



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00980/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28th November, 2014
Signed 16th December, 2014

Decision & Reasons Promulgated
On 18th December 2014

Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BENTO HELDER DE OLIVEIRA

Respondent

Representation:

For the Appellant:

Ms L Kenny, Home Office Presenting Officer

For the Respondent:

Mr G Lee, Counsel, instructed by Lawrence & Co Solicitors

DETERMINATION AND REASONS

1. In this appeal the Secretary of State for the Home Department is the appellant and to avoid confusion I refer to her as being “the claimant”.
2. The respondent is a national of Portugal who was born on 14th September, 1993.
3. The claimant made a deportation order against the respondent on 30th April, 2014, under Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006, on the grounds that it had been decided that the appellant's removal was justified on the grounds of public policy, public security or public health.

4. The respondent moved to Portugal when he was 9 years of age from Angola where he was born. He stayed only for a matter of months before joining his mother who was an EEA national exercising treaty rights in the United Kingdom. She has been exercising treaty rights in the United Kingdom since 1999, and the respondent joined his mother in 2002, and has lived in the United Kingdom since that time. It is not clear when he arrived in the United Kingdom, but he was granted an EEA residence card in December 2002. He was a dependent family member of his mother, an EEA national.
5. The respondent appealed against the claimant's decision pursuant to Regulation 26 of the 2006 Regulations on the basis that his deportation would contravene Section 6 of the Human Rights Act, 1998, as being incompatible with his Convention rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and that the decision to deport him would amount to a disproportionate interference with his family life with his mother, his siblings and his stepfather and also with his private life in the United Kingdom.
6. The respondent's appeal was heard by First-tier Tribunal Judge Page at Newport on 22nd August, 2014. In his decision the judge found himself not satisfied that the claimant had demonstrated that there were serious grounds of public policy or public security to justify her decision to deport the respondent. He noted that the respondent has continually resided in the United Kingdom for more than ten years and that under Regulation 21(4) of the 2006 Regulations the claimant may not make a decision to deport the respondent except on "imperative grounds of public security". This is the higher test of public security that the respondent needs to demonstrate before the deportation of an EEA national can be justified. The judge allowed the appellant's appeal on the basis that the respondent had failed to give proper regard to the factors to be considered in Regulation 21(6) taking account that apart from the offence leading to the 20 month custodial sentence, the respondent had been lawfully in the United Kingdom and was of previous good character. He had been released on licence and provided evidence of his rehabilitation whilst in prison.
7. The claimant challenged the decision, relying on *MG C400/12* where the European Court had, it was said, found that under Article 28(3)(a) the ten year period of residence referred to this provision in principle be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned. Further, Article 28(3)(c) means that the period of imprisonment is in principle capable of interrupting the continuity of the period of residence and of affecting the decision with regard to the grant of enhanced protection provided even where the person concerned resided in the host state for the ten year period of imprisonment. The grounds suggested that the First-tier Tribunal materially erred in law in finding that the appellant should be afforded the highest level of protection of the "imperative ground" test.
8. Whilst it was accepted that the respondent has acquired permanent residence, there were, the grounds urged, serious grounds of public policy in deporting the respondent, given that he was convicted of a serious offence and sentenced to 20 months' imprisonment.
9. Mr Lee very helpfully set out for me the chronology. The respondent was born in Angola on 14th September, 1993 and at some time during 2002 went to Portugal. He remained there only briefly and arrived in the United Kingdom joining his mother, an EEA citizen exercising treaty rights. In December 2002 the respondent was granted an EEA residence card. The offence for which he was convicted took place on 9 April 2013. He was remanded in custody but the date of the remand is not known. It must have been on or after 9th April, 2013. He was remanded in custody

but the date of the remand is not known. It must have been on or after 9th April 2013. He was sentenced on 4th September, 2013 and so he had been in the United Kingdom for a minimum period of ten years prior to the commission of the offence.

10. Mr Lee referred me to the decision of the Tribunal in *MG (Prison – Article 28(3)(a) of the Citizens Directive) Portugal* [2014] UKUT 00393 (IAC) which considered the decision of the Court of Justice in *MG*. They identified the seemingly categorical statement in the first part of paragraph 33 of the European Court’s judgment that “periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) ...”; and its seemingly defeasible statement in the second half of the same sentence (reinforced in paragraphs 35 – 36) that “in principle such periods interrupt the continuity of the period of residence for the purpose of that provision”.

