Upper Tribunal
(Immigration and Asylum Chamber)

Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18 June 2013	.....

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE WARR

Between

DAHA ESSA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the appellant: Mr R Khubber, instructed by Irving and Co Solicitors

For the respondent: Mr S Allan, Senior Home Office Presenting Officer

1. Pending any further clarification of the law by the Court of Justice, the relationship between residence rights and periods of imprisonment should be applied by judges of the Immigration and Asylum chambers as follows:

i. Permanent residence within the meaning of Articles 16 to 18 of the Citizens Directive requires the claimant to be continuously lawfully resident under EU law, that is to say is residing in the host state as a qualified person or the family member of a qualified person for a period of five years.

ii. In determining whether permanent residence is acquired voluntary absences from activities that make a person a qualified person may break the continuity of residence applying the provisions of Article 16 (3). Periods of enforced military service do not break the continuity of such residence.

iii. Periods of penal custody following conviction and sentence and periods of remand in custody that are followed by conviction and a sentence of imprisonment do not contribute to the acquisition of permanent residence by a claimant who was a qualified person shortly before the period of detention.

The claimant is not employed, self sufficient etc during these periods and imprisonment is not considered as contributing to the claimant's integration in the host state.

iv. Periods of wrongful detention, pre-trial remand that lead to an acquittal or a non-custodial sentence, or periods of immigration detention can count towards permanent residence if the claimant qualifies before and after the detention in question.

v. If a cumulative period of five years residence as a qualified person has been achieved by the claimant discounting periods of penal custody, it is uncertain whether such a term will break the continuity of residence for the purpose of acquiring the right of permanent residence. By reference to the developing principles relating to ten years residence, the indications are that it may not do so.

vi. If permanent residence has been acquired but a custodial sentence is served in the period of residence between years five and ten, then the period of residence in prison may be counted towards the ten years if the person concerned remains integrated with the host state by reason of home, employment, family and social nexus.

vii. Once a period of ten years lawful residence in the host state has been acquired, a custodial sentence does not break the continuity of residence up to the date of the decision to deport.

2. The Court of Justice's reference in Case C-145/09 Land Baden-Wurtemberg v Tsakouridis [2011] CMLR 11 to genuine integration, should mean people who have resided lawfully in the Host state for five years and so have the right to permanent residence, rather than people who have resided for ten years.

3. For those who at the time of determination are or remain a present threat to public policy but where the factors relevant to integration suggest that there are reasonable prospects of rehabilitation, those prospects can be a substantial relevant factor in the proportionality balance as to whether deportation is justified. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation.

4. At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, it cannot be seen how the prospects of rehabilitation could constitute a significant factor in the balance. Thus, recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with propensity to commit sexual or violent offences and the like may well fall into this category.

5. What is likely to be valuable to a judge in the immigration jurisdiction who is considering risk factors is the extent of any progress made by a person during the sentence and licence period, and any material shift in OASys assessment of that person.

DETERMINATION AND REASONS

Introduction

1.
The background to this appeal is set out in the Ruling and Directions (Annex 1 to this determination) that the panel issued on the 24 April 2013 following the hearing of the previous day. By that ruling we concluded that the panel of the First-tier Tribunal who dismissed Mr Essa's appeal against deportation on the 18 April 2011 had made a material error of law. We indicated that the appeal would be remade by the Upper Tribunal on the 18 June 2013 with the findings of fact made by the First-tier Tribunal preserved with the exception of its decision on the risk that the appellant presented to the

public and his prospects of rehabilitation. We further indicated the material that we concluded would be helpful in determining this whole appeal and directed that the Home Office respond to the appeal by 4 pm on 4 June 2013.

2.
The appellant provided within the relevant time, an updated report from Mrs Davies the expert instructed in 2011, although little information had been provided by the Probation Service as anticipated in Direction 38 (b). No information of any kind had been received by the Home Office by 4pm on the 4 June 2013.

3.
On the 11 June 2013 the Tribunal received a letter from Mr Allan who had previously represented the Secretary of State. It sought a short adjournment of the case listed for the 18 June 2014 because:

" The Secretary of State had decided, given the significance of this case which plainly extends beyond the circumstances of the individual appellant, to instruct Counsel to be able to satisfactorily assist the Tribunal in this matter. I apologise for the shortness of notice in this regard."

The letter continued that counsel selected to represent the Secretary of State was not available on the 18 June 2013 and an adjournment to a later date in July, August or September was sought.

4.
The appellant's solicitors understandably objected to this application that was in due course refused and has not been renewed before us on the date of the renewed hearing. We are surprised that the application was made when it was. It must have been perfectly apparent to the Secretary of State long before the 23 April 2013 that this was an important case. It represented a decision by the Court of Appeal setting aside a refusal of permission to appeal by the Upper Tribunal on the basis of a novel issue of EU law. Any such decision of the Court of Appeal raises second appeal criteria and is almost certainly bound to contain an important issue of law. The Secretary of State was represented at a contested hearing by counsel at the Court of Appeal, but chose to be represented by Mr Allan a Senior Home Office Presenting Officer before us. If it had been intended to instruct counsel in the event that Mr Allan's submission before us on the 23 April 2013 that remaking was not necessary failed to carry the day, we should have been told then and not subsequently.

5.
We are further dismayed that no regard was had to our directions until very late in the day. We announced our decision on the hearing of the 23 April 2013 that the appeal would be re-made because it contained a material error of law and heard observations by both parties upon a potential time table that was set in order to bring this long standing deportation appeal to conclusion, but to give a reasonable opportunity to both sides to file all the material that we thought would be needed to enable us to properly remake this decision.

6.
Written directions setting out what had already been spelt out orally were sent thereafter to remind the parties of the directions we had given orally but the timetable had started from the date on which the directions were first given on the 23 April 2013. If the Secretary of State fails persistently to adhere to directions and fails to give the Tribunal the assistance it needs on certain questions, then she cannot complain if the matter proceeds when a reasonable opportunity to provide assistance has expired.

7.
As it is Mr Allan recognised that the failure to adhere to the directions meant that no fresh information had been provided by the Home Office, and no indication given of a wish to cross examine any of the witnesses called by the appellant. In the circumstances the opportunity to probe some factual issues was expressly waived.

8.
We once again remind the Secretary of State of her obligation under rule 2(4) of the Upper Tribunal Rules 2008 to assist the Tribunal in pursuing the overriding objective of economical, fair and efficient disposal of these appeals in a prompt time scale. Ignoring such directions until the last possible moment is a breach of such a duty and is very likely to lead to less weight being given to the Secretary of State's case than it otherwise might have been.

