IAC-HW/TH-MP/CP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01737/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th January 2016	**On 14th March 2016**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR VANSE KOUE-BI-TRA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Brocklesby-Weller, Senior Presenting Officer
For the Respondent: Mr T Bobb of Aylish Alexander Solicitors of London

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the decision of the First-tier Tribunal (Judge Cary) promulgated on 16th September 2015 in which the Tribunal allowed the appeal of Mr Koue-Bi-Tra against the decision of the Secretary of State to make a deportation order against him under the provisions of Regulation 19(3)(b) of

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the Immigration (EEA) Regulations 2006 (hereinafter referred to as "the 2006 Regulations").

2. Although the Secretary of State is the Appellant before the Tribunal, I will for ease of reference refer to her as the Respondent as she was the Respondent in the First-tier Tribunal. Similarly I will refer to Mr Koue-Bi-Tra as the Appellant as he was the Appellant before the First-tier Tribunal. No application was made before the First-tier Tribunal or the Upper Tribunal concerning any grounds for an anonymity order.

Background

3. The Appellant is a citizen of France born on 22nd December 1989. He appealed against the decision of the Respondent who on 2nd September 2014 decided to make a deportation order against him under Regulation 19(3)(b) of the 2006 Regulations.

4. The Appellant's history is not in any dispute. He originally arrived in the United Kingdom with his parents and brothers in 1995 when he was approximately 5 years of age. He has lived continuously in the United Kingdom ever since that date. He subsequently applied for indefinite leave to remain in the United Kingdom with his mother, father and three brothers but that application was refused on 17th January 2006. He was however issued with a five year residence permit.

5. The Appellant's previous convictions can be summarised as follows:-

   (i) He first came to the attention of the police for shoplifting on 26th May 2004 when he was 14 years of age. He received a reprimand for that offence on 5th January 2005.

   (ii) He received a warning on 13th April 2005 for assault occasioning actual bodily harm on 2nd February 2005 and common assault on 24th March 2005.

   (iii) He first appeared on 6th December 2005 when he appeared at Balham Youth Court for threatening behaviour on 18th November 2005 when he was made subject to a four month referral order.

   (iv) He appeared at Oxford Crown Court on 20th October 2006 for robbery (27th May 2005) and failing to surrender to custody (12th April 2006).

   (v) A few days later on 23rd October 2006 he appeared at the same court for attempted robbery and possessing an imitation firearm with intent to commit an indictable offence (27th December 2005). For all of those offences he was sentenced to a period of detention in a Young Offenders Institution for three years.

   (vi) The Appellant came to the attention of the courts on 3rd August 2009 when he appeared at the Magistrates Court for resisting or obstructing a police officer in the execution of their duty (17th July 2009). He received a conditional discharge for twelve months.

(vii) He then appeared at the Magistrates Court on 26th October 2009 for travelling on a railway for which he was fined on 7th July 2009.

(viii) Approximately a month later he appeared at the Magistrates Court on 27th October 2010 for possession of cannabis on 27th August 2010 for which he was fined.

(ix) This was followed by an appearance at the Crown Court on 15th March 2011 for assault occasioning actual bodily harm (on 27th October 2010). He was sentenced to a period of twelve months' imprisonment.

(x) Shortly after his release he was found in possession of crack cocaine on 18th June 2011 for which he was fined £100 at Camberwell Green Magistrates Court on 27th June 2011.

(xi) This was followed by an appearance at the Magistrates Court on 29th November 2012 for the possession of heroin on 16th September 2012. He was fined.

(xii) On 25th January 2013 and he was convicted of supplying a controlled drug – class A (heroin), possession with intent to supply a controlled Class A drug (both heroin and cocaine) and having a bladed article which was sharp pointed in a public place. He was sentenced to a period of 54 months' imprisonment on 30th January 2013.

(xiii) He was released on 11th May 2015 and is on licence until 17th July 2017.

6. As a consequence of that sentence of imprisonment, on 21st May 2013 the Appellant was notified of his liability to be deported and on 2nd September 2014 the Secretary of State made a decision to deport him, having first taken into consideration the provisions of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

7. The relevant decision taken on 2nd September 2014 made reference to his conviction on 25th January 2013 and that the Secretary of State had considered the offence for which he had been convicted and his conduct, in accordance with Regulation 21 of the 2006 Regulations. The decision set out that the Secretary of State was satisfied that he would pose a genuine, present and sufficiently threat to the interests of public policy if he were to be allowed to remain in the United Kingdom and that his deportation was justified under Regulation 21. The decision went on to state that the Secretary of State had decided under Regulation 19(3)(b) that he should be removed and an order made in accordance with Regulation 24(3) requiring him to leave the United Kingdom and prohibiting him from re-entering while the order is in force. The Secretary of State proposed to give directions for his removal to France, the country of which he was a national.

