Neutral Citation Number: [2019] EWCA Civ 2017

Case No: C9/2018/2433

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Mr Justice Edis and Deputy Upper Tribunal Judge McGeachy

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2019

Before :

LORD JUSTICE UNDERHILL, VICE-PRESIDENT OF THE COURT OF APPEAL
LORD JUSTICE MOYLAN
and
LORD JUSTICE DINGEMANS

- -

Between :

Michele Terzaghi	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Agata Patyna (instructed by **Fursdon Knapper Solicitors**) for the **Appellant**
Claire van Overdijk (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 31 October 2019

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Approved Judgment

Lord Justice Dingemans:

Introduction

1. The appeal raises, among other issues, a point of practice about the jurisdiction of the Court of Appeal to hear an appeal where the Upper Tribunal disposes of an appeal in two separate decisions.

2. The appeal is against a decision dated 11 July 2018 by the Upper Tribunal (Immigration and Asylum Chamber) ("the Upper Tribunal") given by Mr Justice Edis and Deputy Upper Tribunal Judge McGeachy. The Upper Tribunal had allowed an appeal from and set aside the decision dated 8 February 2018 of the First-tier Tribunal (Immigration and Asylum Chamber) ("the FTT") given by FTT Judge Dean ("the FTT Judge") in its first and earlier decision dated 16 April 2018. The FTT had allowed an appeal by the Appellant Michele Terzaghi ("Mr Terzaghi") against a decision dated 19 May 2016 made by the Respondent Secretary of State for the Home Department ("the Secretary of State") to deport Mr Terzaghi, a national of Italy, to Italy. In its second and later decision dated 11 July 2018 the Upper Tribunal restored the decision of the Secretary of State to deport Mr Terzaghi.

Relevant background

3. Mr Terzaghi is a national of Italy. He was born on 13 April 1992 and is now aged 27 years. He was born in Kenya in 1992 and his mother is a national of both Kenya and Italy and his father is an Italian national. Mr Terzaghi lived in Kenya until 1994 when he was 2 years old. Mr Terzaghi then lived in Italy until 1999 when he was 7 years old. Mr Terzaghi then lived in Tanzania until 2001 when he was 9 years old. Mr Terzaghi's parents and Mr Terzaghi then moved to the United Kingdom so that Mr Terzaghi could attend English speaking schools and he has lived in the United Kingdom since 2001. He attended school in the United Kingdom from September 2001 and left full-time education in July 2008, aged 16 years.

4. Mr Terzaghi has therefore been living in the United Kingdom since 2001. He passed examinations and obtained qualifications. From the age of about 15 years Mr Terzaghi abused controlled drugs and committed various criminal offences. In 2009, when he was aged 16 years, Mr Terzaghi was convicted of taking a motor vehicle without consent, and driving without a licence or insurance. He received a referral order of 6 months and his driving licence was endorsed. In 2012, when he was aged 19 years, Mr Terzaghi was convicted at Cambridgeshire Magistrates' Court of a dwelling house burglary and theft. He was committed to the Crown Court and sentenced to 6 months imprisonment in a Young Offenders Institution. In February 2015, when he was aged 22 years, he was convicted of 7 offences and sentenced on 1 May 2015 to a total of 4 years imprisonment. The 7 offences were committed on 1 November 2014 and included 2 counts of wounding or inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861. The circumstances were that Mr Terzaghi had been affected by his voluntary consumption of drugs and started behaving bizarrely. His parents called the police and Mr Terzaghi, who had picked up a knife, ran away from the police, slashed a police officer on the throat causing a 6 centimetre laceration, cut another police officer on the finger who was trying to remove the knife, challenged firearms officers who had by then been called, and held a neighbour with a saw to his throat.

5. After serving half his sentence Mr Terzaghi was due to be released on licence on 26 November 2016 but was detained under immigration powers. He was released on bail on 10 February 2017.

Integration into the United Kingdom

6. It was common ground that Mr Terzaghi was entitled to a permanent right of residence in the United Kingdom. This meant that Mr Terzaghi could not be deported under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"), which were passed to give domestic effect to Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 ("the 2004 Directive"), unless "serious grounds of public policy or public security" were proved, see regulation 21(3) of the 2006 Regulations. Regulation 21(4) provides for further enhanced protection and provides: that a decision to deport "may not be taken except on imperative grounds of public security in respect of an EEA national who … has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision." Regulation 21(6) provided that "Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin".

7. Mr Terzaghi's case was that he had lived continuously in the United Kingdom since 2001 and was therefore entitled to the further enhanced protection against deportation under regulation 21(4) of the 2006 Regulations. In such a case he could not be deported "except on imperative grounds of public security".

8. The Secretary of State did not accord the enhanced regulation 21(4) status to Mr Terzaghi because the Secretary of State was not satisfied that Mr Terzaghi had lived in the United Kingdom between 2009 and 2011. This issue of fact was resolved in Mr Terzaghi's favour by the FTT following consideration of a tenancy agreement, medical notes and some wage slips. Mr Terzaghi's residence between 2009 and 2011 was not an issue either before the Upper Tribunal or the Court of Appeal.

