



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00620/2018

THE IMMIGRATION ACTS

Heard at Bradford Combined Court Centre
On 21 August 2019

Decision & Reasons Promulgated
On 5 September 2019

Before

UPPER TRIBUNAL JUDGE HANSON

Between

NIVALDO [M]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Hussain instructed by Alison Law Solicitors LLP

For the Respondent: Mr Diwnycz Senior Home Office Presenting Officer

DECISION AND REASONS

1. Following a hearing on 19 March 2019 the Upper Tribunal found a judge of the First-Tier Tribunal had erred in law for the reasons set out in the Error of Law Finding and Reasons decision promulgated on 22 March 2019, a copy of which is set out at Appendix A of this decision.
2. The matter comes back before the Upper Tribunal to enable it to reconsider this matter with a view to substituting a decision to either allow or dismiss the appeal.

Background

3. The issue at large is a narrow one but one of fundamental importance, namely whether or not withstanding the fact the appellant has been in the United Kingdom since April 2006, and acquired 12 years residence before the date of the decision to deport him from the United Kingdom on 25 September 2018, his conduct based primarily upon his acts of criminality has been sufficient to break his integration links to the United Kingdom.
4. Mr Diwnycz in his final submissions clarified his position that he could not concede on the evidence that such ties had not been broken but did not claim they had been fully broken, asserting they had been lessened. The question is whether when considering the extent to which such ties exist the appellant has established he is entitled to the higher level of protection under EU law. As noted in the error of law finding it was not disputed that if it was found the appellant is entitled to the higher level of protection the appeal must succeed.
5. Despite the clear directions having given regarding the provision of all evidence upon which the appellant was seeking to rely by a specified date, Mr Hussain advised the Tribunal that the appellant had written a further statement and that family members had attended who he wish to ask additional questions. Such an approach in not putting in statements that a witness is seeking to rely upon, when there is no reason made out why the solicitors did not comply with directions, containing what may be fresh evidence by way of answers to questions put in evidence in chief, is that the responding advocate, in this case the Senior Presenting Officer, has no notice of the nature of such evidence. Mr Hussain was therefore invited to use the time available to the Tribunal to draft additional statements which could be considered by Mr Diwnycz to see whether admitting the same presented any specific difficulties. As a result a further letter from the appellant dated 20 August 2019 together with an additional witness statement of 21 August 2019 was handed up together with a further statement from the appellant's girlfriend, [LH] also dated 21 August 2019, and a statement from [LH]'s father, Mr [BH], also dated 21 August 2019. Mr Diwnycz had no objection to such statements being admitted and all witnesses present were made available for the purposes of cross-examination re-examination.
6. In addition to the case law set out in the error of law finding one further development is handing down by the Supreme Court of its decision in *Secretary of State for the Home Department v Franco Vomero* [2019] UKSC 35.
7. The additional written evidence from the appellant is in the following terms:
Letter 20 August 2019
Dear, Excellency
Your honour I appreciate you taking your time to read my letter as I understand you are an exceptionally busy individual.

You will be more than aware of my case, there are some aspects I want to address. I moved to England from my native Portugal when I was 10 years old for a better way of life. I attained education in the United Kingdom, this allowed me prosper and become integrated into a better way of life. I have made a numerous amount of friends in my community also not so good friends, which has caused my incarceration in the future, I will not associate with these people, wherever they may be. If they approach me I will use assertiveness further if necessary I will notify my local police authorities. I have been in regular employment and contributed by paying my taxes.

I believe it is imperative to mention my stepmother is a United Kingdom resident, she is my sole supporter without her I would be lost. Understandably if I was deported this would cause separation with my family.

Throughout my sentence I have completed my sentence plan which is a requirement to be completed whilst in HMP custody. I requested courses which may benefit to me, however due to not meeting the criteria, I am unable to do this. This is open to discussion with my probation officer, I am more than willing to complete these additional courses in the community on release.

My NOMIS will clarify this, my incentives was to gain enhanced status through this I have earned privileges continuously over the past 2 years. Wing staff consider me to be polite and I always engage with prison regime. I have used my time in prison productively by gaining additional numerous educational and vocational qualifications, which will give me advantage in helping me get a job when I am released.