9.
In the event Mr Allan did produce a helpful skeleton argument the night before the hearing for which we are grateful. That skeleton made plain that it was accepted positively by the respondent that Mr Essa a Dutch national of Somali origin has achieved a right of permanent residence before the conviction giving rise to these proceedings had arisen.

10.
Having regard to the oral submissions of both parties we conclude the following issues arise for determination by us:-

i.
At what point in the proceedings does the Tribunal decide whether the highest level of protection afforded by Article 28(3) of Directive 2004/38/EC applies?

ii.
When does the duty to facilitate rehabilitation arise?

iii.
What is the appropriate decision in this remade appeal having regard to the present state of the evidence and the principles of EU law?

Issue 1: Level of protection

11.
It will be seen from the facts set out in the ruling that the appellant has been in the UK for approximately 12 years (depending on his month of entry in 2001). It would appear that he could argue that imperative grounds of public security should now apply to him as he has at the date of hearing before us, "resided in the host state for the previous ten years" (see Article 28 (3) (a) Citizens Directive).

12.
Mr Allen's first submission in response was that Mr Essa could not prove residence for the previous ten years because of his criminal sentence. He was first detained for the index offence in April 2007 and spent some 50 days on remand in custody. In June 2008 following conviction after a trial he was sentenced to five years detention in a young offenders institution. He had completed his custodial term on 23 October 2010. He was then held in immigration detention until February 2011 when he was released on bail subject to his licence conditions. If you remove the 30 month period of detention as a prisoner from the period of 12 years residence in the UK Mr Essa's length of present residence is

less than 10 years. Second, the imprisonment as a criminal offender breaks the continuity of his residence so even if he had achieved ten years residence outside penal custody, it was not for the previous ten years.

13.
In the case of Jarusevicius [2012] UKUT 124 IAC the Upper Tribunal expressed the opinion obiter , that a period of criminal detention could not break the continuity of residence for the purpose of imperative grounds as otherwise no person who faces expulsion within ten years of his release from such a sentence could rely on imperative grounds, and the Court of Justice would not have delivered its opinion on imperative grounds in Case C-145/09 Land Baden-Wurtemberg v Tsakouridis [2011] CMLR 11.

14.
Shortly afterwards the Court of Appeal decided the case of FV (Italy) [2012] EWCA Civ 1199 where a claimant had resided for 22 years in the United Kingdom, was convicted of manslaughter and sentenced to eight years imprisonment and had served a sentence of over four years between 2001 and 2006 before a decision to deport him was taken in 2007. It had been previously conceded that the claimant lawfully resident for more than 10 years, had a right of permanent residence and so the test of imperative grounds applied [1] .

15.
The Secretary of State sought to withdraw this concession relying on a sequence of domestic authorities and the principle of two years absence in Article 16 (4). We set out the relevant passages at Annex 2. Reviewing the authorities including the observations in Jarusevicius, the Court of Appeal concluded that the period of imprisonment did not break the continuity of residence for the purpose of applying the imperative grounds, and neither should the period of imprisonment be automatically discounted from the total length of residence. The question was whether a person who had achieved a right of permanent residence remained integrated within the host state or had acquired another centre of personal life outside it (Pill LJ at [85] and [86] and Aikens LJ at [126]).

16.
Mr Allan reminds us that two references have been made to the Court of Justice by this Tribunal addressing in different ways the question of the effect of imprisonment on residence rights namely: Case C-400/12 MG and Case C-378/12 Onuekwere . Decisions in these cases are outstanding at the time this determination is being made. We recognise that the decisions in these two cases may lead to further guidance that requires the principles we will set out in this decision to be revisited. However, in the light of the case law discussed in FV (Italy) a recent decision of the Court of Appeal made after the orders for reference in MG and Onuekwere , we conclude that we can identify the basis of decision making in this field of law that should be applied by judges of the First-tier and Upper Tribunal unless the Court of Justice or a higher court provides guidance to the contrary.

17.
For ease of reference we will borrow from regulation 6 of the Immigration (European Economic Area) Regulations 2006, the term qualified person to describe a national of an EEA state who is undertaking an activity that gives rise to lawful residence under the Citizens Directive after the expiry of the initial entry period of three months. We abstract from the case-law the following principles:

i.

Permanent residence within the meaning of Articles 16 to 18 of the Citizens Directive requires the claimant to be continuously lawfully resident under EU law, that is to say is residing in the host state as a qualified person or the family member of a qualified person for a period of five years.

ii.
In determining whether permanent residence is acquired voluntary absences from activities that make a person a qualified person may break the continuity of residence applying the provisions of Article 16 (3). Periods of enforced military service do not break the continuity of such residence.

iii.
Periods of penal custody following conviction and sentence and periods of remand in custody that are followed by conviction and a sentence of imprisonment do not contribute to the acquisition of permanent residence by a claimant who was a qualified person shortly before the period of detention. The claimant is not employed, self sufficient etc during these periods and imprisonment is not considered as contributing to the claimant's integration in the host state.

iv.
Periods of wrongful detention, pre-trial remand that lead to an acquittal or a non-custodial sentence, or periods of immigration detention can count towards permanent residence if the claimant qualifies before and after the detention in question.

v.
If a cumulative period of five years residence as a qualified person has been achieved by the claimant discounting periods of penal custody, it is uncertain whether such a term will break the continuity of residence for the purpose of acquiring the right of permanent residence. By reference to the developing principles relating to ten years residence, the indications are that it may not do so.

vi.
If permanent residence has been acquired but a custodial sentence is served in the period of residence between years five and ten, then the period of residence in prison may be counted towards the ten years if the person concerned remains integrated with the host state by reason of home, employment, family and social nexus.

vii.
Once a period of ten years lawful residence in the host state has been acquired, a custodial sentence does not break the continuity of residence up to the date of the decision to deport.

18.
For the avoidance of doubt, we should indicate that it is now clear, earlier decisions to the contrary notwithstanding, that residence that straddles the coming into force of the Directive or preceded membership of the EU by the claimant's state of origin can be taken into account, as long as the time for transposing the Directive into domestic law has passed and the claimant is an EEA national with free movement rights at the date of the relevant decision (see Case C 424/10 Ziolkowski [2011] CJEU at [61] to [63].

19.
Applying these principles to the primary facts in this case, we note that the appellant has been resident in the United Kingdom since 2001 and the age of 12. He was admitted as the dependent child of an EU qualified person and has remained dependent in whole or in part on his mother with whom he resides when at liberty ever since.

20.
It is accepted that he acquired permanent residence before April 2007, and we can find no indication in the evidence that he has ceased to be integrated in the United Kingdom, has acquired new links abroad, or has been out of the United Kingdom for a period of two years or more. We conclude that in assessing his length of residence for the purpose of identifying the relevant test to be applied in his case, the whole of his residence from 2001 until the date of the decision to deport can be taken into account, including the thirty months of the custodial term of his sentence.