9. However the fact that Mr Terzaghi had served two separate periods of imprisonment for his criminal offences meant that there was a further and separate issue about whether Mr Terzaghi was entitled to the enhanced protection equivalent to a person who has resided in the United Kingdom for a continuous period of at least 10 years.

10. Mr Terzaghi was given permission to appeal to the Court of Appeal because, at one stage in the proceedings, it looked as if the appeal would raise contested issues about the legal test relating to integration into society in the United Kingdom for the purposes of regulation 21(4) of the 2006 Regulations. However in the event the relevant legal tests to be applied were common ground, and the issues on appeal related to the jurisdiction of the Court of Appeal to hear some of Mr Terzaghi's grounds of appeal and if so whether the Upper Tribunal was entitled to set aside the judgment of the FTT, and if so whether the Upper Tribunal's final determination should itself be set aside. I can therefore set out briefly the relevant legal principles relating to integration for the purposes of the 2006 Regulations.

Relevant legal principles relating to integration for the purposes of the 2006 Regulations

11. The effect of imprisonment on whether a citizen of the European Union has acquired enhanced regulation 21(4) status has been considered by the Court of Justice of the European Union when considering the 2004 Directive in a number of cases including *Onuekwere v Secretary of State for the Home Department* (Case C-2014/13) [2014] 1 WLR 2420; *Secretary of State for the Home Department v MG (Portugal)* (Case C400/12); [2014] 1 WLR 2441; *FV (Italy) v Secretary of State for the Home Department* (Cases C-424/16 and C-316-16); [2019] QB 126; and *K v Staatssecretaris van Veiligheid en Justitie; F v Kingdom of Belgium* (Cases C-331/16 and C-366/16); [2019] 1 WLR 1877. Relevant domestic decisions include a decision of the Court of Appeal in *Warsame v Secretary of State for the Home Department* [2016] EWCA Civ 16; [2016] 4 WLR 77 and a decision of the Upper Tribunal in *Arranz v Secretary of State for the Home Department* [2017] UKUT 294.

12. The following propositions were common ground before us: (1) the 10 year period referred to in regulation 21(4) is counted back from the date of the decision to deport, see *MG (Portugal)* at paragraph 24, *Warsame* at paragraph 10 and *FV (Italy)* at paragraph 65; (2) the 10 year period has to be a continuous period of residence in the United Kingdom, see *MG (Portugal)* at paragraph 25 although this does not prevent some absences provided that there has not been a transfer of "the centre of the personal, family or occupational interests of the person concerned"; (3) periods of imprisonment will, in principle, interrupt the continuity of residence for the 10 year period, see *MG (Portugal)* at paragraph 36 and *FV (Italy)* at paragraph 70. This is because the imposition of a prison sentence showed non-compliance with the values expressed by the society of the host member state in its criminal law, see *Onuekwere* at paragraph 26; but (4) if a citizen of the European Union has resided for 10 years in the relevant state before the period of imprisonment the earlier period "together with the other factors going to make up the entirety of the relevant considerations in each individual case" may be taken into account in determining whether the person has regulation 21(4) status, see *MG (Portugal)* at paragraph 36 and *FV (Italy)* at paragraph 71; (5) integration is based not only on "territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host member state", see paragraph 25 of *Onuekwere* and account should be taken of the following criteria to consider whether integrative links have been broken including "how the penalty is enforced; consideration of the offence committed; general behaviour while in detention; acceptance and completion of treatment; work; participation in educational and vocational programmes; participation in the enforcement of the sentence; and maintenance of personal and family ties in the host member state", see paragraph 123 of the Advocate General's opinion as approved by the judgment of the Court at paragraph 73 in *FV (Italy)*; and (6) the cases where there has been a prior period of 10 years residence and then a period of imprisonment in the lead up to the decision to deport have, for purposes of regulation 21(4) status, been referred to as "a maybe category of cases", see *Warsame* at paragraph 9.

Proceedings before the FTT

13. Following service of the deportation order Mr Terzaghi appealed against the deportation order made by the Secretary of State to the FTT contending that, as an Italian national who had lived in the United Kingdom for nearly 15 years before the

order was made, he was entitled to the protection of regulation 21(4) of the 2006 Regulations.

14. In this case the FTT had statements and heard oral evidence from Mr Terzaghi, his father, his mother and his brother. The FTT also had a bundle and supplementary bundle of documents supplied by Mr Terzaghi and documents supplied by the Secretary of State. These included: the Crown Court judge's sentencing remarks; an OASys report; Mr Terzaghi's Police National Computer record; the liability to deportation and decision to make deportation letters; and a progress update from the National Offender Management Service. It was apparent that the documents also included letters about counselling sessions, a letter from a former employer, and certificates of qualifications obtained. Among the letters were letters from various relatives to the Crown Court Judge giving further details about Mr Terzaghi's struggles with drug addiction. His maternal grandfather suggested that Mr Terzaghi had never liked living in the United Kingdom. Mr Terzaghi's father wrote a letter about the effect of deportation on Mr Terzaghi noting that he hardly had any Italian, his grandfather lived in Rome in a 1 bed flat and was aged 79 years and would not be able to support him. The letter recorded that Mr Terzaghi was part of the family which had been in the United Kingdom since 2001. The documents also included a letter dated 12 March 2015 from Dr Walsh, a general practitioner in a practice in March, Cambridgeshire ("the GP's letter").

