the report concludes expressly that the Appellant's risk of reoffending cannot be managed in the community (see citation at [34] above). The OGRS risk is assessed as 36% within first year and 53% within two years which is quite high. However, the OVP score is lower (20% and 32% respectively) and it is that risk assessment which reflects the personal circumstances of the Appellant and predicts the violence of any further offending which is central to the assessment of whether the Appellant poses a sufficient risk to the security of the public if he reoffends.

53. Against that, as set out above at [35] and [36], the Second OASys Report expresses troubling concerns about the nature of the Appellant's offending in the past and risk in the future as well as concerning comments about the Appellant's attitude to violence and use of violence.

54. I accept that it is said, including by the Appellant himself, that he is motivated to change. However, I can give that evidence very little weight in light of his past record. The index offences were committed whilst he was under a suspended sentence whilst the more recent offences were committed whilst he was on licence. His motivation following release on this occasion has not been tested as he remains in immigration detention.

55. Further, the Appellant has had a number of adjudications for violent altercations whilst in custody, including it appears during his incarceration for the more recent offences. Again, that does not bode well in terms of his intention to change. I have discounted the evidence of Ms Young as her prediction in 2021 that the Appellant had changed was not borne out by later events. I do not accept that the Appellant has rehabilitated.

56. I agree with Mr Melvin's submission that the protective factors recorded in the OASys reports cannot be relied upon to reduce the risk. I have given little weight to the evidence of the Appellant's mother who did not attend the hearing to give evidence. In any event, she was unable to prevent his previous offending. It appears that the Appellant's brother's past history may have contributed to the risk which the Appellant now poses.

57. All in all, I am satisfied that the Appellant continues to pose a genuine, present and sufficiently serious threat to the fundamental interests of society in the UK to justify deportation at the lowest level. I would even have been prepared to find that there were serious grounds for believing that he continues to pose that threat (consistently with the conclusion reached also by Judge Brannan at [67] of his decision).

58. However, I am unable to find that imperative grounds are made out. The authorities make quite clear that the threshold for imperative grounds is significantly higher than serious grounds. There has to be something more to justify deportation due to the Respondent's acceptance in the supplementary decision letter that the Appellant has integrated in the UK notwithstanding his offending. I appreciate that the Respondent has since sought to resile from that position but, for the reasons set out in the error of law decision, the Respondent's review cannot be seen as a further expulsion decision and there has been no action taken by the Respondent to issue any further expulsion decision following the more recent offending (although it remains open to her to make such a decision in future).

59. I remind myself that "there needs to be some threat to the public or a definable section of the public sufficiently serious to make expulsion 'imperative' and not merely desirable as a matter of policy, in order to ensure the necessary differentiation from the second level". The Appellant's exclusion may well be desirable due to the continuing risk which I accept that he poses to the fundamental interests of society. However, I am unable to find on the evidence presented that he poses such a serious and exceptional risk to public security that his exclusion is "imperative".

60. In conclusion, therefore, I do not accept that the Respondent has shown that the Appellant poses a particularly serious risk to the safety of the public or a section of the public that is so compelling that it justifies the exceptional course of deportation of an individual who is accepted to have integrated in the UK by reason of his long residence here.

61. As confirmed by Ms Turnbull, having reached the conclusion I have as to risk, I do not need to deal with proportionality.

CONCLUSION

62. In conclusion, the Respondent has not discharged her burden of showing that there are imperative grounds for deporting the Appellant to Portugal. I therefore allow the Appellant's appeal.

NOTICE OF DECISION

The Appellant's appeal is allowed.

L K Smith
Upper Tribunal Judge Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 October 2024

APPENDIX: ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001069

First-tier Tribunal No: EA/53214/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

…………………………25 July 2024

Before

THE HON. MRS JUSTICE HEATHER WILLIAMS, DBE
UPPER TRIBUNAL JUDGE SMITH

Between

ANTONIO GERMANO ALMADA GOMES MONTEIRO

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Turnbull, Counsel instructed by Turpin & Miller Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on Thursday 18 July 2024

DECISION AND DIRECTIONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Brannan promulgated on 8 February 2023 ("the Decision") dismissing

the Appellant's appeal against the Respondent's decision dated 27 January 2022 making a deportation order against him under The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. The Appellant is a national of Portugal having been born there in 1999. His mother, who is from Guinea-Bissau moved there in 1990. The Appellant moved to the UK with his mother and brother when he was aged 9 years.

3. The Appellant's criminal convictions began in 2018. The deportation order was based on two convictions on 3 August 2020 and 7 December 2020 when the Appellant was sentenced to 36 months in prison for dangerous driving, driving without insurance, driving without a licence, refusing to provide a sample for drug testing and possession with intent to supply of heroin and crack cocaine.

