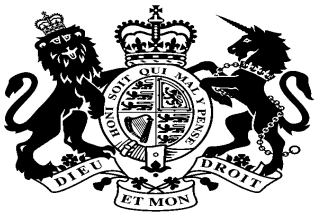

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00235/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 November 2018	**On 18 December 2018**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

VOJTECH [H]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: No appearance
For the respondent: Mr I. Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 05 April 2017 to remove him from the UK on public policy grounds under regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016").

2. First-tier Tribunal Judge Buckwell allowed the appeal in a decision promulgated on 05 December 2017. In a decision promulgated on 16 March 2018 the Upper Tribunal found that the First-tier Tribunal erred in failing to give adequate reasons for

concluding that the highest '10 years' continuous residence' threshold for removal applied and set aside the decision (annexed). The Tribunal outlined the law as it then stood in relation to the '10 year' assessment and made clear directions to the appellant explaining the issues that he would need to address by way of evidence at the resumed hearing. The appeal was listed for a resumed hearing on 11 June 2018. The appellant failed to comply with the previous directions. The parties agreed that an adjournment was necessary for the appellant to formulate his case in a way that the respondent could understand and respond to. Further directions were made for the appellant to serve a detailed witness statement and a chronology of events for the Upper Tribunal to assess whether he had acquired a right of permanent residence in the UK for the purpose of the '10 years' continuous residence' test. By that stage, the Court of Justice of the European Union had issued its judgment in *B v Land Baden-Würtemberg and SSHD v Vomero* [2018] EUECJ C-316/16 confirming that permanent residence was a prerequisite to the highest level of protection against expulsion.

3. On 30 July 2018 the appellant's legal representatives, TNA Solicitors, confirmed that they were "withdrawing from representing" the appellant. After a further adjournment, the appeal was listed for hearing on 13 November 2018. There was no appearance by or on behalf of the appellant. I noted that he had attended previous hearings. There was no message or correspondence from the appellant. There was no adjournment request. I was satisfied that the notice of hearing was sent to his last known address. Mr Jarvis also made enquiries and confirmed that the Home Office notes recorded the following information:

> "Subject has attended Becket House today with a fitness for work statement, reason given is mental health for 8 weeks.
>
> I telephoned [name] in the absence of [name] to check if it was ok for the subject to Voluntarily Depart due to being DO signed, and he was of the opinion that this was ok, subject is an EEC national.
>
> Subject will be departing Dover Eastern docks at 13:45 on 10 November 2018 by Blueline Bus Ref: BL47051YX Praha - UAN Florenc"

4. The notes indicate that the appellant may have left the country on 10 November 2018. An appeal under the EEA Regulations 2016 is not treated as abandoned if the appellant leaves the UK. However, in light of this information I was satisfied that it was unlikely that the appellant would attend the hearing and that there were no grounds for an adjournment. I was satisfied that I could proceed to hear the appeal in his absence.

5. In the absence of the appellant or any other witnesses, I have considered the documentary evidence contained in the three bundles served on his behalf during the course of these proceedings, as well as the documents contained in the Home Office bundle.

Decision and reasons

6. The appellant and his sister gave evidence before the First-tier Tribunal and were found to be generally credible witnesses. The appellant prepared a witness statement in support of the appeal before the First-tier Tribunal. However, the appellant's statement is general in nature and does not contain detail on relevant issues, which is why the Upper Tribunal directed him to produce a more detailed statement. The appellant failed to comply with the direction. He did not attend the hearing to give evidence about his life in the UK. I must determine the appeal on the limited evidence currently before the Upper Tribunal.

Level of protection

7. Regulation 27 of the EEA Regulations 2016 provides three levels of protection against expulsion on public policy grounds. The respondent can make a 'relevant decision' to expel an EEA national from the UK on "grounds of public policy, public security or public health". The decision must comply with the principle of proportionality. It must be based exclusively on the personal conduct of the person concerned, which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Before taking a 'relevant decision' the respondent must take account of considerations such as the age, state of health, family, length of residence and the person's economic situation as well as the extent of his links to his country of origin. This is the minimum level of protection against expulsion.