15. Given the importance that the GP's letter assumed in the decisions of the Upper Tribunal I will set out its contents at some length. In the letter Dr Walsh noted that the Terzaghi family had requested that he provide a report describing Mr Terzaghi's issues over the last few years regarding depression, addiction and suicidal attempts in the hope that this may help mitigate his case. The first report noted by Dr Walsh was from May 2007 (Mr Terzaghi was then aged 15 years) when Mr Terzaghi's mother reported that Mr Terzaghi was smoking cannabis, and that this coincided with problems at school and being ordered to detention. Contact with community drug and advice and education service was suggested. The next contact was December 2010 (when Mr Terzaghi was aged 18 years). Mr Terzaghi had continued to smoke cannabis, his parents were concerned about other drug use and he had been asked to leave school because of behavioural issues. Mr Terzaghi did not accept suggestions that he see the GP and in August 2012 (when Mr Terzaghi was 20) the family were concerned about a suicide attempt and were supporting Mr Terzaghi after his first time in custody. Psychiatric help was offered but Mr Terzaghi reported that he was fine. When he was 21 Mr Terzaghi reported that he was trying to rebuild his life, he had been a "good boy" until his early teens and then had spent 7-8 years messing around and got involved with the wrong people and become involved with drugs and dealing. He had an older partner and they had a child. He had lots of friends and he had been trying to use them for reassurance that all things could be settled down. He had been clean for some time. Dr Walsh considered that he seemed to have a lot of insight to what he had done and the problems this had caused. He was applying for jobs and was supported by his parents. He was quite cooperative in the consultation and referred to the mental health team. In March 2014 (when Mr Terzaghi was nearly 22 years) Mr Terzaghi's mother had contacted Dr Walsh after another suicide attempt following which he had refused help, triggered by the breakdown of his relationship with his partner. Dr Walsh had spoken to Mr Terzaghi who seemed upbeat and his partner had come back. Mr Terzaghi had not attended a clinic meeting but Mr

Terzaghi had reported to Dr Walsh that he had a job, he was not using drugs and he had turned his life around. The letter concluded with Mr Terzaghi's father's report about the incident on 1 November 2014.

16. Mr Terzaghi's witness statement noted that he was 9 years old when he first came to the United Kingdom and he had only left the United Kingdom for visits abroad. He had 16 years of residence in the United Kingdom and had attended school and college throughout his life. Mr Terzaghi said he had been bullied at Cavalry Primary school and Neale Wade School and that this bullying had affected his life. His uncle had died. After school he had studied IT and then done a business course before having a gap year. Mr Terzaghi noted that he had been imprisoned in 2012 for burglary when he was getting money to pay for drugs. Mr Terzaghi referred to a relationship starting in June 2012 (when he was aged 20 years) with his partner who had a young daughter and with whom he had a son. The relationship broke down in 2013 (when he was aged 21 years) and he returned to live with his parents. Mr Terzaghi became depressed and had two sessions of counselling and also attempted suicide on two or three occasions. He admitted himself to a Rehabilitation Centre in Nottingham to assist with his mental state, and worked from January 2014 until 1 November 2014.

17. The hearing before the FTT took place on 23 January 2018 and the decision and reasons were promulgated on 8 February 2018. The FTT Judge noted that the first question to be determined was whether regulation 21(3) or 21(4) applied. There was a brief review of evidence relevant to the issue of whether Mr Terzaghi was in the United Kingdom between 2009 and 2011 and the FTT Judge found that Mr Terzaghi had been resident for 14 years and 9 months before the decision to deport had been made, noting at paragraph 12 of the decision that "during his time in this country he has been in education, work or in receipt of Job Seekers Allowance".

18. The FTT Judge then turned to the issue of criminal offences. The offences were set out and it was found that Mr Terzaghi "had been continuously resident in this country for at least 10 years before any period of imprisonment". The FTT referred to the judgment in *MG (Portugal)* and noted at paragraph 15 of the decision that "in determining whether the Appellant is entitled to the enhanced protection provided [by] regulation 21(4)(a) it is necessary to take a fact-sensitive approach to involving questions of both residence and integration in order to determine whether the periods of imprisonment in the 10 years prior to the deportation decision broke any pre-existing integration in this country".