4. The Appellant was released from prison on 10 February 2022 on licence which was due to expire on 2 August 2023. However, on 13 March 2023, the Appellant was arrested for possession with intent to supply cocaine and heroin. He pleaded guilty to those offences and was consequently recalled to prison where he remains. He was sentenced to 33 months in prison for the further offences.

5. In her original decision dated 27 January 2022, the Respondent accepted that the Appellant had a right of permanent residence, but not that he had been continuously resident in the UK for ten years. However, in a subsequent decision dated 7 February 2022 ("the Supplementary Decision") ([AB/482-484]), the Respondent accepted that the Appellant was entitled to the highest level of protection (imperative grounds) as the ten years requirement was met notwithstanding his period of imprisonment. The Respondent accepted that this had not broken his integrative links. However, in her review prepared during this appeal and after the Appellant's subsequent conviction, the Respondent sought to retract that concession on the basis that the continued offending and imprisonment had broken those links.

6. Judge Brannan did not accept that the Appellant was entitled to the highest level of protection for reasons he gave at [48] to [66] of the Decision. He therefore found that the threat posed by the Appellant was to be assessed on serious grounds and not imperative grounds. Having reached that conclusion, he found that there were serious grounds for believing that the Appellant posed a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. He also found that the Respondent's decision was proportionate. He considered the case also applying Article 8 ECHR but found for similar reasons that the Respondent's decision did not breach the Appellant's human rights.

7. The Appellant appeals the Decision on two grounds as follows:

   Ground 1: the Judge was wrong to conclude that the Appellant was not entitled to the highest level of protection as he had misinterpreted what was said by the Grand Chamber of the Court of Justice of the European Union in B v Land Baden-Wurttemberg and Secretary of State for the Home Department v Franco Vomero Joined Cases C-316/16 and C-424/16 (17 April 2018) ("Vomero"). Specifically, that in assessing the Appellant's integrative links, the Judge had wrongly considered factual matters that occurred after the deportation decision was made in January 2022 (the 2023 conviction and sentence);

   Ground 2: the Judge erred by relying on an unreported decision of this Tribunal in Colad v Secretary of State for the Home Department (UI-2022-005662) ("Colad")

8. Permission to appeal was granted by First-tier Tribunal Judge Curtis on 6 March 2024 in the following terms:

> "1. The application is in time.
>
> 2. Ground 1 argues that the Judge erred in his assessment of whether the Appellant benefited from enhanced protection under the 2016 Regulations. The Respondent had initially decided that the Appellant did so benefit, but, after committing further offences subsequent to the decision to make a deportation order against him, had changed her position and decided that such protection was no longer available to him because the integrative links had been broken. The Judge erred, it is said, by taking into account post-deportation order conduct into account when deciding that the Appellant's integrative links had been broken. Reliance is placed on Vomero as authority that it is the 'date on which the initial expulsion decision is adopted' that is key to the issue, not the date of the appeal hearing.
>
> 3. The Judge, though, referred to Vomero and, in particular, to [70] in which Warby LJ stated that it was necessary to carry out an overall assessment of the person's situation 'at the precise time when the question of expulsion arises'. In other words, according to the Judge, the date of the hearing. Further support for that conclusion is taken by the Judge from [73] and [74] which refers to behaviour, and attitude, of the person during the period of imprisonment which, as the Judge points out, must allow consideration of factors that occurred after the imposition of a custodial sentence (and therefore potentially after an initial expulsion sentence).
>
> 4. The Judge, in [56], considers it clear that the 10-year period of residence is counted back from the initial expulsion decision but returns to the question of whether the integrative links presumed by that residence can be broken by conduct that post-dated the initial expulsion decision. He finds, relying on support from the Upper Tribunal in an unreported determination in which his (unrelated) decision was under appeal, that conduct occurring after the initial expulsion decision can be considered in the assessment of whether integrative links have been broken.
>
> 5. Ground 1 says the Judge was wrong to do so. Particular reliance is placed on the recent Court of Appeal authority in AA (Poland) in which it was stated that 'the issue for consideration was the degree of integration

achieved by [AA] in the ten years prior to the [initial expulsion decision] in December 2020' [48].

6. However, I think it is important to note that in AA there was (it appears) no evidence before the courts that related to the Appellant's conduct after the initial expulsion decision (the OASys report was either dated 27 January 2020 or 5 November 2018 [61]) and the question whether such conduct was relevant to the breaking, or otherwise, of integrative links was not before the Court of Appeal.

7. It strikes me that none of the authorities relied on by the parties are precisely on 'all fours' with the circumstances faced by the Judge. Here, despite being subject of the deportation decision, the Appellant committed a further, and serious, offence. The Appellant effectively suggests that the position of the law is that that offending can be ignored for the purposes of assessing integrative links (which, on the face of it, might be considered perverse). The Judge, himself, resorted to inviting submissions on an unreported UT case which was also not on all fours but in which he was upheld for considering that post-decision conduct was relevant to demonstrate that integrative links had not been broken (i.e., the opposite to that which he found here). That, almost by itself, suggests that there is a need for authoritative guidance on the question which drives me to conclude that the Appellant ought to be entitled to at least argue ground 1.

