Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00689/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 13 June 2019	**On 15 July 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

HUSSEIN [U]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Karnik, instructed by Citywide, solicitors
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By decision promulgated on 24 July 2018, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons were as follows:

> "1. The appellant, Hussein [U], was born on 10 February 1992 and is a citizen of the Netherlands. He claims to have arrived in the United Kingdom aged 12 in April 2004. On 30 October 2015, at Sheffield Crown Court the appellant was convicted on two counts of possession with intent to supply of a controlled drug (class A) and was sentenced to a total of four years six months' imprisonment. The Secretary of State decided to make a deportation order on 18 June 2016 but, owing

to an error in the decision, this was withdrawn and a further decision was made dated 23 January 2017. The appellant appealed against that decision to the First-tier Tribunal (Judge Shimmin) which, in a decision promulgated on 26 February 2018, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. There are two grounds of appeal. I shall deal first with the second ground for reasons which will become apparent. I am grateful to Mr Karnik, who appeared before both Tribunals on behalf of the appellant, for his helpful submissions. He has referred me to several cases which stress the importance of assessing the level of protection available to an individual under EU law by reference to whether or not he or she has acquired rights of permanent residence. I was referred to the case of *LG and CC* (EEA Regs: residence; imprisonment; removal) Italy [2009] UKAIT 0024. The Asylum and Immigration Tribunal (AIT) held at [82]:

> "Thus, even if the highest level of protection is not available as a matter of right, a person's period of residence is still relevant in deciding whether his expulsion would be disproportionate on the facts of his case. Where a person has become fully integrated into this country by more than ten years residence, particularly if he has severed any links with his country of origin, it would be consistent with the purpose of the Directive (as stated in the Preamble) to apply a stringent test, which may be equivalent in practice to the "imperative grounds" test."

3. I was also provided with a copy of the preliminary ruling under Article 267 TFEU in respect of B (Citizenship of the European Union – right to remove and reside freely – enhanced protection against expulsion – judgment) [2018] EUECJ C-316/16. Where the European Court at [61] held that:

> "In the light of all the foregoing the answer to the first question in Case C-424/16 is that Article 28(3)(a) of the Directive 2004/38 must be interpreted as meaning that it is a prerequisite of eligibility for the protection against expulsion provided for in that provision that the person concerned must have a right of permanent residence within the meaning of Article 16 and Article 28(2) of that directive."

4. Accurate calculation of the length of residence and, in particular, the acquisition of permanent residence within the host country is, therefore, vital as a prerequisite for any analysis of the protection available from deportation for any individual. At [47–49] Judge Shimmin wrote:

> "47. The appellant argues that he gained residence as a dependant of his mother.
>
> 48. The appellant's mother came to the UK in 2004 and I accept, on the documentary evidence before me, that she worked 2005 to April 2007. However after that there is no documentary evidence that she is a worker. She told me that she was without work for six months but went back to work for two and a half years. Her oral evidence was very uncertain and unclear and there was no evidence of the job in the documents. In fact the appellant's documents contradict her later claimed employment. They show

that she received tax credits to April 2009. In addition an HMRC questionnaire states that her 'employment started 8 March 2005 and ended 5 April 2007'. I found her oral evidence is inconsistent with the documentary evidence so I reject her claim around her second employment. There is no evidence that during the second period that she was a jobseeker and there is no evidence of temporary incapacity to work as submitted by Mr Karnik. I find that Regulation 6(2) is not applicable.

49. For the above reasons I conclude the appellant cannot claim five years' permanent residence as his mother's family member."

5. At the Upper Tribunal hearing, Mrs Pettersen, who appeared for the Secretary of State, accepted that the judge was wrong to have said that there was "no evidence" of the mother's temporary incapacity to work. It appears that Mrs [M[(the appellant's mother) had been asked in cross-examination why she had stopped working in 2007 and she had given an explanation; she had fallen down and injured herself. There was medical evidence showing that Mrs [M[had been confined to bed as a result of longstanding back pain and mobility issues. There was also evidence in the appellant's bundle that Mrs [M[had received Personal Independence Payment (PIP). There was evidence also the appellant had received Disability Living Allowance (DLA). I accept that this evidence appears to have been overlooked by Judge Shimmin. I accept also that it may be relevant to the question of determining the acquisition by the appellant of permanent residence.

6. I find that, in relation to ground 2, the judge has erred in law and that his decision should be set aside. I make no formal finding in respect of ground 1. However, should it become relevant at the resumed hearing, I wish to hear further argument in respect of the appellant's contention that the nature of his criminal offending does not engage "imperative" grounds of protection.

Notice of Decision and Directions

7. I make the following directions:

(A) There will be a resumed hearing before the Upper Tribunal (Upper Tribunal Judge Lane) at Bradford on a date to be fixed. Two hours are allowed. If an interpreter is required, the appellant's solicitors must notify the Upper Tribunal immediately.

(B) None of the findings of fact of the First-tier Tribunal shall stand. The parties may adduce new evidence provided copies of any documentary evidence are sent to the Tribunal and to the other party no later than 10 days before the resumed hearing.