19. The Appellant's education, fluent English, qualifications and work "at various times since leaving school" was noted. The relationship with Mr Terzaghi's former partner and the birth of his son was recorded. The FTT Judge noted that the 3 months served of the 6 month sentence of imprisonment in 2012 was not "sufficient to break the links of integration which the appellant had formed over the previous 10 years of his residence in this country" and it was recorded that he had continued to obtain qualifications and seek employment after this time. Reference was then made to the offences on 1 November 2014 and the judge's sentencing remarks. The FTT Judge found that Mr Terzaghi was open and honest stating that he had used drugs before but nothing like this had happened and he was disgusted by what had happened and had decided to cut ties with his old associates and move away. Family visits from his mother and father continued, together with visits from his brother and friends.

20. The FTT Judge found that "when taken in the round, I find that the period of imprisonment for the index offence does not break the integrating links forged previously in the United Kingdom". For these reasons it was found that Mr Terzaghi was entitled to the highest level of protection pursuant to regulation 21(4) of the 2006 Regulations. The FTT Judge then turned to consider Mr Terzaghi's offences and the assessment of risk in the OASys report and noted negative drug tests in prison, and an improving motivation to engage with the probation service. The FTT Judge considered Mr Terzaghi's evidence that he had broken ties with former associates and moved to Basingstoke where he was hoping to continue and develop contact with his son, which had led to 3 supervised contact sessions. The report from the contact facilitator noted a strong father bond with support from grandparents. The FTT Judge noted that Mr Terzaghi had addressed issues which led to his past criminality and the continuing contact with his son meant that risks were lessened to a considerable degree because there was a clear motivation to steer clear of criminality. Mr Terzaghi's appeal against the deportation order was allowed.

Proceedings before the Upper Tribunal

21. The Secretary of State sought permission to appeal to the Upper Tribunal and contended that the periods of imprisonment meant that Mr Terzaghi had not acquired 10 years residence before the relevant date of the decision, and that the FTT had made an error of law in finding that Mr Terzaghi had either integrated into the United Kingdom or that his integrative links had not been broken by his abuse of drugs, use of violence and prison sentences.

22. The Secretary of State was granted permission to appeal to the Upper Tribunal against the decision of the FTT to allow Mr Terzaghi's appeal. The grounds of appeal included complaints that "the FTTJ has failed to place any significant weight on the fact that the Appellant's residency has been significantly interrupted by his period of imprisonment and detention" and that the appeal "should have not have been considered under one of the `narrow maybe' category of cases … given the amount of time incarcerated in which the Appellant was separated from society". It was noted that if the FTT Judge was correct to consider this as one of the maybe cases an overall assessment of whether integrating links previously forged had been broken was required, and it was said "that the FTTJ has failed to engage in such an assessment in coming" to the conclusion that regulation 21(4) applied. It was said "the appellant's offending demonstrates that he has failed to respect the values of society by committing offences that involved both drugs and violence that required a significant sentence in order to protect society and as such has failed to adhere to the norms and values of society that in turn demonstrates his failure to integrate into society". It was said that the failure of the FTTJ to consider the appellant's criminal conduct in the relevant 10 year period was a fundamental error.

The first decision of the Upper Tribunal

23. The first hearing before the Upper Tribunal took place on 27 March 2018 and the decision and reasons were promulgated on 23 April 2018. The Upper Tribunal held that the FTT had made an error of law by finding that Mr Terzaghi had integrated into United Kingdom society and that the integrative links had not been broken because of Mr Terzaghi's abuse of controlled drugs and criminal offences. In making that assessment the Upper Tribunal relied in particular on the GP's letter, to which it was

said the FTT had given insufficient weight. The Upper Tribunal found that this was an error of law and set aside the determination of the FTT.

24. In its decision dated 23 April 2018 the Upper Tribunal recorded that the "case concerns the proper approach to the impact of a prison sentence on the integrative links established by an EEA national in the United Kingdom by virtue of long residence here". A short summary of the chronology was given and the sentencing remarks of the Crown Court Judge were summarised. The Upper Tribunal then set out relevant provisions of the 2004 Directive and the 2006 Regulations and referred to the decisions in *MG (Portugal)* and *Warsame* recording "the statement of the law by the FTT Judge in paragraph 15 of her decision is not challenged, and we proceed on the basis of that agreement". The Upper Tribunal recorded that Mr Terzaghi had been resident in the United Kingdom between 2001 and 2014. The Upper Tribunal noted in paragraph 10 that part of the FTT Judge's decision which had referred to Mr Terzaghi being in "education, work or in receipt of Job Seekers Allowance" noting there had been no analysis of when he was in work and when he was seeking Job Seekers Allowance. The Upper Tribunal continued to summarise the findings of the FTT Judge noting the finding "that the majority of his life has been spent in the United Kingdom where he has lived, been educated, worked and formed friendships", and that Mr Terzaghi had shown motivation to address his offending.

25. The Upper Tribunal recorded that the Secretary of State argued that "the judge had reached conclusions which were not open to her – there was insufficient reasoning in her conclusions". The Upper Tribunal held, in paragraph 25 that "although this is put as a `reasons challenge', in our judgment it really involves a dispute about the meaning of `integrative links'". The Upper Tribunal referred to regulation 21(6) of the 2006 Regulations and noted the phrase "social and cultural integration into the host member state" as a factor to be considered separately from "family and economic situation" meaning that integration was more than "living with his family".