8. Ground 2 challenges the Judge for relying, as I have mentioned above, on an unreported decision of the UT dealing with an appeal against one of his own decisions. It is not suggested that the Judge allowed procedural unfairness to occur (and I note he put the parties on notice, and invited submissions, that he felt the UT judgment was of potential relevance). I do, though, grant permission in relation to ground 2 because it is, in essence, an extension of ground 1 and about the lawfulness of the Judge's decision to take account of post-decision conduct."

9. The matter comes before us to determine whether there is an error of law in the Decision. If we conclude that there is, we have to consider whether to set aside the Decision in consequence. If we do so, we either have to remit the appeal to the First-tier Tribunal or re-make the decision in this Tribunal, if necessary, at an adjourned resumed hearing.

10. We had before us an amended composite hearing bundle running to 491 pages ([AB/xx]) and a bundle of authorities. Having heard submissions from Ms Turnbull and Mr Tufan, we indicated that we found an error of law in the Decision and would therefore set that aside. Following discussion, it was agreed that the level of fact-finding may not be extensive as the re-making would involve a reassessment of the facts as found at the previous hearing which was quite recent. Accordingly, we agreed that the appeal should remain in this Tribunal, and we gave directions for the re-making hearing. We indicated that we would set out our reasons for finding an error of law in writing which we now turn to do.

DISCUSSION

The Legal Framework

The EEA Regulations

11. The relevant provisions of the EEA Regulations read as follows:

"**Exclusion and removal from the United Kingdom**
23.—….
(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—
(a) …;
(b)the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27; or
…
Decisions taken on grounds of public policy, public security and public health
27.—(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 serve economic ends.
(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.
(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—
(a) has a right of permanent residence under regulation 15 and who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or …
(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
(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;
(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.
(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ('P') 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.
…

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).”

Directive 2004/38

12. The relevant provisions of EU law are contained in Directive 2004/38 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States as follows:

“Article 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 Sate 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 twelve 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 residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Article 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 have 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 ten years; or
   (b) …”

The Decision

13. The Judge’s analysis which is challenged by the grounds is at [48] to [65] of the Decision.

14. At [48] of the Decision, the Judge set out what he saw as the relevant paragraphs of Vomero being [70] to [75]. He emphasised the words "at the precise time when the question of expulsion arises" ([70]), "all the relevant factors as regards the behaviour of the person concerned during the period of imprisonment" ([73]) and "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" ([74]).

15. He then provided the following interpretation of that passage as follows:

> "49. In line with paragraph 70, the question of expulsion arises now, at the time of the hearing, rather than at the point when the Respondent made her decisions. The point which I emphasise in paragraphs 73 and 74 fortify that conclusion by referring to behaviour in prison being relevant, which clearly expects that the Tribunal may look at matters after the imprisonment.
>
> 50. The CJEU went on to say its conclusion at paragraph 83 which reiterates the need to look at conduct 'throughout the period of detention', without any temporal limit at the time of the expulsion decision.
>
> 51. However Ms Turnbull also drew my attention to paragraphs 84 to 95. These address the fourth question to the CJEU in Vomero, which was:
>
> > *'(4) If the answers to Question 1 and Question 2 are in the negative: are there mandatory provisions of EU law for determining 'the precise time when the question of expulsion arises' and the point in time at which an overall assessment must be made of the affected Union citizen's situation in order to establish the extent to which the non-continuous nature of the period of residence in the 10 years preceding the decision to expel the person concerned prevents him from qualifying for enhanced protection against expulsion?'*
>
> 52. She rightly submits that this question is similar to that raised in the present case. However, at paragraph 84 the CJEU recast the question as:
>
> > '*By its fourth question, the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg) wishes to know, in essence, at what point in time compliance with the condition of having 'resided in the host Member State for the previous ten years', within the meaning of Article 28(3)(a) of Directive 2004/38, must be assessed.'*
>
> 53. It then addressed specifically, at paragraphs 85 to 88 the calculation of the 10-year period concluding:
>
> > *'88 It follows from the foregoing that the question whether a person satisfies the condition of having resided in the host Member State for the 10 years preceding the expulsion decision and, accordingly, whether he is able to benefit from the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be assessed at the date on which the expulsion decision is initially adopted.'*
>
> 54. I note that the court used the term 'able to' in this paragraph rather than a mandatory term such as 'does'.
>
> 55. The court then went on to say, at paragraph 89 to 94, that circumstances after the initial expulsion decision may inform whether the

actual level of threat is made out. The parties are agreed that this is the case.

