



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00138/2015

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice

**Decision & Reasons
Promulgated**

On 5 October 2015

On 16 October 2015

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HASMUKH CARSANE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: Not represented

DECISION AND REASONS

1. The appellant in the proceedings before the Upper Tribunal is the Secretary of State for the Home Department. I shall refer herein to Mr Carsane as the claimant.
2. The claimant is a citizen of Portugal, born on 22 February 1970. He asserts that he arrived in the United Kingdom in 1999. The Secretary of State indicates that whilst she has no information relating to the date of the claimant's arrival here she does accept that: (i) the claimant was working here on 7 June 2001, (ii) he made an application for an EEA residence permit in October 2001, (iii) he was issued with an EEA

residence permit for a five year period on 24 January 2002, and (iv) he was provided with document confirming his entitlement to permanent residence in the United Kingdom - with his wife and two children as dependants - which was valid until 17 July 2012.

3. Unfortunately, the claimant's stay in the United Kingdom has been interspersed with criminal offending. I need not set out the history of such offending in this decision save for the following, briefest, of terms. The claimant was most recently convicted on 27 October 2014 at Harrow Crown Court of common assault, affray and threats to kill - for which he was sentenced to a total of 21 months' imprisonment (this sentence including within it the activation of a nine month suspended sentence of imprisonment imposed earlier in the same year). This offending behaviour led the Secretary of State to make a decision to deport the claimant on 1 April 2015, and it is this decision which underpins the current proceedings.
4. The claimant appealed the aforementioned decision to the First-tier Tribunal and that appeal was heard by First-tier Tribunal Judge I. Ross on 10 August 2015. Judge Ross allowed the appeal in a decision of 14 August 2015, to the extent that the Secretary of State's decision was found to be not in accordance with the law. The crux of the reasoning for such decision is encapsulated in the following extracts from the First-tier Tribunal's determination:

"6. ...On the sole basis of the evidence provided by the appellant in his wife's application, the Respondent did not accept that he had been continuously resident in the UK for 10 years. Accordingly the Respondent only considered whether there were serious reasons for the making of a deportation order and failed to consider at all whether there were imperative reasons for the making of an order required by Regulation 19.

8. Ms Ferguson accepted that the Secretary of State ought to have considered the appellant's position as an EEA national who has lived continuously in the UK for 10 years, particularly when it was accepted that he obtained permanent residency in 2007.

9. I am satisfied that the current decision is not in accordance with the law, being inconsistent with the appellant's known immigration history."

5. Permission to appeal to the Upper Tribunal against the aforementioned decision was granted by First-tier Tribunal Judge Grimmett in a decision of 8 September 2015. Thus the matter came before me.
6. For the reasons that follow it is plain that the First-tier Tribunal's decision contains an error of law requiring it to be set aside - and I do just that.
7. The inference to be drawn from reading paragraphs 6 to 9 of the FtT's determination is that it was of the understanding that, without more, if the claimant had demonstrated that he had been continuously resident in the UK for a period of 10 years or more then he would be entitled, as a matter of law, to the enhanced protection afforded by regulation 21(4) of the

Immigration (EEA) Regulations 2006 i.e. that a relevant decision may not be taken against him except on imperative grounds of public security.

8. This though is to completely misunderstand the application of regulation 21(4) and also its kindred article in Directive 2004/38, article 28.

9. Regulation 21 of the 2006 Regulations provides:

1. In this regulation a 'relevant decision' means an EEA decision taken on grounds of public policy, public security or public health.
2. A relevant decision may not be taken to serve economic ends
3. ...
4. A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who-
 - a. Has resided in the United Kingdom for a continuous period of 10 years....

10. Article 28 of the Directive states, under the heading "Protection against expulsion", as follows:

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
2. The host Member State may not take an expulsion decision against union citizens or their family members, irrespective of nationality, who have the rights of permanent residence on its territory, except on serious grounds of public policy or public security.
3. An expulsion decision may not be taken against union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
 - (a) have resided in the host Member State for the previous ten years; or
 - (b) are a minor..."

11. The provisions of articles 27 and 28 of the Directive reflect what is also set out in the Directive's preamble, paragraphs 23 and 24 stating as follows:

"23. Expulsion of Union Citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope of such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state

of health, family and economic situation and the links with their country of origin.

24. Accordingly, the greater the degree of integration of Union Citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union Citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors.”

12. The question as to the correct approach to article 28(3) of the Directive was raised in MG (Portugal) [2014] 1 WLR 2441, which arose as a consequence of a reference from this Tribunal. The questions the court had to determine in MG (Portugal) were as follows:

1. Does a period in prison following sentence for commission of a criminal offence by a Union Citizen break the residence period in the host Member State required for that person to benefit from the highest level of protection against expulsion and Article 28(3)(a) of the Directive or otherwise preclude a person relying on this level of protection?
2. Does reference to “previous ten years” in Article 28(3)(a) mean that the residence has to be continuous in order for a Union Citizen to be able to benefit from the highest level of protection against expulsion?
3. For the purposes of Article 28(3)(a) is the requisite period of 10 years during which a Union Citizen must have resided in the host Member State calculated –
 - (a) by counting back from the expulsion decision, or
 - (b) by counting forward from the commencement of the citizen’s residence in the host Member State?
4. If the answer to question 3(a) is that the 10-year period is calculated by counting backwards then does it make a difference if the person has accrued 10 years’ residence prior to such imprisonment?

13. The conclusion in relation to the second and third questions is to be found in paragraph 28 of the judgment, in which it is stated:

“In the light of all the foregoing, the answer to Questions 2 and 3 is that, on a proper construction of Article 28(3)(a) of Directive 2004/38, the 10-year period of residence referred to in that provision must, in principle, be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned.”

14. In later considering the answer to the first and fourth questions the Court decided, in paragraph 38, that article 28(3)(a) must be interpreted so as to mean:

“...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.”

15. It is to be observed that each reference made by the CJEU to the effect of periods of imprisonment on the continuity of residence is foreshadowed by the phrase “*in principle*”. This was clearly deliberate and intended to indicate that a period of imprisonment will not automatically mean that the highest level of protection is lost – an interpretation favoured by the Upper Tribunal in its decision in MG [(prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392] upon its return from the CJEU.
16. Consequently, when determining whether a person is entitled to the enhanced level of protection afforded by article 28(3)(a) of the Directive and regulation 21(4) of the 2006 Regulations it is plainly necessary to consider the whole of the history of the individual’s residence in this country. This includes, *inter alia*, whether such person has resided in this country for a period of at least ten years before any sentence of imprisonment, and whether he or she has integrated into the country so as to fulfil the requirements set out in the preamble to the Directive. The question of whether enhanced protection should be available despite the fact of imprisonment is a question which must be made on an overall assessment of an individual’s situation at the precise time when the question of expulsion arises and that is the question which the First-tier Tribunal ought to have addressed. It did not do so and as a consequence it plainly fell into error.
17. For these reasons I find that the First-tier Tribunal’s determination contains an error of law capable of affecting the outcome of the appeal. It was agreed, given that the claimant has not yet had a fair and proper determination of his appeal in the First-tier Tribunal, that the case should be remitted back to the First-tier Tribunal to be determined afresh.

Notice of Decision

The decision of the First-tier Tribunal is set aside. This appeal is remitted to the First-tier Tribunal to determine afresh.

Signed:



Upper Tribunal Judge O’Connor
Date: 14 October 2015