21.
FV (Italy) and the authorities cited therein, identify the date of the decision to deport as the basis for assessment of the relevant criteria and the calculation of relevant residence is made by working back from that date. The date of the decision to deport is October 2010 and thus a few months short of 10 years from whichever date he entered in 2001.

22.
Accordingly, the level of protection against expulsion afforded to the appellant is that identified by Article 28 (2) of the Directive: serious grounds of public policy. However, in assessing private life, degree of integration, present risk and/or degree of rehabilitation the Tribunal can receive post-decision evidence (see s.85(4) NIAA 2002 and the decision of the UT in Boodhoo and another (EEA Regs: relevant evidence) [2013] UKUT 00346 (IAC)). We are conscious that where a passage of two years has expired since the first decision was made to deport, the Citizens Directive Article 33 (2) requires the Member state to check that the individual is currently and genuinely a threat to public policy and there have been no material change of circumstances.

Issue 2: The duty to facilitate rehabilitation

23.
As we observed in our ruling and directions the Court of Justice in Tsakouridis used the term ‘genuinely integrated’ to describe those for whom the prospects of rehabilitation were a relevant issue in the assessment of the balance.

24.
Tsakouridis was a case where the Court examined the issue of imperative grounds relating to those who had resided in the host state for ten years or more. The Court of Appeal in the instant case did not elaborate on whether the principles apply generally or only to those who had permanent rights of residence. As the case below was determined on the basis of an assumption that the appellant had rights of permanent residence, we conclude that the Court of Appeal did not consider that only those with ten years residence could benefit from the principle.

25.
In our directions for remaking, we invited the parties to consider the matter and suggested that the test was genuine integration rather than the precise number of years of residence. Mr Allan’s skeleton argument disputed that proposition and suggested that genuine integration was not a novel test but only shorthand for the structured approach based on length of residence.

26.
We agree that the Court’s reference to genuine integration must be directed at qualified persons and their family members who have resided in the host state as such for five years or more. People who have just arrived in the host state, have not yet become qualified persons, or have not been a qualified person for five years, can always be removed for non-exercise of free movement rights irrespective of

public good grounds to curtail free movement rights. If their presence during this time makes them a present threat to public policy it would be inconsistent with the purposes of the Directive to weigh in the balance against deportation their future prospects of rehabilitation.

27.
If they achieve rehabilitation on return to their state of origin with whom they have not yet lost links then they can always apply to revoke the deportation order against them that would otherwise prevent them exercising free movement rights in the host state in the future.

28.
However, we conclude that it is not necessary for the claimant to have resided 10 years, although the longer the residence the greater the degree of integration is likely to be, and the weightier the prospects of rehabilitation would be as a factor against removal. We observe that the EU permanent right of residence means what is says. After it is acquired it is no longer necessary for the EEA national to be a qualified person exercising an economic activity or self sufficiency in order to qualify for residence.

29.
In the light of the Secretary of State's express recognition that Mr Essa acquired permanent residence before April 2007, we do not need to explore the difficult questions that may arise at the periphery of the decided cases.

30.
The problem area concerns those EEA nationals and their family members who have been resident in the host state for five years or more but who have not been engaging in activity that makes them a qualified person for a continuous period during that period. They may have resided in the host state for many years beyond the minimum five years and achieved a substantial degree of integration there and loss of contact with their state of origin. We will reserve the question of whether the prospects of rehabilitation can be a factor in these cases for future consideration.

31.
We accept Mr Allan's further submission that even in a case where it clearly applies as a consideration, such as the present one, the prospects of rehabilitation are only one factor and not a determinative consideration. Since this is a novel principle to be applied by judges of both chambers without much substantive guidance we have considered the issues at a level of generality before applying the following principles to the case in hand.

32.
We observe that for any deportation of an EEA national or family member of such national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. In such a case, if there is acceptable evidence of rehabilitation, the prospects of future rehabilitation do not enter the balance, save possibly as future protective factors to ensure that the rehabilitation remains durable.

33.

It is only where rehabilitation is incomplete or uncertain that future prospects may play a role in the overall assessment. Here we must take our guidance from the Court of Justice in Tskouridis and the Court of Appeal in the present case remitting the matter to this Tribunal. It is in the interests of the citizen, the host state and the Union itself for an offender to cease to offend. This is most likely to be the case with young offenders who commit a disproportionate number of offences, but many of whom will stop offending as they mature and comparatively few of whom go on to become hardened criminals and persistent recidivist offenders. We can exclude consideration of offenders beneath the age of 18 as EEA law will prevent their deportation save in the unusual event that it is in their own interest (Article 28 (3) (b) of the Citizens Directive).

34.
If the very factors that contribute to his integration that assist in rehabilitation of such offenders (family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like) will assist in the completion of a process of rehabilitation, then that can be a substantial factor in the balance. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation.

35.
At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, we cannot see how the prospects of rehabilitation could constitute a significant factor in the balance. Thus recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with impulses to commit sexual or violent offences and the like may well fall into this category.

36.
The difficult category will be those offenders with mental health issues that medical science considers to be treatable, and who are receiving the appropriate treatment but whose prospects of rehabilitation are somewhat distant at the date of assessment. Although the Court of Appeal have made clear that there is no general duty on the Secretary of State to explain positively how deportation would assist rehabilitation, the interface of criminal law, mental health law, immigration and free movement law make it likely that this will be an era where tribunal judges will need particular information as to the consequences of deportation for the individual. If a proven treatment programme is interrupted with adverse effects on future prospects, if the claimant is transferred from a secure environment in the host state to an insecure one outside it, if facilities elsewhere are sub-standard and ineffective, these may well be factors against deportation. If the conduct is at the highest level of dangerousness, if prospects of future release are years away and speculative, if the conduct or the illness has resulted in the loss of the kind of social ties that sustain integration, and there are appropriate facilities in the state of origin to which the claimant could be transferred, it may well be that the balance comes out in favour of removal, and the social costs to the host state of the long term detention and treatment of such offenders may be a factor in that balance.

Issue 3: Application to the present case

The evidence

37.
The most detailed accounts of the appellant’s conduct and attitude before, during and following his sentence come from the two reports of Ms Davies the Chartered Forensic Psychologist dated 23 March 2011 (44 pages excluding appendices) and an addendum of 20 May 2013 (23 pages). Ms

Davies has assessed the information that she has gathered using the Historical Risk Management Tool (HCR-20) developed in 1997 to assess risk of violence (‘actual attempted or threatened harm to a person or persons’) for which she gives the literature reference. This assessment examines 20 factors under the headings: historical risk factors (10), clinical risk factors (5), risk management factors (5) and protective factors (5) before going on to make an overall assessment of risk. She explains that historical factors are the more static and unchanging ones, whilst clinical factors are more dynamic in nature and associated with the possibility of change. In the most recent report she has produced a sequence of tables designed to show changes between 2011 and 2013. Mr Allan was able to demonstrate that there were some errors in Table 2 C4, Table 3 R1 and R2, that might distort the progress made. During the course of the hearing Ms. Davies was able to email the appellant’s instructing solicitors and acknowledge that the errors were in the tables rather than the discussion of the factors in the report and she confirms her overall opinion of risk having regard to them.

