IAC-FH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00765/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th March 2020	**On 27 April 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR E K O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Not in attendance
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This decision follows the setting aside of the First-tier Tribunal decision which allowed the appellant's appeal on 12th August 2019 against the deportation order made by the Secretary of State on 27th November 2018 under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). In the same decision the Secretary of State also refused a human rights claim. The Secretary of State appealed that First-tier Tribunal decision observing that there was a lack of evidence as to the length of residence in

accordance with the 2016 Regulations and thus whether the enhanced protection applied. An error of law was found because the judge legally erred in applying the 'imperative grounds' test under the 2016 Regulations without adequate analysis of the evidence. There were no preserved findings.

2. I note that the Secretary of State's deportation decision of November 2018 was certified under regulation 33 but in view of the pursuit of the appeal through the First-tier Tribunal and the Upper Tribunal, I conclude that the Secretary of State has 'waived' that certification.

3. Mr EKO failed to attend either the error of law hearing or the resumed hearing before me. On file were the notices to him from the Upper Tribunal of the date, time and venue of the hearings on 20th November 2019 and 11th March 2020. Indeed, the hearing of 20th November 2019 was adjourned to allow the appellant to attend the resumed hearing and submit further evidence. The court had also attempted to contact Mr EKO on the day of the error of law hearing without success. With reference to the overriding objective under The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended), I am satisfied that the appellant has been given every opportunity to attend the resumed hearing and failed to do so without explanation and it was fair and in the interests of justice to proceed with the hearing and decision.

4. As recorded in the error of law decision the appellant is a citizen of Italy born in Modena on 21st March 1993. He came to the UK as a child with his mother in 2004. She arrived on her Ghanaian passport as a visitor and the appellant was enrolled at Bishopsford Community School at the age of 11 years. He was at school for five years before attending Nescot College where he studied design and painting and decorating and after that was in and out of work. Sometimes he was on JSA and sometimes he did agency work. He latterly started his own business. In his written appeal he stated that he had been in the UK for over fourteen years and had never been to Italy. According to his mother's written statement she and the appellant had left Italy to escape an abusive relationship with the father. Oral evidence was given before the First-tier Tribunal that the father came to the UK "a few years after this" [their arrival] and the appellant remembered a court ordered contact hearing. There were very limited details.

5. Mr EKO has been convicted of fifteen offences on nine occasions as follows:-

   i. 4th October 2011 convicted of theft and received a conditional discharge of twelve months.

   ii. On 2nd August 2012 convicted of being drunk and disorderly, failing to surrender and breach a conditional discharge for which he received an attendance centre requirement of twenty hours.

   iii. On 25th November 2013 convicted of travelling on a railway without paying a fare and fined.

   iv. On 14th October 2014 convicted of travelling on a railway and fined.

v. On 19th October 2015 convicted of possessing a controlled drug class B cannabis and received a conditional discharge.

vi. On 8th July 2016 convicted of one count of possessing an offensive weapon in a public place, received a community order and possessing a controlled class A drug cocaine, and received a community order and fined.

vii. On 22nd September 2016 convicted of driving a motor vehicle with a specified control drug above the specified limit and received a community order and driving a vehicle whilst uninsured and had his driving licence endorsed. He was also convicted of possessing cannabis for which he received a community order.

viii. On 12th October 2016 convicted of driving a motor vehicle with a proportion of specified controlled drug above the specified limit and received a community order and disqualified from driving for three years.

ix. On 12th January 2017 convicted of possessing a controlled drug class B cannabis and he received a fine.

6. By the date of the hearing before the First-tier Tribunal in August 2019, the Police National Computer ("PNS") printout dated August 2019, showed the appellant had also been convicted of a further and tenth offence in March 2019 of driving a vehicle whilst uninsured for which he received a fine and endorsement on his driving licence.

7. The Secretary of State in her decision specifically did not accept he had been resident in the United Kingdom in accordance with the 2016 Regulations for a continuous period of five years in order to secure permanent residence. Specifically, the appellant had failed to show that his father was exercising treaty rights in the United Kingdom for a continuous period of five years, and further that the appellant himself had failed to provide evidence of his claimed periods of education and employment.