56. What is clear from Vomero is therefore that the actual period of 10 years of residence is counted back from the initial expulsion decision. But it is not clearcut whether the breaking of integrative links can take place after."

16. The Judge then referred to Secretary of State for the Home Department v Viscu [2019] EWCA Civ 1052 ("Viscu") and to the meaning of "expulsion decision" which he correctly identified as being set out at article 28 of Directive 2004/38. He set out that article at [57] of the Decision. Nothing turns on that. However, he then went on to say this:

> "The parties agree that in assessing whether the relevant threshold is met (i.e. mere 'grounds', 'serious grounds' or 'imperative grounds'), and personal circumstances (paragraph 1), I look at the situation now. Ms Turnbull effectively submits that the term 'expulsion decision takes on a different meaning – 'initial expulsion decision' – specifically when considering integrative links under Vomero because the 10 year period is stated as ending with the initial expulsion decision in Vomero."

17. The Judge then turned to the case of Colad which he considered supported his position. Colad in this Tribunal was a challenge to Judge Brannan's own decision in that case. However, he had in that case taken into account positive behaviour post-dating the Respondent's decision. The Respondent there challenged Judge Brannan's decision that integrative links had not been broken. The error of law hearing was before a panel of this Tribunal (Upper Tribunal Judge Pitt and Deputy Upper Tribunal Judge J F W Phillips) which led to a decision issued on 13 September 2023. Judge Brannan quoted from that decision at [60] of the Decision as follows:

> "*12. Turning to integrative links the grounds and Ms Cunha's submissions refer to Vomero and suggest firstly that proper consideration was not given to the severing of integrative links whilst imprisoned and that the finding that integrative links were enhanced whilst in prison is perverse and secondly that no proper account was taken in regard to the Appellant's previous offending.*
>
> *13. So far as the former is concerned the reasoning in the decision is extremely clear and comprehensive. The Judge considers separately the Appellant's integrative links before detention, the nature and circumstances of what was a very serious offence and his conduct in detention. There is, in our judgment, nothing perverse about taking into account the Appellant's conduct in detention or on licence when the reports from prison and the offender manager are positive. It would be as perverse not to take this into account as it would be to fail to take into account bad behaviour whilst in custody.*
>
> *14. The Appellant's previous offending is not ignored in the decision. To the contrary the Judge takes account of the appellant's previous offending in considering both integrative links (at paragraphs 44 and 45) and the Appellant's personal conduct. Full account is taken of this offending in the context of the report from Dr Galappathie who had concluded that the*

Appellant presented a low risk of reoffending and the OASys report which came to a similar conclusion. Whilst giving the report little weight for the reasons given the conclusions of low risk of reoffending are not impugned.
15. It is very clear that the Judge takes a comprehensive and holistic approach and in our judgment there is nothing in the Judge's approach or reasoning that could amount to an error of law."

18. Judge Brannan attaches importance in the passage which precedes this citation to the fact that the hearing before him had taken place after the Appellant was released on licence which was after the decision to deport the Appellant. He then draws the following proposition from this citation:

"61. Paragraph 13 is key, because Mr Colad had only been on licence after the initial expulsion decision. The Upper Tribunal thought it correct that I could take into account his conduct then, after the expulsion decision, to decide integrative links. What is sauce for the goose is sauce for the gander: if good conduct after an initial expulsion decision can support integrative links, bad conduct can undermine them."

19. For the foregoing reasons, Judge Brannan concluded at [62] of the Decision that there were "two parts to deciding whether the Appellant has the protection of imperative grounds". The first consisted of looking at the actual period of residence accumulated which Judge Brannan appeared to accept related only to the "the actual period of residence prior to the expulsion decision" ([63]). The second, he said involved looking at whether integrative links had been broken. He there again referred to Viscu from which he cited as follows ([64]):

"*…(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.***"
[our emphasis]

20. Based on his understanding of the case-law, Judge Branna then reached the following conclusion:

"65. The Respondent accepted on 7 February 2022 that the Appellant had 10 years of continuous residence. That position cannot change because it is temporally fixed under Vomero. In the same decision, the Respondent decided the Appellant's integrative links were not broken by his offending and imprisonment up to that date. However, circumstances have changed since then and the Respondent no longer takes that position. I must assess integrative links now."

21. Judge Brannan therefore found at [66] of the Decision that, whilst the Respondent had taken the position in the Supplementary Decision that

integrative links had not been broken it was “clear cut ..as a result of the further offending …that the Appellant then broke what integrative links he still had”.