8. The reasons for that decision are set out in a letter of the Respondent dated 2nd September 2014 (see K2 of the Respondent's bundle).

9. The Appellant appealed against that decision to the First-tier Tribunal. It was asserted in the Grounds of Appeal that the Respondent had incorrectly applied the 2006 Regulations to the Appellant in the light of his length of residence over a period of over twenty years.

The decision of the First-tier Tribunal:

10. The appeal came before the First-tier Tribunal (Judge Perry) on 6th February 2015. In a decision promulgated on 5th February of that year, the judge dismissed the appeal under the 2006 Regulations.

11. The Appellant appealed to the Upper Tribunal on seven grounds, including that he was entitled to the highest level of protection against removal in view of his length of residence in the United Kingdom and his level of integration. The appeal was heard by Upper Tribunal Judge O'Connor on 8th June 2005 and in a determination promulgated on 25th June 2005 gave his reasons as to why he considered the decision of the First-tier Tribunal had erred in law.

12. It is plain from that determination at [8] that the Respondent had accepted before the Upper Tribunal that the First-tier had erred in its approach to consideration of whether the Appellant was entitled to the highest level of protection (Regulation 21(4)) and that it had failed to consider whether the Appellant was a person sufficiently integrated into the United Kingdom to obtain such protection irrespective of the fact that he had served a lengthy prison sentence prior to the issue of the deportation decision.

13. Consequently the judge remitted the appeal to the First-tier Tribunal to be determined de novo (see paragraph 12 of the determination). At [13] Upper Tribunal Judge O'Connor made reference to the other six grounds of appeal and observed that he had heard the Appellant's representative in relation to only one of them as to whether the First-tier Tribunal erred in its consideration of the Appellant's entitlement to permanent residence. The judge considered that he could find no error in the First-tier Tribunal's consideration of the issue given the evidence but nonetheless did not direct the scope of the First-tier Tribunal was any way restricted and also stated that that was an issue which would be a matter for the First-tier Tribunal to determine afresh on evidence placed before it. Consequently the determination of the First-tier Tribunal (Judge Perry) was set aside and the appeal was remitted to the First-tier Tribunal to be determined afresh.

The second hearing before the First-tier Tribunal:

14. In accordance with that decision, the appeal came before the First-tier Tribunal (Judge Cary) on 4th September 2015. In a determination promulgated on 16th September 2015 the judge allowed the appeal under the 2006 Regulations. The judge heard evidence from the Appellant and from two members of his family.

15. It is plain from reading the determination that the parties were aware of the basis of the appeal and the reasons why the Upper Tribunal had set the previous decision

aside. At [9] the judge set out that the issue to be determined was that under Regulation 21(4) of the 2006 Regulations relating to whether the Appellant had acquired the enhanced protection prior to the making of the deportation decision and if so, whether the residence was such to establish that he had integrated into life in the United Kingdom.

16. The judge set out his decision and reasons at paragraphs [29] to [43]. The judge set out the relevant legal provisions at paragraphs [30] to [34]. At [35] the judge considered the issue under Regulation 21(4) and in this context set out the relevant legal authorities of the CJEU including **The SSHD v MG Case Number c-400/12 CJEU** and the Upper Tribunal's decision in **MG (prison – Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392**. At [36] to [38] the judge set out his findings of fact on the principal issue. He reached the conclusion, based on the findings of fact that he had made, that the Appellant was able to establish the necessary period of residence under Regulation 21(4)(a) and that he could rely on the enhanced protection provided by that Regulation. At [38] the judge recorded that whilst he had found that the Appellant could establish the necessary period of residence, to succeed in the appeal the Appellant would have to demonstrate that the decision was not justified on the "imperative grounds of public security". In this context the judge has set out the decision of **Land Baden-Württemburg v Tsakouridis (Case C-145/09) CJEU (Grand Chamber)** and other CJEU decisions concerning the issue of "imperative grounds of public security" under Article 28(3). At [41] the judge set out the sentencing remarks in relation to the Appellant's most recent conviction for drugs and at [42] made an assessment as to the risk of reoffending based on the written material contained in the OASys assessment prepared by the Probation Service. The judge took into account the assessment which had provided for a medium risk of serious harm and assessed against that material which was considered to be the most up-to-date evidence relating to the stabilising factors in relation to his employment, accommodation and his association with those with whom he had previously offended. The judge reached a finding of fact that in the light of the evidence that he had considered, both oral and documentary, that the Appellant had now obtained a form of employment, he had also obtained stable accommodation with his sister and was no longer associating with those who were involved in his most recent offending. He reached the overall conclusion that there was nothing to suggest that there was a serious risk that he would revert to his previous behaviour.