The hearing

8. At the resumed hearing before me, Mr Tufan confirmed that there was no evidence that the appellant had been removed and there was no notification that he had changed his address. The appellant benefited only from the lowest level of protection and albeit he had not received a custodial sentence he was a persistent offender.

9. The first issue is whether the appellant's presence has been in accordance with the 2016 Regulations.

Legal Framework

10. I have set out the relevant 2016 Regulations and underlined specific parts applicable to the appellant.

11. Regulation 4 sets out the provisions in relation to workers and students as follows:

4.- "Worker", "self-employed person", "self-sufficient person" and "student"

(1) In these Regulations –

(a) "worker" means a worker within the meaning of Article 45 of the Treaty on the Functioning of the European Union1;

(b) "self-employed person" means a person who is established in the United Kingdom in order to pursue activity as a self-employed person in accordance with Article 49 of the Treaty on the Functioning of the European Union2;

(c) "self-sufficient person" means a person who has –

(i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during the person's period of residence; and

(ii) comprehensive sickness insurance cover in the United Kingdom;

(d) "student" means a person who –

(i) is enrolled, for the principal purpose of following a course of study (including vocational training), at a public or private establishment which is –

(aa) financed from public funds; or

(bb) otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located;

(ii) has comprehensive sickness insurance cover in the United Kingdom; and

(iii) has assured the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that the person has sufficient resources not to become a burden on the social assistance system of the United Kingdom during the person's intended period of residence.

(2) For the purposes of paragraphs (3) and (4) below, "relevant family member" means a family member of a self-sufficient person or student who is residing in the United Kingdom and whose right to reside is dependent upon being the family member of that student or self-sufficient person.

(3) In sub-paragraphs (1)(c) and (d) –

(a) the requirement for the self-sufficient person or student to have sufficient resources not to become a burden on the social assistance system of the United Kingdom during the intended period of residence is only satisfied if the resources available to the student or self-sufficient person and any of their relevant family members are sufficient to avoid the self-sufficient person or student and all their relevant family members from becoming such a burden; and

(b) the requirement for the student or self-sufficient person to have comprehensive sickness insurance cover in the United Kingdom is only satisfied if such cover extends to cover both the student or self-sufficient person and all their relevant family members.

(4) In paragraph (1)(c) and (d) and paragraph (3), the resources of the student or self-sufficient person and, where applicable, any of their relevant family members, are to be regarded as sufficient if –

(a) they exceed the maximum level of resources which a British citizen (including the resources of the British citizen's family members) may possess if the British citizen is to become eligible for social assistance under the United Kingdom benefit system; or

(b) paragraph (a) does not apply but, taking into account the personal circumstances of the person concerned and, where applicable, all their relevant family members, it appears to the decision maker that the resources of the person or persons concerned should be regarded as sufficient.

(5) For the purposes of regulation 16(2) (criteria for having a derivative right to reside), references in this regulation to "family members" includes a "primary carer" as defined in regulation 16(8).

12. Regulation 6 governs the provisions in relation to a "Qualified person" as follows:

(1) In these Regulations –

"jobseeker" means an EEA national who satisfies conditions A, B and, where relevant, C;

"qualified person" means a person who is an EEA national and in the United Kingdom as –

(a) a jobseeker;

(b) a worker;

(c) a self-employed person;

(d) a self-sufficient person; or

(e) a student;

"relevant period" means –

(a) in the case of a person retaining worker status under paragraph (2)(b) [or self-employed person status under paragraph (4)(b)]1, a continuous period of six months;

(b) in the case of a jobseeker, 91 days, minus the cumulative total of any days during which the person concerned previously enjoyed a right to reside as a jobseeker, not including any days prior to a continuous absence from the United Kingdom of at least 12 months.

(2) A person who is no longer working must continue to be treated as a worker provided that the person –

(a) is temporarily unable to work as the result of an illness or accident;

(b) is in duly recorded involuntary unemployment after having been employed in the United Kingdom for at least one year, provided the person –

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;

(c) is in duly recorded involuntary unemployment after having been employed in the United Kingdom for less than one year, provided the person –

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;

…

(3) A person to whom paragraph (2)(c) applies may only retain worker status for a maximum of six months.