26. The Upper Tribunal held that the assessment of the FTT Judge was flawed in law in "that she failed to give any or any adequate weight to any of the factors which tended to suggest that the level of true social or cultural integration into the society of the United Kingdom was limited to the fact that he had lived here and maintained links with his family, who also lived here" and noted that the three significant convictions in a 5 year period required specific evaluation and that it suggested a prolonged period of alienation from society rather than integration. The Upper Tribunal held that his family relationship with his son required assessment. The Upper Tribunal noted that in Mr Terzaghi's father's letter to the Crown Court Judge he reported Mr Terzaghi's depression, suicide attempts and visits to a drug rehabilitation centre in Nottingham.

27. The Upper Tribunal also noted the OASys assessment in April 2016 and the GP's letter. The Upper Tribunal stated that the GP's letter had been referred to in the judgment of the FTT Judge but there had been no analysis of its contents. The Upper Tribunal recorded that the GP's letter reported concerns about Mr Terzaghi's drug use from 2015, confrontations at home, and rejection of offers of help. The Upper Tribunal noted that the letter referred to an appointment when Mr Terzaghi had reported to the GP when aged 21 years that he knew that he had spent 7-8 years messing around, that he had been a good boy in his early teens before he got involved with the wrong people. He did not have a job but was applying for jobs. The Upper

Tribunal noted that the GP's letter also referred to a suicide attempt in March 2014 and subsequent refusals of help.

28. The Upper Tribunal stated "It appears to us that this letter describes a person who is not integrated into society, who persistently commits the crime of using banned drugs, and who refuses offers of medical help to resolve his problems. It specifically shows that the FTT judge was wrong when she said that he had either been in education, in work or claiming Job Seekers Allowance when in this country". The appeal was allowed on the basis that "there was an error of law in failing to take all relevant factors [and] into account". The decision of the FTT was set aside and the appeal was adjourned to a further hearing in the Upper Tribunal.

The second decision by the Upper Tribunal

29. The second hearing before the Upper Tribunal took place on 16 May 2018 and Mr Terzaghi and his father gave evidence. The decision and reasons were promulgated on 11 July 2018. The Upper Tribunal held that although Mr Terzaghi had lived in the United Kingdom for 10 years before his first period of imprisonment, he had only lived in the United Kingdom and he had not integrated so that the period of imprisonment broke whatever links there were, and Mr Terzaghi's case therefore fell to be determined pursuant to regulation 21(3) of the 2006 Regulations, and not under regulation 21(4) of the Regulations.

30. The determination expressly noted in paragraph 1 that "this judgment is to be read together with our earlier judgment signed on 16 April 2018". The second judgment recorded that it appeared to the Upper Tribunal that the GP's letter dated 12 March 2015 "cast doubt on some of the findings made by the FTT judge and that she had not explained those findings in the light of its contents. That is why we allowed the appeal."

31. The Upper Tribunal recorded that at the hearing on 16 May the judgment was reserved and "because there had been some incomplete evidence about how the Respondent had progressed while on licence" they had given Mr Terzaghi an opportunity to file a further report from the probation service. A further report was then filed from Jeremy Thomas, a probation officer, who was optimistic about Mr Terzaghi's present level of compliance with the terms of his licence, and the present level of risk that he posed to the public in circumstances where there did not appear to be any current drug use.

32. At the hearing on 16 May 2018 Mr Terzaghi and his father had provided witness statements and provided oral evidence. Mr Terzaghi had accepted that the GP's letter dated 12 March 2015 was accurate and that what had occurred was completely out of character. He had talked about rebelling against his parents, as well as working as a carpet fitter and forming the relationship with his ex-partner. He had said he had last used recreational drugs in November 2014 and that all his tests since his release were clear, but the Upper Tribunal noted a positive drug test for cocaine in September 2017, albeit things had got better when he had relocated to Basingstoke and had 4 clear drug tests between December 2017 and May 2018. The Upper Tribunal did not accept that he could have forgotten about the positive test for cocaine in September 2017. The Upper Tribunal assessed that up to his period of imprisonment Mr Terzaghi had maintained links with his family but otherwise had no integrative links

"unless that phrase means simply `had lived here'". The Upper Tribunal assessed Mr Terzaghi's offending as not a one off and out of character but part of a pattern of escalating behaviour which had gravely worried his parents. It was noted that he had been offered and refused assistance. The Upper Tribunal held that Mr Terzaghi was therefore not entitled to the enhanced protection set out under regulation 21(4) of the 2006 Regulations. Having carried out its own assessment the Upper Tribunal then found that Mr Terzaghi had lived here for many years without contributing to society, he did not have contact with his son and was contemplating litigation to secure that, and his "bonds to society more generally were slender and easily broken".