17. At [43] the judge set out his conclusion that he found on a "very narrow balance" that the decision to deport him was not justified on the imperative grounds of public security. The judge concluded that the degree of integration of the applicant was such that his removal could not be justified currently particularly in view of the likely impact it would have on the Appellant who had no real connection to France other than through his citizenship. The judge made reference to the OASys assessment and that he clearly posed some risk but he could not characterise such a risk as "exceptionally serious". Thus the judge allowed the appeal and recorded that if the Appellant committed any further offences it would be inevitable that he would face a further attempt to deport him which may well succeed.

The appeal before the Upper Tribunal:

18. The Secretary of State sought permission to appeal that decision and permission was granted on 10th November 2015 by First-tier Tribunal Judge Parkes.

19. The written grounds on behalf of the Secretary of State are not drafted in the clearest terms however Ms Brockelsby-Weller distilled the paragraphs into three grounds. Dealing with Ground 1 (referred to as 1(f)) in the written grounds), she submitted that the judge erred in law in his assessment of the Appellant's integration into the UK when considering whether he could benefit from the enhanced protection of 21(4) of the 2006 Regulations. She submitted that the judge recorded that the Appellant had spent seven and a half years of the qualifying ten years in prison at [29] and that he had limited contact with his family members in the UK. She submitted that whilst the judge considered in detail the authorities at [35] it was his assessment of integration and whether those links remained that was in error. In this context she referred the Tribunal to [43] in which the judge had stated that the bulk of the ten year period was either in custody or licence, that he had not worked during that period of time, that there had been relatively few periods when his life had been trouble-free; that his relationship with his family had been at best tenuous and at worst non-existent, that there was nothing to suggest that he was ever a law-abiding citizen and was on the face of it a career criminal resorting to crime as a means to supporting himself financially. In essence she submitted that in the light of those findings of fact made at [43] the findings set out [37] were in direct conflict and thus if the judge relied on factors which he held against the Appellant there would need to be cogent reasons to establish why the judge found that the ten year period was such to support his integration. She made reference to the decision of **MG** and **Onuekwere** that a custodial sentence was demonstrative of a rejection of social values and that in those circumstances it was difficult for the judge to rely on his family and time spent as a minor and thus the findings of the judge as to integration were not internally consistent and as a result of that there was no analysis of the issue of integration properly carried out.

20. As to Ground 2 this was set out at paragraphs 1(a) and 1(g) of the written grounds. It was submitted that the judge materially erred in law by finding that the decision to deport was "not justified on the imperative grounds of public security" at [43]. She submitted that the judge had failed to take into account the seriousness of the offence and that he sentence of 54 months did reach the imperative grounds of threshold. The Appellant was convicted of either supplying heroin or cocaine on no less than six separate occasions and thus where a person has been convicted of one or more violent, drugs or sex offences, he will usually be considered to have been convicted of an offence that has caused serious harm. The imperative threshold she submitted, was not just for offences such as terrorism and that the Appellant was dealing in drugs and that had significant repercussions on society as a whole. Consequently the judge did not properly reason that in his determination.

21. The third ground of challenge relates to his assessment of the risk of reoffending. She submitted that there were no explicit findings concerning Regulation 21(5)(c)

although the judge made reference to the OASys Reports as set out at paragraph 42 of the determination. Both reports, she submitted demonstrated that he was at medium risk of reoffending. She further submitted that whilst the judge identified the risk at [42] that the judge erroneously considered the Appellant's circumstances that would prevent him from reoffending including loss of accommodation, relationship breakdown or drug or alcohol misuse. She submitted that the Appellant had not demonstrated those stabilising factors and that the judge had not considered a holistic assessment of risk and that the medium risk identified by the OASys Report was sufficient to demonstrate that his personal conduct represented a "genuine, present and sufficiently serious threat". As the grounds submitted at paragraph 1(i) that "medium risk" amounted to a very serious real risk and that the judge should have placed greater weight upon this in his assessment. Thus she submitted the judge had erred in law for those three reasons.