…

(5) Condition A is that the person –

(a) entered the United Kingdom in order to seek employment; or

(b) is present in the United Kingdom seeking employment, immediately after enjoying a right to reside under [sub-paragraphs (b), (d) or (e) of the definition of qualified person in paragraph (1) (disregarding any period during which worker status was retained pursuant to paragraph (2)(b) or (c)).

(6) Condition B is that the person provides evidence of seeking employment and having a genuine chance of being engaged.

(7) A person may not retain the status of –

(a) a worker under paragraph (2)(b); [...]4(b) a jobseeker; or 5(c) a self-employed person under paragraph (4)(b);

for longer than the relevant period without providing compelling evidence of continuing to seek employment and having a genuine chance of being engaged.

(8) Condition C applies where the person concerned has, previously, enjoyed a right to reside under this regulation as a result of satisfying conditions A and B or, as the case may be, conditions D and E –

(a) in the case of a person to whom paragraph (2)(b) or (c) [or (4)(b) or (c)]7 applied, for at least six months; or

(b) in the case of a jobseeker, for at least 91 days in total,

unless the person concerned has, since enjoying the above right to reside, been continuously absent from the United Kingdom for at least 12 months.

(9) Condition C is that the person has had a period of absence from the United Kingdom.

(10) Where condition C applies –

(a) paragraph (7) does not apply; and

(b) condition B [or, as the case may be, condition E]8 has effect as if "compelling" were inserted before "evidence".

24. Under Regulation 14.-

14. - *(1) A qualified person is entitled to reside in the United Kingdom for as long as that person remains a qualified person.*

25. Regulation 15 is headed "Right of permanent residence" and provides, inter alia:

> "*15. - (1) The following persons acquire the right to reside in the United Kingdom permanently –*
>
> *(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;*
>
> *(b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;*"

13. Regulation 23 governs the 'Exclusion and removal of EEA nationals from the United Kingdom' and specifically in relation to exclusion as follows:

> *…*
>
> *23(6) Subject to paragraphs (7) and (8), 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;*
>
> *(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27;*

14. Regulation 27 reads as follows:

> *Decisions taken on grounds of public policy, public security and public health*
>
> *27. - (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.*
>
> *(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 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 (**17**).*
>
> *(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 (**18**); 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.)

Analysis

15. The appellant had not shown that he had achieved permanent residence. He entered the UK when he was 11 years old. He produced a passport demonstrating he was an Italian national. His mother's passport and visit visa demonstrated that his mother had entered the UK in 2004 as a Ghanaian national with a visit visa valid from August 2004 to August 2006. There is no evidence in the papers as to the whereabouts of the father, said to be an Italian national, and whether he resided in the UK at all. The statement of the mother confirmed that she and her son the appellant relocated to the UK because of domestic violence and the courts ordered the father not to 'come near us'. She stated she was summonsed to the Family Court in Holborn but the only record is an acknowledgment of a 'date of conciliation appointment' on 22nd November 2006. There is no indication of the parties, their location or whether

this was instigated by representatives. There is no confirmation that the father was in the United Kingdom at all during the period of residence of the appellant, rather the opposite from the claim that they had left the father to come to the UK to avoid, understandably, his violence.

16. It is clear from the evidence provided and the school documentation, that the appellant attended school in the UK from the age of 11 years onwards but under Regulation 4(1)(d)(ii) and (iii) he would be required to have comprehensive sickness insurance in the United Kingdom to be deemed to be in the UK in his own right and in order to reside in accordance with the regulations. He could not be construed as a family member of his father for whom there was no evidence of presence in the UK. Thus, it cannot even be found that the appellant commenced his studies as the family member of a qualified EEA national (ie his father). There was no evidence that the appellant had either sufficient resources – his mother was in the UK on a visit visa –or comprehensive sick insurance.

17. In order to determine the appellant's qualified status under the 2016 regulations his work record (or other qualifying status) needed to be considered under Regulation 6 reproduced above. The appellant produced a tax calculation from HMRC dated 14th December 2018 and there was evidence in the bundle that the appellant claimed Job Seekers Allowance ("JSA") in December 2012.

