Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00570/2017

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 9th January 2019 and 29th April 2019	**On 10 May 2019**

Before

UPPER TRIBUNAL JUDGE COKER

Between

LUIS MORAIS

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Walsh (pro bono on 9th January 2019), Ms R Moffatt on 29th April, instructed by Birnberg Peirce & Partners
For the Respondent: Mr E Tufan on 9th January, Mr D Clarke on 29th April, Senior Home Office Presenting Officers

DETERMINATION AND REASONS

By a decision promulgated on 23rd January 2019 I set aside the decision of the First-tier Tribunal for the following reasons:

1. On 18th September 2017, the SSHD took a decision to make a deportation order on the grounds of public policy in accordance with regulation 23(6)(b) and regulation 27 of the Immigration (European Economic Area) Regulations 2016 against Mr Morais.

2. Mr Morais had been convicted of assault occasioning actual bodily harm for which he was sentenced to 18 months imprisonment and made the subject of a restraining order. He was also convicted for breach of a non- molestation order and sentenced to 18 months imprisonment to run consecutively. The total sentence was 3 years imprisonment. He did not appeal sentence or conviction.

3. Mr Morais appealed the deportation decision submitting that as an EU National, deportation was 'unsuitable' and that his deportation would be unduly harsh upon his children. He appeared in person before the First-tier Tribunal and, in a decision promulgated on 26th June 2018, First-tier Tribunal Judge Bird allowed the appeal, finding that Mr Morais had been residing in the UK continuously from 2002 until the expulsion decision dated 18th September 2017~~8~~[1]; he thus achieved the third level of protection (enhanced protection) and imperative grounds for his removal were required.

4. The respondent sought and was granted permission to appeal on the following grounds:

> ….
> 4.At the hearing the judge found that:
> - [Mr Morais] can only be deported on imperative grounds of public security, having acquired this protection by virtue of 10 years residence in the UK prior to incarceration [42];
> - [Mr Morais'] offences cannot be seen as threats to the public or sections of the public, as the offences took place against his former partner [42];
> - The appellant does not pose a threat to public security [43].
>
> The [SSHD] considers the First-tier Tribunal Judge has erred in the following ways:
> 5.The [SSHD] submits the First-tier Tribunal Judge has applied the wrong test when establishing 'imperative' protection, by applying a purely binary calculation to conclude that the appellant has been resident in the UK from 2006 – 2017. As the respondent had already stated in his decision letter that the appellant had been unable to show a continuous 5 year period exercising Treaty rights until 2014, it was incumbent on the First-tier Tribunal Judge, if he disagreed, to make a contrary finding and explain how the 10 years period relied upon had been reached. The First-tier Tribunal Judge makes no such findings in respect of a permanent right of residence (PRR) see [31-31], and the Tribunal only considers temporal factors rather than examining whether [Mr Morais] has been residing in accordance with the directive for the requisite period. It is necessary in EEA cases for the appellant to show they have acquired permanent rights of residence before they can move on to the next stage of preferential protection. Reliance is placed on *CJEU JUDGMENT (Joined cases C-316/16 and C-424/16 which* provides *"Accordingly the Court concludes that the enhanced protection linked to a 10-year period of residence in the host member State is available to an EU citizen only if he first satisfies the eligibility condition for the lower level of protection, namely having a right of permanent residence after residing legally in the host Member State for a continuous period of five years."*
> 6.As the [SSHD] considered [Mr Morais] did not acquire PRR until 2014, he would not have been able to show imperative protection until 2019, by which time continuum would have been broken by a period in prison. The [SSHD] submits the First-tier Tribunal Judge has made a material error in finding [Mr Morais] has imperative protection, without establishing a prior period of PRR first. Similarly [Mr Morais] is unable to show much in the way of integration.
> 7.The respondent also considers the First-tier Tribunal Judge is wrong to conclude that because [his] violence has been against his ex-partner, this