22. Mr Bobb relied upon his skeleton argument which he had produced at the hearing. As to the first ground, he submitted that the Secretary of State's representative at the hearing conceded that the Appellant's case fell to be determined under Regulation 21(4)(a) which was a concession that the Appellant had been continuously resident in the UK for that period of time. He referred the Tribunal to paragraph 9 of the determination and that the documentary evidence before the judge demonstrated that the Appellant had been residing in the United Kingdom from 1995 when he was only 5 years of age and that the judge, made a finding that prior to the relevant decision the Appellant had resided in the UK for just over 20 years (at [36]). Whilst Ms Brocklesby-Weller had submitted that there had been no concession made relying on [24], Mr Bobb submitted that the determination did make reference to such a concession. Nonetheless, he submitted that a careful examination of the determination demonstrated that the judge correctly directed himself to the requirements to be taken into account when considering whether the ten year period counted back from the date of decision, has interrupted the residence and at paragraphs 7 to 9 of the skeleton argument he set out the relevant considerations from the case law identified by the judge and in particular the following:-

> "The key question for the Tribunal to ask when considering whether there had been a period of ten years' residence prior to the decision to deport or whether imprisonment involved either the transfer to another state of the centre of the personal, family or occupational interests of the person concerned and/or whether the 'integrative links' previously forged with the host Member state had been broken."

He referred the Tribunal to the findings of fact made at [36 and 37], namely at the date of decision he had been resident in the UK for just over twenty years, he had been resident for over eleven years before his first sentence and imprisonment, he had become well integrated by the time he had started serious offending and that although he had spent time in custody during the ten years prior to the decision which must have a negative impact on the Appellant's integration, it was not sufficient to interrupt integration on the facts of the case, despite the persistent criminality. The judge found he had no evidence that he had formed links with another country and that his family in the UK continued to have an interest in him,

although the extent and expression of that interest undoubtedly had fluctuated. Thus he submitted that the findings of fact were open to the judge on the evidence before him and that the conclusion that he was not deprived of the enhanced protection as a result of his integrative links with the UK had not been broken by his imprisonment was one reasonably open to him.

23. In answer to the Secretary of State's grounds, he submitted that whilst the judge had made reference to seven and a half years of the ten year period in prison that was not factually correct, that in fact he had served four years and eight months and two weeks of the relevant period in prison (which was calculated by adding together the three years served for the 2006 offence, the six weeks served for the 2010 offence and the one year and seven months served of the 2011 offence). As to members of the family, it was submitted the judge rightly found on the evidence that contact had been maintained although it had fluctuated [37] he submitted that that was not unusual when the law-abiding members of the family have a family member who was sent to prison. He reminded the Tribunal that the evidence before the judge was that the family were extremely disappointed in the offending and thus had limited contact with him at the time. However the judge accepted the evidence at the hearing of reconciliation between the family members of the Appellant. He submitted that whilst there appeared to be an apparent contradiction between paragraphs [37 and 43] the determination should be read as a whole and that this was an Appellant who had demonstrated that he had no links in France and that he had not broken the level of integration that he had prior to his imprisonment. Thus the first ground is not made out.

24. As to the second ground, he submitted that the challenge to the findings of the judge that his conduct did not amount to imperative grounds of public security were open to the judge who properly applied the relevant case law and in particular the decision of the CJEU in **Tsakouridis**. In this context, he submitted on the facts of the case the Appellant was not part of an organised group of drug traders and that the circumstances of his offence could be properly distinguished from the circumstances in the case of **Tsakouridis** who was dealing with large quantities of drugs as part of an organised group. He submitted the level of offending was not the same and that he was in effect dealing on a street corner and whilst it was serious did not breach or come within "imperative grounds" and thus the judge correctly directed himself and was entitled to reach that conclusion.

25. As to Ground 3 and the risk of reoffending, he submitted that the judge had proper regard to the OASys assessment and the risk of harm posed. It was open to the judge to consider the risk of harm if the Appellant was unable to find employment, however the judge found him to have been able to do so. Furthermore there was evidence before the judge of the lengths that he had gone to rehabilitate himself during the period of imprisonment and thus it was open to the judge to find that he had not represented a propensity to reoffend notwithstanding that he posed "some risk" (see[43]). Mr Bobb made reference to the work undertaken in prison to address his offending behaviour; the number of offending behaviour courses, including enhanced thinking skills and the work done with the Geese Theatre Company. He

submitted that the Secretary of State's grounds in which it was stated that the evidence did not demonstrate he had a stable career, but it was open to the judge to make the finding at [42] based on the evidence of his employment. Furthermore the finding as to his accommodation and living with his sister was a matter that the judge was entitled to take into account when considering the assessment of risk of reoffending. Consequently he submitted that the decision of the First-tier Tribunal Judge disclosed no error of law and that the appeal should be dismissed.