8. In the case of a person who has acquired a right of permanent residence the respondent can only expel the person if there are "serious grounds of public policy, public security or public health". In the case of a person who has resided in the UK for a continuous period of at least 10 years prior to the 'relevant decision' the respondent can only expel the person if there are "imperative grounds of public security".

9. The Court of Justice of the European Union has made clear that permanent residence is a prerequisite to establishing a continuous period of 10 years' residence to benefit from the highest level of protection from expulsion: see *Vomero*. In assessing the 10-year period it is also necessary to consider whether any integrating links with the UK might have been broken by periods of imprisonment. One can see from this synopsis of the law that the highest level of protection against expulsion is not available simply because a person has lived in the UK for a chronological period of 10 years. The protection against expulsion is directly linked to the extent that a person has established rights under EU law and the extent of their integrating links to the UK.

10. The appellant is a Slovakian national. The exact date when he entered the UK is unclear, but he says that he entered with his parents in 2005 when he was around 14 years old. It is reasonable to infer that, at that age, the appellant was likely to be living with his parents. At that time, as Slovakian nationals, his parents were required to register under the Accession State Worker Scheme. There is evidence to

show that the appellant's parents registered under the scheme in 2005. There is some evidence in the form of P60 and P45 certificates to show that his parents may have carried out some work during 2005-2006 but there is no evidence to indicate a consistent pattern of work thereafter. A letter from the appellant's mother to the Secretary of State indicates that his father may have worked until 2008 but there is no evidence to support this statement. The appellant's mother asserted that he gave up work to care for her but there is little or no evidence to show the extent of her condition or to show whether it was sufficiently serious to show a permanent incapacity to work. The weight of the evidence indicates that it is likely that the appellant's parents have been largely dependent on state support for most of their time in the UK.

11. I have considered whether the appellant acquired a right of permanent residence in his own right. The appellant says that he went to school and then attended Thanet College. He has produced evidence from the school to confirm that he attended The Royal Harbour Academy from 2006-2008. Educational certificates from Thanet College indicate that he was studying there from 2009-2011. The appellant was studying for a continuous period of five years but there is insufficient evidence to show that he acquired a permanent right of residence on this basis. To acquire a right of permanent residence the appellant would need to show that he lived in the UK "in accordance with" the relevant EEA Regulations for a continuous period of five years. An EEA student is only a 'qualified person' for the purpose of the EEA Regulations if he has comprehensive sickness insurance and is not a burden on the social assistance system. There is no evidence to show that the appellant met those requirements during the period from 2006-2011 when he was studying in the UK. There is no evidence to show that the appellant has worked in the UK or that he has resided in accordance with the EEA Regulations as a worker for the required period. For these reasons I conclude that the appellant has failed to show that he acquired a right of permanent residence in his own right.

12. I have considered whether the appellant might have acquired permanent residence as a 'family member' of EEA nationals exercising rights of free movement in the UK either (i) as a direct descendant while he was under 21 years old or (ii) as a dependent. The appellant says that his problems began when he began a relationship with Czech national called [DO], who "got me into drugs". His statement does not say when the relationship started, but a chronology of events indicates that it may have been in 2013. The appellant says that he lived with his girlfriend, but again, no date is given as to when he moved out of the family home. Although the evidence is vague, it seems likely that the appellant was living in the family home with his parents until at least 2013. However, to qualify as a direct descendent under 21 years old he needs to show that his parents were exercising rights of free movement in the UK. Although there is some evidence to indicate that they registered under the Accession State Worker Scheme when they first arrived in the UK and may have worked for a short period of time, the evidence falls far short of showing that his parents exercised rights of free movement or were residing in accordance with other aspects of the regulations for a continuous period of five years. For these reasons I

conclude that the appellant has failed to show that he acquired a right of permanent residence as a 'family member'.

