



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

Appeal Number: DA/00857/2014

THE IMMIGRATION ACTS

Heard at Columbus House, Newport

**Decision &
Promulgated**

Reasons

On 31 March 2015

On 14 April 2015

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M P

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer

For the Respondent: No representative

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge Halliwell) allowing MP's appeal against a decision taken on 1 May 2014 to deport him as an EU citizen under Reg 21 of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003 as amended) and ss.3(5)(a) of the Immigration Act 1971.
3. For convenience, I will hereafter refer to the parties as they appeared before the First-tier Tribunal.
4. The appellant is a citizen of Portugal who was born on 17 March 1980. He has been resident in the UK since 3 October 2000. Between 11 October 2002 and 17 September 2013, the appellant was convicted on ten occasions for seventeen offences, including one sexual offence, three offences against the person, four public order offences, two relating to the police and courts and one drugs offence. On 20 August 2013, at Mold Crown Court, the appellant was convicted of assault occasioning actual bodily harm contrary to s.47 of the Offences against the Person Act 1861 and sentenced to fifteen months' imprisonment.
5. On 21 October 2013, the appellant was notified that the Secretary of State was considering whether to deport him on the grounds of public policy. On 25 October 2013, the appellant responded and relied on a nine year relationship with a British national to whom he claimed to be married and with whom he had two children aged 7 and 6 who resided with their mother. He also relied on the fact that he had a 16 year old stepdaughter. The appellant claimed that he had cohabited with his partner prior to his most recent imprisonment.
6. On 1 May 2014, the Secretary of State made a decision to remove the appellant as an EU national on grounds of public policy under the 2006 EEA Regulations and to make a deportation order against him under s.3(5) (a) of the Immigration Act 1971.

The Appeal

7. The appellant appealed to the First-tier Tribunal. The issue before Judge Halliwell was whether the appellant could establish that he had been resident in the UK for a "continuous period of at least ten years prior to the relevant decision" such that he could only be removed on "imperative grounds of public security" (see reg 21(4) of the 2006 EEA Regulations). It was accepted by the Secretary of State's representative that the "high threshold" under reg 21(4) was not established on the evidence.
8. Judge Halliwell concluded that the appellant had established the required "continuous period of at least ten years" residence in the UK prior to 1 May 2014 (the date of the "relevant decision"). He accepted that the appellant had resided in the UK for over thirteen years since 3 October

2000 despite having spent fifteen and a half months in prison of the fourteen years he had been in the UK.

9. At para 9 of his determination the judge considered the case of MG (Prison - Article 28(3)(a) of the Citizens Directive) Portugal [2014] UKUT 00392 (IAC) ("MG(UT)") and the relevance of periods of imprisonment to establishing the continuous residence for "at least ten years" as follows:

"9. Following the decision of the Upper Tribunal in **MG (prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392 (IAC)** in which case I will refer hereafter to as *MG (UT)* it is clear that where an Appellant has resided in the United Kingdom for more than 10 years that a period of imprisonment during those 10 years does not necessarily prevent a person from qualifying for enhanced protection under Regulation 21(4) if that person is sufficiently integrated. A period of imprisonment must have a negative impact in so far as establishing integration is concerned."

10. At paras 22-23, Judge Halliwell applied the law as set out in para 9 based upon MG(UT), concluding that the periods of the appellant's imprisonment for a total of fifteen and a half months over fourteen years did not prevent him establishing "at least ten years" continuous residence prior to 1 May 2014 because he had "integrated into the UK". The judge said this:

"22. The Appellant is now 34 years of age and he has been here since the age of 20. During that time he has amassed 10 convictions for 17 separate offences, and the last offence for serious unprovoked violence which resulted in a 15 month term of imprisonment. However as an EEA citizen the Appellant's position is different from that of a non EU citizen, because of rights arising under the EU Treaties, directives and regulations. I have summarized the law at the beginning of this determination. I have no reason to doubt any of the factual evidence given to me by the Appellant and his partner as to the length of time the Appellant has spent in the United Kingdom. That evidence was not changed, and I am satisfied that at that the date of the Deportation Decision the Appellant had resided in this Country for over 13 years. It follows therefore, that in principle, he cannot now be deported except upon the imperative grounds of National Security. That threshold is extremely high and there is no evidence before me, or submission from the Respondent's Representative, that that high threshold has been breached.

23. Following the case of *MG(UT)* the only issue I have decide is whether the Appellant's offending so negatively impacts upon his time here that he cannot be considered to be sufficiently integrated into the UK. I am however satisfied the Appellant is integrated into the UK. Despite his offending he had a loving family and partner D all of whom support him and are emotionally and when working, financially, dependent upon him. His offending has resulted in his spending about a year and quarter in prison, which means he has resided in the Community as at the present time for over 12 years. That is sufficient to bring him within the enhanced protection from deportation of those EU citizens who have resided here for upwards of 10 years. The high threshold for deportation in such cases has not been reached and his appeal under the Regulations succeeds."

