**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-000797

First-tier Tribunal No: DA/00138/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

On 12th of December 2023

**Before**

**THE HONOURABLE MRS JUSTICE HILL DBE**
**(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)**
**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**Fuad Abdi Haji Hassan**
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**The Secretary of State for the Home Department**

Respondent

**Representation:**
For the Appellant: The appellant did not attend and was not represented
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

**Heard at Field House on 7 November 2023**

**DECISION AND REASONS**

**Preliminary issue – the appellant's non-attendance**

1. The appellant did not attend the hearing before us and was not represented. He had not sought an adjournment or explained his absence. He had failed to respond to previous Tribunal directions. The respondent had sent him a copy of the bundle and written submissions on which it sought to rely. Despite this, the appellant had ceased to engage actively with his appeal following a previous adjourned hearing, at which he had been legally represented.

2. In this context, we considered whether it was appropriate to continue with the hearing in the appellant's absence. We were conscious that the appellant was no longer legally represented. Even if there were no good explanation for the appellant's non-attendance, the question was whether, in proceeding, we would

© CROWN COPYRIGHT 2023

deprive the appellant of the right to a fair hearing (see: Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)). We concluded that to proceed would not deprive the appellant of that right. He had had notice of the hearing, which he could have attended. The respondent had sent to him a copy of its bundle and submissions, to which he could have responded and made representation to us, if he did not wish to attend the hearing. He had therefore been given various ways in which to participate in the hearing. We therefore concluded that it was appropriate to proceed with the hearing.

**The history of this litigation**

3. It is necessary to set out the litigation history, as it reflects on how the respondent now resists the appellant's appeal.

4. The appellant had appealed on 6 April 2021 to the First-tier Tribunal on 6 April 2021 against the respondent's decision to make a deportation order against him on 24 March 2021, pursuant to Regulations 23 and 27 of the Immigration (EEA) Regulations 2016 ('the Regulations'). The context was of the appellant's criminal offending.

5. The appellant's appeal was heard by Judge Dilks, (the 'Judge') who, in a decision of 28 January 2022, dismissed his appeal.

**The Judge's decision under appeal**

6. We briefly recite the appellant's immigration history, as recorded by the Judge.

7. The appellant is a national of the Netherlands, born on 31 October 1995. He claimed to have entered the UK in around 2000. He attended primary and secondary schools in the UK. The Judge was satisfied that this included the final year of primary school from November 2006, and secondary education from 2007 to November 2011. This was relevant because the appellant relied on a five-year period from 2006 to 2011 as being the basis on which he had permanent residence under the Regulations. This could entitle him, at the very least, to a certain level of protection against deportation under the Regulations (so-called 'serious grounds' protection under Regulation 27(3)). If he resided in accordance with the Regulations for a further five years, he would be entitled to so-called 'imperative grounds' protection, (Regulation 27(4)), by November 2016.

8. On 30 December 2019, the appellant was convicted of the offences, to which the deportation decision relates, of possessing, with intent to supply, heroin and crack cocaine, and possession of cannabis, for which he received a 30-month prison sentence on 3 February 2020. He had a history of previous drugs possession offences between 2014 and 2018. In its deportation decision, the respondent had disputed that the appellant's residence in accordance with the Regulations. The respondent noted the appellant's claim to have been in primary and secondary education in the UK but concluded that there was a gap in the evidence on that issue. For the avoidance of doubt, it did not, based on the documents to which we have been referred, contend that attendance in primary/secondary education could not meet the requirements to be a 'student' under the Regulations, as it later contended. The respondent was also not satisfied that the appellant had provided evidence of comprehensive sickness insurance cover.

9. In the appeal before her, the Judge considered whether the appellant's residence in the UK was in accordance with the Regulations. The Judge considered the appellant's reliance on enrolment for the principal purpose of following a course of study, under Regulation 4(1)(d)(i), (the 'study' issue); and whether he had comprehensive sickness insurance cover in the UK (Regulation 4(1)(d)(ii)). While accepting that the appellant had been in full-time education from 2006 to 2011, the Judge did not accept that the appellant had relevant insurance cover. While the appellant had a European Health Insurance Card or 'EHIC,' the Judge concluded than EHICs related to short-term visitors, rather than those residing in accordance with Regulations. Consequently, the Judge rejected the appellant's claim to have resided in accordance with the Regulations, and concluded that he had only a basic level of protection under Regulation 27(1). The Judge considered whether the appellant's removal was justified on grounds of public policy, public security, or public health. The Judge considered the non-exhaustive list of fundamental interests of society at paragraph 7 of Schedule 1 of the Regulations. The Judge concluded that the appellant's personal conduct represented a genuine, present, and sufficiently serious threat affecting one of those fundamental interests, for the purposes of Regulation 27(5), namely the offences of possession with intent to supply heroin and crack cocaine, which had a wide impact on the community at large.