I deeply regret my actions which led to my offence. I am honest enough to admit I deserved to be imprisoned this has given me time to reflect. Indisputably I have learnt my lesson and have no intentions of returning to jail. In the future I would like to become a role model in my community explaining to teenagers the perils of becoming involved in criminal activities and breaking the law. I would explain to them this is not the best pathway to choose along with spelling out the harsh reality of prison life.

Intrinsically I believe I am a decent hard-working individual who quite simply made a life changing mistake. Therefore I will be extremely grateful if you could have mercy on me by allowing me to remain in the United Kingdom with my family.

Witness statement 21 August 2019

Whilst in prison I have seen directly the impact of drugs. For example a number of prisoners addicted to drugs, having been sentenced to crimes committed in order to fund their addiction.

It has given me insight that selling drugs has far reaching implications for society at large.

This week I have been given a trusted prisoner status on account of my exemplary record as an inmate.

Whilst in prison I have been visited by my family on the maximum number of times allowed and have maintained a close relationship with my partner, stepmother,

father, siblings and friends. They have all been very consistent in maintaining contact with me and supporting me during my sentence.

Since in prison I have a new baby brother, [J] who is 10 months old. I've been very fortunate that my stepmother and father had bought my siblings to visit me - [V] (21), [L] (11) [D] (6) [E] (4) which has allowed me to maintain close links with all of my family.

In addition to that [LH] has visited me every two weeks (maximum allowed) without fail, and we very much remain a couple and plan to continue our life together, once I am released.

8. Prior to his imprisonment the appellant had established what many would see as a good and productive life as a young man who had received an education, obtained employment, had a strong relationship with his girlfriend and with the family available to him in the United Kingdom. This is reflected in the comments of the Sentencing Judge, Judge Tremberg, who in the sentencing remarks of 14 September 2017 stated:

“You pleaded guilty, at what I accept as the first available opportunity, on a written basis and, in broad terms, I sentence you broadly in accordance with it. You are a man who has several advantages that most of the defendants who appear in the dock of criminal courts never have. You come from a supportive and decent family, some of whom are still here standing by you at court today. You are well educated, intelligent, you are in work - or you were - and you have a circle of decent friends who the court sees in the public gallery, young gentleman who are clearly from, themselves, decent backgrounds. And yet, over the past months of your life, your life appears to have unravelled as you have pressed the self-destruct button not once, not twice, but three times.”

9. The appellant was sentenced for supplying Crack Cocaine to another between 23 June 2017 and 25 July 2017 and an offence of possession with intent to supply Cocaine on 25 July 2017. The Sentencing Judge noted that these offences were committed after the appellant had appeared in court in May 2017 and received a sentence of 9 months imprisonment suspended together with 250 hours of unpaid work for attacking another man. The sentence handed down to the appellant by the Crown Court was therefore both in relation to the drugs -related offences which on the first count the appellant received 40 months imprisonment, the second count 56 months concurrent and for his breach of the suspended sentence 7 months consecutive, making a total of 63 months in total or 5 years 3 months imprisonment.
10. The chronology shows that the appellant acquired 10 years residence in the United Kingdom prior to his arrest in May 2017 but that he was known to the authorities prior to this - see [21] of the Error of Law finding.
11. The OASys assessment of 5 July 2018, at page 229 of the appellant's appeal bundle, which sets out the Review Sentence Plan - Motivation, capacity to change and positive factors; confirms the appellant's motivation has changed during his period of imprisonment and that he is very motivated to address his offending

and that his capacity to change and to reduce offending has changed by the appellant accepting full responsibility for his actions in recognising the impact his actions have had on himself and his family. The report records the appellant being issued with the victim awareness pack which he was at that stage still to complete. There is no evidence that the appellant has been the subject of adjudications or of concern in relation to his behaviour in the prison environment. The report records that the appellant has a very positive and constructive attitude towards using his time in custody in a very positive way, being warning and adjudication free.

