Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: DA/00109/2019** (P)[1]

THE IMMIGRATION ACTS

Decided Under Rule 34
On 5th November 2020

Decision & Reasons Promulgated
On 10th November 2020

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Piero [A]
(ANONYMITY DIRECTION NOT MADE)

Respondent

DECISION and REASONS

1. I have taken into account the Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal 2020 and the Presidential Guidance Note No. 1 2020.

2. The Tribunal may pursuant to Rules 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) ("the Upper Tribunal Procedure Rules") make decisions in appeals without a hearing. The Upper Tribunal gave the provisional direction owing to the Covid-19 pandemic that the decision on the error of law in this matter could be

[1] The coding in this order is in accordance with the Senior President's Judges' and Members' Administrative Instruction No.2

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determined on the papers and invited submissions from both parties. There has been no response from the parties.

3. I bear in mind the principles established in **Osborn v The Parole Board** [2013] UKSC 61. I have concluded that the matter although complex factually does not require, in the interests of justice and fairness, a hearing to determine the matters on the error of law.

4. The appellant's appeal against deportation was allowed under the Immigration (European Economic Area) Regulations 2016 by First-tier Tribunal Judge Shimmin on 23rd December 2019.

5. Permission to appeal was granted to the Secretary of State on the basis that Mr **[A]** was not entitled to the highest level of protection because he had not shown he had exercised treaty rights during the relevant period and because the judge had not considered whether his integrative links had been broken by his imprisonment on 18th October 2018.

6. At paragraph 32 of the decision Judge Shimmin set out the documentation (predominantly dated between 2006 and 2015) provided by the Appellant and stated as follows:

> *'This documentation has not been challenged by the respondent. On the basis of the this documentation and the other evidence before me I am satisfied on the balance of probabilities that the appellant has been continuously resident in the United Kingdom for 10 years prior to his imprisonment in accordance with the EEA Regulations 2016. Hence I find the appellant qualified for the enhanced protection of Regulation 27(4) relating to imperative grounds of public security'.*

7. As set out in the application for permission to appeal the appellant, born in 1996, is a repeat offender and on 7th September 2018 was convicted of a sexual assault on a female and sentenced to 2 years in prison with a sex offenders notice of 10 years. On 23rd October 2018 he was convicted of possessing a Class A drug and a Class B drug and sentenced to 4 weeks imprisonment. The deportation decision (from which the 10 years residence should be counted backwards) was made on 16th January 2019.

8. The grounds assert that the judge merely calculated a linear ten year period, did not engage with the supplementary letter dated 6th March 2019 from the Secretary of State as to why the highest level of protection did not apply and failed to take a proper approach to rehabilitation in the light of **MC (Essa Principles recast) Portugal** [2015] UKUT 50. In relation to the assessment of the enhanced level of protection, the relevant authorities have been set out in **Terzaghi v SSHD** [2019] EWCA Civ 2017 and the principles summarized at paragraph 12 of that judgment.

9. I find that the judge failed to grapple with the relevant authorities in relation to integration of the appellant in the light of his criminal offending. It is important to

consider whether the integration has been broken. The appellant's mere residence may have been broken even if he had during the relevant period exercised treaty rights (which is not clear). The absence of that consideration is a material error of law which strikes at the fundamental basis of the legal underpinning of the decision. As pointed out in the grounds of appeal the judge did not consider **FV (Italy)** (Cases C-424/16 and C-316/16) which confirmed that permanent residence was a requirement to enjoy enhanced protection, contrary to **Vomero** [2016] UKSC 49.

10. Nor has the judge conducted an assessment further to Regulation 27(8) of the Immigration (European Economic Area) Regulations 2016 which requires regard to be had to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society). Although Schedule 1 is set out in the decision, paragraphs 2, 3 and 4 considerations do not appear to have been applied.

Notice

11. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed: *Helen Rimington*
Upper Tribunal Judge Rimington Dated: Signed 5th November 2020

Directions

The Secretary of State shall be responsible for filing and serving the supplementary decision letter dated 7th March 2019 no later than 21 days from the date of these directions.

Any further evidence shall be filed and served by either party **at least 28 days prior to any resumed hearing in the First-tier Tribunal.**

Signed: *Helen Rimington*
Upper Tribunal Judge Rimington Dated: Signed 5th November 2020