10. In reaching her conclusion on the threat represented by the appellant's personal conduct, the Judge considered the assessment of a probation officer, in an 'OASys' report, that the appellant posed a medium risk of reoffending, albeit with a low risk of harm. The Judge considered that while the appellant had previously worked, and now lived with his family in London, he had previously lived with his family, but had then moved to Leicester, where he had supplied drugs. The fact that the appellant now had a young daughter born in May 2020, had been considered in the OASys assessment. The Judge considered the proportionality of the deportation order and concluded that it was proportionate. In reaching her decision, the Judge was conscious that the appellant had lived in the UK since 2000, from the age of 5, and remained socially and culturally integrated in the UK. The Judge considered that there was no evidence that the appellant had any medical or health issues and that while the appellant had some previous employment in the UK, it was not significant. The Judge accepted that the appellant had no meaningful ties in the Netherlands but concluded that there would not be very significant obstacles to his integration in the Netherlands, taking into account his age, health and education. Whilst his deportation would entail hardship, the appellant was a healthy male adult. The Judge noted that the appellant had not relied on any ongoing family life with the mother of his daughter. While the appellant's daughter was a British citizen, whose best interests the Judge considered, those interests lay in remaining with her mother, her primary caregiver, in the UK. The Judge did not accept that it would be adverse to the appellant's daughter's best interests for the appellant to be deported. The appellant had not provided evidence to show that his presence in the UK was needed to prevent his daughter from being ill-treated; her health or development being impaired; or her care being other than safe and effective. The Judge considered that the appellant could maintain contact with his daughter by phone, video calls or visits. The Judge went on to conclude that the appellant had no family life with other adult relatives in the UK.

11. The Judge also considered whether the appellant's rehabilitation would be hindered if he were deported and concluded that it would not. The Judge

concluded that the appellant's deportation was proportionate, for the purposes of the Regulations.

12. The Judge considered separately the appellant's rights under Article 8 of the European Convention on Human Rights ('ECHR'). In that context, the Judge considered Sections 117A to D of the Nationality, Immigration and Asylum Act 2002. The Judge noted that appellant's prison sentence was at least 12 months but less than four years. The Judge consider whether either of the exceptions to the public interest requiring the appellant's deportation applied. The Judge concluded that there would not be very significant obstacles to the appellant's integration into the Netherlands; and that whilst he had a genuine and subsisting parental relationship with a qualifying child, namely his daughter, the effect of his deportation on her would not be unduly harsh. The Judge also concluded that there were not very compelling circumstances over and above either of those two exceptions. Therefore, the Judge dismissed the appellant's appeal by reference to Article 8 ECHR.

**The Appellant's appeal against the Judge's decision**

13. The appellant's initial application for permission to appeal to this Tribunal was refused but the appellant renewed his appeal on two grounds. The first ground was that the Judge had failed to consider that an EHIC card could be sufficient evidence of comprehensive sickness insurance cover and, in doing so, the Judge had ignored the respondent's own guidance on this issue. The second was that the Judge had limited her consideration and explanation that the appellant had not met the exception to deportation on Article 8 ECHR grounds, to whether the appellant's deportation would affect his daughter's health, development, and safety. Those factors were relevant, but not sufficient, and the Judge ought to have considered all the circumstances when assessing whether the effect of the appellant's deportation on his daughter would be unduly harsh.

**The Upper Tribunal's grant of permission**

14. Judge O'Callaghan of this Tribunal granted permission on the following basis:

> "I am satisfied that ground 1 enjoys merits insofar as the parties should properly expect to address the Tribunal as to the recent CJEU judgment in VI v. HMRC ECLI:EU:C:2022:177, (10th March 2022), at [68]-[69]".

15. Judge O'Callaghan regarded the second ground as having less merit but concluded that it was proper for the grounds to be considered as a whole. We pause to observe that the CJEU's decision in VI post-dated the Judge's decision and consequently she cannot be criticised for having not understood the law in light of VI, albeit the issue remained of whether she had erred in law.