26. I reserved my determination.

Discussion:

27. The relevant provisions of both the EEA regulations and the Directive as they implement into domestic law, the Citizens' Directive 2004/38 ("the Directive") are annexed to this decision. For present purposes it is sufficient to note that the effect of these provisions is to provide three levels of protection against removal, depending upon the extent to which the EEA national has demonstrated becoming integrated into the United Kingdom as a result of continuous residence in the United Kingdom.

28. The EEA regulations provide enhanced levels of protection against removal for EEA nationals who have become integrated in the host Member State as a consequence of living for a sufficiently lengthy period of time in that Member State. Thus, regulation 21(3) provides that an EEA national with a permanent right of residence, which is acquired as a consequence of completing five years' continuous residence in accordance with the regulations, cannot be removed except upon *serious grounds* of public policy or public security. Regulation 21(4) provides the highest level of protection for an EEA national who has "resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision". Such a person cannot be removed except upon *imperative grounds of public security.*

29. It is, therefore, necessary to examine what is required to access the highest level of protection against deportation on the basis of ten years residence.

30. In *SSHD v MG* (C-400/12) the Court of Justice was concerned, *inter alia,* with the question of whether the ten years' residence demanded by Article 28 in order to have the benefit of the highest level of protection against deportation had to be continuous and unbroken, or whether it could comprise an overall period of residence punctuated by periods of imprisonment but amounting to ten years after periods of imprisonment had been deducted. The Court concluded that:

> "… on a proper construction of Article 28(3)(a) of Directive 2004/38, the 10 year period of residence referred to in that provision must, in principle, be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned."

But the Court went on to indicate that the absence of a continuous and unbroken period of 10 years residence did not necessarily disqualify a person from having the benefit of the highest level of protection:

> "As for the question of the extent to which the non-continuous nature of the period of residence during the 10 years preceding the decision to expel the person concerned prevents him from enjoying enhanced protection, an overall assessment must be made of that person's situation on each occasion at the precise time when the question of expulsion arises (see to that effect, *Tsakouridis,* paragraph 32*).*
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> …
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> …Article 28(3) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment. However, the fact that the person resided in the host Member State for the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken."

31. The decision of the Court of Justice in *SSHD v MG* was considered by the Upper Tribunal in *MG (prison-Article 28(3)(a) of Citizens Directive) Portugal* [2014] UKUT 00392 (IAC). The Tribunal concluded that:

> "The judgment should be understood as meaning that a period of imprisonment during those 10 years does not necessarily prevent a person from qualifying for enhanced protection if that person is sufficiently integrated. However, according to the same judgment, a period of imprisonment must have a negative impact in so far as establishing integration is concerned."

32. The questions that the CJEU had to determine were fourfold. Firstly, does a period in prison following sentence for a commission of a criminal offence by a union citizen break the residence period in the host Member State required for that person to benefit from the highest level of protection against expulsion under Article 28(3)(a) of the Directive or otherwise preclude the person relying on this level of protection? Secondly, does reference to previous ten years in Article 28(3)(a) mean that the residence has to be continuous in order for a union citizen to be able to benefit from the highest level of protection against expulsion? Thirdly, for the purpose of Article 28(3)(a) is the requisite period of ten years during which a union citizen must have resided in the host Member State calculated (a) by counting back from the expulsion decision, or (b) by counting forward from the commencement of the citizen's residence in the host Member State? Lastly, if the answer to question 3(a) is that the ten year period is calculated by counting backwards then does it make a difference if the person has accrued ten years' residence prior to such imprisonment?

33. The answer to question 3 was that the period of ten years had to be considered by counting back from the expulsion decision and that the residence had to be one which was not tainted as it were by imprisonment. The answer to question 4 in general terms, was that it did not make a difference if ten years' residence prior to such imprisonment had been accrued in the sense that it did not mean automatically that the individual was able to rely on such residence but it was a material factor. The crucial finding in relation to the second and third questions was set out in paragraph 28 as follows:-

> "In the light of all the foregoing the answer to questions 2 and 3 is that on a proper construction of Article 28(3)(a) the ten year period of residence referred to in that provision must in principle be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned."

