Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00244/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 August 2017	**On 1 September 2017**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

HUSSEIN AHMED YUSSUF DUALEH
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Arkhurst, of Counsel, instructed by Caulker and Co.
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondent challenges the determination of First-tier Tribunal Judge Cockrill allowing the deportation appeal of this appellant under the EEA Regulations. The determination was promulgated on 30 May 2017 following a hearing at Taylor House on 17 May 2017. For convenience, I refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a Dutch national (of Somali descent) born on 7 October 1992 who claims to have entered the UK in August 1999. He has a number of cautions and criminal convictions, the most recent

being for five counts of supplying Class A drugs (heroin and crack cocaine) and possessing Class B drugs as a result of which he received a prison sentence of 33 months in August 2015 for each count, to be served concurrently. On 26 August 2015, the respondent notified the appellant that she intended to make a deportation order against him on the grounds of public policy in accordance with Regulations 19(3)(b) and 21 and the order was signed on 15 April 2016. The appellant was deported on 31 May 2016 and the appeal proceeded in his absence with the attendance of his sister and Counsel.

3. The judge noted that whilst there was no evidence of entry, there was evidence that the appellant had been in school between 2004 until 2012. He concluded that in the absence of evidence to rebut that, the appellant had shown a presence of over 10 years in the UK and was entitled to the highest level of protection afforded by the Regulations which meant he could not be deported unless imperative grounds of public security could be shown. Whilst he considered that the appellant would not have been able to prevent his deportation had the lower level of protection applied, the sentence imposed on the appellant was not heavy enough to justify his deportation given that the higher level had been found to apply.

4. The respondent sought permission to appeal on 2 June 2017 and this was granted by First-tier Tribunal Judge Cruthers on 11 July 2017 on the basis that the judge had arguably erred in finding that the appellant benefited from the higher level of protection. The respondent had argued that the appellant had to demonstrate that he had acquired permanent residence and showing he had been in education was not enough. Further, he was required to show that he had integrated into British society and had been living here in accordance with the Regulations. It was maintained that the judge had failed to engage with these matters.

The Hearing

5. At the hearing on 31 August 2017, I heard submissions from the parties. Mr Arkhurst adduced a new document from a school in respect of the appellant however as this document had not been before the First-tier Tribunal Judge, I declined to admit it at this stage.

6. Mr Whitwell relied on the grounds and on the judgment of the Court of Appeal in Warsame [2016] EWCA Civ 16 relied upon therein. He submitted that the judge had erred with regard to the level of protection afforded to the appellant. The appellant had been in prison for part of the ten-year period preceding the order for expulsion and so had failed to show that he had accumulated ten years of continuous residence. The judge was then required to consider whether there had been ten years of residence prior to imprisonment

and whether, if there had, the imprisonment had broken the integrating links previously forged with the host member state. He had failed to engage at all with this matter and had not conducted any assessment on integration or on whether he had been exercising treaty rights even though the decision letter specifically raised this matter (at 10-12). There were gaps in the evidence relating to residence. The appellant could have come and left. As the judge noted in his determination, critical documents regarding his period of residence were missing from the bundle. The fact of enrolment in a school and an NHS card did not establish residence or the exercise of treaty rights. The judged had erred and his decision should be set aside and re-made.

7. In response, Mr Arkhurst submitted that there was no material error. The judge had considered all the evidence. There had been evidence of school enrolment and an NHS card to demonstrate residence. Furthermore, the appellant's parents and sister were here and he had been living here. It was difficult to see what more evidence he could have provided to show integration. The sentence was not sufficiently serious to justify deportation. The decision should stand.

8. Mr Whitwell replied. He reiterated that there was no consideration in the determination of the issue of integration. The appeal needed to be re-heard.

9. At the conclusion of the hearing I reserved my determination which I now give.

Findings and Conclusions

10. The issue in this case is whether the judge considered all the matters required of him in order to reach a conclusion that the appellant had acquired permanent residence and thus benefited from enhanced protection.

11. The ten-year period of continuous residence leading up to 15 April 2016 when the deportation order was signed, was interrupted by the 33- month prison sentence he received in 2015 and, according to the appellant's own witness statement, time spent in prison in 2012 witness statement: paragraph 26). It was, therefore, necessary for the judge to consider whether the appellant had acquired residence prior to being in prison, whether he had been exercising treaty rights and whether any integration with the host community forged by the earlier period of residence was broken by the time spent in prison.

12. I accept that the judge had before him evidence that the appellant had registered with the NHS, that he had enrolled at school between 2004 and 2012 and that his sister gave oral evidence that they had

arrived together in August 1999. On that basis, the judge reached the conclusion that the appellant had shown a presence in the UK and that he was, therefore, entitled to enhanced protection. That was the wrong approach. The judge did not appreciate that *"imprisonment is, in principle, capable of interrupting the continuity of the period of residence … and of affecting the decision regarding the grant of the enhanced protection provided …even where the person concerned resided in the host member state for the ten years prior to imprisonment"* (MG (Portugal) [2014] 1 WLR 2441 at 38) and he failed to carry out the overall assessment of the appellant's circumstances, identified as a necessary step in Warsame and MG. The judge thus erred in law.

13. The next issue is whether this error is material. As the judge, himself, pointed out, crucial documents relating to residence had not been included in the appellant's bundle. There is no evidence of the work and community activities the appellant claimed in his statement to have undertaken here. He appears to have been in trouble with the police from 2012 onwards. There is no information on what he was doing during this time other than dealing in drugs and stealing. The judge also observed that had the lower level protection applied, the appellant would not have had a case strong enough to prevent deportation. In the circumstances, it is, therefore, impossible to speculate on what the outcome would have been had the judge applied the proper test. On that basis, I find that the error is material and that the determination cannot be sustained.

14. Decision

15. The First-tier Tribunal made an error of law and the decision to allow the appellant's appeal is set aside. A fresh decision shall be made by another judge of the First-tier Tribunal at a hearing to be arranged.

16. Anonymity

17. No anonymity order was made by the First-tier Tribunal. I was not asked to make one and, in any event, see no reason to do so.

Signed

Upper Tribunal Judge

Date: 31 August 2017