[1] Typographical error corrected

> equates to him not being a danger to the public [53]. The [SSHD] submits that the ex partner is a member of the public , who should not be differentiated against, simply because of the relationship. If there was no ongoing risk from [Mr Morais] , the court would not have considered it necessary to put in place the indefinite restraining order to prevent [Mr Morais] from contacting the ex partner. Moreover, the fact that [Mr Morais] broke that restraining order demonstrates a wider disregard of laws and societal values….[Mr Morais'] offending behaviour is clearly an issue to warrant state intervention. There is no suggestion that underlying character, one which could pose a threat to any sector of society has been adequately managed. It is considered that to effectively discount the offending behaviour and minimise the potential victims the [sic] in the manner which the Tribunal did, amounts to a material error of law.
> 8…..without 'imperative protection – which the [SSHD] does not accept has been properly determined – all he needs to show is that [Mr Morais] meets the criteria of regulation 27(3). The [SSHD] maintains that deportation on 'serious grounds' is warranted, bearing in mind [Mr Morais'] violent offending and disregard for Orders of the Court, so that for the above reasons and those given in the [SSHD's] decision letter dated 18/09/17 it remains in the public interest to deport him as quickly and efficiently as possible.
> …

5. Mr Walsh accepted that the decision by the First-tier Tribunal Judge that the threats to his former partner were not threats to public order was an error but took issue with whether it was an error of law such as to cause the decision to be set aside.

6. Mr Walsh also accepted that the comment by the First-tier Tribunal judge that the sentence imposed could be seen to be harsh was not appropriate but that it did not amount to an error of law in the context of this appeal.

7. Mr Walsh, who was representing Mr Morais pro bono, provided a very helpful skeleton argument.

8. The respondent accepted Mr Morais had been exercising Treaty Rights from 2009 until 2016 – a continuous period of 7 years – and that he had acquired permanent residence. In the reasons for the decision the SSHD disputed that Mr Morais had been resident in the UK since 2002: he referred to Mr Morais' broken National Insurance record for the years 2004-5 and 2005-6, and 2007-8 and 2008-9. He accepted that Mr Morais had made a full year of National Insurance contributions for the year 2002-3 and 2003-4, 2006-7. Because of this the SSHD did not accept that Mr Morais had been continually resident in the UK and exercising his Treaty Rights since 2002.

9. Before the First-tier Tribunal, the SSHD submitted that Mr Morais had failed to show that he had been resident in the UK for a continuous period of 10 years; that there were serious grounds of public policy and public security that required Mr Morais' removal from the UK.

10. The First-tier Tribunal judge identified the issue before her in [27] of her decision namely

> "firstly whether [Mr Morais] has established five years' continuous residence in the United Kingdom in accordance with the Regulations and therefore can be said to be permanently resident in the United Kingdom. Or secondly whether [Mr Morais] has acquired ten years continuous residence in the United Kingdom. If [Mr Morais] satisfies ten years' then in accordance with Regulation 27 the Secretary of State has to show that there are imperative grounds for deporting [him] from the United Kingdom on grounds of public security. If he fails to acquire ten years but nonetheless acquires five years'

> continuous residence then serious grounds of public policy and public security have to be shown before he can be deported."

11. It is unclear why the First-tier Tribunal Judge thought she had to determine whether Mr Morais had acquired permanent residence, given that the SSHD accepted he had (as confirmed by Mr Tufan before me). Nevertheless she went on to accept Mr Morais' evidence, that of his cousin and the witness statement of his ex-partner that he had been residing in the UK since 2002 and had only gone abroad on holiday with his family. She also found that even if the period after 2002 was broken, which she did not accept, he could rely on the period from 2006 until the expulsion decision in 2017 , to establish 10 years' residence. In paragraph 35 she states

> "…[Mr Morais] has established [continuous residence for 10 years]. The mere fact that there are partial national insurance contributions for two years between 2005 and 2007 does not mean that [Mr Morais] was not residing in the United Kingdom at that time. The evidence that has been provided both by the [SSHD] and [Mr Morais] shows that despite that time [Mr Morais] has been residing in the United Kingdom continuously from 2006 until the decision to deport him was taken in 2017."

12. The First-tier Tribunal judge considered Mr Morais' offending in the context of 'imperative' grounds for removal. She did not consider them in the context of a person who has permanent residence ie level 2 protection: serious grounds of public policy and public security save to state in [43]

> "…Finally I must consider whether [Mr Morais] continues to pose a present and genuine threat to public security. On the evidence before me he does not."