34. They went on to consider the answer to questions 1 and 4 deciding in paragraph 38 that Article 28(3)(a) must be interpreted as meaning that a period of imprisonment is in principle capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for even when the person concerned resided in the host Member State for the ten years prior to imprisonment. However the fact that the person resided in the host Member State for the ten years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken thus forming part of what has been described as the "maybe" category of **MG**.

35. In each reference made to the effect of imprisonment, the words "in principle" are used. This demonstrates that periods of imprisonment will not automatically mean that the highest level of protection is lost. Thus it is necessary to consider the whole history of the individual's residence in the host nation and if he has for a period of at least ten years before any sentence of imprisonment resided in this country, has integrated into the country so as to fulfil the requirements of the Preamble (and Article 16 of the Directive), then that can be taken into account and can, depending on all the circumstances, mean that despite having been sentenced to a term of imprisonment, he does not lose his enhanced protection.

36. The decision in **MG** (as cited) therefore appears to state that whether the enhanced protection should still exist is a question which must be made on an overall assessment of the individual's situation and is therefore dependent on the findings of fact made by the Tribunal.

37. It is therefore necessary to consider the findings of fact in the decision of the First-tier Tribunal. At paragraph [35] the First-tier Tribunal Judge set out the relevant legal principles and directed himself in accordance with the decision of **SSHD v MG** (as cited) and also the determination of the Tribunal (when considering **MG** on its return from the decision of the European Court). Furthermore, the judge considered the issue of integration at [35]; (page 11 of the decision) when reviewing the case law and set out what he described as the "key question":-

> "The key questions for the Tribunal to ask when considering whether there had been a period of ten years' residence prior to the decision to deport were whether imprisonment involved either the transfer to another state of the centre of the personal, family or occupational interests of the person concerned, and/or whether the 'integrating links' previously forged with the host Member State had been broken."

38. The judge then set out his findings of fact on the relevant issues at [36]. The judge made findings of fact from the evidence (which are unchallenged) that the applicant

had arrived in the UK when aged 5 years 2 months and had arrived with his family therefore in February/March 1995 and at the date of the decision he had been resident in the UK for just over twenty years. He further found that the Appellant received his first custodial sentence in October 2006, when he had been present in the United Kingdom for over eleven years.

39. At [37] the judge went on to consider the issue of integration and found as a fact that the Appellant had lived with his family members (from the age of 5) until 2002 living in the London area. He then moved to a further area with his mother and younger siblings and at a later date his behaviour began to deteriorate. The judge however found that on the evidence before him that he was satisfied that he had become integrated into life in the UK by the time he had started his serious offending in 2006 and that "indeed he was 17 years of age when he was first sentenced to imprisonment in a young offenders' institution."

40. Thus the judge found that from the ages of 5 to 17 years he had demonstrated his integration in the UK; he had resided in the UK during that period, he had undergone his education in the United Kingdom and had lived with his family members during that period of time and had not been to France, nor had he left the UK or forged any links with his country of citizenship.

41. Furthermore the judge took into account the Appellant's conduct during the ten years prior to the decision to make a deportation order which he later referred to at [43] as a period where he had not been a law abiding citizen and had spent the bulk of that period either in custody or on licence. The judge found that was likely to have a negative impact on the Appellant's integration. However, he concluded that whilst that period of time between 2005 and his release was one that could be properly described as "chaotic" that it was insufficient to interrupt that period so as to deprive him of the enhanced protection or that it was sufficient to disrupt his links with the UK despite that criminality. He found as a fact that there was no evidence that he had formed any links with any other country and that his family members (all of whom were based in the UK) continued to have an interest in him although the extent of that had fluctuated.

42. Ms Brocklesby-Weller submitted that the findings as to integration made at [43] were in direct conflict with those of [37] and that there was no analysis of the issue of integration. I have therefore considered whether in fact they are opposing findings of fact. It seems to me that in deciding that question it is important to read the determination as a whole and in particular paragraph [37] and the concluding part of [43]. At paragraph [37] as summarised above, the judge set out his findings on the issue of integration having properly directed himself to the relevant legal principles. At paragraph [43] the judge set out the factors relevant to the ten year period before the expulsion decision was made but went on to consider (in the light of his findings at [37] and his consideration of the circumstances of the offence [41] and the risk of reoffending at [42]) that he found on a "very narrow balance" that the decision to deport the applicant was not justified on imperative grounds of public security. He concluded on the issue of integration that his degree of integration was such that his

removal could not be justified in view of the likely impact it would have on the applicant who had no real connection with France and in light of the findings made cumulatively at [37], [41] and [42].

