Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00952/2013

THE IMMIGRATION ACTS

Heard at : Hendon Magistrates' Court	**Determination Promulgated**
On : 16 March 2015	**On 17 March 2015**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JESSY AMOUR FABIEN LONGFORT
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Tarlow, Senior Home Office Presenting Officer
For the Respondent: In Person

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Longfort's appeal against the decision to deport him from the United Kingdom pursuant to Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Longfort as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of France, born on 25 November 1991. He claims to have arrived in the United Kingdom in 1997 with his mother. He first came to the adverse attention of the authorities here in 2006. He has received twelve convictions for seventeen offences since that time:

4. On 23 January 2007 he was given a nine month referral order for common assault; on 4 July 2007 he received a three month action plan order, four week curfew order and a three month parenting order for taking a motor vehicle without consent and handling stolen goods; on 28 September 2007 he was sentenced for breaching the action plan order and the previous sentence was revoked and varied to a three month action plan; on 17 December 2008 he received a 12 month conditional discharge for theft; on 24 April 2009 he received a 12 month community rehabilitation order, a 60 hour community punishment order and a four week curfew order for robbery and breach of conditional discharge; on 3 September 2009 he received a 12 month community rehabilitation order for possession of a Class A drug (crack cocaine); on 23 September 2009 he received a community punishment and rehabilitation order for various offences including assaulting a constable and failing to surrender to custody; on 19 February 2010 he received 12 months detention at a Young Offenders Institute for burglary and theft; and on 5 May 2011 he received an 18 month detention in a Young Offenders Institute for burglary and theft.

5. The index offence, leading to the current deportation proceedings, was of attempted robbery, when he attacked a 16 year old school girl and attempted to take her mobile telephone, for which he was convicted on 11 September 2012 and sentenced to 16 months detention in a Young Offenders Institute. However since that time, and whilst on licence, he committed further offences. On 19 October 2013 he was convicted of possession of a Class B drug (cannabis) and received a £110 fine and on 24 March 2014 he was convicted of burglary, after breaking into a flat and stealing various items on 8 October 2013, for which he received a 27 month term of imprisonment.

6. The appellant's liability to deportation was considered by the respondent on 31 March 2010 in light of his conviction on 19 February 2010, and on 8 December 2011 in light of his conviction on 5 May 2011, but no action was taken against him on either occasion. He was issued with a warning on both occasions.

7. Following his conviction on 11 September 2012 the appellant was served, on 27 November 2012, with a notice of liability to deportation. On 3 May 2013 the respondent made a decision to deport him under Regulation 21 of the EEA Regulations.

8. In the reasons for deportation letter, the respondent considered that the appellant had not acquired the right to permanent residence and that he posed a genuine, present and sufficiently serious threat to the interests of public policy. It was considered further that his deportation would not breach his Article 8 rights under the ECHR.

9. In a supplementary letter dated 14 May 2013, the respondent accepted, on the basis of documentary evidence submitted by the appellant of his attendance at school in the United Kingdom, that he had obtained a permanent right of residence by virtue of a five year period of continuous residence. However, whilst it was accepted that he had resided in the United Kingdom for at least ten years, it was not accepted that he met the necessary integration test so as to qualify him for the higher level of protection on imperative grounds of public security. On the basis of the evidence produced, and in view of the fact that he had been assessed as posing a high risk of re-offending, the respondent considered that his deportation was justified on serious grounds of public policy.

10. The appellant appealed against that decision and his appeal was heard on 20 August 2014 by First-tier Tribunal Judge Bart-Stewart. The judge accepted that he had acquired not only a right of permanent residence but also a right to enhanced protection and that deportation could accordingly be justified only on imperative grounds of public security. Relying on the judgments in Tsakouridis (European citizenship) [2010] EUECJ C-145/09 and Essa v Secretary of State for the Home Department (EEA: rehabilitation/integration) Netherlands [2013] UKUT 316 and having considered the question of integration, the judge concluded that the threshold of imperative grounds of public security had not been met and that the appellant's deportation would therefore be in breach of Regulation 21 of the EEA Regulations. She allowed the appeal under the EEA Regulations.

11. The respondent sought permission to appeal to the Upper Tribunal on the grounds that the judge had failed to consider that the appellant had ignored two warning letters and that he remained a high risk of re-offending; and that she had erred in her consideration of his rehabilitation prospects in France.

12. Permission to appeal was granted on 27 October 2014 on the grounds raised.

Appeal hearing and submissions

13. At the hearing before me, the appellant confirmed that he did not have a legal representative and was happy to proceed.