38.
We found Ms Davies’s report to be reliable and helpful. She was clearly comprehensive and objective in her assessments, explained her methodology and terminology, and had the benefit of considering data obtained from prison and probation service.

39.
By contrast the report by Ms Meadows the offender manager was shorter (8 pages), more of a pro-forma summary of scores than a personal assessment, and undated although it must have been in existence before November 2010 and apparently based on an OASys assessment last conducted 26 March 2010. Judges of both immigration chambers who do not also sit as criminal judges or have extensive knowledge of the tools used by the National Probation Service may need a little more by way of background information to be able to evaluate such material. Although we understood there are sound management reasons why the full data extracted in an OASys assessment is not provided to the offender, what would be valuable to a judge considering risk factors is the extent of any progress made during the sentence and licence period, and any material shift in OASys assessment that we understand from the London Probation trust at least to be conducted regularly at intervals of between 6 months and 12 months. The failure to properly understand such reports is not limited to the untutored judiciary. Mr Allan accepts that the observation in the Home Office decision letter of 20 November 2010 that the overall score of low risk of offending ‘conflicts with the written comments of the offender manager’ was inappropriate. It is perfectly possible to have an overall assessment of low risk of offending despite the presence of historic risk factors and initial disruptive behaviour in prison; there is no conflict with the assessment made in the same report, that the risk of potential harm to the public, were the offender to commit a future violent offence, is high.

40.
We accept that the overall assessment is whether the risk of serious harm to the public by the claimant re-offending is sufficiently high to be unacceptable in all the circumstances, in which case the offender remains a present risk to public policy.

41.
However, by far the biggest problem with the data available to us emanating from the Probation Service is that it is out of date. No fresh assessment has been conducted since 2010, and the limited up date information contained in the correspondence that the appellant’s solicitors have had with the probation service does not tell us much other than there was no unexplained failure to report to the licence officer, no offending or breach of licence conditions. We are unable to resolve a factual issue

live in 2010 whether the claimant had failed to take up a victim awareness course or whether on reflection it was considered not appropriate that he be offered such a course.

42.
We are disappointed not to have had the benefit of a more thorough assessment from the Probation Service of his behaviour on licence but we must decide the case on the materials available to us and this we now do.

43.
We take account of the witness statements of the appellant and his family and the fact that there has been no application made to cross examine any of the makers. They present a consistent picture.

The offence and the risk assessment arising from it

44.
The appellant was born in October 1988 and was 12 when he arrived in the UK to reside with his mother and a number of other siblings in 2001. He attended school and left with seven or eight GCSEs and started at college before his arrest on the index offence

45.
He was 18 when he committed the index offence of knife point robbery in January 2007, and by that stage he had one previous conviction aged 17 for handling stolen goods. He contested his guilt at trial; showed no remorse or awareness of the terrifying nature of his conduct on his victim who was trapped in an empty railway carriage at the time of the events. He continued to deny guilt for some time after sentence.

46.
From April 2007 to October 2010, he was in detention on remand or serving the custodial part of his sentence of five years detention in a young offenders' institution. From the data we have been provided with from his successive prisons, he seems generally to have been regarded as polite, well mannered, cooperative and was given enhanced status, however there have been a number of adjudications for un-cooperative and abusive behaviour including a number of warnings whilst he was at HMP Highpoint in 2010.

47.
In 2010 before completion of his custodial term his offender manager assessed that there was some suspicion of inappropriate life styles prior to April 2007 and the offending indicates reckless and risk-taking behaviour.

48.
He had only been released on bail for some two months when he came before the First–tier panel in March 2011 who were not convinced that his recent behaviour was motivated by factors other than to avoid deportation and would be durable.

49.
He has successfully completed his period of licence from February 2011 to April 2013. He has complied with the terms of his immigration bail since February 2011 including being detained on two occasions in 2011 and 2012 when it was anticipated that his removal was imminent. He has had some employment since his release but he states that the uncertainty as to his future and his recall to immigration detention have interrupted the prospects of stable employment for the time being.

50.
We have no doubt that Mr Essa constituted a serious threat to public order when he committed the index offence and was sentenced in June 2008. He had committed a robbery by threatening his victim with a knife with a six inch blade. He did not use the knife to cause physical injury and was not considered a dangerous offender by the trial judge. However, possession of such weapons in a public place itself constitutes a threat to public order, and potentially a serious one. He remained in denial about his conduct and the threat that he represented to others and the risk of harm to others if he committed a future violent offence was sufficiently serious and insufficiently mitigated by insight and rehabilitation to make him eligible for deportation.

51.
He had made significant advances in his rehabilitation by the time he appeared before the panel in March 2011, although it was faced with a difficult issue of assessing how far those advances were durable.

52.
There have been further substantial advances between March 2011 and June 2013. We summarise them:

i.
He has complied with his conditions of licence and bail even when he faced the threat of imminent removal.

ii.
He has remained at home with his mother and continued to have close contact and support from his siblings and wider family.

iii.
He has acknowledged his guilt; the impact of his offending on others, and the need to sustain a law abiding and responsible life style. Ms Davies was satisfied that he has improved victim empathy. We note however that he has continued to minimise guilt in that he still denies to Ms Davis that he was actually in possession of a knife as opposed to pretending to the victim that he had a knife.

iv.
He has taken some employment although there is substance in his observation that it is difficult to enter stable employment in his precarious circumstances.

v.
He has recently (January 2013) started a relationship with a girl friend that may prove to be durable and a source of stability, although Ms Davies discounts such a relationship as a protective factor until it has lasted 12 months.