13. The appellant could only qualify as a dependent of his siblings as an 'extended family member' under regulation 8 because he is not a 'direct descendent' for the purpose of regulation 7. There is some evidence to show that his brother and sister registered to work, but the evidence falls far short of showing that he was dependent upon either one of them let alone for a continuous period of five years. Even if he was able to show dependency he could only acquire a permanent right of residence if he had been issued with a residence card as an 'extended family member' and would therefore be treated as a 'family member' by operation of regulation 7(3). Only those who are treated as 'family members' can acquire a right of permanent residence under regulation 15(1)(b). There is no evidence to show that he has ever been issued with a residence card as an 'extended family member'. For these reasons I conclude that the appellant has failed to show that he acquired a right of permanent residence as a dependent of his siblings.

14. It follows from these findings that there is insufficient evidence before the Tribunal to show that the appellant benefits from the higher level of protection from expulsion afforded to those who have acquired a right of permanent residence ("serious grounds"). Having failed to show that he acquired permanent residence, following *Vomero*, he is also unable to show that he is entitled to the highest level of protection ("imperative grounds"). The respondent need only show that there are grounds of public policy, public security and public health to justify his removal from the UK.

15. The appellant's antecedents show that he was convicted of interfering with a vehicle in November 2009 and sentenced to a 12-month conditional discharge. He was 19 years old at the date of the conviction. The appellant's claim that his problems began when he was drawn into drug use by a girlfriend in 2013 is borne out by his offending history. He had no further convictions until 2013 when he was convicted for various minor offences relating to handling stolen goods, possession of a controlled drug, breaches of a conditional discharge and several counts of theft (shoplifting). The nature of the offences is consistent with someone who was thieving to fund a drug habit. However, none of the offences were sufficiently serious to be dealt with by way of a custodial sentence, nor are they serious enough, taken alone, to justify his expulsion from the UK on public policy grounds.

16. The offence that prompted the decision to remove the appellant on public policy grounds was a far more serious conviction in 2016, when he was sentenced to a total of 42 months' (3 years and 6 months) imprisonment for supply of class A drugs (crack cocaine) and several counts of "conceal/disguise/convert/transfer" of criminal property. The judge's sentencing remarks indicate that the appellant pleaded guilty at the first opportunity. They give an indication of the nature of the offences, but neither the sentencing remarks nor the appellant's statement provide any specific information about the offences. The sentencing remarks were as follows:

> "Class A drugs – little more need be said about the seriousness of that. I apply the guidelines of course, and I take note of the way in which the prosecution put it and it is a lesser role in category 3. But there is a real seriousness in the persistent dishonesty indicated in many counts of transferring criminal property which you were involved in almost on a day-to-day basis; not over a great long time, but nevertheless you were very close to the wheels of criminality going round, committed no doubt by others: burglary, people's cards, people's personal property being taken, and most significantly – and this is not addressed in the guidelines, [by] the taking and use of other people's passports. It is well known that that gives rise to further serious criminality in the community, and that is a matter which to my understanding and judgment is an aggravating feature. So the transferring of criminal property counts, given their persistence and the nature of them, are very serious offences which cross the custody threshold quite clearly in themselves. You were very busy over that period of time, and in addition of course there is the class A drugs offence.
>
> Your record is one, sadly, which has the profile of someone who takes drugs himself, and I accept that that is the case, but it is a record nonetheless. You are not a person by any stretch of the imagination of previous good character. …..I do recognise that you have made some progress as far as your drugs habit is concerned, and that is encouraging. I hope you can put things behind you. It won't be easy of course, in particular because I am afraid you are going to prison, but there is it; I have to do my duty and that means not just helping you, although of course judges help defendants as far as they can all the time, but when it is as serious as this I am afraid there can be no alternative. And I have to look to the victims of crime. Fairness is not always wholly associated with the interests of a defendant but the interests of victims and of the general public who suffer from these matters."