14. Mr Tarlow made an application to amend the grounds to include a challenge to the judge's finding that the higher level of protection, on "imperative grounds" applied, on the basis that there was a lack of reasoning and a failure to address the considerations in MG (prison-Article 28(3) (a) of Citizens Directive) [2014] UKUT 392.

15. I allowed the amendment, given that it seemed to me to be an obvious and relevant point and that, in any event, the first line of ground one was indicative of such a challenge.

16. Mr Tarlow went on to submit that the judge's finding at [31], that the appellant was not a persistent offender, was almost perverse in the light of his offending history. He submitted that, in the light of MG, the appellant did not qualify for the highest level of protection and, if the Tribunal accepted that the judge had erred in that respect, the decision had to be re-made since all her findings flowed from that assessment.

17. The appellant had no response to the question of the protection threshold in legal terms and accordingly I advised the parties that in my view the Tribunal had erred in law in its assessment of the relevant level of protection and had failed to take into consideration the relevant case law. Accordingly I set aside the judge's decision. I then considered how best to proceed with the re-making of the decision.

18. The appellant was keen for me to re-make the decision straight away. He advised me that his mother had told him the previous evening that she would be attending the Tribunal hearing. However she was not present. I was concerned that she may have believed the hearing to commence at 2pm, as there had been an error in the administration of the court list and the list indicated a 2pm start, whereas in fact the case had been listed to commence at 10.30am, which was the time the appellant said he had told her to attend. Accordingly I rose in order for efforts to be made to contact her. When she failed to answer the calls made to her on the number provided by the appellant I advised the parties that I was minded to remit the case to the First-tier Tribunal so that evidence could be given and findings made in regard to the question of integration.

19. However the appellant requested that the decision be re-made by me in the absence of his mother. I advised him that that may well be detrimental to his case since his mother's involvement in his life was relevant to the issue of integration, but he was adamant that he wished the proceedings to continue and did not want an adjournment. In the circumstances, and given that there was no further evidence, other than a more recent OASys report, some certificates and a statement from the appellant which he produced, I proceeded to hear submissions with a view to re-making the decision (in any event there was no appearance by the appellant's mother at 2pm).

20. Mr Tarlow submitted that the appellant was a recidivist and that the more recent OASys report did not materially assist him as his pattern of behaviour had continued and he still posed a risk of harm to the public. There was no level of integration. He was not entitled to the highest level of protection. There were serious grounds of public policy justifying his deportation.

21. The appellant, in response, submitted that prior to re-offending he had been getting his life together and had been signing on for nine months until the Home Office took his passport off him, so preventing him from finding work. The respondent was wrong in considering him to be a high risk of re-offending, as the recent OASys report assessed him as a medium risk. He was now an even lower risk as he had undergone a victim awareness course in prison and had not had any drugs and had certificates confirming that. He had no prospects in France and would be homeless. He had learned a lot in prison and had matured and realised the benefits of his skill in art. He had won first prize in two competitions for art work in prison, he was a peer mentor in graphic design and he had built up his digital portfolio. He had a reference from his graphic design class teacher and he could use that to get into university. He was looking at a career in games design. His mother had always come to court when she had been informed of the hearing and she had faxed a letter of support to the detention centre in Dover which had unfortunately not been sent on when he was moved to Colnbrook. His younger brother had lived in the United Kingdom all his life from the age of six months and was going to go to university and he wanted to be here for him. His mother was an NHS nurse and did not have a lot of

money and would find it difficult to help him if he had to relocate to France. He would not re-offend.

Consideration and findings.

22. Having found that the First-tier Tribunal erred in law by failing to consider the findings in MG with respect to the level of protection to which the appellant was entitled under the EEA Regulations, I now turn to that case and to the relevant article of the Citizens Directive, namely Article 28 of Directive 2004/38/EC, as reflected in Regulation 21 of the EEA Regulations, which states as follows:

> "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 10 years; or
>
> (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

23. Following the Upper Tribunal's request, in a decision of 24 August 2012 in MG (EU deportation - Article 28(3) - imprisonment) Portugal [2012] UKUT 268, for a preliminary ruling from the Court of Justice and the European Union (CJEU) on Article 28(3)(a) of the Citizens Directive, the CJEU gave its ruling in Case C-400/12, finding as follows:

> "28. In the light of all of the foregoing, the answer to Questions 2 and 3 is that, on a proper construction of Article 28(3)(a) of Directive 2004/38, the 10-year period of residence referred to in that provision 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."

and at [33] to [38]:

> "33. It follows that periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 and that, in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision.
>
> 34 As regards the continuity of the period of residence, it has been stated in paragraph 28 above that the 10-year period of residence necessary for the granting of enhanced protection as provided for in Article 28(3)(a) of Directive 2004/38 must, in principle, be continuous.