43. I am therefore satisfied that the findings, when read together, are not internally inconsistent as the Secretary of State contends but that the judge did consider the issue of integration, did make an analysis of that issue and made findings of fact that were open to him on the evidence. Thus Ground 1 is not made out.

44. Dealing with Grounds 2 and 3, it is submitted on behalf of the Secretary of State that the judge erred in law by finding that the decision to deport was not justified on the "imperative grounds of public security" as he had failed to take into account the seriousness of the offence and did not properly reason this in the determination. It is further asserted that the judge failed to consider the risk of reoffending in accordance with the OASys Report and had erroneously considered the Appellant's present circumstances.

45. The judge at [38] reminded himself that whilst he had found that the Appellant had established that he could rely on the enhanced protection of Regulation 21(4)(a), the Tribunal would have to be satisfied that the decision was not justified on the imperative grounds of public security. At [39]-[40] of the determination, the judge properly directed himself to the decision of **Tsakouridis** (as cited) and other relevant case law. The questions put to the court in that decision involved whether the expression "imperative grounds of public security" is to be interpreted as meaning that only irrefutable threats to the external or internal security of a Member State could justify expulsion, that it is only to the existence of the state and its essential institutions, their ability to function, the survival of the population, external relations and the peaceful coexistence of nations. If that was the appropriate test it would be set at a very high level.

46. In answering those questions, the court was concerned on the facts of that case with involvement in dealing in drugs. The court stated as follows:-

> "41. The concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as reflected by the use of the words 'imperative reasons'.
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> 42. It is in this context that the concept of 'public security' in Article 28(3) of the Directive 2004/38 should also be interpreted.
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> 43. As regards public security, the court has held that this covers both a Member State internal and its external security (and he cites a number of cases).
>
> 44. The court has also held that a threat to the functioning of the institutions and essential public services and survival of the population, as well as the risk of a serious disturbance to foreign relations or to the peaceful coexistence of nations, or a risk to military interests, may affect public security (and refers to a number of other cases).

> 45. It does not follow that objectives such as the fight against crime in connection with dealing in narcotics as part of an organised group are necessarily excluded from that concept and it appears that if one follows the language of that, it was intended that the fight against dealing in narcotics was capable of being considered to be a threat in foreign relations or peaceful coexistence of foreign relations but it matters not because clearly it is not necessary from what the court says that there should be any cross-border element in the criminal conduct which leads to deportation on the basis of Article 28(3)."

47. At paragraph [49] the court set out the following:-

> "49. Consequently, an expulsion measure must be based on an individual examination of the specific case and can be justified on imperative grounds of public security within the meaning of Article 28(3) of the Directive only if, having regard to the exceptional seriousness of the threat, such a measure is necessary for the protection of the interests it aims to secure, provided that that objective cannot be attained by less strict means, having regard to the length of residence of the union citizen in the host Member State and in particular to the serious negative consequences such a measure may have for union citizens who have become genuinely integrated into the host Member State."

48. The court went on to state that when applying the Directive that a balance must be struck between the "exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made", by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity and, if appropriate the risk of reoffending.

49. Thus the court confirmed that the expression "imperative grounds of public security" creates a considerably stricter test than "merely serious grounds" but since the application of the test is primarily for the Member State concerned, which must take into account social conditions as well as the various factors the Directive itself refers, the question is likely to turn to larger extent on the particular facts of the case. It is also plain that the Tribunal must give effect to the Regulations which themselves must be interpreted against the background of the right of free movement and the need to ensure that derogation from it are construed strictly. Thus even in cases where removal is prima facie justified on imperative grounds of public security the decision maker must consider amongst other things whether the offender has a propensity to offend in a similar way (see paragraph [24] of the decision **SSHD v Straszewski [2015] EWCA Civ 1245**).