17. The serious nature of drugs offences on society is obvious; especially in cases involve the supply of class A drugs. In this case there was associated criminality, whereby the appellant was transferring the property from other criminal offences to fund his drug habit. The serious nature of the offences he committed is reflected in the length of the sentence. Until that point, the appellant's record involved petty offending, but the criminality funding his drug use had clearly escalated into far more serious offending by 2016. I am satisfied that the serious nature of the later offences is sufficient to engage the lowest threshold for removal on grounds of "public policy". However, other considerations need to be taken into account before removal can be justified.

Other considerations

18. It is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society that it becomes relevant to consider whether the decision is proportionate taking into account the considerations identified in regulation 27(5)-(6) and the further public policy considerations contained in Schedule 1 of the EEA Regulations 2016: see *SSHD v Straszewski* [2015] EWCA Civ 1245 and *MC (Essa principles recast)* [2015] UKUT 520 in the context of the EEA Regulations 2006.

19. The appellant says that he was drawn into drug use by his girlfriend and it seems clear from his antecedents that this is at the root of his offending behaviour. Although his earlier convictions were less serious, they indicate that the appellant was willing to engage in criminality on a regular basis to fund his drug habit. The subsequent conviction showed a serious escalation in his offending behaviour. The description of the property offences indicates persistent and regular criminal behaviour.

20. The sentencing judge noted that the appellant expressed an intention to address his addiction. The appellant's statement says that his period in prison helped him to realise how things had gone wrong. He made a mistake and deeply regretted it. He has realised the importance of his family. He said that he would not take drugs or steal again. There is some evidence to show that the appellant has taken some steps to address his drug use. A letter from East Kent Drug and Alcohol Recovery Services dated 04 July 2016 states that that he attended a service called Turning Point between April 2013 and June 2016. Their electronic records indicated, at that stage, that he had given drug free urine tests since November 2015. This does not mean that he was drug free from April 2013 because clearly he wasn't. Nearly all of his convictions were for offences committed during 2013-2015. Nevertheless, it is an indication that after he was arrested for the most serious offence he took steps to tackle his drug addiction. There is evidence to show that he attended a RAPt (Rehabilitation for Addicted Prisoners Trust) rehabilitation course while in prison.

21. It is unclear when the appellant was released from prison, but a rough estimation based on the length of his sentence indicates that it is likely that he was released on licence halfway through his sentenced i.e. in early 2018. Correspondence on the court file indicates that he was moved into immigration detention in January 2018 and was released on immigration bail on 05 February 2018.

22. At the date of the First-tier Tribunal hearing the appellant was still serving his sentence. Because the First-tier Tribunal decision erroneously concentrated on whether the appellant's offending was sufficiently serious to overcome the "imperative grounds" threshold there is no analysis of the appellant's rehabilitation or likelihood of reoffending. The appellant would have been released on licence but there is no information from his Offender Manager or any information about the terms of his licence.

23. It is common for appellants to express regret when faced with the one of the consequences of their criminal behaviour i.e. deportation. Whether the appellant's intention to reform is genuine is difficult to assess without hearing from him in person. He chose not to attend the hearing and did not serve an up to date statement.

24. There is no evidence to show how he has fared since his release from prison, when the stresses and strains of ordinary life might challenge any progress he might have made in relation to his drug addiction. Mr Jarvis accepted that there is no evidence to show that the appellant has been convicted of further offences. However, I take into

account the fact that he has only been released from detention for a few months. In the absence of any up to date evidence from the appellant or an opportunity to speak to him to assess his resolve to remain drug free, it is too early to tell whether he has been rehabilitated. In short, I find that the appellant has failed to produce sufficient evidence to show that the underlying cause of his offending behaviour has in fact been addressed to the extent that he no longer represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

25. The appellant is a 27-year-old Romani man from Slovakia who has lived in the UK for a period of 13 years. He entered the UK when he was 14 years old with other close family members. The appellant says that his mother wanted to move to a place where they would face less discrimination as Romani people. The appellant attended school and college, but the evidence indicates that he did not obtain any significant qualifications. There is no evidence to show that he used any skills that he had to obtain regular work after he completed his studies in 2011. There is little or no evidence to show that he has engaged any EU rights since he has lived in the UK. Instead, the evidence shows that he was drawn into drug use and was likely to be living on the margins of society, relying initially on petty criminality to fund his habit, before moving on to more serious offending behaviour.