Ground 1: ‘Vomero’

22. In order to consider the Appellant’s first ground, it is necessary to follow the structure of the analysis in Vomero. At [63] of its judgment, the Grand Chamber set out the first, second and third questions which were in fact raised in the case linked to Vomero as follows:

> “By its first three questions, which should be examined together, the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg) seeks, in essence, to ascertain whether the requirement of having ‘resided in the host Member State for the previous ten years’ set out in Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it may be satisfied by a Union citizen who at a young age moved to a Member State other than that of which he is a national and who lived in that Member State for twenty years before receiving a custodial sentence there, which he is serving at the time an expulsion decision is taken against him, and, if so, under what conditions.”

Those questions are therefore directly linked to the level of protection but not specifically to the timing of that consideration.

23. Judge Brannan appears to have thought that [70] of the judgment assisted his conclusion. We therefore set that out in full:

> “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, *G.*, C-400/12, EU:C:2014:9, paragraphs 33 to 38).”

24. Judge Brannan relied in particular on the words “when the question of expulsion arises”. However, those words have to be read in context, in particular that there needs to be “an overall assessment” at that “precise time” which includes the period of ten years residence. That undermines rather than supports Judge Brannan’s conclusion that

integrated links are a separate issue divorced from the period of residence. We do not consider that paragraph to be determinative of the issue of when integrative links fall to be considered.

25. Ms Turnbull placed reliance on the passage which followed that cited by Judge Brannan as follows:

> "76. As regards the concerns expressed by the referring court that **taking into account the period of imprisonment for the purposes of determining whether it has interrupted the continuity of the 10-year period of residence in the host Member State prior to the expulsion measure could lead to arbitrary or unfair results, depending on when that measure is adopted**, it is appropriate to provide the following clarifications.
>
> **77 It is true that, in some Member States, an expulsion measure may be imposed as a penalty or legal consequence of a custodial sentence, a possibility expressly provided for in Article 33(1) of Directive 2004/38. In such a case, the future custodial sentence cannot, by definition, be taken into consideration for the purposes of assessing whether or not a Union citizen has been continuously resident in the host Member State for the 10 years preceding the adoption of that expulsion measure.**
>
> 78 **The result may therefore be, for example, that a Union citizen who has already resided continuously for 10 years in the host Member State at the date on which he receives a custodial sentence accompanied by an expulsion measure is entitled to the enhanced protection against expulsion provided for in Article 28(3)(a) of Directive 2004/38.**
>
> **79 Conversely, as regards a citizen against whom such an expulsion measure is adopted after his detention, as in the main proceedings, the question arises whether or not that detention had the effect of interrupting the continuity of the period of residence in the host Member State and depriving him of the benefit of that enhanced protection.**
>
> **80 However, it should be pointed out, in that regard, that, where a Union citizen has already resided in the host Member State for a period of 10 years when his detention begins, the fact that the expulsion measure is adopted during or at the end of the period of detention and the fact that that period of detention thus forms part of the 10-year period preceding the adoption of that measure do not automatically entail a discontinuity of that 10-year period as a result of which the person concerned would be deprived of the enhanced protection provided for under Article 28(3)(a) of Directive 2004/38.**
>
> 81 Indeed, as is apparent from paragraphs 66 to 75 above, if the expulsion decision is adopted during or at the end of the period of detention, the situation of the citizen concerned must still, under the conditions laid down in those paragraphs, be subject to an overall assessment in order to determine whether or not he can avail of that enhanced protection.
>
> **82 Thus, in the situations referred to in paragraphs 77 to 81 of this judgment, whether or not the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 is granted will still**

depend on the duration of residence and the degree of integration of the citizen concerned in the host Member 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."

[our emphasis]

26. We agree with Ms Turnbull that, in particular [77] read with [81] and [82] of the judgment in Vomero undermine rather than support Judge Brannan's analysis. In particular, [77] makes clear that a period of detention post-dating "an expulsion measure" cannot be taken into account for the purposes of determining whether the person satisfies the ten years of continuous residence criterion. Further, [78] also makes clear that if the expulsion measure is issued at the start of the period of detention, the future detention cannot affect the integration formed up to that point. Although [80] envisages the taking into account of conduct during detention, that is only where the expulsion measure is adopted during or at the end of that period. That is further clarified at [81]. Paragraph [82] of the judgment makes clear that the duration of residence and degree of residence/integration are part of the same issue and not, as Judge Brannan thought, separate questions. That point is reinforced by what is said at [83] of the judgment. Furthermore, [73] and [74] of Vomero do not fortify the Judge's conclusion, as he suggested at his [49]; the references to the attitude and the behaviour of the person concerned during imprisonment are plainly qualified by the Grand Chamber's identification of the period that falls to be considered.

27. The Grand Chamber went on at [84] to consider the fourth question (also raised in the case linked to Vomero) as follows:

> "By its fourth question, the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg) wishes to know, in essence, at what point in time compliance with the condition of having 'resided in the host Member State for the previous ten years', within the meaning of Article 28(3)(a) of Directive 2004/38, must be assessed."