18. The tax records showed the following:

- For the tax year 2013/2014 he claimed JSA between 18th January 2013 to 22nd May 2013, was employed between 23rd May 2013 and 25th August 2013 earning £431 (nil tax paid) and claimed JSA between 3rd February 2014 and 14th May 2014.
- For the tax year 2014 -2015 he claimed JSA between 3rd February 2014 and 14th May 2014 and again between 15th May 2014 and 7th January 2015. On 8th January 2015 to 14th January 2015 he claimed Employment and Support Allowance from the Department of Work and Pensions.
- For the tax year 2015 to 2016 there was no record of employment and no record of being registered as a Jobseeker.
- For the tax year 2016/2017 he is registered as being in employment for approximately 4 ½ months between 12th September 2016 to 6th January 2017 earning £2,930 paying £90.20 tax.
- For the tax year 2017/2018 he was employed by McDonalds between 15th February 2018 and 10th May 2018 earning £1,606 but paying no tax. For the tax year 2018/2019 he is recorded as being employed by McDonalds between 15th February 2018 and 10th May 2018.

19. The appellant cannot comply with Regulation 6 in order to show he has resided in the UK in accordance with the Regulations for a five-year period counting

from his date of entry into the United Kingdom in order to qualify for permanent residence. There is no evidence that the appellant has worked for a period in excess of one year under 6(2)(b). From 2013 to 2016 he is recorded by HMRC as working for only 3 months.

20. Further to Regulation 6(2)(c), in 2014 he was on JSA for 10 months, and under Regulation 6(3) he cannot retain worker status for more than six months. In order to comply with regulation 6(2)(c) he must also fulfil Conditions A and B. He cannot comply with Condition A under regulation 6(5)(b). He could not show that he was *present* in the United Kingdom seeking employment, immediately after enjoying a right to reside under [sub-paragraphs (b), (d) or (e) of the definition of qualified person. There is no evidence of any employment or registration as a Jobseeker from 14th January 2015 to 12th September 2016 and only sporadic working from 2016 to 2018. Until 12th September 2016 he had one period of employment for three months in 2013.

21. There was minimal evidence of tax returns for the period during which the appellant now states he is self-employed, but I accept that he was working for McDonald's in the tax year 2018/2019 because of the HMRC documentation.

22. Owing to the record of being a worker and jobseeking, the applicant cannot show that he has secured five years continuous residence under regulation 15 of the 2016 regulations. Whilst at school and in college in 2011, he has not shown he resided in accordance with the Regulations and for the reasons given above he has not fulfilled the criteria for being a qualified person for a period of five years.

23. The enhanced levels of protection under Regulation 27 will depend on whether the person has acquired a permanent right of residence. The decision can only be taken on "serious grounds of public policy and public security" if that is the case. As held in SSHD v Vomero [2019] UKSC 35 to secure the enhanced and highest level of protection against deportation on 'imperative grounds' the appellant needed to establish he had permanent residence. I find that he has not achieved permanent residence owing to the intermittent nature of his employment and jobseeking activity. He cannot therefore secure the ten years residence for the reasons given above. At no point since his entry until September 2016 had the appellant resided in the UK in accordance with the regulations. Therefore, on the limited evidence provided by the appellant he has secured the lowest level of protection under Regulations 23 and 27(5) of the 2016 regulations.

24. The Secretary of State maintained that the appellant was a persistent offender who fell within the criteria of Regulation 27(5) and Schedule 1 (a) (h) and (j) so that deportation was proportionate.

25. As set out in the decision to deport, and highlighted above, the appellant he had been convicted 9 times for 15 offences between a period of 4th October 2011

and 12th January 2017 including theft, being drunk and disorderly, possessing a controlled drug class B cannabis, possessing an offensive weapon in a public, possessing a controlled drug class A drug cocaine, driving a motor vehicle whilst under the influence of a specified controlled drug and using a vehicle whilst uninsured. He has been further convicted in 2019. The appellant demonstrates a trend of re-offending.