26. I accept that the focus of the appellant's family life is in the UK and that other members of his family seem to have formed integrating links to this country. However, apart from the mere fact of his length of residence, there is little evidence to indicate that the appellant has formed any significant integrating links. In contrast to the situation at the date of the First-tier Tribunal hearing, when the appellant was still in prison, neither the appellant nor any of his family members attended this hearing. The appellant is not married and has no children. There is no evidence to indicate that he is in a serious relationship with a person who has a right remain in the UK. The evidence indicates that he may have left the country to travel to Prague. I note that he told Judge Buckwell that his girlfriend, who he claimed he was no longer with, was deported to the Czech Republic. The appellant's life in the UK has not engaged rights of free movement. There is no evidence to show that he has worked or earned a living here. The evidence shows that for the last five years he has struggled with drug addiction, and as a result, became a persistent petty offender leading to more serious criminality by 2016.

27. After having considered the evidence in the round I am satisfied that the nature of the appellant's offending behaviour is sufficiently serious to engage the lowest threshold for removal on grounds of public policy. The earlier offences, although not sufficient taken alone, form part of the picture leading to more serious offending. I conclude that the nature of that offending represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I bear in mind that his past convictions are not in themselves sufficient to justify the decision. Although there is some evidence to indicate that the appellant took some steps to address his addiction while in prison his failure to attend the hearing or to produce up to date evidence since his release from detention means that I cannot be

satisfied that he has addressed these problems sufficiently to reduce the risk of reoffending. After having taken what evidence there is of the appellant's individual circumstances into account, I conclude that the decision to remove him on public policy grounds is proportionate on the facts of this case.

28. For the reasons given above I conclude that the 'relevant decision' is in accordance with the EEA Regulations 2016.

29. Although the Home Office notes indicate that the appellant might have left the country, it seems likely that he will come to know the content of this decision through his family members. The address on the court file is that of his family home. The appellant should be aware that the effect of the EEA removal decision ('deportation order') dated 05 April 2017 is to prohibit him from returning to the UK so long as the order is in force. Regulation 34 of the EEA Regulations 2016 states that a person may only apply for revocation of the order if there has been a material change in the circumstances that justified making the order. Article 32 of the Qualification Directive (2004/38/EC) states that a person who is excluded on grounds of public policy may submit an application for lifting an exclusion order after a reasonable period, depending on the circumstances, and in any event, after three years from enforcement of the final exclusion order.

DECISION

The appeal under the EEA Regulations 2016 is DISMISSED

Signed  Date 15 November 2018
Upper Tribunal Judge Canavan

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00235/2017

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice
On 19 February 2018

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

VOJTECH [H]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr T. Lindsay, Senior Home Office Presenting Officer
For the respondent: Ms V. Cross of TNA Solicitors

DECISION AND REASONS

Background

1. For the sake of convenience, I will refer to the parties as they were before the First-tier Tribunal although the Secretary of State is technically the appellant before the Upper Tribunal.

2. The appellant is a Slovakian national who entered the UK in 2005 with his parents and siblings. He was 14 years old. The appellant was convicted of several low-level offences in 2009, 2013 and 2015, which did not meet the threshold for imprisonment. In December 2015 he was convicted of supplying a controlled drug, for which he was sentenced to a total of three and a half years' imprisonment. The Secretary of State decided to remove the appellant on public policy grounds under regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") in a decision dated 05 April 2017.