28. That question was answered by the Grand Chamber in a way which sets out how the level of protection interacts with the level of threat. It is answered at [85] to [95] of the judgment as follows:

> “85. Under Article 28(3)(a) of Directive 2004/38, ‘an expulsion decision may not be taken’ against a Union citizen who has resided in the host Member State ‘for the previous ten years’ except on imperative grounds of public security.
>
> 86 It follows from that wording that ‘the previous ten years’ means the 10 years preceding that expulsion decision, with the result that **the condition relating to the 10-year period of continuous residence must be verified at the time that decision is adopted.**
>
> 87 As noted in paragraph 65 above, the Court has already stated that the 10-year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned.
>
> 88 It follows from the foregoing that **the question whether a person satisfies the condition of having resided in the host Member State for the 10 years preceding the expulsion decision and, accordingly, whether he is able to benefit from the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be assessed at the date on which the expulsion decision is initially adopted**.
>
> 89 It must be noted, however, that **that conclusion is without prejudice to the separate issue of when it is necessary to assess whether there are actually ‘grounds of public policy or public security’ within the meaning of Article 28(1) of Directive 2004/38, ‘serious grounds of public policy or public security’ within the meaning of Article 28(2) of that directive, or ‘imperative grounds of public security’ within the meaning of Article 28(3) of that directive, on the basis of which expulsion may be justified.**
>
> 90 In that regard, **it is indeed for the authority which initially adopts the expulsion decision to make that assessment, at the time it adopts that decision, in accordance with the substantive rules** laid down in Articles 27 and 28 of Directive 2004/38.
>
> 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 there are still ‘grounds of public policy or public security’, ‘serious grounds of public policy or public security’ or ‘imperative grounds of public security’, as applicable.**
>
> 92 It must be borne in mind, in particular, that under the second subparagraph of Article 27(2) of Directive 2004/38, the issue of any expulsion measure is, in general, conditional on the requirement that the conduct of the person concerned must represent a genuine, present threat affecting one of the fundamental interests of society or of the host Member State (see, to that effect, judgments of 22 May 2012, *I*, C-348/09, EU:C:2012:300, paragraph 30, and of 13 July 2017, *E*, C-193/16, EU:C:2017:542, paragraph 23).
>
> 93 It should also be noted that where an expulsion measure has been adopted as a penalty or legal consequence of a custodial penalty, but is enforced more than two years after it was adopted, Article 33(2) of Directive 2004/38 expressly requires the Member State to check that the individual

concerned is currently and genuinely a threat to public policy or public security and to assess whether there has been any material change in the circumstances since the expulsion order was issued (judgment of 22 May 2012, *I*, C-348/09, EU:C:2012:300, paragraph 31).

94. Furthermore, it follows, more generally, from the case-law of the Court that the **national courts must take into consideration, in reviewing the lawfulness of an expulsion measure taken against a national of another Member State, factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy or public security.** That is so, above all, if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court (see, by analogy, judgments of 29 April 2004, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, paragraph 82, and of 8 December 2011, *Ziebell*, C-371/08, EU:C:2011:809, paragraph 84).

95 In the light of the foregoing, the answer to the fourth question in Case C-316/16 is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that **the question whether a person satisfies the condition of having 'resided in the host Member State for the previous ten years', within the meaning of that provision, must be assessed at the date on which the initial expulsion decision is adopted.**"

[our emphasis]

29. As we pointed out to Mr Tufan, in answering the fourth question, the Grand Chamber referred at [91] and [94] to an updating assessment to be carried out by the reviewing court of the level of the threat. If the Grand Chamber had intended that the same assessment could be carried out when looking at integrative links, it could have said so, but it did not. Instead, it reiterated that the issue whether a person satisfied the condition of ten years' prior residence was to be determined "at the date on which the initial expulsion decision is adopted". As we have already shown, the Grand Chamber in <u>Vomero</u> made clear that whether an individual is actually resident for the ten-year period and whether integrative links are broken so that the period cannot be satisfied are part of the same question.

30. For the foregoing reasons, <u>Vomero</u> does not in fact support the reasoning in the Decision; we are quite clear that it supports the opposite conclusion namely that reoffending after the initial expulsion decision has been made is not relevant to the decision-maker's assessment of whether the ten years of continuous residence condition is met. We therefore accept that the first ground is made out.

31. Before leaving <u>Vomero</u>, we mention two additional points.

32. First, we do not understand the point made by the Judge at [54] of the Decision by reference to [88] of <u>Vomero</u>. The words "able to" relate to whether a person meets the condition of residence. The Grand Chamber however states in terms that this question is to be assessed

at the time of the expulsion decision. It there uses the word “must” which is clearly therefore in mandatory terms.