Issues on appeal

33. There were three main grounds of appeal pursued by Ms Patyna on behalf of Mr Terzaghi in her excellent and succinct submissions. First it was submitted that the Upper Tribunal was wrong to find that the FTT made an error of law in evaluating Mr Terzaghi's integrative links with the United Kingdom, the reality was that the Upper Tribunal simply disagreed with the FTT Judge's findings which did not justify finding an error of law. Secondly it was submitted that the Upper Tribunal should specifically have raised the issue of the GP's letter with Mr Terzaghi if it was to be the basis on which the appeal was allowed. Thirdly it was submitted that the Upper Tribunal had itself made errors of law in making findings that Mr Terzaghi's removal would not be disproportionate and had ignored facts about Mr Terzaghi's schooling and upbringing in the United Kingdom together with the latest evidence from Mr Thomas, the probation officer, showing that there was no current risk from Mr Terzaghi.

34. Ms Van Overdijk, to whom we are also grateful for her submissions on behalf of the Secretary of State, submitted in writing that the Court of Appeal had no jurisdiction to entertain the first and second grounds of appeal relating to the first determination of the Upper Tribunal. The submission was modified orally and it was contended that it was only the second ground of appeal which this Court had no jurisdiction to entertain. This point of jurisdiction was supported by a Respondent's Notice. As to the grounds of appeal it was submitted that: first there had been an important failure to deal with relevant factual material, and in particular the GP's letter, by the FTT which amounted to an error of law; secondly that the GP's letter was before the FTT Judge and referred to but not analysed by the FTT Judge, and was therefore relevant material so that there was no need to make specific reference to it in submissions before the Upper Tribunal or in questions from the court, and in any event in the second decision by the Upper Tribunal it was recorded that Mr Terzaghi accepted that its contents were accurate so that nothing would have been gained by mentioning it; and thirdly that the second decision of the Upper Tribunal was both reasonable and right and disclosed no error of law so there was no basis for the Court of Appeal to interfere with it.

35. By the conclusion of the hearing it was apparent that the matters for this Court to decide are: (1) the jurisdiction of this court to entertain grounds of appeal arising from a first decision of the Upper Tribunal where the Upper Tribunal has gone on to dispose of the appeal in a second decision; (2) whether the Upper Tribunal was right to find that the FTT made an error of law in its approach to the facts of this case; (3) whether the Upper Tribunal wrongly failed to permit Mr Terzaghi or his legal representatives to deal with the GP's letter in the hearing leading up to the first

determination; and (4) whether there were any errors of law in the making of the Upper Tribunal's second decision.

There is jurisdiction to hear the grounds of appeal against the first determination of the Upper Tribunal (issue 1)

36. The jurisdiction of the Upper Tribunal is statutory and relevant provisions are contained in sections 12 and 13 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). Section 12 deals with the jurisdiction of the Upper Tribunal on appeal from the FTT and provides:

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal–
>
> (a) may (but need not) set aside the decision of the First-Tier Tribunal, and
>
> (b) if it does, must either–
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision."

37. Section 13 of the 2007 Act provides for the right to appeal to the Court. This provides:

> "(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.
>
> (2) Any party to a case has a right of appeal, subject to subsection (14).
>
> (3) That right may be exercised only with permission (or, in Northern Ireland, leave)."

38. Excluded decisions are set out in section 13(8) of the 2007 Act and include under (f) "any decision of the Upper Tribunal that is of a description specified in an order made by the Lord Chancellor". Article 3(m) of the Appeals (Excluded Decisions) Order 2009 provides

> "(m) any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under section 40A of the British Nationality Act 1981, [section 82 of the Nationality, Immigration and Asylum Act 2002], or regulation 26 of the Immigration (European Economic Area) Regulations 2006."

39. It might be noted that the relevant regulation of the 2006 Regulations in this case is regulation 21 but that regulation 26 deals with rights of appeal in relation to the 2006 Regulations. This means that if the first decision of the Upper Tribunal is a "procedural, ancillary or preliminary decision" it cannot be appealed to the Court of Appeal, leaving only appeals from decisions dealing with the final disposal of the appeal.

40. The issue of what is meant and excluded by "procedural, ancillary or preliminary decision" has been considered by the Upper Tribunal in *VOM (Nigeria)* [2016] UKUT 410 (IAC); [2017] Imm AR 117 and by the Court of Appeal in *AA(Iraq) v Secretary of State for the Home Department* [2017] EWCA Civ 944; [2018] 1 WLR 1083. The following relevant propositions can be stated: first the jurisdiction to appeal to the Court of Appeal is statutory, see paragraph 15 of *AA*; secondly if the UT finds an error of law in the decision of the FTT but then goes on to make its own decision (rather than remit the case to the FTT) the "error of law decision" will be an intermediate decision only, see paragraph 25 of *VOM*; and thirdly once the final decision has been made by the Upper Tribunal, the intermediate decision of the Upper Tribunal will merge with the final decision of the Upper Tribunal generating a composite decision for the purposes of an appeal, see paragraph 25 of *VOM* and paragraph 30 of *AA*.