35 As for the question of the extent to which the non-continuous nature of the period of residence during the 10 years preceding the decision to expel the person concerned prevents him from enjoying enhanced protection, an overall assessment must be made of that person's situation on each occasion at the precise time when the question of expulsion arises (see, to that effect, *Tsakouridis*, paragraph 32).

36 In that regard, given that, in principle, periods of imprisonment interrupt the continuity of the period of residence for the purposes of Article 28(3)(a) of Directive 2004/38, such periods may - together with the other factors going to make up the entirety of relevant considerations in each individual case - be taken into account by the national authorities responsible for applying Article 28(3) of that directive as part of the overall assessment required for determining whether the integrating links previously forged with the host Member State have been broken, and thus for determining whether the enhanced protection provided for in that provision will be granted (see, to that effect, *Tsakouridis*, paragraph 34).

37 Lastly, as regards the implications of the fact that the person concerned has resided in the host Member State during the 10 years prior to imprisonment, it should be borne in mind that, even though - as has been stated in paragraphs 24 and 25 above - 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 that person's expulsion, the fact that the calculation carried out under that provision is different from the calculation for the purposes of the grant of a right of permanent residence means that the fact that the person concerned resided in the host Member State during the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment referred to in paragraph 36 above.

38 In the light of the foregoing, the answer to Questions 1 and 4 is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning 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 10 years prior to imprisonment. However, the fact that that person resided in the host Member State for the 10 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."

24. In MG (prison-Article 28(3) (a) of Citizens Directive) [2014] UKUT 392, the Upper Tribunal found some difficulty in interpreting the CJEU's ruling, but concluded as follows:

"48..... If the Court in MG had meant to convey by the terms "cannot be taken into account" that periods of imprisonment automatically disqualify a person from enhanced protection under Article 28(3)(a) protection, it would not have seen fit to proceed in paragraph 35 to accept as a possibility that the "non-continuous" nature of a period of residence did not automatically prevent a person qualifying for enhanced protection. Nor would it have chosen in paragraph 38 to describe periods of imprisonment as "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…" It would have had to say that, if they fall within the 10 year period counting back from the date of decision, periods of imprisonment always prevent a person qualifying for enhanced protection. **In addition, what the Court goes on to say in paragraph 37 about the implications of the fact that a person has resided in the host Member State during the**

10 years prior to imprisonment is clearly intended to underline that even though such a person has had a period of imprisonment during the requisite 10 year period (counting back from the date of decision ordering the expulsion: see para 27) it is still possible for them to qualify for enhanced protection and in this regard their prior period of residence "may be taken into consideration as part of the overall assessment referred to in paragraph 36 above". We also bear in mind, of course, as did Pill LJ in Secretary of State for the Home Department v FV (Italy) [2012] EWCA Civ 1199 at [42] that in Tsakouridis the CJEU Grand Chamber did not consider the fact that Mr Tsakouridis had spent a substantial period of time in custody in Germany in the year prior to the decision to expel him (taken on 9 August 2008) as defeating his eligibility for enhanced protection under Article 28(3)(a**). Nevertheless (and this is where we consider Mr Palmer right and Miss Hirst wrong), the fact that the Court specifies that "in principle" periods of imprisonment interrupt the continuity of residence for the purposes of meeting the 10 year requirement can only mean that so far as establishing integrative links is concerned such periods must have a negative impact**."

25. I have highlighted what I consider to be the most relevant parts of the judgment, from which it is clear that periods of imprisonment can be considered as interrupting the continuity of residence by having a negative impact, but do not necessarily preclude the acquisition of ten years residence and that the overriding consideration is integration. It is clear that the ten years have to be counted back from the relevant decision.

26. In the appellant's case, he had resided in the United Kingdom for a period of at least ten years prior to his first imprisonment and that is clearly a matter which may be taken into consideration as part of the overall assessment required in order to determine whether his integrating links previously forged with the United Kingdom have been broken. The relevant question is whether his integrating links have been broken as a result of his periods of imprisonment and accordingly I turn to the question of integration.