33. Second, and following on from that, we do not understand the point made at [58] of the Decision to which Ms Turnbull drew our attention. As we understand it, the reference to “initial expulsion decision” comes from Vomero itself (see for example at [95]). We do not therefore understand the Judge’s criticism of Ms Turnbull’s submission. It may be that the Judge has misunderstood the submission. As we understand it, Ms Turnbull accepted, in line with Vomero, that whether a person meets whichever threshold applies is to be determined taking account of post-decision facts and evidence. That is consistent with [91] and [94] of Vomero. However, the prior question of which level of protection applies is to be determined at the date of the expulsion decision, again consistently with Vomero (for example at [95]). The submission recorded at [58] of the Decision is therefore no more than a reflection of the distinction as made by the Grand Chamber in Vomero (see what we say at [29] above).

34. We also mention for completeness that none of the subsequent caselaw that we have been referred to calls into question the Grand Chamber’s approach in Vomero. The time point that we have addressed in this appeal did not arise in Viscu, but Flaux LJ (as he then was) after citing Vomero, indicated at [44] that the extent to which there is a severing of integrative links for the purposes of the ten-year rule “will depend upon an overall assessment of the individual’s situation at the time of the expulsion decision”. Similarly, in Secretary of State for the Home Department v AA (Poland) [2024] EWCA Civ 18 (where, again, the present issue did not arise for determination) Warby LJ said at [48] “[t]he issue for consideration was the degree of integration achieved by AA in the ten years prior to the Decision in December 2020”.

35. Mr Tufan drew our attention to the Respondent’s Review at [AB/486-491] which reads as follows so far as relevant:

> “[A] Introduction
> 1. The respondent continues to rely on the Reasons for Refusal Letters dated 27/01/2022 and the supplementary refusal letter dated 07/02/2022.
> …
> *(ii) Whether the appellant qualifies for enhanced protection on imperative grounds under Regulation 27(4) of the 2016 EEA Regulations.*
> 7. The respondent does not accept that the appellant qualifies for enhanced protection on imperative grounds.
> 8. The respondent appreciates that this aspect was not specifically addressed in the previous Reasons for Refusal letter but does so now, in light of the appellant’s latest convictions.
> 9. The respondent seeks to rely upon the case of **MG [2014] EUECJ C-400/12 (16 January 2014)** at **[28]** which highlights that the 10-year period of residence must, in principle, be continuous and must be calculated

by counting from the date of the decision ordering the expulsion of the person concerned. **[31-34]** cites that imposition of a custodial sentence is an indication of a rejection of societal values and that periods of imprisonment can in principle interrupt the continuity of residence. This argument is iterated in the case of **Viscu [2019] EWCA Civ 1052 (20 June 2019)** where at **[44]**, the Court of Appeal also stated that a custodial sentence is indicative of a rejection of social values and thus a severing of integrative links with the Member state.

10. The appellant was imprisoned on remand on 03/08/2020 and the expulsion decision was 27/01/2022. The respondent submits that his incarceration has contributed to interrupting the continuity of his residence in the UK as well as his consistent criminality from 2018 onwards.

11. The respondent relies upon **B & FV (Citizenship of the European Union - Right to move and reside freely - Enhanced protection against expulsion - Judgment) [2018] EUECJ C-316/16 (17 April 2018)** which confirms that where a person is deemed to constitute a genuine, present and sufficiently serious threat to the fundamental interests <u>and</u> where there are public policy or security grounds to deport, <u>matters after the date of expulsion can be taken into account</u> (underline my emphasis, please refer to **[90-95]**). This case also affirms that after a certain period, it may be necessary to carry out a fresh
updated assessment. This missive qualifies as that updated assessment.

12. **BV** at **[73]** also refers to relevant considerations in the overall assessment which includes the nature of the offence which resulted in the imprisonment, the circumstances under which the offence was committed and the behaviour of the appellant during the period of imprisonment. As mentioned before, the appellant relies on the previous decisions as well as the Judge's sentencing remarks for both cases and the latest OASys report which specifically refers to the appellant's altercations with both other prisoners and prison staff. The respondent again relies upon the fact that the appellant was recalled to prison after the expulsion decision.

13. Respondent relies upon the **Schedule 1, paragraph 2** of the **EEA REGULATIONS 2016**. The appellant has failed to demonstrate having any familial or societal links in the UK outside of his Portuguese relatives (his mother and brother who himself is subject to deportation). His pro-criminal associates outside of prison cannot contribute to his integration in the UK: they negatively impact his integration.