11. They said at paragraphs 48 and 49:-

“48. Despite our difficulties, we have concluded that a categorical reading of (1) cannot be what the Court meant or at least that what it must have had in mind was to draw a distinction between a positive taking into account and a negative interruption. If the Court in *P MG* had meant to convey by the terms “cannot be taken into account” that periods of imprisonment automatically disqualify a person from enhanced protection under Article 28(3)(a) protection, it would not have seen fit to proceed in paragraph 35 to accept as a possibility that the “non-continuous” nature of a period of residence did not automatically prevent a person qualifying for enhanced protection. Nor would it have chosen in paragraph 38 to describe periods of imprisonment as “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...” It would have had to say that, if they fall within the 10 year period counting back from the date of decision, periods of imprisonment always prevent a person qualifying for enhanced protection. In addition, what the Court goes on to say in paragraph 37 about the implications of the fact that a person has resided in the host Member State during the 10 years prior to imprisonment is clearly intended to underline that even though such a person has had a period of imprisonment during the requisite 10 year period (counting back from the date of decision ordering the expulsion: see para 27) it is still possible for them to qualify for enhanced protection and in this regard their prior period of residence “may be taken into consideration as part of the overall assessment referred to in paragraph 36 above”. We also bear in mind, of course, as did Pill LJ in *Secretary of State for the Home Department v FV (Italy)* [2012] EWCA Civ 1199 at [42] that in *Tsakouridis* the CJEU Grand Chamber did not consider the fact that Mr Tsakouridis had spent a substantial period of time in custody in Germany in the year prior to the decision to expel him (taken on 9 August 2008) as defeating his eligibility for enhanced protection under Article 28(3)(a). Nevertheless (and this is where we consider Mr Palmer right and Miss Hirst wrong), the fact that the Court specifies that “in principle” periods of imprisonment interrupt the continuity of residence for the purposes of meeting the 10 year requirement can only mean that so far as establishing integrative links is concerned such periods must have a negative impact.

49. Had it been necessary to our reaching a decision in the claimant’s case, we would have given serious consideration to making clear in our decision that if there was an application for permission to appeal our decision to the Court of Appeal, we would have been likely to grant it, in order for an important point of principle, namely the precise meaning of regulation 21(4) of the 2006 Regulations and Article 28(3)(a) in the context of a period of residence which includes imprisonment, to be addressed by a national court superior to our own and in a case in which the issue was material. The issue of deportation of foreign criminals is of compelling public importance. This would also enable the Court of Appeal to consider to what extent its judgment in *Secretary of State for the Home Department v FV (Italy)* (which considered that Article 28(3)(a) was essentially just an integration test) requires modification in the light of the CJEU rulings in *Onuekwere* and *MG*. It would also afford an opportunity for that Court to rule on whether, applying the doctrine of indirect effect, the requirement of regulation 21(4) that an EEA national must have resided in the UK “for a *continuous* period of at least ten years prior to the relevant decision” (emphasis added) is inconsistent with the CJEU ruling in *MG*, which clearly

contemplates that even someone with “non-continuous” residence over that 10 year period can qualify for enhanced protection under Article 28(3)(a).”

12. Mr Lee suggested that whether the respondent had been in the United Kingdom for ten years or for five years made no material difference because of the findings at paragraph 10. At paragraph 10 the judge said this:-

“The [claimant] was aware of the significant length of time the [respondent] had lived in the UK when making the decision to deport him, a decision made without having evidence of whether the [respondent] posed a high risk of reconviction/offending. There was no probation report or NOMS report prepared. I find myself in agreement with the point made by Mr Alexander that it is unclear therefore on what grounds or on what basis the [claimant] has reached her decision. The [claimant] was aware that [respondent's] whole family resided in the United Kingdom, which of course includes his mother, stepfather and younger siblings. The [claimant] was aware that the [respondent] has socially and culturally integrated himself into the UK and given the length of time he has been here since he was a child it must have been questionable whether the [respondent] could reintegrate back into Portugal, a country where he has hardly lived. He now speaks English fluently and speaks very little Portuguese.”

13. I have concluded that any error in the judge’s determination (and I am far from satisfied that there was any error) was not material given the level of the respondent's social and cultural integration into the United Kingdom as identified by the First-tier Tribunal Judge.
14. The making of the decision by First-tier Tribunal Judge Page did not involve the making of an error on a point of law. I uphold his decision.

Richard Chalkley

Upper Tribunal Judge Chalkley