50. The judge at [41] went on to apply those principles having regard to the nature of the offence committed and by referring to the judge's sentencing remarks and at [42] considered the risk of reoffending. As submitted by Mr Bobb, it was open to the judge to consider that the circumstances of the appellant's offending, whilst serious, was distinguishable for the facts of **Tsakouridis;** the appellant was not part of an organised group of drug traders. In respect of the issues of risk of re-offending the judge made reference to three reports and summarised them noting that the Appellant had been assessed as a medium risk and made direct references to that

assessment and the conclusion that "the offender has the potential to cause serious harm but is unlikely to do so unless there is a change in his circumstances, for example, failing to take medication, loss of accommodation, relationship breakdown and alcohol misuse." The judge also recorded the assessment whereby it stated that the nature of the risk would be greater as a result of the Appellant being "unable to find meaningful employment which would provide an income and occupy his time and/or if he becomes 'reacquainted who have pro-criminal associations.'" It was also said that a failure to engage with offending behaviour programmes and/or continued association with offending peers was likely to increase the risk and that the completion of intervention and future planning measures to include employment and housing would be said to reduce the risk.

51. The judge had the opportunity to hear oral evidence from the Appellant and from the family members concerning his present conduct since release and found on that evidence that his circumstances had changed and that he had now a form of employment, he had obtained stable accommodation with his sister and was no longer associating with those in the area who had been involved in the most recent offending. As Mr Bobb submitted, the judge had before him evidence of the work undertaken whist in prison to address his offending behaviour which included a number of offending behaviour courses such as the ETS (Enhanced Thinking Skills) and the work done with the Theatre Company.

52. Contrary to the submissions of the Secretary of State, the judge therefore considered that he had demonstrated those circumstances which could be described as the "stabilising factors" and which had been identified in the OASY's report as relevant to the assessment of ongoing risk. Whilst Ms Brocklesby-Weller submits that the judge erroneously considered the Appellant's circumstances that would prevent him from reoffending, those were specifically referred to in the material before the judge and it was open to him to reach the conclusion on the evidence that presently the conduct of the Appellant demonstrated that those stabilising factors were present. As set out in the decision of **SSHD v Straszewski** (as cited) at paragraph [25], it required an evaluation to be made of the likelihood that a person concerned would offend again and the consequences if he did so. In addition, the need for the conduct of the person concerned to represent a "sufficiently serious" threat to one of the fundamental interests of society required the decision maker to balance the risk of future harm against the need to give effect to the right of free movement.

53. A careful reading of the determination demonstrates that the judge was not saying there was no risk (see paragraph [43]) nor was he departing from the contents of the report but had considered the reports against the background of the Appellant's offending but in the light of the present evidence as a whole, including the evidence of the Appellant and the witnesses which he had summarised earlier in the determination. Thus he had considered the factors identified as going to risk; namely of employment, accommodation, relationship with family, and continuing links to offending peers and found that they were no longer present and that this had affected the risk assessment and as such overall the circumstances were such that the decision to deport the Appellant was not justified.

54. Whilst the judge had not expressly referred to Regulation 21(5)(c) it is plain that this was in his mind in those paragraphs where he considered the issue of risk of reoffending. Thus the judge did carry out an evaluative exercise of the evidence in this regard. As stated in the decision of **Straszewski**, in any given case an evaluative exercise of this kind may admit of more than one answer. If so, provided all the appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in a sense of falling outside the range of permissible decisions. It has not been advanced on behalf of the Secretary of State that the decision of the judge or his findings of fact were either irrational or perverse and in light of the foregoing, the judge properly considered the appropriate factors and made findings of fact based on the evidence before him. Whilst it may be said it was a generous decision, it is not one that fell outside the range of permissible decisions and was a decision open to him on the evidence presented before him. He clearly found this to be a finely balanced case and when balancing the factors reached the conclusion that it was on a "very narrow balance" that he found the decision to deport him was not justified on the imperative grounds of public security and at [43] made it plain to the Appellant the consequences of any further offending. Therefore the grounds advanced on behalf of the Secretary of State are not made out and do not demonstrate any error of law in the decision of the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal does not disclose an error of law and the decision stands.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Reeds

ANNEX: The relevant provisions:

Directive 2004/38

Recitals 23 and 24 in the preamble to Directive 2004/38 read as follows:-

> "23. Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.
>
> 24. Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989."

Article 27(1) and (2) of the Directive provide:-

> "(1) Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
>
> (2) Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
>
> The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."

Under Article 28 of the Directive:-

"(1) Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

(2) The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

(3) An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

<u>The 2006 Regulations</u>

"Decisions taken on public policy, public security and public health grounds:

21-(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 permanent right of residence under regulation 15 except on serious grounds of public policy or 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 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.

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(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.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his 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) shall not shall not constitute grounds for the decision; and

(b) if the person concerned is in the United Kingdom, diseases occurring after the three month period beginning on the date on which he arrived in the United Kingdom shall not constitute grounds for the decision."