12. The attendance of the family at prison visits is evidence not of the establishment of fresh strands of integration but evidence of the continuation of the strong links the appellant had formed within the United Kingdom prior to his imprisonment.
13. It cannot be disputed that the appellant has through his conduct demonstrated a disregard for the laws of the United Kingdom but there is nothing from the prison regarding further offending and it is not disputed the appellant has spent most of his life in the UK.
14. The appellant's claim to have maintained strong family ties was also supported by the witnesses who gave their evidence and who, despite detailed but appropriate cross examination from Mr Diwnycz, maintained their stance that strong family bonds exist which have not been broken or substantially reduced by the appellant's behaviour.
15. Two statements handed down on the day were from [LH], the appellant's girlfriend, and her father Mr [BH]. Both are dated 21 August 2019.
16. [LH]'s statement is in addition to her earlier statements which have been taken into account together with all the other written evidence. In her most recent statement [LH] states:

“Whilst Nivaldo has been in prison, I have been visiting him every two weeks which is the maximum allowed.

Since the last hearing my business has grown considerably to the point we are moving premises. I had stated previously that I would move to Portugal with Nivaldo, however this position is no longer as clear-cut, because of the uncertainty of life in Portugal, leaving my family in the UK, having never lived abroad, and Brexit. I still live at home with my parents and my financial situation does not permit me to live independently as the business does not bringing sufficient money to do so.

17. In his witness statement 21 August 2019 Mr [BH] wrote:

“Nivaldo and my daughter have been in a relationship since 2014/15. During that time Nivaldo was staying at our home 4 or 5 nights a week. They were very much and still remain a close and loving couple.

I have discussed with [L] the prospect of her moving to Portugal with Nivaldo and share her concerns about the sustainability of this (cost, language, employment prospects, Brexit uncertainty, for example).

When Nivaldo is released he is very much welcome to live with us and I'm prepared to support him in establishing himself in employment and as a couple."

18. The oral evidence of Mr [H] confirmed he has the financial resources and sufficient accommodation to enable his proposal to be implemented and sustained. Mr [H] is clearly devoted to his daughter and family and confirmed that whilst he was willing to do what he could to assist if the appellant was able to remain in the United Kingdom he would not provide financial assistance to the appellant if he was deported and his daughter remained in the United Kingdom as his resources are best utilised meeting the needs of his family. I do not take this as a statement of a lack of strong ties between the appellant and this family unit, Mr [H] in particular, but recognition by Mr [H] as a father that it is his children and family that come first and who are his priority.
19. The appellant's educational achievements are evidenced by the documents in the bundle as is his employment history. Whilst it is accepted as a convicted prisoner the appellant may have difficulties in the job market he is clearly committed to rebuilding the life he had previously which was only lost to him as a result of his criminal conduct.
20. The Secretary of State's representative in the application for permission to appeal asserted in this case the appellant had shown no desire to integrate into the United Kingdom. I do not find this made out on the evidence. The appellant clearly integrated and developed a strong settled life in the UK prior to his imprisonment. Whilst the period of incarceration resulting from his stupid behaviour of fighting and being injured involved in drugs is relevant to assessing whether such integration was lost, the assertion in the grounds that such integration had been broken was not made out on the evidence and was not a stance adopted by Mr Diwnycz who, realistically, accepted that this is a person who has spent most of his life in the United Kingdom.
21. When looking at the integration question, in addition to the factual matrix which I find the appellant has established as asserted in the evidence it is necessary to consider the quality and strength of the same and the nature of ties to the United Kingdom. An assessment of that as the starting point clearly shows that the appellant has established quality family, education, and employment ties to the United Kingdom. The family ties remain very strong despite the appellant's acts of criminality and subsequent period of imprisonment. Not only was the strength of such ties recognised by the Sentencing Judge it is clear such ties continue to exist at the date of this hearing.
22. I find on the basis of the evidence that the appellant has made out that his level of integration into the United Kingdom is sufficient to establish the requisite 10 years such that any decision to remove him may not be taken except on imperative grounds. His conduct, whilst relevant to the strength of such ties, does not demonstrate he does not have the required strength and depth of integrative links or has lost the same.

23. As noted above, it was accepted that if the requisite 10 years continuous residence is made out imperative grounds would not be established on the facts and accordingly I substitute a decision to allow this appeal.
24. All parties to this case, those involved professionally, and family members hope this will be the last time Mr [M] is involved in acts of criminality leading to him coming before the courts. Brexit was mentioned in the evidence and it may be that if the United Kingdom leaves the EU he will not have the benefit of the protection found in the Immigration (EEA) Regulations in the future. Had UK domestic legislation been applicable, pursuant to the UK Borders Act 2007, there is a strong possibility the appellant's appeal will have failed and he would be deported. This is the stark choice the appellant may face in the future.