**The respondent's Rule 24 response and further developments in the litigation**

16. The respondent provided a Rule 24 response on 28 February 2023. While not addressing the issue identified by Judge O'Callaghan, for the first time, the respondent raised two new issues. The first was what we had termed the 'study' issue under Regulation 4(1)(d)(i) of the Regulations, namely whether enrolment in primary and secondary school constituted enrolment, "for the principal purpose

of following a course of study (including vocational training)." The second was what we termed the 'assurance' issue, namely, whether the appellant met the requirement of Regulation 4(1)(iii), having "assured the [respondent], 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."

17. Upper Tribunal Judge Gill first adjourned the hearing on 21 June 2023, and directed that the parties provide skeleton arguments on the relevance of VI, and the issues raised in the respondent's Rule 24 response.

18. A further hearing then took place before us on 20 July 2023, at which the respondent accepted that VI was binding on this Tribunal and that the Judge had therefore erred in her assessment of the appellant's comprehensive sickness insurance cover. As we recorded in our directions given at that hearing, the issues (then listed as issues (3) and (4)), on which the parties focussed were as follows:

> "(3) … can the respondent permissibly rely on the study and assurance issues, said to have been raised for the first time in her rule 24 reply, despite neither issue apparently being relied on by her in her refusal letter or before the Judge to argue that the Judge's decision should not be set aside?
>
> (4) If the answer to question (3) is 'yes', should the Judge's decision stand on the basis that the appellant did not meet the study and assurance requirements."

19. The hearing on 20 July 2023 was the last time at which the appellant was legally represented. We adjourned that hearing with detailed directions requiring written submissions on the study and assurance issues, because the two issues had only been the subject of detailed oral submissions which had developed during the course of the hearing, and which, without criticism of the representatives, we were concerned meant we could not do justice in deciding the issues. Once the appellant ceased to have legal representatives, we varied the directions with which he was required to comply, but he did not engage any further in the litigation. Nevertheless, the respondent has provided detailed responses to our directions, which Mr Terrell prepared and on which he made oral submissions to us. We thank him for the clarity and quality of those submissions, which assisted us.

## The hearing before us on 7 November

## The respondent's submissions

20. The respondent formally conceded that the Judge had erred in law on the health insurance cover issue. However, Mr Terrell sought to argue that the error was not material, such that the Judge's decision should not be set side. This was because the appellant did not, in any event, meet the 'study' and 'assurance' requirements of Regulation 4(1)(d). Mr Terrell addressed the first issue (previously 'issue (3)) by acknowledging the need for procedural rigour in appeals, but relying on the Court of Appeal's decision in SSHD v AJ (Angola) [2014] EWCA Civ 1636, at paragraph [49], as authority for the proposition that an identified error

of law may be said to be immaterial if it is clear on the materials before the Judge that any rational tribunal must have come to the same conclusion, in this case, in light of the two new issues. While we have considered the respondent's written submissions, Mr Terrell accepted, in our view correctly, that both the study issue and the assurance issue potentially included mixed questions of fact and law. While Mr Terrell submitted that the study issue was perhaps clearer, he accepted that the answer was less clear on the 'assurance' issue. If, as the respondent now contends, the appellant needed to have provided some form of assurance, capable of evaluation by the respondent when he started education, the respondent accepts that the logic of her contention is that the appellant would have needed to give this assurance at the start of his study. Mr Terrell accepted that the evidence before the Judge on the issue of whether an assurance had been given was far from clear. It was not even clear what the appellant's legal position was on this issue.

21. Mr Terrell accepted that it might well be argued that the respondent should not be permitted to raise a new issue that had never been before the Judge. However, the respondent's position was now that, even if the matter needed to be remade, the study and the assurance issues should be the focus in remaking the decision in the appellant's appeal. He urged us to retain the remaking in the Upper Tribunal, as the appellant had not indicated that he was continuing to pursue the litigation. In any event, if we were minded to remit matters to the First-tier Tribunal, then he asked us to preserve significant findings, which we set out later in these reasons.

## Discussion and Conclusions

### Ground (1) – accepted error of law

22. First, as already set out, the respondent accepts that the Judge erred in concluding that the appellant did not have comprehensive sickness insurance cover in the UK, which met the requirement of Regulation 4(1)(d)(ii), in light of VI.