3. The appellant appealed against the removal decision taken under regulations 23(6)(b) and 27 the EEA Regulations 2016. First-tier Tribunal Judge Buckwell allowed the appeal in a decision promulgated on 05 December 2017. The judge made the following findings:

> "60. … With respect to the protective threshold, I find without any doubt that the evidence confirms that the Appellant has spent at least 10 years in this country and therefore Regulation 27(4)(a) is applicable. The respondent has to show that there [are] imperative grounds of public security which apply and which therefore entitled the Respondent to make the relevant decision to deport the Appellant.
>
> 61. Based on the totality of the evidence presented I do not find that the public security threshold has been successfully met by the Respondent. Mr Briant himself questioned whether the threshold could be met by the Respondent based on the evidence which was before me. He was entirely correct in expressing that view. The public security issues have not been strongly asserted on behalf of the Respondent. Taking account of all the evidence I do not find that that risk has been established on behalf of the Respondent. I have fully taken into account the principles set out within Regulation 27(5) of the EEA Regulations 2016 in making my assessment."

4. The Secretary of State appealed the First-tier Tribunal decision on the following grounds:

   (i) The First-tier Tribunal erred in approaching the ten-year period for enhanced protection against removal as a "purely binary calculation" and failed to have regard to the principles set out in relevant case law as to how the ten-year period should be assessed: see *SSHD v MG* [2014] EUECJ C-400/12 and *Warsame v SSHD* [2016] EWCA Civ 16.

   (ii) At the date of the Upper Tribunal hearing the ground was refined to include the Opinion of Advocate General Szpunar in the cases of *B v Land Baden Württemberg* (C-316/16) and *SSHD v Vomero* (C-424/16) (delivered 24 October 2017).

Legal Framework

5. In *Land Baden Württemberg v Tsakouridis* (EU:C:2010:708) the Court of Justice of the European Union ruled:

1. Article 28(3)(a) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as meaning that, in order to determine whether a Union citizen has resided in the host Member State for the 10 years preceding the expulsion decision, which is the decisive criterion for granting enhanced protection under that provision, all the relevant factors must be taken into account in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State, reasons which may establish whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned.

2. Should the referring court conclude that the Union citizen concerned enjoys the protection of Article 28(3) of Directive 2004/38, that provision must be interpreted as meaning 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. Should the referring court conclude that the Union citizen concerned enjoys the protection of Article 28(2) of Directive 2004/38, that provision must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is covered by the concept of 'serious grounds of public policy or public security'.

6. In *SSHD v MG* (EU:C:2014:9) the Court of Justice of the European Union ruled:

1. On a proper construction of Article 28(3)(a) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 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.

2. 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.

7. In *Warsame v SSHD* [2016] EWCA Civ 16 the Court of Appeal concluded that the First-tier Tribunal erred in taking into account periods of imprisonment in assessing whether the appellant had a continuous period of 10 years' residence in light of the Court of Justice decisions in *SSHD v MG (Portugal)* (C400/12) EU:C:2014:9 and *Onukwere v SSHD* (C-378/12) EU:C:2014:13.

8. In *SSHD v Franco Vomero* [2016] UKSC 49 the Supreme Court decided that it was unable to come to a concluded view as to whether a person needs to acquire a right of permanent residence before relying on a continuous period of 10 years residence. Lord Mance noted that a majority of the Court favoured the view that possession of a right of permanent residence is not needed to benefit from the enhanced protection of the 10-year threshold. However, a minority of the Court regarded the position as unclear. As such, a referral was made to the Court of Justice for clarification.

9. The Opinion of Advocate General Szpunar in *B v Land Baden Württemberg* (C-316/16) and *SSHD v Vomero* (C-424/16) (EU:C:2017:797) concluded:

> 128. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg, Germany) and the Supreme Court of the United Kingdom as follows:
>
> In Case C-424/16:
>
> (1) The acquisition of a right of permanent residence within the meaning of Article 16 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, as amended by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011, is a prerequisite of enjoying enhanced protection under Article 28(3)(a) of that directive.
>
> (2) The expression 'the previous 10 years' in Article 28(3)(a) of Directive 2004/38 must be interpreted as referring to a continuous period, calculated by looking back from the precise time when the question of expulsion arises, that includes any periods of absence or imprisonment, provided that none of those periods of absence or imprisonment has had the effect of breaking the integrative links with the host Member State.
>
> In Case C-316/16:
>
> When the question of expulsion arises, it is necessary, in order to determine whether enhanced protection under Article 28(3)(a) of Directive 2004/38, as amended by Regulation No 492/2011, may or may not be granted following a period of imprisonment, to carry out an overall assessment *in concreto* taking account of all relevant factors, in each individual case, relating to all periods of presence in that Member State, including periods

> of imprisonment, so as to ascertain whether a period of imprisonment has had the effect of breaking the integrative links with the host Member State over the previous 10 years.