Decision

25. **I remake the decision as follows. This appeal is allowed.**

Anonymity.

26. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated the 29 August 2019

Annex A



Upper Tribunal
(Immigration and Asylum Chamber)

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Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NIVALDO [M]
(anonymity direction not made)

Respondent

Representation:

For the Appellant: Mrs R Petterson – Senior Home Office Presenting Officer.

For the Respondent: Mr T Hussain instructed by Alison Law Solicitors.

ERROR OF LAW FINDING AND REASONS

1. The Secretary of State appeals with permission a decision of First-Tier Tribunal Judge Saffer promulgated on 9 January 2019 in which the Judge allowed the above respondent's appeal against the decision to deport him from the United Kingdom pursuant to the Immigration (EEA) Regulations 2016.

Background

2. The above respondent is a citizen of Portugal born on 5 December 1995. On 25 September 2018 the Secretary of State made a Deportation Order as a result of the above respondent being jailed for a total of 5 years and 3 months on 14 September 2017, the total sentence being composed of:
 - a. 3 years and 4 months for being concerned in the supply of crack cocaine with a street value of £150,000, that to run concurrently with
 - b. 4 years and 8 months for possessing crack cocaine with intent to supply it, and
 - c. a further 7 months to run concurrently for an assault where he breached a suspended prison sentence of 9 months from May 2017 (he was 21).
3. The Judge accepted the record of convictions. It was accepted the above respondent moved to the United Kingdom in April 2006 and was in full-time education until July 2012, exercising EEA Treaty Rights during this period as accepted by the Secretary of State. The Judge found the evidence from the schools compelling which was also supported by evidence of the above respondent, his father and a Miss Stevens [36]. The Judge accepted the above respondent enrolled on a BTEC Course and worked at Scunthorpe United until mid-2014 until he was imprisoned in September 2017. The Judge was satisfied the above respondent was exercising EEA treaty rights from 2012 to 2017 [37].
4. At [38] the Judge finds:

“38. Accordingly, he was exercising EEA Treaty Rights continuously and lawfully from 2006 to 2017 and had acquired the highest level of EEA protection prior to his imprisonment. Given that finding his appeal must succeed given the concession by Mr Spence and as the deportation letter does not asserts that the “imperative” test is met.”
5. The Judge finds at [39] it was not necessary to go through the above respondent’s offending behaviour or life in the UK or Portugal but that had he been required to, or if he was wrong in relation to the length of the time the applicant has been exercising EEA Treaty rights, then [40 – 48] of the decision under challenge would apply. On the basis of findings made, which will be applicable if only the first or second levels of protection applied, the above respondent’s appeal under the EEA Regulations would have been dismissed as it would pursuant to article 8 ECHR.
6. The Secretary of State asserts the Judge has not undertaken a holistic approach when assessing the appellant’s qualifying period of residence in the United Kingdom applying a purely binary calculation to justify the heightened protection. The Secretary of State asserts that a period of imprisonment in principle breaks the continuity when calculating the 10-year period necessary for protection from removal on imperative grounds, such 10-year period to be counted back from the date of the deportation/expulsion decision and not the date of sentence of

imprisonment. The grounds argue on that basis the above respondent cannot rely upon that provision.

7. The grounds acknowledge that it is possible to rely in principle on a 10 year period of residence before the first custodial sentence but it is argued the above respondent showed no desire to integrate prior to the custodial sentence handed down on 14 September 2017 as the above respondent has been frequently involved in criminality since 2008, which the Secretary of State argues breaks any integrative links. It is also argued the period of incarceration would have broken any integrative links that existed and that for those reasons the above respondent cannot rely on “imperative” protection which is not an absolute right. The grounds argue the Judge has fallen into material misdirection by failing to assess the imperative grounds test adequately or in accordance with the case law and that there is no assessment of the above respondent’s integrative links and that had the matter been properly assessed under regulation 27(3) based on ‘serious grounds’ only the Secretary of State argues it will be proportionate to deport the above respondent despite his long-standing connections with the UK.
8. Permission to appeal was granted by another judge of the First-Tier Tribunal on 29 January 2019 on the basis it was arguable the Judge erred as stated in the grounds relating to the assessment of the level of protection capable of affecting the outcome.
9. The above respondent’s position set out in the Rule 24 response, as pleaded as follows:

10 year residency

- i) It is the Respondent’s case that the Appellant’s claim is misconceived in respect of the facts previously having been presented to the FTT.
- ii) The Respondent relocated from Portugal to the United Kingdom in April 2006, aged 11 years.