### Ground (2) – no error of law

23. We deal with the appellant's second ground briefly, which was a challenge to the Judge's reasoning about whether the effect of the appellant's deportation on his daughter would be unduly harsh. The ground was put in brief terms, and stated that:

> "It is submitted that by restricting consideration of undue harshness at paragraph 46 of the FTTJ's decision to ill-treatment, health, impaired development and safe and effective care, the FTTJ has fettered his consideration of the unduly harsh test such that this aspect of the decision is unlawful."

24. The appellant's skeleton argument did not do any more than reiterate this original ground. We accept Mr Terrell's submission that this ground (2) amounts to a disagreement with the Judge's conclusion rather than disclosing any error of law. It was clear from the Judge's decision that she did not confine her consideration to the issues cited, but considered the ability of the appellant to continue his parental relationship with his daughter (see paragraph [46]), in the

context of his current contact (albeit limited) with his daughter (paragraphs [44] to [45]).

**Whether the accepted error on ground (1) was such the Judge's decision should be set aside**

25. The key to answering this question was whether it was clear, on the evidence before the Judge, that any rational Tribunal would have come to the same decision, even considering the 'study' and 'assurance' issues. Put another way, was there only one answer on the evidence before the Judge? This was particularly problematic where the issues were mixed questions of fact and law, and the Judge had never been asked to grapple with these issues. While we do not bind any Tribunal in any remaking, we conclude that it was far from clear that any rational tribunal would have dismissed the appellant's appeals based on either issue. The lack of clarity shouts out to us, particularly in relation to the 'assurance' issue. The respondent is unable to direct us to any conclusive case law on this issue. In his attempt to help us, the closest that Mr Terrell has been able to find is paragraphs [4] and [46] of Commission v Italy (Free movement of persons) [2000] EUECJ C-424/98, in which the CJEU stated that where a student assured the relevant national authority, by a means of a declaration or by such alternative means as the student chose that were at least equivalent, that he had sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during his period of residence, it was unlawful for the Italian authorities to ask the student to guarantee that they held resources of a certain amount, thereby not giving students the choice between a declaration or alternative means; and not permitting the use of a declaration where the student was accompanied by family members.

26. Mr Terrell also referred us to Grzelczyk (Principles of Community law) [2001] EUECJ C-184/99, as authority for the proposition that whilst member states would not require minimum resources, the truthfulness of the declaration must be assessed at the time it was made (paragraph [45]), but the Court of Appeal in Jeleniewicz v SSWP [2008] EWCA Civ 1163 also confirmed that the assurance was not a "one-off" requirement and continued reliance on it might fail if there were a change in circumstances (paragraphs [14] and [15]).

27. While these propositions are helpful in remaking an appeal, they do not begin to answer the question of what evidence there was before the Judge as to the assurance, as it was never raised as an issue. There is simply a stark gap in the evidence which means we are unable to conclude that there is only one answer.

28. We then turn to the study issue. Mr Terrell once again did his very best to assist and referred us to Francoise Gravier v City of Liege [1985] EUECJ R-293/83, for the proposition that vocational training was broad and included preparation for a qualification for a particular trade or profession. Vincent Blaizot v University of Liege and others (Social Policy) [1988] EUECJ R-24/86, decided that university courses aimed at such preparation were "vocational studies" (paragraph [1]), while case-law has since developed to include university and higher education (Commission v Austria (Social policy) [2005] EUECJ C-147/03, paragraph 70; and Bressol & Ors et Chaverot & Ors (Free movement of persons) [2010] EUECJ C-73/08, paragraph [79]). The implication of these cases was that they related to tertiary education. Mr Terrell also referred us to the respondent's guidance, "Qualified persons (European Economic Area nationals) and Withdrawal

Agreement right of permanent residence" - Version 11.0. He argued that the guidance was consistent with these cases.

29. Despite Mr Terrell's efforts to persuade us, we are not satisfied that the evidence, in the context of the law to which we were referred, was clear, such that there was only one answer open to the Judge. It is unclear to us whether, where the guidance refers to 'study' or status as a 'student', this was limited to tertiary education, and we pause to note, (as we had raised with the representatives at the earlier adjourned hearing) that the "Register of Student sponsors" (page [38] of the guidance) includes a number of schools, as opposed to universities. We also have no idea how the guidance is applied in practice, for example to those aged between 16 to 18 who are studying for vocational qualifications or apprenticeships. Once again, we reiterate that we are not in any way deciding these issues, which are for a Judge remaking the decision on the appellant's appeal.