53.
Ms Davies’s overall conclusion is that his risk of re-offending has reduced and she now considers him to be a low risk of violent recidivism and in the low risk range for general recidivism and at the current time presents a low risk of harm to others. She gives an indication of the kind of warning signs that would be apparent if there was deterioration in this prognosis including inappropriate peer group associations, feeling under pressure to prove himself, reporting that he is being unfairly treated, poor emotional management evidenced by verbal outbursts (9.2.1). There is no evidence of

substance abuse, mental illness, psychopathy or personality disorder (5.1.10 to 5.1.13). Among the factors that Ms Davies identifies as of significance in this assessment are:

‘He told me that being kind and maintaining supportive relationships with his family is what is important to him now. He acknowledged that it has been hard for his mother to see him going through the process of deportation and he accepted responsibility for the hurt he has caused her.’ (5.2.4)

‘Mr Essa appears to have good familial support and has abstained from associations with an antisocial peer group since his release from detention.’ (7.3.2)

‘Mr. Essa is assessed at being at increased risk of re-offending if deported given the lack of familial support that he would receive. Social support helps provide a sense of belonging, approval, safety and affection. Social support can offer a buffer against stressful life changes and helps a person to manage and reduce stress. Family relationships are of particular importance’. (8.7)

54.
There is no countervailing information or assessment since March 2011. We conclude that, with the benefit of the 27 month period since the panel examined his case, his progress and family support has been proven to be genuine and durable. His remaining family in the Netherlands have not played the same kind of role in his life that his mother, siblings and more extended family have in the United Kingdom.

55.
He is now 24 years of age and we are satisfied more mature and aware of the consequences of his actions than he was in 2007. We are aware that his licence period has concluded and if he succeeds in this appeal neither the discipline of immigration bail nor the prospect of undermining his appeal will operate as a control factor in the future. We agree with Ms. Davies’s assessment that deportation would undermine important aspects of his support network and progress to date, and would remove an incentive to durable rehabilitation that exists while he remains in a host state. He can be under no doubt what the consequences would be if he offends in the future.

56.
We recognise that there is room for further progress in employment, personal relationships, and independent living but the support factors to encourage him to develop stability in these aspects of his life are stronger in the United Kingdom than the Netherlands.

Conclusions

57.
Making our own assessment on the material now available to us we conclude:-

i.
The appellant would constitute a threat to public policy in this case if he were to commit a future violent offence. We consider that the current assessment of the risk of his doing so is low and this assessment has been tested by his release into the community for over two years.

ii.
The appellant has resided in the United Kingdom for 13 years and just over half his life. He has strong family connections here and is well integrated. His prospects of preserving and developing his rehabilitation are significantly improved by continued residence here. Deportation to the Netherlands

would remove important support factors and incentives to behave and would appear to be positively detrimental to his future rehabilitation.

iii.
In all the circumstances of his case, deportation now for the conduct leading to his conviction would be disproportionate.

58.
We accordingly re-make the appeal by allowing it. Both members of the panel have contributed to this decision

Signed Date

Chamber President

Annex 1

Upper Tribunal

(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House
On 23 April 2013

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE WARR

Between

DAHA ESSA

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr R Khubber, instructed by Irving and Co Solicitors

For the Respondent: Mr S. Allan, Senior Home Office Presenting Officer

RULING AND DIRECTIONS

Introduction

1. Mr Essa is a citizen of the Netherlands who was born in Somalia in 1988. He was brought by his mother to the Netherlands in 1989 when he was a few months old. He and his family obtained Dutch nationality in due course.

2. In 2000 his mother followed two of his elder siblings to the United Kingdom and in 2001 brought over the appellant then aged about 12 and two more of his siblings. He has lived in the United Kingdom ever since.

3. His family in the United Kingdom consists of his mother, his aunt, his brothers Abdullah and Abdirhaman, his sisters Khadra, Iman Amina and Amal. Khadra and Iman at least are married and have children. His father and another sister Fardusa live in the Netherlands. The appellant's evidence was that the family have lost contact with Fardusa and that his father is disabled and lives with accommodation owned by friends in the Netherlands and only makes sporadic contact with the family in the United Kingdom.

4. The appellant continued his education in the United Kingdom and in September 2006 started studying for a BTEC in travel and Tourism with the Tower Hamlets College, having started an early qualification in a college at Maida Vale. In June 2006 he was convicted of handling a stolen mobile phone and was given a fine and made the subject of a referral order. In March 2007 he was the subject of further proceedings for failing to comply with the referral order.

5. In about April 2007 he was arrested by the police on suspicion or robbery. This eventually led to his appearance at Snaresbrook Crown Court on 23 April 2008 where after a trial he was convicted of a count of robbery that occurred on 14 January 2007. The robbery involved threatening the victim in an enclosed space with a knife with a blade of some 6-7 inches. The judge concluded that although he could not be treated as a dangerous offender within the meaning of criminal legislation, this was an offence at the high end of the range of knife point robbery and a sentence of five years in a young offender's institution was imposed.

6. It was this sentence that led the Secretary of State to conclude on 12 October 2010 that the appellant represented a present threat to public order and should be deported to the Netherlands.

7. The appellant's appeal against this decision came before a panel of the First-tier Tribunal (FtT) on 31 March 2011 and it was dismissed in decision sent out 18 April 2011. We shall return to the subsequent history of this appeal later.

8. At the time of the panel's decision the appellant had served the custodial part of his sentence but was initially detained in immigration detention until granted bail to his mother's address in February 2011. He has remained on immigration bail ever since apart from two short periods when he was returned to immigration custody to effect his removal. Whilst he has been at liberty he has been supervised on licence by a probation officer. His licence conditions formally came to an end the day that the appeal came before us.

9. The panel concluded that:

i. The appellant represented a sufficient risk of further acts of violence endangering the public to make his presence in the UK a serious threat to public policy.

ii. Deportation was proportionate to the interference with private and family life and here combining consideration of proportionality under the ECHR and the EU Directive.

10. It did not separately consider the impact of deportation on the appellant's rehabilitation. It was prepared to assume that he had the right of permanent residence in the United Kingdom and so engaged the higher test of 'serious grounds of public policy'.

11. After the panel had dismissed his appeal permission to appeal to the Upper Tribunal was successively refused by the First-tier and Upper Tribunal. The appellant then sought judicial review of the Upper Tribunal's refusal of leave to appeal and on 12 January 2012 at an oral hearing Mitting J concluded it was arguable that the grounds relied on came within the criteria for challenge established by the Supreme Court in Cart v Upper Tribunal [2011] UKSC 28. The substantive application was opposed by the Secretary of State and came before Lang J on 1 June 2012 who refused it.

12. The appellant appealed to the Court of Appeal who on 21 December 2012 allowed the appeal and found that the FtT had made an error of law and accordingly quashed the Upper Tribunal's refusal of permission and directed the Tribunal to reconsider the matter.

13. On 12 February 2013 Upper Tribunal Judge Southern granted permission to appeal and the matter then came before us for hearing.

14. The reason that the Court of Appeal quashed the Upper Tribunal's refusal of permission to appeal was that the FtT had not considered for itself what the effect of deportation would be on the appellant's rehabilitation. Such a factor has emerged as a relevant consideration in the exercise of the proportionality question to be considered under Directive 2004/38/EC Article 28.