The Respondent had remained within the United Kingdom as his main residence until his arrest in May 2017 (a total duration of 11 years). The Respondent avers that the conviction in September 2017 was the first instance of when he was subject to a custodial sentence and thereby his residence of 11 years prior to the same clearly suffices in respect of proving his right to permanent residency.

- iii) For reasons aforementioned, as the Respondent had duly resided within the UK for a continuous period of 10 years before any time of imprisonment, the correct test to consider would have been ‘deportation on imperative grounds’, which was applied by the FTT Judge accordingly.

Integrative Links

- iv) The Appellant has also raised the Respondent’s integrative links within the application, the Respondent avers that his integration links had been discussed and considered by the FTT Judge within the initial appeal.
- v) It is the Respondent’s case that his family in the UK consists of the following: Biological Father, Step Mother, Biological Sister, 4 Half Brothers and her

Partner (relationship spanning over 3 years). The Respondent's Biological Mother resides in Angola and the only connections that the Respondent has in Portugal are of his Father's cousins to which the Respondent has never been in touch with.

- vi) The Respondent has completed his education in the UK as well as taking part in extracurricular activities i.e. training Younger players at Scunthorpe United Football Club.
- vii) The Respondent was also working at British Steel prior to his arrest with a view to collate savings to purchase a house with his Partner.
- viii) It is the Respondent's case that the above said assertions are sufficient to establish the Respondent's integrity of links with the United Kingdom and its people.

The Respondent also relies upon the requirement for deportation to comply with the notion of proportionality and consideration should be given to the age/family/economic situation/length of residence/social cultural integration and links with country of origin.

Error of law

10. By virtue of Regulation 23(6) 2016 regulations an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if: (a) that person does not have or ceases to have a right to reside under these Regulations; or (b) the Secretary of State has decided that the person's removal is justified on the grounds of public policy, public security or public health in accordance with regulation 27; or (c) the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3).
11. By virtue of Regulation 27(4) a decision to remove may not be taken except on imperative grounds of public security in respect of an EEA national who (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or (b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.
12. The general approach is in two stages (i) does the Appellant's conduct satisfy the applicable "public policy" criterion (whether the general one or the more or most stringent one); and (ii) if it does, is the decision to remove a "proportionate" one in all the circumstances.
13. In *LG (Italy) v Secretary of State for the Home Department* [2008] EWCA Civ 190 the Court of Appeal confirmed that an EEA national who had been here for 10 years can only be deported on imperative grounds of public security, which bear a qualitative difference to the less stringent grounds applicable to deportation of those with shorter residence. Imperative connoted a very high threshold and the ground requires an actual and compelling risk to public security, though public

security need not be equated to national security. The Court of Appeal said that “risk to the safety of the public or a section of the public” seemed reasonably consistent with the ordinary meaning of the test and seemed to be of the opinion that the severity of the offence committed was not necessarily one to make removal “imperative”.