41. In this case the first decision of the Upper Tribunal was the basis on which the second decision of the Upper Tribunal was carried out. Indeed the Upper Tribunal specifically stated that in paragraph 1 of its second determination dated 11 July 2018 that "this judgment is to be read together with our earlier judgment signed on 16th April 2018". This shows that the Upper Tribunal adopted the correct legal approach and meant that Mr Terzaghi could, if he obtained permission, pursue grounds of appeal arising from the first or second decisions. This would include errors of law in purporting to identify an error of law (as alleged in the first ground of appeal), or procedural failures such as a failure to allow a party to address relevant points (as alleged in the second ground of appeal).

42. I consider any other conclusion would be contrary to the intended scheme of appeals because it would require parties who considered that they had a ground of appeal to challenge a first decision of the Upper Tribunal by attempting to appeal that decision to the Court of Appeal before any further decision had been made in case the ground of appeal was later characterised as a procedural failure. This would increase costs to parties and add to the work of the Court of Appeal for no good reason. There is nothing in the statutory wording to support such an approach and, like the Upper Tribunal in *VOM*, I do not consider that such a result can have been the intention of Parliament in enacting sections 12 and 13 of the 2007 Act. I therefore find that this Court has jurisdiction to hear all of the grounds of appeal.

The Upper Tribunal was wrong to find an error of law in the determination of the FTT and to set aside the judgment of the FTT (issue 2)

43. I turn first to the relevant principles to be applied to determining when a factual finding can give rise to an error of law. It was common ground that a finding of fact made by a tribunal for which there is no evidence is an error of law. It was also common ground that a material mistake about facts might, depending on the circumstances, amount to a justiciable error of law. However as was made clear by

the Supreme Court in *R(Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19; [2013] 2 AC 48 at paragraph 25 "it is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined" and that "the appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it". The approach set out in paragraph 25 of *R(Jones)* was followed recently by the Court of Appeal in *(UT) Sri Lanka v Secretary of State for the Home Department* [2019] EWCA Civ 1095 at paragraph 26 which noted that more than reasoning which "is not as well-structured or expressed as it might be" is required to be shown.

44. There is an exception to this principle, the boundaries of which exception was not before us, where the Upper Tribunal is developing "structural guidance on the use of expressions which are central" to the statutory scheme of the Tribunals, see the judgment of Lord Carnwath in *R(Jones)* at paragraphs 41-43 and the earlier judgment of Lord Hoffmann in *Lawson v Serco* [2006] ICR 250 at paragraph 34. It was not submitted to us that this exception was engaged in this appeal.

45. A further principle which it is relevant to note is that, even if an appellate court is entitled to hear an appeal because of an error of fact (because the appeal court has jurisdiction to hear appeals on facts) appellate courts should be very cautious in overturning findings of fact made by a first instance judge. This is because first instance judges have seen witnesses and take into account the whole "sea" of the evidence, rather than indulged in impermissible "island hopping" to parts only of the evidence, and because duplication of effort on appeal is undesirable and increases costs and delay. Judges hearing appeals on facts should only interfere if a finding of fact was made which had no basis in the evidence, or where there was a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence so that the decision could not reasonably be explained or justified.

46. In my judgment there was not, in this case, an error of law disclosed in the judgment of the FTT judge. First the principles of law on integration to be applied by the FTT Judge were properly analysed and set out. It was common ground both before the Upper Tribunal and before us that the FTT Judge had not made any error of law in her approach to the relevant principles. Secondly although the Upper Tribunal did state in paragraph 2 of its first decision dated 23 April 2018 that the case concerned the proper approach to the impact of a prison sentence on the integrative links established by an EEA national, it was apparent that the issue that the Upper Tribunal took with the judgment of the FTT Judge was that the GP's letter "cast doubt on some of the findings made by the FTT Judge and that she had not explained those findings in the light of its contents", see paragraph 3 of the second decision dated 11 July 2018 and not with any difference in approach to the meaning of "integrative links". There was nothing in the judgment of the Upper Tribunal, in either the first or second decisions, which took further forward the issue of what amounted to integration. In this case there was in reality a disagreement by the Upper Tribunal with findings of fact made by the FTT Judge which the Upper Tribunal thought were generous to Mr Terzaghi in the light of the contents of the GP's letter. Such a disagreement does not amount to an error of law entitling the Upper Tribunal to set aside the judgment of the FTT judge. Thirdly although the Upper Tribunal properly pointed out that in paragraph 12 of the judgment the FTT judge had said that "during his time in this country he has

been in education, work or in receipt of Job Seekers Allowance" the FTT Judge was not saying that had accounted for the whole of his time in this country, because the FTT Judge expressly referred to and considered the offences and the periods of imprisonment. The Upper Tribunal was wrong to suggest in paragraph 30 of its first decision that the statement made by the FTT Judge should have been read as suggesting that Mr Terzaghi had not, for example, been imprisoned when in this country.