13. Mr Tufan submitted that the First-tier Tribunal judge had erred in law in finding that Mr Morais had acquired 10 years residence such that he acquired 'imperative grounds' protection. He submitted that the 10 years could only be acquired if a person had already acquired permanent residence and thereafter acquired a further 5 years residence in the UK. He submitted that in order to acquire 'imperative grounds' he not only had to show that he had five years' permanent residence (which the SSHD accepted he had shown in 2016) but that he had been residing in accordance with the Directive for 10 years and this could only have been achieved in 2021 if the appellant had not been imprisoned and subject to an expulsion decision.

14. This omits to take into consideration the provision that once a Union Citizen acquires the right of permanent residence, the right to reside is not subject to the continuing exercise of Treaty Rights (see [53] and [54] C-316 and C-424/16).

15. [61] C-316 makes clear that a person must have a right of permanent residence as a prerequisite for eligibility for protection against expulsion under the enhanced '10-year' protection. Mr Walsh accepted that in calculating 10 years, the residence must be legal residence but submitted that the 10 years residence could be accrued by a combination of residence both pre- and post- the acquisition of permanent residence provided that there was a total 10 years lawful residence. There was no suggestion by the Secretary of State that Mr Morais had been unlawfully residing in the UK.

16. Paragraph 5 of the grounds takes issue with the calculation by the judge of the 10 years. But the judge heard evidence, saw the documentary evidence and reached a conclusion that he had been in the UK since 2002 and that his residence had not been broken. As an alternative she finds that Mr Morais can rely upon the period since 2006 until the expulsion decision. The judge gave adequate reasons for

finding he had been resident in the UK since 2002. There is no error of law in that finding.

17. There is no requirement that a person has to be exercising Treaty rights for the 10 year period to be able to acquire enhanced protection. None of the case law to which I was referred required the 10 year period of residence to commence with an initial period of five years exercising Treaty Rights. If that were the case I would expect there to have been some suggestion or dicta to that effect.

18. The two significant decisions referred to – C-400/12 and C-316/17 & C-424/16 both discuss enhanced protection and how it can be lost.

19. In C-400/12 *MG v Portugal* the operative part of the judgment is recorded as

> Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment. However, the fact that that person resided in the host Member State for the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken.

20. Paragraphs 67 to 69 of C-316/16 consider enhanced protection. National Authorities are required to take into account "all the relevant factors". In [68] the court says

> "…an overall assessment must be made of the person's situation on each occasion at the precise time when the question of expulsion arises"

21. The First-tier Tribunal judge did not consider all the circumstances. She only considered how many years Mr Morais had been resident.

22. The grounds seeking permission to appeal do not in detailed terms raise the issue of "all the circumstances when the question of expulsion" arose. Nor did the decision letter, which referred only to the assertion that Mr Morais had not acquired enhanced protection. But in paragraph 6, the grounds state:

> "Similarly [Mr Morais] is unable to show much in the way of integration".

23. Mr Walsh submitted that the question of what else had to be taken into account in determining whether someone had enhanced protection, other than 10 years residence had not been before the First-tier Tribunal judge and thus the only issue she had to determine was whether Mr Morais had been resident for 10 years. It could not, he submitted be an error of law for her not to determine something that was not before her. Mr Tufan submitted that the question of integration had been raised before the First-tier Tribunal. It is correct that the issue of integration was brought to the attention of the First-tier Tribunal judge but, it seems from the judgment, this was in the context of submissions made by the SSHD in relation to the mid-level of protection as a person with permanent residence, not enhanced protection.

24. It does appear that the issue whether Mr Morais was entitled to enhanced protection is not merely a question of how long Mr Morais had resided in the UK was not brought to the attention of the First-tier Tribunal judge. The submissions seem, from the judgment, to have centred around the SSHD's submission that Mr Morais had not been continually resident for 10 years and was thus not entitled to enhanced protection; although the judge's comments about public order and on the

sentence passed do indicate that she was aware that something else ought perhaps to have been considered.