14. In *VP(Italy) v Secretary of State for the Home Department* [2010] EWCA Civ 806 the Court of Appeal endorsed *LG (Italy)* and said that imperative grounds of public security required not simply a serious matter of public policy but an actual risk to public security so compelling that it justified an exceptional course of removing someone who had become integrated by many years residence in the host state. The severity of the offence could be a starting point for consideration but there had to be something more to justify a conclusion that that removal was imperative to the interests of public security.
15. No arguable legal error arises from an analysis of the evidence or findings if the Judge’s conclusion that the above respondent was entitled to the higher level of protection stands. The core issue is therefore whether the finding the above respondent is entitled to the enhanced protection against expulsion is infected by material legal error.
16. It is not challenged that the above respondent will have acquired a right of permanent residence, a pre-requisite to establishing the higher level of protection on the facts as found by the Judge, which was conceded by the Secretary of State.
17. The authorities relevant to the question under consideration are *Vomero* [2016] UKSC 49 in which the Supreme Court referred to the European Court of Justice the question whether enhanced protection against deportation under Directive 2004/38 art.28(3)(a) depended on an EU citizen's possession of a right of permanent residence within art.16 and art.28(2). It further asked how the time period under which enhanced protection could be acquired was to be calculated, and the Judgement of the Grand Chamber following such a request.
18. The CJEU decided in *Vomero* (C-316/16 and C- 424/16) that it was necessary for the EU citizen to have a right of permanent residence to benefit from the 10 year protection. They clarified that the 10-year period does run back from the date of the expulsion decision but where a Union citizen had already resided in the MS for 10 years before detention that did not automatically mean that the person was deprived of the benefit of the enhanced protection. An overall assessment of the person’s situation may lead to the conclusion that notwithstanding the detention, the integrative links between the person and the host MS have not been broken. Those aspects include the strength of the integrative links forged before detention, the nature of the offences which resulted in detention, the circumstances in which the offence was committed and the conduct of the person during the period of detention. The EEA regulations have now been amended to clarify that a permanent right of residence is needed for the 10 year protection to be available.

19. At [70 – 83] the Grand Chamber state:

“70. As to whether periods of imprisonment may, by themselves and irrespective of periods of absence from the host Member State, also lead, where appropriate, to a severing of the link with that State and to the discontinuity of the period of residence in that State, the Court has held that although, in principle, such periods of imprisonment interrupt the continuity of the period of residence, for the purpose of Article 28(3)(a) of Directive 2004/38, it is nevertheless necessary – in order to determine whether those periods of imprisonment have broken the integrative links previously forged with the host Member State with the result that the person concerned is no longer entitled to the enhanced protection provided for in that provision – to carry out an overall assessment of the situation of that person at the precise time when the question of expulsion arises. In the context of that overall assessment, periods of imprisonment must be taken into consideration together with all the relevant factors in each individual case, including, as the case may be, the circumstance that the person concerned resided in the host Member State for the 10 years preceding his imprisonment (see, to that effect, judgment of 16 January 2014, G., C-400/12, EU:C:2014:9, paragraphs 33 to 38).

71. Indeed, particularly in the case of a Union citizen who was already in a position to satisfy the condition of 10 years’ continuous residence in the host Member State in the past, even before he committed a criminal act that resulted in his detention, the fact that the person concerned was placed in custody by the authorities of that State cannot be regarded as automatically breaking the integrative links that that person had previously forged with that State and the continuity of his residence in that State for the purpose of Article 28(3)(a) of Directive 2004/38 and, therefore, depriving him of the enhanced protection against expulsion provided for in that provision. Moreover, such an interpretation would deprive that provision of much of its practical effect, since an expulsion measure will most often be adopted precisely because of the conduct of the person concerned that led to his conviction and detention.

72. As part of the overall assessment, mentioned in paragraph 70 above, which, in this case, is for the referring court to carry out, it is necessary to take into account, as regards the integrative links forged by B with the host Member State during the period of residence before his detention, the fact that, the more those integrative links with that State are solid – including from a social, cultural and family perspective, to the point where, for example, the person concerned is genuinely rooted in the society of that State, as found by the referring court in the main proceedings – the lower the probability that a period of detention could have resulted in those links being broken and, consequently, a discontinuity of the 10-year period of residence referred to in Article 28(3)(a) of Directive 2004/38.

73. Other relevant factors in that overall assessment may include, as observed by the Advocate General in points 123 to 125 of his Opinion, first, the nature of the offence that resulted in the period of imprisonment in question and the circumstances in which that offence was committed, and, secondly, all the relevant factors as regards the behaviour of the person concerned during the period of imprisonment.

74. While the nature of the offence and the circumstances in which it was committed shed light on the extent to which the person concerned has, as the case may be, become disconnected from the society of the host Member State, the attitude of the person concerned during his detention may, in turn, reinforce that disconnection or, conversely, help to maintain or restore links previously forged with the host Member State with a view to his future social reintegration in that State.

75. On that last point, it should also be borne in mind that, as the Court has already pointed out, the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated is not only in his interest but also in that of the European Union in general (judgment of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraph 50).