26. Schedule 1 (3) of the 2016 regulations sets out that

> ***1. -*** ***...***
>
> ***(3).*** *Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.*

27. Schedule 1 of the 2016 Regulations provides a non-exhaustive list of the fundamental interests of society in the UK. From the nature of the appellant's offences, it is clear that they contravene the fundamental interests of society specifically set out in Schedule 1 (7), which include [and I have underlined the relevant provisions]

> *(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;*
>
> *(b) maintaining public order;*
>
> *(c) preventing social harm;*
>
> *(d) preventing the evasion of taxes and duties;*
>
> *(e) protecting public services;*
>
> *(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;*
>
> *(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);*
>
> *(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);*
>
> *(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;*
>
> *(j) protecting the public;*
>
> *(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);*

(l) countering terrorism and extremism and protecting shared values.

28. The appellant has been convicted on 9 occasions for 15 offences from the age of eighteen years onwards, and had failed consistently to consider the impact on society. His offences include theft, and a failure to pay fares (repeated), drug use and possession of an offensive weapon (a baton). In addition, the appellant has twice been convicted of using a vehicle whilst uninsured but also, twice, driving a vehicle with 'the proportion of specified controlled drug above the specified limit'. Although not identifying an individual victim these offences are detrimental to the welfare of society as a whole and undermine the fabric and resources of society. Driving whilst under the influence of drugs can have serious implications for the personal safety of all road users and has the potential to cause very serious personal injury and damage to members of the public. The appellant has continued to offend from 2011 until shortly before his deportation order was signed in 2018 and has continued to offend subsequently. He asserted in the papers and before the First-tier Tribunal that he has not offended more recently (since 2016) but even that does not indicate that he is not a persistent offender. Furthermore, the updated PNC printout dated 16th August 2019 clearly shows that the appellant had yet another conviction on 25th March 2019 for driving a vehicle whilst uninsured. The appellant has repeated the same offence which adds weight to the finding that he is a persistent offender and apparently without remorse.

29. I conclude that the appellant is a persistent offender and despite his protestations that his criminal offending ceased in 2016 those representations were misleading to the First-tier Tribunal. Even prior to that date he had a long history of offending, and even though the offences did not attract a custodial sanction, as seen above have a wider societal impact.

30. The approach under the 2016 Regulations to persistent offending is clearly set out in Schedule 1 (7) (h) and although none of the offences as characterised by the sentence given might in themselves meet the requirements of Regulation 27, the cumulative effect does so. Preventing social harm and protecting public services are particular features of the fundamental interests of society and which in this case would prompt the removal of the appellant.

31. A letter from the Offending Manager at the London community Rehabilitation Company (Probation Service) confirmed on 21st December 2018 that the appellant had successfully completed his Community Orders with Unpaid work following various offences and had no further interaction with the Probation Service since 1st November 2017 but '*at that time he was assessed as posing a medium risk of harm to the public (mainly due to the nature of his offence), and Medium risk of reoffending*'. The appellant at that time advised that he had '*turned his life around. He states that he now has a partner, he is gainfully employed, and he and his partner are expecting their first child*'.

32. The appellant was nonetheless considered by the Offending Manager to remain a medium risk of re-offending and the nature of the offences committed are a threat to the fundamental interests of society. That the offences ranged for a period of 8 years, from the age of 18 years onwards, indicate that to date the risk he will re-offend remains present.

33. I find that the Secretary of State has discharged the burden of proving that the conduct of the appellant in all the circumstances represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct, as per Arranz (EEA Regulations - deportation - test) [2017] UKUT 294 (IAC).

34. Regulation 27(5)(a), however, states that any decision to remove the appellant must comply with the principle of proportionality and further the considerations under Regulation 27(6) must be taken into account.

35. The appellant is now 27 years old and he appears to be in good health. There is no indication of any serious irreversible harm should he be deported to Italy.

36. With regard to his family situation, he claims to be in a partnership with a British national and that his mother is resident in the UK. His mother is said to have Indefinite Leave to Remain but no confirmation of this was produced. She submitted a statement in support of her son but there is no indication that they live together or there is dependency or that his removal would in any way affect her immigration status and that said, the relationship between mother and son was said in the letter of his legal advisors dated 15th August 2017 now to be 'strained'.

37. The appellant confirmed in the papers in his statement (undated) that he is in a relationship but, although he produced a birth certificate indicating that she was born in Kent England in 1997, he has not produced his partner's passport to confirm her status as being a British citizen. The estimated date of delivery of the child, of whom he was said to be the father, was April 2019 but there was no further mention of the child in the papers save for the obstetric records.