25. Although the question of whether Mr Morais, with 10 years residence, was entitled to enhanced protection should have been considered by the judge in the context of the circumstances as a whole it seems that, despite there being reference to his conduct and the sentence, it was not considered properly. There is no finding as to Mr Morais' integration or whether his circumstances are or were such that he lost what enhanced protection he may have had. Although this was not brought to the attention of the First-tier Tribunal in terms, she was required to reach a decision in accordance with the law, which she failed to do.

1. The issues before me were firstly whether Mr Morais was entitled to enhanced protection on the basis of integrative links arising from 10 years lawful residence and if so whether he meets the 'imperative grounds of public security test. Secondly if he does not meet the enhanced protection criteria, whether the 'serious grounds test' (level 2) is met. Finally, there was the question whether deportation would breach the appellant's Article 8 rights. Neither representative made submissions on this latter point, agreeing that it in fact added little to the issues to be decided by me.

2. I had the following documents before me:

- Respondent's bundle as before the First-tier Tribunal;
- Appellant's bundle as believed to be before the First-tier Tribunal listed as 42 pages but not including the document stated to be on page 42;
- Diagnostic and Developmental Assessment by the National Autistic Society on the youngest child dated following assessment on 28th March 2018;
- Appellant's bundle of documents for the Upper Tribunal pages 1 to 15a;
- Response to the pre-action protocol request from Chelmsford Family Court;
- Respondent's revised skeleton argument dated 7th March 2019;
- Appellant's skeleton argument undated;
- Speaking note prepared by Ms Moffatt dated 11th March 2019.

3. I heard oral evidence from Ms Newman, (the appellant's former partner), Mrs DaLuz (the appellant's mother) with the assistance of an interpreter, and from the appellant. The appellant amended his witness statement prior to signing. I heard oral submissions from both representatives.

4. The appellant, a Portuguese citizen, born on 2nd November 1985, has been continuously residing in the UK since 2002, exercising Treaty Rights. He acquired permanent residence in 2007. The expulsion decision is dated 18th September 2018, made following his conviction, after a contested trial, on 8th February 2017 for assault occasioning actual bodily harm and for breach of a restraining order. He was sentenced on 8th March 2017 to 18 months imprisonment on each count, to run concurrently. He was also made subject to an indefinite restraining order preventing him from contacting Ms Newman directly or indirectly, save through solicitors.

5. According to the sentencing remarks, the content of which was not challenged, the appellant met Ms Newman some 14 years prior to the conviction. They have 2 daughters born 2007 and 2010:

> …the relationship began to change when she became pregnant with your youngest daughter. You had been taking steroids and became aggressive and irrational in your behaviour, she told us. And in 2014 you started dabbling in cocaine but it later increased she told us to a daily habit. You accepted in evidence that you were a heavy cocaine user, spending a substantial amount of money per week. You kept, during the relationship, asking her for money threatening to smash the house up if you didn't get it. Ms Newman estimated that from 2014 until the end of your relationship, she spent something reaching £10,000 on your drug addiction.
> On 20th September 14, an argument started. You became aggressive towards her and punched her twice in the face, striking her right jaw, the second punch far heavier. As a result she fell to the floor and blacked out…..she did not at that stage report the matter to the police and forgave you, but the relationship did not improve because of your continual demand for money and your ever increasing cocaine habit and thus on other occasions, not indictments – counts, you used unpleasant and aggressive violence upon her…9th March 2016…16th April 2016…Again she did not report these matters to the police ….but thereafter you were constantly and continually phoning or texting her….21st June [2016]…you struck her…on 23rd June [2016] at last she reported your behaviour to the police and applied to the Family Court for a non-molestation order, which was granted and continued until 6th January [2017].
> Following service of this order…you denied having received it, lying to the jury about it and accusing that officer of lying. You flouted its conditions….
> Although the incidents of violence described by Ms Newman, save count 1, do not form counts on the indictment, I am entitled to take them into account as additional aggravating features….
> Looking that the guidelines in assessing your culpability and harm, there is a proven history of violence by you towards Ms Newman and an abuse of both power and trust…