47. It should be noted that even if the Upper Tribunal had had jurisdiction to hear an appeal on the facts, I do not consider that the Upper Tribunal should have set aside the judgment of the FTT Judge. This is because the FTT Judge had heard evidence from Mr Terzaghi, his father and brother. The FTT Judge, in a detailed judgment, had expressly referred to relevant facts including Mr Terzaghi's schooling in the United Kingdom, his qualifications, as well as his offending and drug use and recent changes in his life with clean drug tests and contact with his son. The FTT Judge had, as the Upper Tribunal rightly recognised, referred to the GP's letter, although the FTT Judge had not set out the terms of the letter. In those circumstances what was in issue between the FTT Judge and the Upper Tribunal was the weight to be given to a particular part of the evidence. This is not a principled basis for interfering with a finding of fact. For all these reasons I would allow the appeal from the judgment of the Upper Tribunal and restore the judgment of the FTT Judge.

Opportunity to address the GP's letter (issue 3)

48. In these circumstances it is not necessary to address the second ground of appeal, and it is only fair to note that we do not have a record of what occurred before the Upper Tribunal. It was common ground that if any document is likely to form the basis of a judgment against a party then that party should have a fair opportunity of dealing with it, either because the document has been expressly referred to by one party or because the point has been raised in the course of submissions. It would not have been an answer to the point to say that the party later accepted in evidence that the document was accurate because this is a different point from whether the contents of the document were so fundamental that it was an error of law for the FTT Judge not to have set out the contents and dealt with them.

49. The fact that there was not, according to the information supplied to us at the hearing, any reference to the GP's letter in the course of submissions at the first hearing before the Upper Tribunal supports the proposition that the GP's letter, and the weight to be given to it, were simply part of the overall evidence to be assessed by the FTT judge and the failure to deal with its contents did not amount to an error of law.

The second decision of the Upper Tribunal (issue 4)

50. It is also not necessary to address the second decision of the Upper Tribunal in which the Upper Tribunal, having heard evidence from Mr Terzaghi, rejected his evidence, considered the documents, and then determined that such integrative links as had been made had been broken so that Mr Terzaghi was entitled only to regulation 21(3) protection, and that his deportation was justified on serious grounds of public policy. Particular criticisms were made of the fact that the Upper Tribunal did not take sufficient account of the views of the probation officer who had been asked by the Upper Tribunal to provide an up to date report on Mr Terzaghi which was positive.

51. It might be noted in arguing this ground of appeal both parties appeared to adopt completely different positions from their submissions on the first issue before us, with submissions on behalf of Mr Terzaghi contending that it was an error of law to have given insufficient weight to a probation officer's assessment, and submissions on behalf of the Secretary of State rightly reminding us that it was necessary to identify an error of law, and not just a disagreement with a factual analysis in a judgment. All of this emphasises the need for parties to remember the guidance given in *R(Jones)* and repeated in *UT (Sri Lanka)*.

Conclusion

52. For the detailed reasons set out above: (1) I find that this Court does have jurisdiction to hear all of the grounds of appeal raised on behalf of Mr Terzaghi; (2) the Upper Tribunal was wrong to find that there was an error of law in the judgment of the FTT because what was disclosed was a disagreement over weight given to various factors, rather than a result which could not be justified on the evidence; (3) it is therefore not necessary to deal with the second ground of appeal but it was common ground that if any document is likely to form the basis for allowing an appeal then a party should have a fair opportunity of dealing with it; (4) the third ground of appeal does not arise in these circumstances.

53. I would therefore allow this appeal and restore the decision of the FTT Judge.

Lord Justice Moylan:

54. I agree.

Lord Justice Underhill (Vice-President of the Court of Appeal):

55. I agree that for the reasons given by Dingemans LJ this appeal should be allowed and the decision of the FTT should be restored.

56. As regards the issue of jurisdiction raised by the Secretary of State, I am bound to say that I was surprised to see this point taken. In cases where the Upper Tribunal has found an error of law in a decision of the FTT and proceeded to re-make the decision itself (whether there and then or at or after a further hearing) it is in my experience not uncommon for an appeal to this Court to be pursued on the basis that the Upper Tribunal should not have set aside the decision of the FTT, albeit typically accompanied by a contention in the alternative that the re-made decision of the Upper Tribunal was wrong in law, and I have known such challenges to succeed without this Court considering the challenge to the re-made decision. I have never before seen it argued that an appeal could not be pursued on this basis, and for the reasons given by Dingemans LJ it is quite clear that it can.

57. As regards the question of whether the FTT did in fact err in law, I agree that this is one of those cases in which the Upper Tribunal has fallen into the trap, which is tempting for appellate tribunals at every level, of treating a difference of view about the weight to be given to one or more elements in a multi-factual assessment as if it gave rise to an issue of law. There is, as Dingemans LJ notes, still room for debate about how the distinction between fact and law should be drawn. Some flexibility is appropriate, in particular where the appellate tribunal is itself a specialist body, with a

legitimate function of encouraging a degree of consistency in how first-instance tribunals decide issues that occur with some frequency: see, e.g., the observations at para. 44 of my judgment in *Jeffery v British Council* [2018] EWCA Civ 2253; [2019] ICR 929. But I agree that this was not a case where recognition of that point affects the outcome.