76. As regards the concerns expressed by the referring court that taking into account the period of imprisonment for the purposes of determining whether it has interrupted the continuity of the 10-year period of residence in the host Member State prior to the expulsion measure could lead to arbitrary or unfair results, depending on when that measure is adopted, it is appropriate to provide the following clarifications.

77. It is true that, in some Member States, an expulsion measure may be imposed as a penalty or legal consequence of a custodial sentence, a possibility expressly provided for in Article 33(1) of Directive 2004/38. In such a case, the future custodial sentence cannot, by definition, be taken into consideration for the purposes of assessing whether or not a Union citizen has been continuously resident in the host Member State for the 10 years preceding the adoption of that expulsion measure.

78. The result may therefore be, for example, that a Union citizen who has already resided continuously for 10 years in the host Member State at the date on which he receives a custodial sentence accompanied by an expulsion measure is entitled to the enhanced protection against expulsion provided for in Article 28(3)(a) of Directive 2004/38.

79. Conversely, as regards a citizen against whom such an expulsion measure is adopted after his detention, as in the main proceedings, the question arises whether or not that detention had the effect of interrupting the continuity of the period of residence in the host Member State and depriving him of the benefit of that enhanced protection.

80. However, it should be pointed out, in that regard, that, where a Union citizen has already resided in the host Member State for a period of 10 years when his detention begins, the fact that the expulsion measure is adopted during or at the end of the period of detention and the fact that that period of detention thus forms part of the 10-year period preceding the adoption of that measure do not automatically entail a discontinuity of that 10-year period as a result of which the person concerned would be deprived of the enhanced protection provided for under Article 28(3)(a) of Directive 2004/38.

81. Indeed, as is apparent from paragraphs 66 to 75 above, if the expulsion decision is adopted during or at the end of the period of detention, the situation of the citizen concerned must still, under the conditions laid down in

those paragraphs, be subject to an overall assessment in order to determine whether or not he can avail of that enhanced protection.

82. Thus, in the situations referred to in paragraphs 77 to 81 of this judgment, whether or not the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 is granted will still depend on the duration of residence and the degree of integration of the citizen concerned in the host Member State.

83. In the light of all the foregoing, the answer to the first three questions in Case C-316/16 is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that, in the case of a Union citizen who is serving a custodial sentence and against whom an expulsion decision is adopted, the condition of having 'resided in the host Member State for the previous ten years' laid down in that provision may be satisfied where an overall assessment of the person's situation, taking into account all the relevant aspects, leads to the conclusion that, notwithstanding that detention, the integrative links between the person concerned and the host Member State have not been broken. Those aspects include, inter alia, the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed and the conduct of the person concerned throughout the period of detention.

20. The date of the expulsion decision is 25 September 2018. 10 years back takes us to 25 September 2008. By that date the Judge accepts 12 years residence in the United Kingdom exercising treaty rights (April 2006 to September 2017).
21. The Secretary of State's case is that the above respondent's history of criminality clearly demonstrates a lack of integration based upon acts contrary to the laws of the United Kingdom and expectations of how individuals who have integrated will behave. The document produced by the Criminal Casework Directorate reveals the following:

"The appellant first came to the attention of the authorities in the United Kingdom on 5 October 2008, when he received a reprimand from Humberside Police for common assault. On 17 January 2010 the appellant received a warning from Humberside Police for 2 counts of battery.

On 16 September 2010, at North Lincolnshire Juvenile Court, the appellant was convicted of common assault and sentenced to a referral order of 6 months, with costs of £120 in compensation of £100.

On 22 December 2011, at North Lincolnshire Juvenile Court, the appellant was convicted of assault occasioning actual bodily harm. He was sentenced to a youth rehabilitation order, with an activity requirement of 90 days and a supervision requirement of 12 months.

On 28 November 2013, at North Lincolnshire Juvenile Court, the appellant was convicted of an aggravated vehicle taking (taking) accident causing damage to property other than vehicle under 5000GBP. The appellant was sentenced to an order to continue unpaid work requirement consecutive with £20 costs. The appellant was also convicted of using vehicle when uninsured and failing to report

an accident. He was sentenced to a youth rehabilitation order with an unpaid work requirement and his driving licence was endorsed.