The Appeal to the Upper Tribunal

11. The Secretary of State sought permission to appeal to the Upper Tribunal. On 15 December 2014, the First-tier Tribunal (Judge J M Holmes) granted the appellant permission to appeal.
12. Thus, the appeal came before me.
13. On behalf of the Secretary of State, Mr Richards relied upon the grounds set out in the Secretary of State's application for permission. His primary submission was that the judge had wrongly applied EU law and, in particular, the judge had misunderstood MG(UT). Continuity of residence was broken by a period of imprisonment. He submitted that the Upper Tribunal had not concluded that the Court of Justice's case law - in particular Onuekwere v SSHD (Case C-387/12) and SSHD v MG (Case C-400/12) (16 January 2014) - had decided the opposite, namely that periods of imprisonment, in themselves, did not break an individual's residence for the purposes of establishing ten years' "continuous" residence. Mr Richards submitted that Onuekwere established that periods of imprisonment did break continuity of residence when an individual sought to establish five years' continuous residence and a resulting permanent right of residence. Mr Richards submitted that the CJEU cannot have intended that any different approach should apply in establishing the necessary "ten years" continuous residence when removal or deportation could only be effected on the basis of "imperative grounds of public security".
14. In the alternative, Mr Richards submitted that if MG had decided that continuity of residence was not necessarily broken by imprisonment and would not do so if the individual had sufficiently "integrated" into UK society, Judge Halliwell had wrongly applied that to the appellant in para 23 of his determination. Mr Richards submitted that all the judge had, in fact, found was that the appellant had been integrated into his "family" but not into "society".
15. The appellant, who was unrepresented, briefly addressed me and argued that he had become integrated into UK society.

Discussion

16. The relevant provision in the 2006 EEA Regulations is, as I have already identified, reg 21(4) which states, so far as relevant, as follows:

"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 at least ten years prior to the relevant decision; ..."

17. Regulation 24(4)(a) reproduces Art 28(3)(a) of the Citizens' Directive (Directive 2004/38/EC). It is convenient if I refer to domestic provision in this judgment as nothing turns on any difference in wording in the Directive.
18. There is no doubt that the appellant has, in one sense, resided in the UK for "at least ten years" continuously since he arrived in October 2000 prior to the respondent's decision taken on 1 May 2014. Only if the fifteen and a half months of imprisonment in the fourteen years between those two dates has the effect of breaking the 'continuity' of that residence would reg 21(4)(a) not be applicable.
19. As is well recognised, the "imperative grounds" criterion for removal or deportation is the "highest" of three criteria applicable in EU cases. The 'baseline' threshold for removal is set out in reg 21(3), namely on grounds of "public policy, public security or public health". The second, and "middle", threshold is applicable to those who have a "permanent right of residence" under reg 15 when removal can only take place on "serious grounds of public policy or public security".
20. In Onuekwere, the CJEC clearly decided [at 22] that:

"periods of imprisonment cannot be taken into consideration for the purposes of the acquisition of a right of permanent residence".
21. As the Upper Tribunal in MG(UT) observed at [47]:

"that ruling is expressed without any qualification".
22. It follows that the "middle" threshold will only be engaged when an individual can establish 5 years' continuous residence which is not broken by any periods of imprisonment. However, in SSHD v MG, the CJEC expressed itself in less clear terms in the context of the "highest" threshold giving rise to the "enhanced" protection of reg 21(4)(a).
23. I was not referred directly to the text of the CJEC's decision but Mr Richards relied on the UT's detailed consideration of that decision in MG(UT) – which was, of course, the very case which had been referred to the CJEC.
24. The Upper Tribunal in MG(UT) dealt with the CJEU's ruling at [41]-[49]. The UT noted that there was "an apparent contradiction" in the CJEU's ruling whether periods of imprisonment could interrupt the continuity of residence for the purposes of establishing ten years' continuous residence which, if established, only permitted removal or deportation on "imperative grounds of public security". At [48] the UT rejected the view that the CJEC had decided that periods of imprisonment necessarily interrupted continuity of residence. The Tribunal said this:

"48. ... If the court in *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 38(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 2009) 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."