**How the decision on the appellant's appeal should be re-made**

30. We considered whether to remit the matter to the First-tier Tribunal or to remake it in the Upper Tribunal. We do not accept Mr Terrell's submission that it is appropriate to retain remaking in the Upper Tribunal, either on the basis of the limited nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made; or because the appellant has ceased to engage in this appeal before us. We have borne in mind paragraph 7.2 of the Senior President's Practice Statement and conclude that the new issues raised by the respondent before us are such that to decide them ourselves would be to deprive the appellant, in the context of the Judge's error, of an opportunity to have these issues put to and considered by the Judge; and the ongoing need to make detailed findings on the assurance issue, in particular, means that it is appropriate to remit remaking to the First-tier Tribunal. In remitting remaking, we add two points. First, we accept Mr Terrell's submissions that it is appropriate to preserve a number of the Judge's findings, which we set out below. Second, there is no reason why Judge Dilks could not, if the Resident Judge regards it as appropriate, conduct the remaking. There is no allegation of bias, and the assurance and study issues are substantively new issues. It is, of course, also open to the Resident Judge to reallocate remaking to a different judge, depending in the First-tier Tribunal's resources, as they see fit.

**Preserved findings**

31. We first preserve the Judge's finding at paragraph [20] that "there is no evidence that the appellant derived a permanent right to reside from his parents".

32. Next, we preserve the findings at paragraph [27] that "the appellant's offender manager, taking into account these and other scores and the assessment as a whole, considered that the appellant posed a medium risk of re-offending, albeit a low risk of harm."

33. We also preserve the findings at paragraphs [30] and [31] that "I consider that it can properly be said that the threat affects one of the fundamental interests of society, in particular bearing in mind that the appellant's most recent and serious offence was in relation to the supply of class A drugs and whilst there may not be

an immediate or direct victim there is wider societal harm, and I find that the threat is sufficiently serious"; and " For these reasons I find that the appellant represents a genuine, present, and sufficiently serious threat to the public to justify his deportation on grounds of public policy."

34. Further, we preserve the finding at paragraph [37] that at the time of the hearing before the Judge, "…there is no evidence that he [the appellant] has any medical/health issues."

35. Moreover, we preserve the finding at paragraph [38], that, at the date of the hearing before the Judge, "the appellant had done some work in the UK" but that this "had not been significant."

36. Next, we preserve the finding at paragraph [39] that "the appellant has no meaningful ties to the Netherlands."

37. In addition, we preserve the findings at paragraph [40] that there would be no "very significant obstacles to the appellant's integration in the Netherlands, taking into account his age, health, education and that he has done some work and training in the UK.... I accept that relocation to the Netherlands would entail hardship, but I find as a healthy adult male he has not established that he would not be able to cope in the Netherlands and he has not shown he would be unable to learn the language or adjust."

38. We also preserve the findings that the effect of deportation on the appellant's child would not be unduly harsh (paragraph [46]); and at paragraph [47] that "there are no further elements of dependency beyond normal emotional ties for the appellant and any of his adult relatives in the UK" and that he does not claim to have a current partner (paragraph [57]). The Judge's conclusions on Article 8 ECHR are therefore undisturbed by our decision. We have remitted remaking solely on the issues under the Regulations.

**Further directions on remittal**

39. We direct that the respondent is permitted to rely in the remitted appeal to the First-tier Tribunal on the two issues, namely the 'study' and the 'assurance' issues.

40. While we do not direct as such, we observe that it may assist the remaking Judge if the respondent is able to adduce evidence of any records indicating that the appellant has or has not claimed benefits in the UK. It might also assist if the appellant is able to adduce evidence on whether any declaration or assurance was given by or on behalf of the appellant, which the respondent was able to evaluate.

**Notice of Decision**

41. **The Judge erred in law in concluding that the appellant was not a student, pursuant to Regulation 4(1)(d) of the Regulations, by virtue of not having comprehensive sickness insurance cover.**

42. **The Judge did not err in her assessment of the appellant's Article 8 ECHR appeal.**

43. **Remaking of the appeal under the Regulations is remitted to the First-tier Tribunal. It remains open to the respondent to argue before the remaking Judge that the appellant could not satisfy the requirements of Regulation 4(1)(d)(i) (the 'study' issue') and Regulation 4(1)(d)(iii) (the 'assurance' issue).**

44. **Remaking may be considered by any Judge of the First-tier Tribunal, including Judge Dilks, subject to the preserved findings set out in these reasons.**

**J Keith**

Judge of the Upper Tribunal
Immigration and Asylum Chamber

**29th November 2023**