6. The appellant's evidence as to dates was vague. I accept that this may have been in large part because he was being asked about matters that took place several years ago. He said he had taken 2 courses of steroids, of about 5 to 6 weeks each, around 2010 when he was working as a bouncer/doorman. He did not say when he first started taking cocaine but was sure that he had not been taking cocaine at the same time as the steroids. He said that after his arrest (August 2016) that he started to wean himself off cocaine to the extent that he was drug free by the time of his trial; that he stopped taking drugs in about February 2017, and that he didn't know when he stopped taking drugs altogether, but he had stopped before he went to prison. He said he was no longer taking any drugs. He denied hiding drugs whilst he had been taking them. The appellant produced no drug testing results either for his time in prison or since his release; he said he recalled being tested for drugs once in Maidstone prison; he had not volunteered for regular drug tests; he had not undertaken any drug related courses other than the one he said he had completed in HMP Chelmsford for which he did not have a certificate. He said he had been to hospital once because of cocaine use; he had spoken to his doctor two or three times about giving up; there as no documentary evidence from the GP.

7. His cousin provided a witness statement to the First-tier Tribunal and an undated letter to the Upper Tribunal but did not attend to give oral evidence; according to the appellant this was because she had a business to run. In her statement she said she had not had much to do with the appellant prior to his arrest in August 2016 but that after his arrest she saw him regularly to offer him support and friendship. She

said that she believed “he had been taking drugs and he stopped using them”. She says she is aware that he did a drug abuse course in HMP Chelmsford although he did not get a certificate. She does not say when she thinks he stopped taking drugs, and nor does she say how she was aware he had done a drug abuse course

8. Ms Newman’s evidence was that the appellant’s behaviour had changed in 2009 when he took steroid. She thought it was around July, just before she discovered she was pregnant in August. He became irrational and violent. She confirmed that she realised he was taking cocaine in 2011; she found some, but he had been violent and aggressive prior to her discovery that he was taking cocaine. She referred in a telephone call with CAFCASS to the appellant having alcohol problems when he was trying to give up cocaine and that he had been to hospital on several occasions because of excess use of cocaine.

9. The appellant expressed remorse and dismay at his violence. He said in oral evidence that he realised he was guilty of the offences the moment he committed but he pleaded not guilty and his trial was fully contested. He did not provide an explanation why he had pleaded not guilty if he knew he had committed the offences; in later oral evidence he said he had accepted his guilt when he was sentenced. According to the report of the telephone call he had with the CAFCASS officer on 26th October 2016 he was denying his had assaulted her and had been defending himself. He denied receiving the non-molestation order Ms Newman obtained from the Family Court; he continued that denial in his witness statement before me (which although amended on the day of the hearing, did not amend that paragraph) but in oral evidence he accepted he had received it. He had moved out of the joint home a few months before he was arrested ie around March/April 2016. He confirmed that until his arrest in June 2016 he had seen his children through their maternal grandparents but, according to the CAFCASS report, this had stopped because the maternal grandmother threatened him. He had sought a Child Arrangement Order after that. He had not seen them after his arrest.

10. Ms Newman’s evidence e was that after he moved out, he had seen the children through her parents, but she had stopped this because they had said they were no longer willing to facilitate the visits because of his violent threats. She did not know the nature of the threats, she had not witnessed any between the appellant and her parents and only knew what she had been told. She confirmed that the appellant had made a child arrangement order application but that after he was released from prison she contacted his mother and they arranged for him to see the children at her home. She recognised that there would be an impact upon the children having seen violent and aggressive behaviour, but she had no fears that he would be violent to the children. Because he now complied with the restraining order there was no risk of them witnessing any violence or aggressive behaviour towards her. She had been speaking to his brothers and his brothers’ wives while he was in prison and since his release. She said his behaviour had become much calmer and more focussed. He didn’t skip work and she accepted that he was no longer on drugs. He saw the children every week and they occasionally stayed overnight. In response to a question from me she said she was not merely relying upon what the appellant’s brothers said about his behaviour and that he as now drug free, but she’d also spoken to their wives, some friends and most of all her children. She said they wanted to see him, were very happy when they saw him and if they expressed the slightest doubt about seeing him then she would not make them go; they had never expressed any doubt and she had no worries about any risk to them.

