The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: DA/00872/2013**

THE IMMIGRATION ACTS

Before

Upper Tribunal Judge Pinkerton

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR IH
(ANONYMITY DIRECTION MADE)

Respondent

DIRECTIONS FOR RESUMED HEARING

1. This appeal is remitted to the First-tier Tribunal sitting at Taylor House for a fresh hearing on all matters before a judge, judges or panel other than Judge M Colvin and Ms S Singer.

2. Both parties have leave to file and serve updating witness statements, reports and other evidence to be served no later than 10 working days prior to the substantive hearing.

3. The First-tier Tribunal will expect (a) to have produced to it not only the PNC record but the results of any investigations about its accuracy and (b) to hear argument about which convictions are disputed.

4. Solicitors for Mr H to notify the Tribunal if an interpreter is required, and if so, in which language.

5. Such other directions as may be considered appropriate shall be made by the First-tier Tribunal.

Signed **Dated**
Upper Tribunal Judge Pinkerton

APPELLANT: SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT: MR IH

CASE NO: DA/00872/2013

DATE OF INITIAL HEARING IN UPPER TRIBUNAL: 24 APRIL 2014

Representation:

For the Appellant: Mr P Duffy
For the Respondent: Miss L Taylor-Gee

REASONS FOR FINDING THAT TRIBUNAL MADE AN ERROR OF LAW, SUCH THAT ITS DECISION FALLS TO BE SET ASIDE

1. For ease of reference purposes the parties are referred to as they were before the First-tier Tribunal so that Mr H is the appellant and the Secretary of State is the respondent.

2. The appellant is a citizen of the Netherlands. He appealed the decision of the respondent made on 23 April 2013 to make a deportation order against him. A panel comprising First-tier Tribunal Judge Colvin and Ms S Singer (Non-legal member) allowed the appeal against the deportation under the Immigration (EEA) Regulations 2006.

3. The respondent sought permission to appeal and permission was granted. The respondent's grounds argue that the panel failed to identify which of the appellant's thirteen convictions for 23 offences they had disregarded because the appellant disputed them and why the panel did so.

4. The judge granting permission said that (a) there is no doubt that the appellant had an extensive and serious criminal record for a man of only 30 years of age. Given that his convictions include serious offences of violence and of dishonesty and his own history of substance abuse, it is arguable that the panel erred in disregarding some of the convictions without clear evidence that it was correct to do so; (b) furthermore, the convictions that were disregarded should have been identified. The panel did not make adequate findings on the central issue and that disclosed the arguable error of law; (c) the grounds also argue that the panel paid insufficient weight to the danger that the appellant posed to the public from his offending. There is little in the determination that explains why the panel rejected the evidence of the serious risk posed to the public by the appellant which is a further arguable error; (d) in addition it is an

arguable error that the panel mis-directed itself as to the balancing of the public interest and the interest of the appellant's child.

5. By a letter dated 23 April 2014 the respondent sent a fax to the Tribunal seeking leave to vary the respondent's grounds of appeal. This was on the following basis: -- At paragraph 46 of the determination the panel find that the appellant may only be deported on "imperative grounds of public security". The submission in the letter is that following the decision of the ECJ in the case of **Secretary of State for the Home Department vs MG (Judgment of the Court) [2014] EUECJ C-400** in the instant case the appellant could not avail himself of the protection of Regulation 21(4) of the Immigration (European Economic Area) Regulations 2006. This Regulation states that *the relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision*.

6. The submission by the Secretary of State is that as the decision to make a deportation order was made whilst the appellant was still serving a custodial sentence counting back from the date of the decision the ten year period is immediately broken by the fact that the appellant is still in custody. The decision was published some four days prior to the First-tier Tribunal hearing. Although that meant that it may be that none of the parties to the hearing were aware of the judgment the failure to take into account the judgment of the ECJ on the very issue in hand must be a material error.

7. I asked Miss Taylor-Gee whether she objected to the application to vary the Secretary of State's grounds of appeal and she responded that she did. I asked her if the application caused her difficulties because she was taken by surprise by it. Miss Taylor-Gee responded that although she had been briefed only very recently she had been able to prepare to meet the argument. Indeed I noted that in the short time available she had managed to address in a lengthy skeleton argument not only those matters upon which permission to appeal had been given but also the application for the variation of the grounds of appeal.

8. On the basis that the appellant was not taken by surprise at the hearing before me and caused no difficulties in putting forward legal argument I decided that there would be no unfairness to the appellant to allow the grounds to be varied. An important point had been raised by the respondent which ought to be aired before me. The grounds seeking permission to appeal are therefore varied.

9. According to the determination (at paragraph 9) the appellant challenged the PNC record. At his trial the judge accepted the convictions that he disputed and disregarded them. The appellant gave oral evidence before the panel, adopted his two written statements and although he was cross-examined there is no reference to him being challenged about the offences he did not accept. I find that it is hardly surprising therefore that

the panel at paragraph 47 discounted some convictions disputed by the appellant. I do not find therefore that the panel erred in relation to that matter although I comment that the panel may have wished to judge for itself the issue of the disputed convictions after asking appropriate questions and made findings that would have helped in the consideration of the panel's conclusions as to the appellant's integration into UK society. A future hearing should have that matter canvassed before it.

10. It is arguable that the panel failed to attach sufficient weight to the appellant's offending behaviour. There is little in the determination that explains why the panel rejected the evidence of the serious risk posed to the public by the appellant. It is not apparent anywhere in the determination what the panel makes of both the OASys Report and the independent risk assessment report placing the appellant in the category of medium risk of harm to members of the public. It may be that the panel merely agreed with what is said in the OASys Report that the appellant has a potential to cause serious harm but is unlikely to do so unless there is a change in circumstances but that needed to be stated with reasons and this was not done. Such findings needed to go into the "mix". The panel failed to spell out the public interest aspect in the appellant's own deportation and therefore fell into error in not doing so.

11. The panel can be forgiven for not being aware of the case of **MG** as it had only very recently been promulgated and it was not drawn to the panel's attention.

12. I do not consider that the respondent's representative at the hearing conceded that the "imperative grounds of public security" point applied. As recorded in paragraph 31 Mr Little (the Presenting Officer) accepted that the appellant has been in the UK for ten years and wishes to leave the issue of "imperative" to the panel.

13. In paragraph 52 of the determination the panel was of the firm opinion that the appellant's deportation could not be said to be justified on "imperative grounds of public security" which is necessarily a high threshold to expel an EEA national with over ten years' residence in the UK. However, I agree with the respondent that because of the decision in **MG** the ten year period of residence must in principle be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned. An interpretation of Article 28(3)(a) of Directive 2004/38 means that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host member state for the ten years prior to imprisonment. However, the fact that the person resided in the host member state for ten years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host member state have been broken.

14. I find that it cannot be said that had the panel been aware of and heard argument about the case of **MG** it would inevitably have come to the same conclusion and therefore this point on its own reveals a material error of law.

15. As I announced at the hearing the decision of the First-tier Tribunal panel is therefore set aside and the appeal will be heard afresh.

16. Having set aside the decision of the First-tier Tribunal s.12 (2) of the TCEA 2007 requires me to remit the case to the First-tier with directions or make a fresh decision for myself. In accordance with the practice statement dated 25 September 2012 and in particular the nature of the judicial fact finding which is necessary in order for the decision in the appeal to be re-made, and having regard to the overriding objective in Rule 2 of the practice statement I find that it is more appropriate in this appeal for the case to be remitted to the First-tier Tribunal to be heard by a different panel, judge or judges, and I direct accordingly.

Signed:

Upper Tribunal Judge Pinkerton