25. Consequently, the UT decided that the relevance of periods of imprisonment to the continuity of residence for the purposes of the ten year requirement was that those periods of imprisonment were relevant, in a negative sense, in establishing "integrative links" with the UK which underlay the basis for restricting removal or deportation of an individual to "grounds of imperative public security".
26. Mr Richards submitted that this statement by the UT explaining the CJEC's case law was *obiter*. In that, he is undoubtedly correct. The UT decided the appeal in MG's favour on the basis that his deportation could not even be justified applying the 'baseline' level of protection of grounds of public policy (see [39]). Nevertheless, the UT examined in detail the CJEC's case law and reached a reasoned conclusion in [48] of its determination. As the UT itself recognised at [49]:

"The CJEU's ruling in MG ... clearly contemplates that even someone with 'non-continuous' residence over the 10 year period can qualify for enhanced protection under [reg 21(4)(a)]."

27. In my view, the UT's decision properly reflects the CJEU's case law. I agree with the interpretation of MG I have set out above at [48] of the determination. Consequently, I reject Mr Richard's primary submission that Judge Halliwell erred in law in concluding that the appellant's periods of imprisonment, amounting in total to fifteen and a half months,

necessarily broke the continuity of his residence prior to 1 May 2014 such that he could not establish he was entitled to the enhanced protection under reg 21(4)(a). However, a period of imprisonment must have a negative impact insofar as establishing integration and, therefore, the required continuity and application of reg 21(4)(a) is concerned.

28. Before moving on to consider the judge's reasoning in relation to integration, it follows from what I have set out above that I do not accept Mr Richards' submission, relying upon ground 1, that in order to establish the necessary ten years' continuous residence under reg 21(4)(a) it is necessary for an individual first to establish that he has a permanent right of residence based upon five years' continuous lawful residence in the UK under reg 15. The CJEU's approach to, what is in our domestic law, reg 21(4)(a) is inconsistent with that view. The enhanced protection from removal or deportation under reg 21(4)(a) is not necessarily built upon an existing right to the mid-level protection conferred by five years' continuous residence and a right of permanent residence under reg 15.
29. Regulation 21(4)(a) confers no right of residence of any sort. Unlike reg 15, it is only concerned with a level of protection afforded to certain individuals with ten years' continuous residence. They may or may not have a permanent right of residence as well and, therefore, enjoy rights of residence etc. that flow from it. Those individuals will also enjoy the mid-level of protection from removal or deportation set out in reg 21(3), namely only on the basis of "serious grounds" of public policy or public security. The enhanced level of protection from removal or deportation in reg 21(4)(a) does not need necessarily to flow from acquiring a further five years' continuous residence beyond that necessary to give rise to the permanent right of residence. It is a freestanding basis upon which an individual benefits from the enhanced level of protection from deportation and removal only. As I have said, the contrary view cannot be sustained in the light of the CJEU's decision in SSHD v MG.
30. I now turn to the issue of integration. Mr Richards submitted that the judge's reasoning in para 21, which I have set out above, is insufficient to establish that the appellant has integrated into UK society (despite his periods of imprisonment) such that he is entitled to the enhanced protection from deportation. I do not accept that submission. The evidence was, and the judge accepted it as he was entitled to, that the appellant had a nine year relationship with a British citizen with whom he had two children. Apart from periods of imprisonment, he lived with his partner and two children together with his stepchild. They were a 'family unit'. The issue of integration in society looks to the depth and strength of ties to the UK. Here, the appellant had the strongest of ties with a family all of whom are British citizens. The judge's finding was not, as Mr Richards characterised it, simply in effect that the appellant had integrated into his family. The finding was, in essence, that the appellant had integrated in the UK through his family ties in the UK. When he was not in prison, the judge found that there were emotional ties and, when he was working, they were financially dependent upon him. In my judgment

it was properly open to the judge on this evidence to conclude that the appellant had integrated in society such that, despite having spent short periods of time in prison totalling in all fifteen and a half months over fourteen years, he had nevertheless integrated in society and life in the UK such that those periods of imprisonment did not break the continuity of his residence for the purposes of reg 21(4)(a). In the light of all the evidence before the judge (which he accepted) the judge's finding was not irrational or otherwise unsustainable in law.

31. As a consequence, the enhanced protection under reg 21(4)(a) applied and it was not suggested before the judge that the appellant's offending was such that his deportation could be justified on "imperative grounds of public security". Given the high threshold of the enhanced protection, no other view would be tenable on the facts of this appeal.
32. Thus, the judge did not err in law in allowing the appellant's appeal under the Immigration (EEA) Regulations 2006.

Decision

33. Accordingly, the First-tier Tribunal's decision to allow the appellant's appeal under the 2006 EEA Regulations did not involve the making of an error of law. That decision stands.
34. The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT FEE AWARD

This is not an appeal for which a fee is payable. Therefore there can be no fee award.

Signed

A Grubb
Judge of the Upper Tribunal