11. The youngest child is on the autistic spectrum. The report does not refer to the appellant other than in passing; it was prepared when he was in prison. The report recommends that changes in routine should be managed by pre-warning and supported visually. before me is dated

12. I have placed no weight on the witness statement or undated letter from the appellant's cousin; she was not available for cross-examination and it was not possible to obtain any detail of what she said such as to support or not support the appellant's account. She does not refer to helping the appellant give up drugs, rather that he had stopped taking drugs.

13. I have placed no weight on Mrs DaLuz's evidence. She was very reluctant to accept that the appellant had committed the crimes for which he had been convicted. She described his behaviour as 'normal' during the period he was on bail at a time when he was taking drugs and on his own evidence he was aggressive. She said that when he came out of prison she had discussed with him doing courses to address his offending behaviour, but she could not recall the course or when that discussion took place. I do not believe that discussion ever took place given that she did not acknowledge that he had committed the crimes. I have concerns that if the appellant did mistreat the children, although she said she would inform Ms Newman of any mistreatment, she would not in fact do so because of her reluctance to accept her son was guilty of violent crime against Ms Newman.

14. The appellant dissembled n some respects. He was not forthcoming in his acknowledgement of the difficulties that had existed in terms of contact through Ms Newman's parents but, given Ms Newman's evidence, I have no reason to doubt that he has genuine love and affection for his children. I have no reason to doubt but that he is caring and is not violent or aggressive towards them. In so far as his drug taking is concerned, he was vague and sometimes inconsistent as to when he ceased taking drugs. He was, I find, honest that it was a process and was not an immediate curtailment of drug taking. I find that he started taking steroids in 2009 and although he may not have taken cocaine at the same time, I find that he started taking cocaine very shortly afterwards. I am satisfied that the drug taking was instrumental in aggression towards Ms Newman and that this aggression started whist she was pregnant with their youngest child. Although possibly not culminating in actual physical violence for some years, I find that the aggression was such as to cause significant difficulties in their relationship (as referred to by Ms Newman) and which frequently resulted in him leaving the home.

15. Ms Newman was very impressive. She was thoughtful and despite the appellant's previous aggressive behaviour and violence towards her she was concerned to maintain a relationship between him and the children. She was aware of the impact upon them of witnessing violence and had taken care to ensure that they had a relationship with their father; this was not because of what he wanted but because she saw it important for the children to see him. The affection they hold for his is borne out in the copy letters in the bundle. Although there was a lack of evidence from the appellant 'proving' that he was drug free, I am satisfied that her assessment could be relied upon. I am satisfied d that although she did not deal immediately with his violent and aggressive behaviour when it started in 2009, her current views and attitude are such that if there were any relapse in his drug taking or behaviour, she would immediately take steps to stop him seeing the children. I accept her evidence that she believes him to be drug free and tat belief is not only

genuinely and sincerely held but is sufficient to enable me to find that on the evidence before me, he is now drug free.

Integrative links

16. Mr Morais has been resident in the UK since 2002 when he was 17 years old. He acquired permanent residence in 2007. He has continued to live in the UK and, save for his time in prison, has worked more or less continuously. He had a long-standing relationship with Ms Newman which finally broke down after violence and aggression in around March/April 2016. His violent and aggressive behaviour commenced in mid-2009 and gradually became worse, fed by illegal drug use. There had been periods of time before that when they had not lived together. They have two children born 2007 and 2010. He speaks fluent English and apart from occasional holiday visits out of the UK, the whole of his adult life has been in the UK. He speaks Portuguese, but it is unclear whether he can read or write Portuguese. His close family, there than one brother, is in the UK although they have little or no effect on his criminality. His former partner had to obtain a restraining order in 2016, which he broke. He is subject to a life-long restraining order preventing him from having any direct contact with his former partner and indirect contact is only permissible through a solicitor. He continued to take illegal drugs until sometime in 2017. He was sentenced to a cumulative period of imprisonment of 3 years on 8th February 2017. The expulsion decision is dated 18th September 2017.