15. The principle was first considered in the UK in the decision of the Court of Appeal in Batista [2010] EWCA Civ 896; 29 July 2010. It was considered by Advocate General Bot in his opinion in Case C-145/09 Land Baden-Wurtemberg v Tsakouridis [2011] CMLR 11 given on 8 June 2010 and adopted by the Court of Justice in its decision of 23 November 2010 where it described it at [50] as

' the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated , which as the AG observes in point 95 of his Opinion, is not only in his interest but also that of the European Union in general'.

16. The ambit of the duty to consider this factor, and the weight to be attached to it as an element in the proportionality balance remain to be decided on a case by case basis, but as yet there is no jurisprudence from the Upper Tribunal applying the principle in the relevant factual context.

17. Before Lang J, it was argued for the Secretary of State that even though no submissions had been directed to this duty, the FtT had in effect considered it when they gave their reasons for rejecting the private and family life claim of the appellant advanced under Article 8 of the ECHR at [64] of the panel's determination.

18. The same argument was advanced in the Court of Appeal. Maurice Kay LJ at [15] considered the submission arguable but in the end did not hit its target. The FtT had been bound to consider the issue as an established aspect of EU law but had not done so. It was not suggested to the Court of Appeal that even if the FtT had not in fact considered the issue at all it could have made no overall difference to the result.

19. Mr Allan provided helpful written submissions for the purpose of this hearing that may be summarised as:-

a. It was accepted that the FtT had made the error identified by the Court of Appeal.

b. The error was not material to the outcome of the decision as it was not a weighty matter in the context of the panel's overall findings.

c. The panel had in substance considered that there was no obstacle to the appellant living in the Netherlands and his family in the UK could visit and support him from there when considering his Article 8 claim.

d. Accordingly, the Tribunal should not exercise its discretion to remake the case.

e. Alternatively, if it were to remake the case it should do so summarily on the basis of the FtT's findings of fact.

Issue 1: Error of Law:

20. We find that the panel did make an error of law, as established by the Court of Appeal although from the written submissions presented to it, it does not appear that it was invited to consider the principle or the decision in Tsakouridis .

Issue 2: was the error material?

21. The error was in respect of an issue that was relevant to the central decision in the case: whether the appellant represented a present threat by reason of his propensity to commit violent offences and if so whether deportation was proportionate.

22. The question of the propensity of the appellant to offend was an issue very much canvassed before it. It formed the cornerstone of the Secretary of State's case that the appellant was a present threat. In that context it had the results of the last OASyS risk assessment performed on 26 March 2010 by NOMS whilst the appellant was serving his sentence and a much more detailed report of a chartered forensic psychologist Lisa Davies, dated 23 March 2011, to whom we shall make further reference.

23. If the panel's error went to a relevant issue, central to the decision in question, then in our judgment it would be a material error unless it could be said that it would have made no difference to the outcome.

24. It was Mr Allen's submission that it would not have made a difference, it was Mr Khubber's that it would or it might. The latter submission is sufficient to establish materiality. Unless it can be said that it could not make such a difference it would be a material error.

25. Having focussed the submissions to this issue at the hearing and given the matter anxious consideration, we indicated that we had reached the view that the error was material. We now give brief reasons for this conclusion.

26. In our judgment there was clear evidence before the Tribunal in the shape of Mrs Davies's report that stability of home and personal support from family members were factors against stress that was itself a risk factor for re-offending (see R1 at Bundle 217; R3 at Bundle 221; R5 at Bundle 222).

27. She noted the OASyS assessment of a low risk of offending but a high risk of harm to the public if he did re-offend. She explained that applying the static or historic factors there was a low risk of violent recidivism. She then explained to these factors she added the clinical or dynamic factors, that is to say factors that can change.

28. She concluded at 6.1 (Bundle 225):-

‘When assessing the relevance of clinical risk factors and accounting for his current presentation and future plans the HCR-20 would indicate that Mr Essa has, in my opinion, a moderate risk of violent recidivism at the current time. I have assessed his risk as moderate with weighting given his current lack of insight into his offending and his current inability to provide an active account of his actions. Mr Essa’s risk is likely to reduce if he remains engaged in offending behaviour work with his probation officer during his licence period ”.

(emphasis supplied)

29. On the evidence before the panel, deportation to the Netherlands would result in a significant diminution of family support for this appellant and a withdrawal of the discipline of the licence conditions and the benefits of regular supervision in the community; when combined, this had the capacity to reduce the risk of re offending he presented in March 2011.

30. If the combination of support from family members and the probation service significantly reduced the appellant’s risk of offending at all or violent offending in particular, then both the threat he represented at present and the proportionality of expelling him would be undermined, possibly to a significant degree.

31. The panel did not consider the impact of deportation on rehabilitation. It did not refer to Mrs Davies conclusions about the impact of supervision on licence on current moderate risk factors and it perhaps failed to understand the overall evaluation of her report as they found it ‘not entirely clear’.

32. In the light of Mrs Davies evidence, and the evidence of substantial contact and support that the family provided to the appellant: a home with his mother, many prison visits during his detention, financial support on release, some help in establishing himself in work after release, we cannot but conclude that the panel’s assessment of threat and future prospects might well have been different.

33. Accordingly we set aside the FtT’s decision. It is then necessary to consider how the matter should be remade.

Issue 3 Re-making

34. Neither side invited us to remit the appeal to the FtT to start all over again. We agree. The hearing below was fair and the findings of fact rational so far as they went. There has been a considerable passage of time and a definitive answer is important to both parties. The issues of evaluation are somewhat novel. We will therefore re-make the decision ourselves.

35. Re-making requires us to evaluate what the impact of deportation would be on rehabilitation. We are further conscious that two years have passed since the panel’s decision and the appellant tells us that he has kept in touch with his licence supervisor and has successfully completed the licence period without recall.

36. We would be bound to take this information into account when assessing precisely what the impact of probation supervision would be or has been. We are conscious that Union law requires us to

consider the present threat that the appellant presents to public policy, and that must be assessed at the end of the process close to the moment of proposed expulsion.

37. Accordingly we cannot re-make the decision summarily, simply adding one formal consideration to the balance of factors presently decided against the appellant. Although we can preserve the panel's primary findings of fact, and do not need to start again, we must decide how much weight should be given to the rehabilitation prospects in this case, weighing this against the other factors in the proportionality exercise including the present level of threat he presents.

Directions

38. The panel will remake this appeal for itself on Tuesday 18 June 2013 at Field House 10.00 listed for half a day. There is no need for an interpreter. We indicate:

a. We preserve the findings of fact of the FtT save that we will reach our own decisions on present risk and prospects of rehabilitation.

b. We would value information from the probation service supervising him and any update from Mrs Davies in the light of any progress made.

c. We anticipate considering analysis of OASyS assessments and the conclusions of Mrs Davies's 2011 report. If the Home Office challenge those observations and conclusions it should explain how and why and may need to present appropriate evidence of its own to do so.

d. We would welcome any information on how offenders who would otherwise be released on licence in the UK could be supervised if deported to the Netherlands. We are aware of the general predicament posed in non EU cases see R (ota Hindawi) v Parole Board [2012] EWHC 3894 Admin, 17 December 2012 Blake J.