38. I make an overall assessment of his integration in the United Kingdom and his links with Italy. The appellant asserts he came to the UK in 2004 and although disputed by the Secretary of State, the evidence stemming from the school indicates that he attended there from the age of 11 years and thus in 2004. There is a reference in June 2006 end of year report that 'he has had another good year in Key Stage 3' which would suggest he commenced the academic year of September 2004. I accept his first arrival in the UK is likely to have been at the age of 11 and he attended school and further education college where he obtained employment qualifications in painting and decorating. I have explored his employment record above and note that there have been substantial periods of inactivity, particularly between 14th January 2015 and 12th September 2016 when it is not even clear that he was in the UK. The fact of

his schooling and college education would suggest that the appellant has secured integration but his subsequent offending. The severing of integrative links depends upon an overall assessment of the individual's situation at the time of the expulsion decision. The papers before me did not indicate any contribution to UK society and limited evidence of his current relationship with his family in the UK and his partner.

39. Although he maintains that he is now self employed and produced some expense receipts for his business named EKO Removals, there was nothing by way of accounts, bank statements or financial receipts to show this company is trading and that the appellant could be classified as self-employed and receiving income although I accepted he was working for McDonald's in the tax year 2018/2019.

40. He also gave evidence in his statement to the court that his last conviction was in 2016. As seen above, the updated PNC dated 2019 shows the conviction on 25th March 2019 for driving a vehicle whilst uninsured. His statement on file may have been compiled prior to his attendance at court but the evidence given at court was that his 'last offence was in 2016' and accords with the written statement and denial of further offending. That was incorrect and although I accept he did not receive a custodial sentence this shows that the appellant's offending has continued which undermines his integration.

41. The appellant gave evidence in the First-tier Tribunal that he had lived in Italy to the age of 10 years and thus, although denied, he must have some understanding of the Italian language. With regard his employment he has produced evidence of qualifications on decorating, gained whilst in the UK, and these skills could be deployed in Italy to support himself and any family who chooses to relocate there with him. It is his assertion that he has no family or contacts in Italy but even if that is the case I find that as a young fit healthy adult with work experience and marketable qualifications in the form of decorating, could adapt and forge a life in Italy where he spent the first 10 years of his life.

42. There is very limited evidence (the Offending Manager made passing reference to a rehabilitation course) that he has undertaken rehabilitative work in the United Kingdom. His mother and any partner and possible child have not prevented him from continuing to offend. I am not persuaded that his deportation to Italy will prejudice his rehabilitation or that he needs to remain in the UK to become rehabilitated.

43. Overall I conclude that for the reasons set out above and in view of the genuine present and sufficiently serious threat the appellant poses to the fundamental interests of UK society, the removal is justified on the grounds of public policy and security and proportionate under Regulation 27.

44. I turn to a consideration of the issues under Article 8 of the European Convention on Human Rights and whether his deportation would breach the UK's obligations thereunder.

45. The Immigration Rules in relation to deportation do not apply directly to EEA nationals but the position of the Secretary of State in relation to the article 8 claims of those faced with deportation is set out under those rules. Parliament's view of what the public interest entails is set out at sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002. Section 117D (2)(c)(iii) states that the definition of a 'foreign criminal' includes persistent offenders. The appellant is not subject to automatic deportation because he has not been given a year's custodial sentence.

46. SC (Zimbabwe) v SSHD [2018] EWCA Civ 929 at paragraph 24, largely adopted and condoned the approach in Chege [2016] UKUT 00187 (IAC) at paragraphs 53 and 54 with regard persistent offenders

> *53. Put simply, a "persistent offender" is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or up to a certain time before it, or that the continuity of the offending cannot be broken. …Someone can be fairly described as a person who keeps breaking the law even if he is not currently offending. The question whether he fits that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts.*
>
> *54. Plainly, a persistent offender is not simply someone who offends more than once. There has to be repeat offending but that repetition, in and of itself, will not be enough to show persistence. There has to be a history of repeated criminal conduct carried out over a sufficiently long period to indicate that the person concerned is someone who keeps on re-offending. However, determining whether the offending is persistent is not just a mathematical exercise. How long a period and how many offences will be enough will depend very much on the facts of the particular case and the nature and circumstances of the offending. The criminal offences need not be the same, or even of the same character as each other. Persistence may be shown by the fact that a person keeps committing the same type of offence, but it may equally be shown by the fact that he has committed a wide variety of different offences over a period of time."*