17. In *B v Land Baden-Wurttemberg* (C-316/16) and *Secretary of State for the Home Department v Vomero* (C-424/16) the ECJ gave a preliminary ruling on 17th April 2018 and held, in response to the four questions before it:

> **Was it a prerequisite of eligibility for the protection against expulsion provided for in Directive 2004/38 art.28(3)(a) that the person concerned have a right of permanent residence?** Yes. The court noted that the protection against expulsion provided for in the directive gradually increased in proportion to the degree of integration of the EU citizen concerned in the host Member State. Thus, whereas a citizen with a permanent right of residence may only be expelled on 'serious grounds of public policy or public security', a citizen who had resided in the host Member State for the previous ten years may only be expelled on 'imperative grounds of public security'. Accordingly, the enhanced protection linked to a 10-year period of residence was available to an EU citizen only if he first satisfied the eligibility condition for the lower level of protection, namely having a right of permanent residence after residing legally in the host Member State for a continuous period of five years.
>
> **How should the period corresponding to the 'previous ten years' within the meaning of Directive 2004/38 art.28(3)(a) be calculated?** The 10-year period of residence must be calculated by counting back and that period must, in principle, be continuous. The court observed, however, that Directive 2004/38 did not specify the circumstances which were capable of interrupting the 10-year period of residence for the purposes of the acquisition of enhanced protection. The court therefore held that an overall assessment must systematically be made of the situation of the person concerned at the time when the question of expulsion arose. In that assessment, the national authorities had to take all the relevant factors into consideration in each individual case and must ascertain whether the periods of absence from the host Member State involved the transfer to another State of the centre of the personal, family or occupational interests of the person concerned.
>
> **Did periods of imprisonment automatically deprive a person of the enhanced protection in Directive 2004/38 art.28(3)(a)?** No. To determine whether detention periods had broken the integrative links previously forged with the host Member State, it was necessary to carry out an overall assessment of the situation of the person concerned at the precise time when the question of expulsion arose. Thus, periods of detention did not automatically deprive a person of the enhanced protection. The court also pointed out that the overall assessment of the

> situation of the person concerned must take into account the strength of the integrative links forged with the host Member State before his detention as well as the nature of the offence, the circumstances in which that offence was committed and the behaviour of the person concerned during the period of imprisonment.
> **At what point in time should compliance with the condition of having 'resided in the host Member State for the previous ten years' be assessed?** At the date on which the initial expulsion decision was adopted. However, where an expulsion decision was adopted but its enforcement was deferred for a certain period of time, it may be necessary to carry out a fresh assessment of whether the person concerned represented a genuine, present threat to public security.

18. Mr Morais has been in the UK for a continuous period of 10 years, counting back from the expulsion decision. The period of imprisonment does not, *per se,* break any integrative links he may have acquired. In this appeal it is relevant to consider whether Mr Morais had acquired integrative links during his residence in the UK.

19. The consumption of cocaine in the manner undertaken by the appellant of necessity involves the illegal possession of cocaine which, although not charged, is a criminal offence. The violence, albeit maybe not actual physical violence, and aggression meted out to his partner commenced whilst she was pregnant with their second child. Such behaviour, although directed at only one person, so far as alleged, is in any event a threat to public order. The possession and consumption of illegal drugs is a threat to public order. I am satisfied that Mr Morais' behaviour since 2009 is such as to conclude that he had not acquired integrative links at that time, irrespective of the fact that he remained in the UK. His continued consumption of illegal drugs and his continued aggression towards his partner was a continuing threat to public order. Despite having the centre of his life in the UK, continuing to live and work in the UK, and have children, his behaviour is not that of a man who is integrated into UK society.

20. Mr Morais is not a man who had acquired integrative links over a period of 10 years prior to his arrest and that therefore consideration had to be given to whether he had lost them. He had not acquired such links.

21. I find that Mr Morais is not entitled to the highest level of protection from expulsion.

Permanent residence

22. As a person with permanent right of residence, a decision to remove Mr Morais can only be taken on serious grounds of public policy and public security. In assessing this, regulation 27 and Schedule 1 of the 2016 Immigration (European Economic Area) Regulations 2016 are to be considered.