39. In order for the next hearing to be effective and result in a final decision on this appeal we further direct:-

a. The appellant must file any supplementary evidence he wishes by 4.00pm 21 May 2013. The evidence should be served on the tribunal and marked for the attention of the President and on Mr Allen who has indicated he will retain possession of this case.

b. By 4.00pm 4 June 2013 the Home Office must:

i. serve any evidence that it intends to rely in response to the appellant's case;

ii. indicate whether it seeks to cross examine any witnesses of the appellant;

iii. indicate whether it challenges the assumption of the FtT that the appellant was genuinely integrated into the UK. Having regard to the terms of the judgment in Tsakouridis we provisionally think this is the appropriate test rather than whether he had a right of permanent residence.

c. Skeleton argument from the appellant to be served by 4.00 Monday 10 June and from the respondent by 4.00pm 14 June 2013.

d. We acknowledge safe receipt of the appellant's bundle of authorities.

Date: 24 April 2013

Annex 2

Extract from the decision of the Court of Appeal in FV (Italy) [2012] EWCA Civ 100

Per Pill LJ

1. In Jarusevicius (EEA Reg 21 – effect of imprisonment) [2012] UKUT 00120(IAC) (" J "), the Upper Tribunal (Immigration & Asylum Chamber), Blake J President, presiding, considered the effect of more recent decisions, including Tsakouridis . (PI post-dated the Tribunal decision). J claimed to have entered the United Kingdom in September 2004. In July 2010, he was sentenced to 42 months imprisonment for conspiracy to handle stolen goods. He had previously committed an offence of driving a motor vehicle with excess alcohol. There was no evidence of residence in accordance with the Regulations for a continuous period of 5 years. It was held that J had not acquired the right of permanent residence. The Tribunal concluded that, if he had:

"Whilst we could not envisage this class of conduct giving rise to imperative grounds of public policy, we conclude that the Tribunal was in the alternative entitled to conclude in this case that it amounted to serious grounds." (paragraph 67).

2. The Upper Tribunal concluded that the time spent in detention in J was necessary if the 5 year period for acquisition of a right of permanent residence was to be established and did not count towards such accrual. Without it, 5 years continuous residence had not been acquired. The Upper Tribunal also stated:

"58. We conclude that the decision in Tsakouridis neither requires nor entitles us to reach a contrary result. That case was one where the right to permanent residence had been acquired long before the claimant spent time in prison. The right was not lost by his short absence abroad and nor was it lost by his remand in custody and subsequent sentence on return. We note that in the calculation of the ten years residence, EU law requires the decision maker to count back from the date of the decision to deport, whilst the acquisition of permanent residence means counting forward from the date that it is first established by economic activity or other means under Article 7 of the Directive.

59. In our judgment all the cases cited draw a distinction between acquisition of the right to reside permanently and the loss of that right. The learning from the Court of Justice suggests that:-

i) once a right of permanent residence has accrued it is not lost by a remand in custody or a short sentence or a sequence of them (Nazli , Dogan);

ii) prison is not to be equated to voluntary unemployment that may lead to loss of worker status and the loss of continuity of lawful residence for the purpose of acquiring the right of permanent residence (Orfanopoulos and Oliveri);

iii) the continuity of residence for the purpose of regulation 21(4)(a) (ten years residence) is not broken by a period of imprisonment (Tsakouridis).

60. This may mean that the conclusions of the decisions of the AIT in LG and CC (Italy) and the UTIAC in SO that in addition to not counting towards the five year period, prison also broke the continuity of residence for that period may have to be re-examined. It is one thing to conclude that a period spent serving a sentence of imprisonment is not lawful residence for the purpose of acquiring an EU right of residence, it is another to conclude that lawful residence prior to such a sentence could not be aggregated with lawful residence after service of it. It is difficult to see why if such a period of imprisonment does not break "continuous" residence for the purpose of regulation 21(4)(a), it should do so for the purpose of regulation 15(1)(a). Equally it is difficult to reconcile the conclusion of the AIT

in LG and CC that service of a sentence of imprisonment in the 10 years before the decision to deport prevents the greater protection of "imperative grounds" arising, with the conclusion of the CJEU in Tsakouridis reached on the basis that it could. In a case where this issue is central to the outcome, it may be necessary to consider whether the UT is able to reach its own conclusion on the matter, or should make a reference to the CJEU or is bound by a CA decision pending any reference that is made by that court."

I respectfully agree with the Tribunal's statement at paragraph 59(iii) and also with the need to reconsider the effect of a period of imprisonment in the 10 years before the decision to deport, in the light of Tsakouridis and now PI .

.....

1. To draw from that finding a conclusion that established rights are defeated by 2 years imprisonment is in my view impermissible. The analogy is also inconsistent with the principle stated in recitals 23 and 24 of the Directive, affirmed in Tsakouridis and PI . The 2 year period in article 16(4) may have some value as a marker but, in my judgment, to transpose it into a rule that a 2 year gap caused by imprisonment necessarily defeats established rights cannot be justified. In relation to the right of permanent residence, it runs quite contrary to the wording of article 16(4), which provides that the right is lost only by two years absence. In relation to 10 year rights, it is inconsistent with the approach directed in Tsakouridis .

2. In Tsakouridis , article 16(4) was mentioned at paragraph 30 but only by repeating the referring court's mention of the possibility of analogy. The submission is, in my judgment, inconsistent with the Court's reasoning and ruling in Tsakouridis and in PI . In PI , there had been 2 years custody immediately before the administrative decision to deport was taken and nothing was made of that.

3. In Tsakouridis , at paragraph 43, the Grand Chamber applied the concept of the "degree of integration into the host Member State" and highlighted the relevance of length of residence. Length of residence creates a presumption of integration. The respondent relies on 16 years presence in the United Kingdom before imprisonment as demonstrating a high degree of integration. There must be an overall qualitative assessment. Part of the time having been spent in prison was a factor but only a factor. It would become a lottery if a period in prison during the 10 year period before the deportation order excluded other factors from consideration. The question is whether the Union citizen is still integrated.

4. In my judgment, some domestic authority does need reconsideration in the light of Tsakouridis and PI . There is no doubt that to establish a permanent right of residence under regulation 21(3)(a), residence must be in accordance with the Regulations. Once permanent residence has been established, the test to be applied under regulation 21(4), read with regulation 21(5) and (6), is the integration test stated in recitals 23 and 24 as explained in Tsakouridis . For reasons given, I do not consider that either HR (Portugal) or Cesar C requires this court to reach a different conclusion on the present facts.