(C) Both parties are directed to file at the Upper Tribunal and serve upon each other skeleton arguments dealing with all issues which may arise in the remaking of the decision by the Upper Tribunal. The skeleton arguments should be filed and served no later than 5 days prior to the resumed hearing.

8. No anonymity direction is made."

2. At the resumed hearing at Bradford on 13 June 2019, both the appellant and his mother, [SM], gave evidence.

The Law

3. Regulations 27 and 28 of the Immigration (European Economic Area) Regulations 2016 provide as follows:

> 'Decisions taken on grounds of public policy, public security and public health
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> 27.- (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
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> (2) A relevant decision may not be taken to serve economic ends.
>
> (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—
>
> (a) has a right of permanent residence under regulation 15 and who 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 in the best interests of the person concerned, 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(1).
>
> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—
>
> (a) the decision must comply with the principle of proportionality;
>
> (b) the decision must be based exclusively on the personal conduct of the person concerned;
>
> (c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
>
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010(2); or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

Application of Part 4 to a person with a derivative right to reside

28.- (1) This regulation applies where a person—

(a) would, but for this Part of these Regulations, be entitled to a derivative right to reside (other than a derivative right to reside conferred by regulation 16(3));

(b) holds a derivative residence card; or

(c) has applied for a derivative residence card.

(2) Where this regulation applies, this Part of these Regulations applies as though—

(a) references to "the family member of an EEA national" referred instead to "a person with a derivative right to reside";

(b) references to a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card referred instead to a "derivative residence card";

(c) regulation 24(5) instead conferred on an immigration officer the power to revoke a derivative residence card where the holder is not at that time a person with a derivative right to reside; and

(d) regulations 24(4) and 27(3) and (4) were omitted.'

4. As I understand the submissions made by Mr Diwnycz, who appeared for the Secretary of State at the resumed hearing, the respondent accepts that Ms [M] and the appellant himself have acquired the right of permanent residence. Issues which concerned the First-tier Tribunal, such as the mother's exercise of Treaty Rights and the nature of her immigration status, therefore, are no longer of relevance. It is agreed also that the appellant himself has resided in the United Kingdom more than 10 years before the date of commencement of his imprisonment. It remains at issue whether the appellant has, as a consequence of his imprisonment and criminal offending, severed the integrated links which he had forged in the United Kingdom from his childhood (he entered the United Kingdom when he was 12 years old).

5. The evidence given by the appellant and his mother was not contentious. I accept that, save when in prison, the appellant has resided and continues to reside in the same household as his mother. I accept also that the appellant suffers from epilepsy. I accept his evidence that he last suffered a reasonably serious seizure only 3 to 5 days prior to the resumed hearing. There was a discrepancy in the evidence given about this seizure by the appellant and Ms [M] but Mr Diwnycz did not submit that anything turned upon it.

6. It is submitted by the appellant that he had his mother are mutually dependent; she no longer works but has both physical and mental health problems and provides care and assistance to the appellant when he suffers epileptic seizures. I am prepared to accept that there is a degree of inter-dependence between these individuals, notwithstanding the fact that the appellant himself is an adult. I accept that the appellant's mother suffers mental health issues as detailed in the evidence.

7. At the resumed hearing, Mr Diwnycz produced copy of the appellant's criminal record which showed that, on 13 June 2019, the appellant had been given a conditional discharge having obstructed a police officer.

8. Mr Karnik, who appeared for the appellant, submitted that 'imperative' grounds for removing the appellant had not been established. Both parties accept that the burden of proving that such grounds exist rests on the Secretary of State.

9. I am in no doubt that the public interest concerned with the removal of this appellant is considerable. He has committed a criminal offence involving Class A drugs which has attracted a prison sentence in excess of four years. However, I accept also that the threshold for establishing 'imperative' grounds for the removal of an EU national is a high one. I find

that the appellant's recent offending involving the obstruction of a police officer does not establish that he has a present propensity to repeat the conduct which might represent a genuine present sufficiently serious threat affecting one of fundamental interests of society. Indeed, I find it would be an error to take that offending into account in assessing the present nature of any threat. Further, I find that the appellant, as he claims, has no links with the Netherlands and also that he remains integrated in society of the United Kingdom notwithstanding his offending. In reaching that finding, I have had regard to the fact that the burden of proving the nature of any threat posed by the appellant rests on the respondent and that no issue was taken regarding the written and oral evidence of the appellant and his mother. Although I am aware that the claimed inter-dependency between the appellant and his mother appears to have done little to discourage him from his serious past offending I am, having heard both witnesses give evidence, prepared to accept that they do now rely upon each other as they claim and that both witnesses suffer from medical conditions which, certainly in the case of the appellant, constitute a relevant factor in determining proportionality. Having regard all the evidence, I find that the appellant's appeal against the decision of the Secretary of State to deport him to the Netherlands should be allowed.

Notice of Decision

The appellant's appeal against the decision of the Secretary of State dated 23 January 2017 is allowed.

Signed Date 1 July 2019

Upper Tribunal Judge Lane