23. It cannot be otherwise but that his personal conduct represents a genuine present and sufficiently serious threat affecting one of the fundamental interests of society – he is the subject of a life time restraining order. Of particular relevance to the proportionality of the decision as to whether there are serious grounds of public policy and public security such that he is deported, adverse to Mr Morais, are his lengthy period of illicit drug taking, his aggressive and violent behaviour not only to his former partner but also to his partner's parents, his criminal conviction and sentence, that he breached a non-molestation order and that he is the subject of a life-time restraining order.

24. Matters that go to the decision being disproportionate that are to be taken into account include the fact that he has not, save to the extent that his children

witnessed the violence against his partner, been violent towards the children and there was no evidence that the children have been significantly harmed by his behaviour, he is not a persistent offender; he has worked more or less consistently, he is no longer taking illicit drugs, he sees his children on a regular and frequent basis, he is a caring and loving father and the children would be very upset if they no longer saw him or had regular frequent physical contact with him with occasional overnight stays, one of the children is autistic and a change in her routine in seeing him could have a serious impact, the children's mother who is responsible, thoughtful and very conscious of the best interest of the children is firmly of the opinion that he should remain in the UK so that they can continue to develop their relationship with him. Although he has not developed integrative links such as to enable him to claim the highest threshold, since his release from prison he has become more focussed on his work, has not succumbed to illicit drugs and has placed the development of his family at the centre of his life. He is determined to be at low risk of re-offending by OASys.

25. Mr Clarke submitted that little weight could be placed on Ms Newman's evidence with regard to Mr Morais' reform. He expressed continuing concern at the indications in the CAFCASS report as to Mr Morais' violence and drug taking and that the behaviour was such that the children ought to be considered to be at risk from him because of the impact on children of adverse behaviour by a parent. I do not accept that submission in this case. Ms Newman gave evidence that she had spoken to social services and to the CAFCASS officer; there was and is no continuing interest by social services in the children and they were never placed on the 'At Risk' register. This reflects social services being of the view that Ms Newman was a fit and proper person to be able to manage and deal with her ex-partner's behaviour and was legitimately able to decide whether and to what extent he should see the children. Although Mr Clarke referred to the reference in the CAFCASS report to their intention, if the Children Arrangements Application was pursued, to undertake a full assessment as indicative of continuing concern, this is misplaced. Firstly, the Children Arrangements Application was not pursued because Mr Morais was sent to prison. Secondly, there is a presumption of no order in the family courts and it would only be if the parents could not agree as to future contact that a further application would be made which would then necessitate a further CAFCASS report based on the situation as it was then. On the basis of Ms Newman's evidence before me, the considerations that arose at the time that CAFCASS prepared their disclosed report, such considerations would no longer apply. Furthermore, given that the children were 'known' to social services at the time of the trial and conviction, if there were any concerns by social services about the contact between Mr Morais and his children, then they could be expected to initiate action of their own volition.

26. The best interests of the children clearly lie with Mr Morais remaining in the UK and being able to maintain regular and frequent physical contact with them; this cannot be achieved through skype, face time etc. Weight has to be placed on the views of Ms Newman given that she is the victim of Mr Morais' criminality and the great concern and effort she has put into enabling the children to foster a good relationship with their father.

27. That is now and remains drug and offence free and continues to maintain this relationship renders, I find, his deportation disproportionate.

28. In so far as the other matters that are required to be considered as set out in regulation 27 and Schedule 1, I am satisfied that on the current evidence the appellant is drug free and, although previously involved in illicit drugs which is of wide societal harm, the societal harm is now reduced.

29. Taking all of these matters into account and considering the evidence as a whole I find that the deportation of Mr Morais on serious grounds of public policy and public security is not justified.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision to be remade.

I re-make the decision in the appeal and make the following decisions:

(i) The appellant has not acquired the necessary integrative links to enable him to be treated as having a continuous period of 10 years residence prior to the expulsion decision;

(ii) As a person with permanent residence, the appeal of the appellant against his deportation is allowed; there are no serious grounds of public policy and public security such as justify his expulsion.

Date 2nd May 2019

Upper Tribunal Judge Coker