5. A qualitative assessment must be made and integration is not necessarily defeated by time spent, whether in prison or out of the country, during which residence in accordance with the Regulations is not being exercised. That follows, in my judgment, from the integration test and from the absence of findings in those cases that periods of imprisonment, or periods of absence, during the 10 years preceding the deportation order, necessarily defeat ten year rights under the Directive. Rights of

residence will, however, be defeated, under regulation 15(2) by absence from the host Member State for a period exceeding two consecutive years. It may be that ten year rights go with them.

6. The question whether the requirement of a continuous period of 10 years residence is established at the date of the decision to deport, turns on the degree of integration established at that time. This is a question of fact for the Tribunal. Following the test in Tsakouridis , periods of absence within the 10 years immediately preceding the decision do not of themselves disqualify and neither does a period of imprisonment. The period of imprisonment is, however, relevant as a factor to be considered when deciding upon integration at the date of decision. Integration will not normally be established by time spent in prison save that it may have limited relevance by contributing to the severance of links with the country of origin. If integration has been established prior to the custodial term, it will not necessarily be lost by that term.

7. The factors to be considered are set out by the Grand Chamber in the two cases cited. In PI , two years and four months in prison before the decision was made did not of itself defeat integration. The decision turns on an overall qualitative assessment having regard to all relevant factors, including the length of residence, family connections and any interruptions in integration. The respondent's children are in the United Kingdom. Severance of links with the state of origin is also a factor. Moreover, it follows from the Tribunal's approach in LG , with which on this point I respectfully agree, that a state should not be allowed to defeat a claim by deferring the deportation order until the period of imprisonment has been served.

Per Aikens LJ

1. What conclusions can be drawn from all these cases? First, both HR and Cesar C state that the quality of residence must be the same for both the 5 year continuous period (to obtain PRR) and the 10 year period (to obtain the "enhanced protection"): it has to be "legal residence" ie. residence for the purpose of the Directive. Secondly, neither of the decisions of this court in HR and Cesar C deal directly with the present problem of whether a period of imprisonment during the 10 years immediately prior to the decision to deport means that the EEA national must lose the "enhanced protection" given by Regulation 21(4)(a) in circumstances where that person has established his PRR and has not lost it. (It will be recalled that in HR it was conceded that the appellant could not establish that he had ever obtained his right to PRR by five years continuous residence, because to do so he would have had to count his time in prison). Thirdly, although the AIT in LG & CC held that time in prison in LG's case could not count towards the ten year period, that decision was based principally on an extrapolation of the reasoning in HR **,** itself based on a concession, and was made before the CJEU gave its ruling in Tsakouridis **.** Fourthly, the latter ruling indicates that a period in prison during the 10 years immediately prior to the decision to deport does not automatically mean that the EEA national must lose his "enhanced protection". All factors have to be taken into account and the touchstone is whether there has been a transfer to another state of the centre of the personal, family or occupational interests of the person concerned and/or the integrating links previously forged with the Member State have been broken.

2. Fifthly, in construing Regulation 21(4)(a) we are, in principle, bound to follow the CJEU's statements on the way Article 28(3) of the Directive is to be understood and applied in individual cases. There is no tension between the wording of the Directive and the Regulation. Therefore the only question that might arise is whether we are bound by any domestic decision to construe and apply Regulation 21(4)(a) in a way that is (or might seem to be) inconsistent with the CJEU's opinion in Tsakouridis. In my view, we are clearly free to follow the guidance in the CJEU's decision. We are

not bound by the AIT's decision in LG & CC. Moreover, that decision came before the CJEU set out the relevant principles in Tsakouridis. This court's decision in HR did not deal with the same precise factual situation which confronts us. In any event, as has been said subsequently, notably by this court in Cesar C, the ratio of HR is narrow. In my view we are therefore not bound by this court's decision in HR, given the facts of the present case.

3. How are these conclusions to be applied in this case? Before both the 2007 and 2008 Tribunals it was assumed that FV had "resided" in the UK for 10 years prior to the decision to deport. Effectively, therefore, the SSHD made a concession of both law and fact to that effect. The result of my analysis and that of Pill LJ is that the SSHD was correct in law to have conceded that FV's period in prison from 2002-2006 did not automatically preclude a conclusion that he had resided in the UK for 10 years prior to the decision to deport. But what of the facts? If the matter were to be remitted to the UT to reconsider the facts and if the UT applies the opinion of the CJEU in Tsakouridis , then the UT would have to make an overall assessment of FV's position in the ten years prior to 2007, with a view to seeing whether FV's integrating links with the UK had been broken and/or the centre of FV's personal, family or occupational interests had been transferred to another State. This would, in theory, require a factual investigation of the whole period from 1997 – 2007. Pill LJ has stated (in relation to the question of whether the SSHD can now argue that FV never had a PRR), that it would be unjust to require FV to prove facts to establish that he had a PRR in accordance with Regulation 15(1), bearing in mind it would mean adducing evidence relating to matters before 2001. I respectfully agree with that conclusion. Even if, on the way the CJEU expressed its opinion in Tsakouri dis, some kind of evidential burden was placed on the SSHD to show a rupture in integration or a transfer of the centre of FV's interests to another State, in my judgment it would be unjust to require FV to have to deal with factual issues prior to 2001 on this point, just as it would on the PRR point, so many years after the events and five years after the 2007 Tribunal decision in which no point was taken by the SSHD on the 10 year residence question. I think that the consequence of this is that we must be entitled to assume that there was no rupture of integration or transfer of the centre of FV's interest to another State up to 2001.

4. If that is so, then what has changed in the period from 2001 to 2007 when the relevant decision was made? There is, effectively, only the period of imprisonment from 2002-2006 to consider. There can be no factual dispute about that aspect. To my mind, if, as we must assume, FV had a right to PRR before he was imprisoned, he was then integrated in the UK. On the facts of this case, I fail to see how a period of 4 years in prison in 2002-2006 could lead to a conclusion that FV's existing "integrating links" with the UK had thereby been broken; or that the fact of FV's imprisonment could show that his "centre of interest" had thereby become transferred to another Member State. As Pill LJ has pointed out, FV has been present in this country for 27 years, for 14 of which he was the husband of a UK citizen and he has children here. Nor can he be held responsible for any delay in the decision to deport him since his conviction and imprisonment in 2002.

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[1] Since the hearing the UT has been informed that the Secretary of state has been granted permission to appeal to the Supreme Court against the decision of the Court of Appeal but the appeal has been stayed pending the outcome of the reference in Case C-400/12 MG and Case C-378/12 Onuekwere.