14. With specific reference to the case of **MC (Essa principles recast) [2015] UKUT 520 (IAC) (11 September 2015), headnote 3** highlights that rehabilitation is an aspect of integration. The respondent reiterates that the appellant has failed to demonstrate any substantial rehabilitation (as borne out by his OASys report and his behaviour whilst here in the UK). The respondent submits that it is not enough to have the motivation to rehabilitate: his actions must correspond with those vocal utterances of that alleged motivation. The appellant has simply failed every time he has been given the chance by the UK authorities and the courts to turn his life around.

15. It is not disputed that the appellant has a relationship with his mother. However, she was not able to prevent the appellant's resort to criminality to fund his lifestyle. The appellant has not shown that he has a partner, children or that he has ever worked in the UK. Whilst he was educated here, he has not demonstrated earning any qualifications, all factors (the respondent submits) which contribute to that interruption in the appellant's continuity of residence in the UK.

16. For these reasons it is not accepted that the appellant qualifies for enhanced protection on imperative grounds."

36. We make the following observations about this review. First, as Ms Turnbull pointed out, it is not a supplementary decision. The author of the review appears to accept that, at [11] referring it to a "missive" carrying out an updated assessment. Second, and following on from that, the author of the review relies on Vomero (referred to as "B & FV" in the Review). Insofar as the author considers that it is open to him to reassess integrative links by reference to more recent events without making a further expulsion decision, we have explained why Vomero does not support that analysis (and MG, which the author also cites was addressed in Vomero). Further, the author of the review is apparently unaware that in the Supplementary Decision a concession had been made as to integrative links referring only to the initial decision having failed to consider the issue. Finally, therefore, what is said at [7] to [16] is inconsistent with the Supplementary Decision and the reliance placed on that at [1] of the review. For those reasons, we are unable to accept that the review can be seen as a further expulsion decision.

37. As we understood Ms Turnbull to accept, however, it would of course remain open to the Respondent to make a supplementary decision arising from the Appellant's further offending. However, the nature of that decision may well now be different as we understand both the offending and the conviction to post-date the UK's exit from the EU. As such, the deportation would have to be considered under the EU Settlement Scheme rather than under the EEA Regulations.

Ground 2: 'Colad'

38. We can deal with this ground more shortly. We have already set out the parts of the Decision dealing with Colad.

39. We first note the content of the Respondent's submissions in that case as set out in the Tribunal's decision at [12] as cited at [60] of the Decision. That submission does not necessarily run contrary to the judgment in Vomero. The Respondent argued only that the appellant's previous offending was not properly considered and that the Judge had acted irrationally by taking into account positive conduct during the period of detention. That the Judge could do so for the purposes of assessing whether the imprisonment has the effect that the ten year residence condition was not satisfied is confirmed by Vomero in so far as the detention pre-dated the expulsion decision.

40. The only support which Judge Brannan could take from Colad therefore is the Tribunal's reliance on conduct during the latter part of the detention and whilst on licence. However, the issue in that case was not whether it was open to the Judge to take this into account; it appears from the Tribunal's relatively brief reasoning that no distinction was made between pre-expulsion decision conduct and post-expulsion

decision conduct and that the Tribunal was not addressed on this issue. In the circumstances we consider that the Judge was wrong to attach the significance that he did to this decision.

41. Moreover, of course, an unreported decision of this Tribunal is not binding. Quite clearly, the judgment of the Grand Chamber in Vomero takes precedence.

42. For those reasons, the Appellant's second ground is also made out.

Next Steps

43. Following discussion with the parties we determined that the appeal should remain in this Tribunal for re-making. The hearing before Judge Brannan took place in only February 2024 and it is unlikely that the facts have changed significantly since then. The facts are largely undisputed. As such, the re-making will involve only an assessment of the threat posed by the Appellant against the correct level of protection (imperative grounds) and the issue of proportionality insofar as that falls to be reassessed due to any change of circumstances.

44. In discussion with the parties, we also gave the directions which we set out below.

CONCLUSION

45. For the reasons set out above, the Appellant's challenge to the Decision succeeds on both grounds. The Decision contains errors of law. We therefore set that aside and have given directions for a re-hearing of the appeal before this Tribunal.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Brannan promulgated on 8 February 2024 involves the making of an error of law. We set aside the Decision. We make the following directions for the rehearing of this appeal:

DIRECTIONS

1. **By 4pm on Friday 30 August 2024, the parties shall file with the Tribunal and serve on the other party any further evidence on which they wish to rely.**

2. **By 4pm on Monday 9 September 2024, the parties shall file with the Tribunal and serve on the other party a skeleton argument setting out the issues to be determined with reference to any supporting case-law.**

3. **The appeal will be relisted for a resumed hearing face to face before UTJ L Smith on the first available date after Monday 16**

September 2024 with a time estimate of ½ day. No interpreter is required. If the Appellant wishes to give oral evidence, his solicitors shall be responsible for arranging to procure his attendance at the hearing if he remains in detention.

4. **The parties have liberty to apply for further or amended directions.**

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 July 2024