Decision and reasons

10. On the face of it, the First-tier Tribunal's finding at [60] amounted to no more than a bare statement that the appellant had resided in the UK for a chronological period of 10 years. The sole purpose of a decision is to give reasons for the First-tier Tribunal's findings. Failure to give adequate reasons to explain findings on material issues is an error of law: see *MK (duty to give reasons) Pakistan* [2013] UKUT 00641.

11. However, in this case, whether the First-tier Tribunal was required to give reasons for the bare finding depends on whether a formal concession was made by the respondent at the First-tier Tribunal hearing, and if so, what the terms of the concession were.

12. On behalf of the Secretary of State, Mr Lindsay argued that there is no evidence to indicate that a formal concession was made. On behalf of the appellant, the rule 24 response asserts: "At the hearing the SSHD presenting officer did concede that the Respondent met 10 years threshold."

13. There is a distinct lack of evidence from both parties to support their respective positions. Mr Lindsay did not produce the Presenting Officer's file note of the hearing, which might have clarified whether a concession was made. Although Ms Cross said that she was at the hearing and asserted that a concession was made, it was inappropriate for her to give evidence. She was not the legal representative who presented the case at the First-tier Tribunal hearing. There is no statement from Mr Ashogbon, who was recorded as the appellant's representative. Mr Ashogbon's notes of the hearing have not been produced. No evidence is produced of the nature or the extent the concession.

14. The judge's note of the proceedings does not clarify whether a formal concession was made. It merely states "10 years met" before taking notes of the evidence. I have considered the First-tier Tribunal decision in detail. It is also unclear as to whether a formal concession was made, and if so, the nature and extent of the concession. The judge summarised the reasons given by the respondent for removing the appellant [4-11]. He went on to summarise what happened at the hearing, including the evidence and submissions [17-52]. Although the judge mentions preliminary remarks at [18] there is no mention of the Presenting Officer making a formal concession at the start of the hearing. When summarising the law the judge stated:

> "Significant in this appeal is whether the Appellant is entitled to have the benefit of the 10 year threshold …. If it is found that the 10 year threshold applies then a relevant decision may not be taken" [55].

15. The wording in paragraph 55 did not suggest that a concession was made, but that the issue was to be determined. The only other area of the decision that might

indicate whether a concession was made is the judge's summary of the submissions made by the Presenting Officer. The relevant part is as follows:

> "45. The Respondent relies upon the reasons for refusal letter. As to the 10 year threshold, assuming that to be satisfied, the nature of the offences could justify removal. However it will be necessary for the respondent to establish that there were imperative grounds of public security which justified the decision. The issue would be the threshold in that respect.
>
> 46. Mr Briant raised issues relating to the probation report and the concerns as to whether the Appellant was properly and appropriately engaged in that respect with regard to rehabilitation. There was also reference to language spoken in Slovakia and reference to English. Mr Briant accepted that such aspects of the decision letter were incorrect.
>
> 47. Mr Briant, in expressing concluding views in relation to the EEA provisions Mr Briant acknowledged that the Respondent would have 'some difficulties' in persuading me that the relevant threshold had been met. (sic)"

16. Although there is some indication from the judge's note of the proceedings and the summary of the submissions that the appellant's chronological period of residence was not disputed, the evidence falls short of recording a formal concession by the Presenting Officer that the appellant engaged the requirement of regulation 27(4)(a) within the meaning ascribed to it in the relevant case law. No formal concession is recorded. The summary of Mr Briant's submission relating to the 10-year threshold, "assuming that to be met", is not sufficiently clear to conclude that the Presenting Officer conceded that regulation 27(4)(a) was engaged.