47. I refer to my findings above and, on that basis, find he is a persistent offender.

48. Section 117C (3) to (5) of the Nationality, Immigration and Asylum Act reflects the approach to foreign criminals including persistent offenders and that the public interest requires deportation unless an exception applies or there are very compelling circumstances. The structured approach to the additional considerations in relation to article 8 are as follows

> ***117C Article 8: additional considerations in cases involving foreign criminals***
>
> *(1) The deportation of foreign criminals is in the public interest.*
>
> *(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.*

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where –

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

49. Guidance as to the meaning of the expression "unduly harsh" was provided by the decision of the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53; and subsequent caselaw has emphasised that the focus on whether the effects would go beyond the degree of harshness which would necessarily be involved for any child or partner of any foreign criminal faced with deportation. 'Unduly harsh' sets a very high bar. For an offender sentenced to less than 4 years imprisonment, even if Exceptions 1 and 2 cannot be satisfied, the offender may still avoid deportation if there are "very compelling circumstances" within subsection (6) above. The latter is a stringent test, NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662.

50. Under Paragraph 398 of the Immigration Rules

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

…

(c) the deportation of the person from the UK is conducive to the public good and they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

51. There were no details about the partner or child and very limited evidence as to any family life with a partner. Albeit the best interests of the child are a primary consideration and a best interests assessment should be made in the case of a child further to section 55 of the Borders Citizenship and Immigration Act 2009, there was no information about the child and I note none given either about the partner or child before the First-tier Tribunal save for the limited documents in the bundle including obstetric records, birth certificate and provisional driving licence of the partner, and a few photographs of the appellant and his partner. There was no independent social worker report or any medical evidence. It is relevant to note that neither partner nor child would be required to relocate outside the European Union. As a consequence, the appellant does not meet the requirements for the exceptions under Section 117C or the Immigration Rules (Paragraph 398 and 399) with which the statutory test under Section 117C should be read consistently.

52. Even if there is family life, which I do not accept on the evidence, it is accepted that deportation may have a detrimental effect on family life but nonetheless may remain proportionate even though the family may be broken up because of the appellant's bad behaviour: it is, however, the consequence of deportation. That approach has been recently reiterated in PJ (Jamaica) [2019] EWCA Civ 1213 which identified that the issue was whether there was evidence on which it was properly open to the judge to find that deportation of the appellant would result for the partner and/or the children in a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation. There is no evidence here that it would be unduly harsh for the partner to live in Italy or that it would be unduly harsh for the partner to remain in the UK without the appellant.

53. The appellant has lived for more than half his life in the UK (although there is no record of his residence in the UK for a significant period between 2015 and 2016) and I accept that he came to the UK as a young child at the age of 11 years.

54. As held in the Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813K

> *"… integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."*

On a broad evaluative assessment of his social and cultural integration into the UK I accept that his integration is suggested by his schooling and family in the UK but I refer to the findings above in relation to his work record and his contribution to society, both of which are of a limited nature. I am not persuaded that latterly he has demonstrated social or cultural integration and his offending appears to have undermined what integration there was formerly.

55. With reference to the Immigration Rules at paragraph 399A the appellant has not shown very significant obstacles to his removal to Italy. His father is an Italian national and without further evidence from the appellant to the contrary, I consider it likely having lived there for 10 years as a child, he would have contacts in Italy and some understanding of the language. Even if he does not, I conclude that he would be able to adapt to life there using the skills he has obtained in the UK. From his school reports he demonstrated an aptitude at school.

56. No compelling circumstances were evidenced and the decision to deport the appellant is, in my view, a proportionate response to his offending. In order to outweigh the very significant public interests in deporting him he would need to provide strong article 8 claim over and above the circumstances described in the exceptions to deportation. That has not been done.

57. I thus dismiss the appellant's appeal under the Immigration (European Economic Area) Regulations 2016 and the Immigration Rules and on human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his

family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Helen Rimington* Date 22nd April 2020

Upper Tribunal Judge Rimington

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email