On 16 May 2017, at Great Grimsby Crown Court, the appellant was convicted of assaulting a person thereby occasioning them actual bodily harm. He was sentenced to 9 months imprisonment suspended for 24 months, with an unpaid work requirement of 250 hours.

The appellant first came to the attention of the Home Officers a result of a conviction on 14 September 2017 have been concerned in supplying Class A controlled drug - "Crack" and possessing with intent to supply a controlled drug of Class A - Cocaine. The appellant was sentenced to 56 months imprisonment. He was also given 7 months imprisonment consecutive for breaching the suspended sentence 16 May 2017.

Consequently on 15 February 2018 he was served with the notice of liability to deportation.

22. The Judge was aware of the above respondent's offending history as that is clearly referred to at [4]. The Judge also notes the Sentencing Remarks at [5].
23. There is no reference in the decision to information concerning the above respondent's conduct in prison.
24. Whilst it is argued the Judge does not appear between [35 - 38] to have considered or undertaken an examination of the impact of applicants offending behaviour upon any break in period(s) of integration, the Judge may have found no such breaks occurred as a result of the finding at [38] that the above respondent has been exercising treaty rights continuously lawfully from 2006 to 2017, but that could only be inferred as there is no express examination or finding upon this particular point, hence the Secretary of States challenge that the assessment of entitlement to the high level of protection is based upon a linear calculation and no more.
25. Even though from [39] the Judge examines the position in the alternative which is not his primary finding, some of the points raised in the latter part of the decision are indicative of the Judges thought process. These include it being found the appellant is a serious and persistent offender who presents a genuine, present and sufficiently serious threat to society given his propensity to offend which appears to be a lifestyle choice [40]. It is arguable that somebody who deliberately chooses to flaunt the laws of the United Kingdom is choosing not to integrate and be bound by such laws. The Judge finds prospects of rehabilitation in Portugal would have been better than those in the United Kingdom as those in the UK have failed [41]. The Judge finds the respondent has a genuine and subsisting relationship with Ms Harding. The Judge also finds no compelling reasons above those found in the Immigration Rules as to why the above respondent should not be deported indicating those issues he was seeking to rely upon at that stage, which would have included degree of integration, were not sufficient to override the public interest: although the Immigration Rules and not applicable to EEA matters.

26. The Judge also notes the trigger offences were not committed as a child and were more serious than the above respondent's juvenile offending.
27. The decision in this case was reserved following completion of submissions as it is clearly not a straightforward case. Even if the decision of the Judge eventually proves to be the correct one I find there is merit in the grounds relied upon by the Secretary of State that the Judge in concluding the above respondent is entitled to the higher level of protection fails to properly consider and assess whether the above respondent has shown no desire to integrate into society of the United Kingdom or whether any integrating links that have been formed have been broken and, if so, to what extent.
28. It was accepted at the hearing that that if that is the finding of this Tribunal it would not be appropriate to revert to the Judge's finding in the alternative as Mr Hussain indicated there are further matters that he wished the Upper Tribunal to consider when deciding on the appropriate order when remaking the decision.
29. On that basis the following directions shall apply to the future management of this appeal (reference to the appellant below being to Mr [M]):
 - a. The decision of the Judge shall be set aside. Findings in relation to the appellants family, immigration, education, employment, and criminality shall be preserved.
 - b. The appellant's representative shall advise the Upper Tribunal no later than 14 days from receipt of this decision whether a Production Order is required on the basis of the need for the appellant to give oral evidence. If so the representative shall also advise the Upper Tribunal if an interpreter is required and if so in which language.
 - c. The appellant shall file a consolidated, indexed, and paginated bundle no later than Friday, 19 April 2019 containing all the documentary evidence upon which he intends to rely and serve a copy of the same upon the representative of the Secretary of State. Witness statements in the bundle are to be signed, dated, contain a declaration of truth, and shall stand as the evidence in chief of the maker, who shall be tendered for the purposes of cross-examination and re-examination only.
 - d. The appeal shall be listed on the first available date after 1 May 2019, subject to the availability of Mr Hussain, time estimate 3 hours. The venue of the hearing to be at a suitable centre in light of the appellant serving a custodial sentence.

Decision

30. **The First-tier Judge materially erred in law. I set aside the decision of the Judge. This appeal shall be case managed in accordance with the above provisions to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.**

Anonymity.

31. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 20 March 2019