17. Even if it was conceded that the appellant had lived in the UK for a chronological period of 10 years, the extent of the concession would need to be made clear in the First-tier Tribunal decision. A correct assessment would require the Presenting Officer to state whether the respondent conceded that integrative links had not been broken by the appellant's sentence of imprisonment: see regulation 3(4). There is no evidence to show that such a concession was made.

18. Had the judge made clear the nature and the extent of any concession, and made clear that regulation 27(4)(a) was engaged <u>because</u> of a clear concession, I would have no hesitation in finding that the judge did not need to give detailed reasons for the bare finding at [60]. However, given the lack of clarity as to whether a formal concession was made, and the exact nature of any concession, it was incumbent on the judge to explain how and why he concluded that the appellant satisfied the requirement of regulation 27(4)(a) and thereby benefited from enhanced protection against removal. Having considered the decision as a whole, I find that there is a lack of reasoning to explain how and why the judge concluded that the appellant was entitled to the enhanced protection of regulation 27(4)(a).

19. The Opinion of Advocate General Szpunar in the case of *Vomero* was delivered on 24 October 2017 i.e. around a week before the First-tier Tribunal hearing. Given the proximity of the opinion to the First-tier Tribunal hearing it is unsurprising that the parties, and the judge, might not have been aware of such a recent development in

the law. Although an opinion of the Advocate General is not binding, it is persuasive. The referral in the case of *Vomero* came from the UK Supreme Court so the parties should have been aware of the referral. The opinion of Advocate General Szpunar indicates a different position to the provisional opinion held by the majority of the Supreme Court. There is no evidence to show that the parties to the appeal, or the judge, considered whether the appellant had acquired a right of permanent residence as a prerequisite to assessing the 10-year period for the purpose of obtaining enhanced protection under regulation 27(4)(a).

20. For the reasons given above, I conclude that the combination of the two points is sufficient to find that the First-tier Tribunal involved the making of an error of law. The judge heard evidence from the appellant and his sister and was clearly impressed by their evidence. Those findings have not been challenged and shall stand [58-59]. However, the decision must be set aside in so far as the assessment of regulation 27(4)(a), and any other relevant aspects of regulation 27, is concerned. The decision shall be remade at a resumed hearing.

DIRECTIONS

21. The resumed hearing will be listed on the first available date after eight weeks.

The respondent

22. The respondent did not appear to dispute that the appellant had lived in the UK for a continuous chronological period of 10 years prior to the date of the removal decision. However, the extent of any other concessions, if any, is unclear. The respondent shall provide written clarification of her position in relation to the enhanced level of protection under regulation 27(4)(a) **within 14 days** of the date this decision is sent.

The appellant

23. The appellant will need to consider recent developments in the law as set out above. Subject to further argument or concessions, it is likely that he will need to establish that (i) he acquired a right of permanent residence before accruing a continuous period of 10 years' residence; and (ii) his integrating links with the UK were not broken by his period of imprisonment.

24. It is a matter for the appellant what evidence he wishes to adduce in support of the appeal, but the following non-exhaustive list of evidence is likely to be of assistance to the Upper Tribunal.

    (i) Any evidence to show that the appellant resided in accordance with the EEA Regulations for a continuous period of five years, and in particular, from the date of his arrival in the UK. The appellant was likely to be dependent on his parents when he arrived in the UK. The HMRC is likely to be able to provide a summary of his parents' contributions for the relevant period as evidence to show that they were exercising rights of free movement.

(ii) Any evidence to show whether the period of imprisonment impacted on the connections that the appellant has in the UK i.e. whether it broke integrating links.

(iii) The appellant will also need to consider whether any of the matters in Schedule 1 of The Immigration (European Economic Area) Regulations 2016 might apply to his case and adduce evidence accordingly.

25. Any further evidence relied upon by the parties shall be filed **at least seven days** before the resumed hearing.

DECISION

The First-tier Tribunal decision involved the making of an error of law

The decision is set aside and will be remade at a resumed hearing

Signed  Date 14 March 2018
Upper Tribunal Judge Canavan