27. Contrary to the findings of the First-tier Tribunal it seems to me that the appellant is a recidivist and persistent offender. Since the age of 15 he has been committing criminal offences on a continual basis, with at least one conviction for every year of his life thereafter, such offences becoming gradually more serious. He has received two warnings of liability to deportation, which he chose to ignore and, more significantly, offended again within six to seven months of being released from prison, within the period of his licence, and following the commencement of the current deportation proceedings. It is clear that the appellant has thereby chosen to conduct his life outside the norms of society and with no respect to the public or to the laws of the country in which he has been residing.

28. It is of course a significant factor in the appellant's favour that he has resided in the United Kingdom since the age of five years, that he speaks English as his first language, that he has been educated in the United Kingdom and that his close family members, his mother and brother, reside here. However, it is relevant to note, as stated at page 13 of the recent OASys report of 20 November 2014, that he was expelled from school prior to sitting his GCSEs due to disruptive behaviour and truanting. He has not worked in the United Kingdom and, as stated in the same section of the OASys report, he was recalled to prison during the period of his licence as a result of his re-offending when engaging with a charity which was assisting him in securing employment in the building trade. The OASys report refers, at page 16, paragraph 7.5 to the lack of structure in his day, to his daily use of

cannabis and to his association with drug dealers and pro-criminal peers prior to his imprisonment.

29. There is, furthermore, a lack of evidence to confirm the appellant's claim as to the close family ties he retains in the United Kingdom. Other than his mother's letter of support submitted with the Notice of Appeal to the First-tier Tribunal there is nothing from his mother or brother by way of statements or oral evidence to support his claim. The appellant advised me that his mother had attended a previous hearing that was adjourned on 2 February 2015 but there is no confirmation of that. He also informed me that his mother had told him that she would be attending the hearing today but she did not appear. She did not appear at the hearing before the First-tier Tribunal and has not provided any statement explaining her absence or confirming her intention to attend. It seems that the appellant was living with his mother and brother prior to his current imprisonment, but the OASys report suggests that that arrangement has not been confirmed upon his release. Page 11 of the report, at section 3, states that he will be of no fixed abode in the United Kingdom on release and requires support in securing accommodation. Page 15 of the report, at section 6, refers to some problems with close family members and to a lack of family visits, although reference is made to contact through letters and page 38, section 11.12.2 refers to support from his mother and brother. However, overall, and on the basis of the evidence available to me, it seems to me that the appellant's family ties do little to assist his case with regard to the question of integration and even if there was evidence of support from his mother it is plain that she has had little or no influence on his behaviour.

30. Finally, considering the appellant's activities whilst in prison, it is the case that during his most recent period of incarceration he appears to have made considerable efforts to gain qualifications and to provide a basis for his future on release. He has attended a course to address his use of cannabis, he has attended a victim awareness course and he has been successful in his art and graphic design work. Whilst that all stands in his favour, the relevant question is whether or not it is sufficient to be able to conclude that he has successfully rehabilitated himself and provided a solid basis for his integration into society. Unfortunately I have to conclude that it is not. Plainly those activities were undertaken when he was incarcerated and had little alternative and at a time when he was under a real and imminent threat of deportation. Given his offending history and his involvement in crime following previous periods of imprisonment there can be little confidence in his ability to continue to pursue such positive activities when at liberty. That is particularly so considering that even whilst in prison there continued to be concerns about his behaviour and compliance, as expressed at page 23 of the OASys report.

31. In all the circumstances it seems to me that the appellant has failed to show that despite the periods of detention interrupting his continued residence in the United Kingdom, his period of residence prior to imprisonment and his integrative links to this country are such that he is entitled to the highest level of protection under the EEA Regulations.

32. Accordingly, and on the basis that it is accepted that he has permanent residence in the United Kingdom, the appellant is entitled only to the second level of protection under

Regulation 21(3) and his deportation can be justified only on serious grounds of public policy or public security. I therefore turn to the question of whether such serious grounds exist.

33. It is the appellant's case that he no longer poses a risk of harm to the public and he relies upon the fact that his level of risk was assessed in the most recent OASys report as having been reduced to medium. He claims that on the basis of rehabilitative work he has undertaken in prison, his risk should now be considered as low. It is indeed the case that in the OASys report of 7 November 2012, completed following his conviction and imprisonment in September 2012 for the index offence, he was assessed as a high risk of harm to the public and a high risk of re-offending whilst in the more recent report of 20 November 2014 he has been assessed as posing a medium risk of re-offending and a medium risk to the public. However there is no evidence to support his claim to be a low risk. On the contrary it is relevant to note that the recent OASys report was written some eight months after his conviction, based on an assessment completed on 19 September 2014, six months after conviction, and thus after a considerable period of time already spent in prison. There is no evidence to suggest that the risk he poses has reduced.

34. The OASys report, at section 2.12, page 9, describes the appellant as follows:

> "[His] behaviour demonstrates a pattern of behaviour in terms of his offence of burglary ie a dwelling and theft. He has the propensity to breach community orders/ licence whilst being subjected to this suggesting his attitude of non compliance and a disregard for the law. His offences suggest that he is opportunistic, impulsive and deviant in nature, giving no thoughts of his victims…..there appears to be a willingness for Mr Longfort to resort to aggressive behaviour to resolve conflict or gain what he wants."

35. Section 12.8 of the report states as follows:

> "Mr Longfort's offending behaviour indicates that he holds pro-criminal attitudes, he has not had a stable lifestyle and has been willing to engage in offending behaviour that poses a risk of harm to others in order to get what he wants either financial or conflict resolution….On interview Mr Longfort states that he has no problems engaging with probation however this conflicts with his compliance…I assess that pro-criminal attitudes are linked to risk of serious harm…"

36. Section R6.1 of the report, at page 32, describes how the appellant disputed the account of the incident leading to his conviction in September 2012 for the index offence, minimising the offence and claiming that the victim had made up the robbery. That is clearly relevant to his perception of his offending behaviour. Page 36 of the report, at R10.6, provides an indication of risk of harm, stating that the appellant poses a medium risk of serious harm, defined as a potential to cause serious harm in the event of a change of circumstances. At page 39 the report places him in the category of a high probability of proven reoffending, a high category of proven non-violent reoffending and a medium category of proven violent reoffending.

37. Taken as a whole, considering both OASys reports, the lack of any more recent evidence of risk and the appellant's history of offending and non-compliance, and bearing in mind in particular the recent offending whilst already facing deportation proceedings, it

seems to me that the risk he poses to the public is considerable. Whilst there is evidence, as stated above, of commendable efforts made in prison in attending various courses, there is nevertheless no evidence to suggest that the risk he poses has thereby been reduced. These are all matters which are of course relevant to the question of rehabilitation, as discussed in Essa v Secretary of State for the Home Department (EEA: rehabilitation/integration) Netherlands [2013] UKUT 316. As already stated above, the appellant has failed to demonstrate any significant level of integration into the United Kingdom, despite his years of residence here, and the absence of relevant factors contributing to integration also indicates a failure in terms of rehabilitation.

38. As to whether or not the likelihood of rehabilitation would be greater in the United Kingdom rather than in France, it seems to me that the appellant's history of repeat offending in this country does little to assist him in that regard. He claims that he has now made a plan for the future and will attend university and pursue a career in art and design, and that his deportation to France would destroy such opportunities. However there is no reason why such a career could not be pursued in France. Whilst he may be more able in communicating in English than in French, he nevertheless confirmed that he could understand French and would therefore be able to communicate in France. In any event his communication would be by way of his art which does not require fluency in French. He has extended family there and has recently visited and stayed with family friends and there is therefore no reason to believe that he would be without support and homeless as he claims would be the case. It is relevant to note in that respect that according to the OASys report he has any event no accommodation arranged in the United Kingdom. The OASys report makes frequent reference to the appellant's pro-criminal peers and association with drug dealers in the United Kingdom and he would therefore benefit from being able to avoid association with former peers by relocating to France. In the circumstances there is nothing in the evidence to indicate that the prospects of rehabilitation would be better in the United Kingdom.

39. Accordingly, on the evidence before me I conclude that there are indeed serious grounds of public policy justifying and requiring the appellant's deportation. For the same reasons and on the basis of the findings I have already made, the principles in Regulation (5) apply. In light of the risk assessments discussed, the personal conduct of the appellant plainly represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Furthermore, having regard to the considerations in Regulation 21(6) and in light of the findings already made as to the appellant's length of residence in the United Kingdom, his ties to the United Kingdom and to France and his integration into the United Kingdom, and considering his age and healthy status, the decision to deport him is clearly proportionate. The respondent was and is entitled to seek to deport him and his deportation will not be in breach of the EEA Regulations.

40. For the sake of completeness, although the matter was not raised or pursued, I would add, for the same reasons as given above and on the basis of the evidence before me, that the appellant's deportation would not be in breach of his Article 8 human rights.

DECISION

41. The making of the decision of the First-tier Tribunal involved an error on a point of law. The decision of the First-tier Tribunal is therefore set aside and the Secretary of State's appeal is allowed in that regard. I re-make the decision by dismissing Mr Longfort's appeal on all grounds.

Signed
Upper Tribunal Judge Kebede