



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/01737/2014

**THE IMMIGRATION ACTS**

Heard at Royal Courts of Justice  
On 8 June 2015

Decision & Reasons Promulgated  
On 25 June 2015

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MR VANSE KOUE-BI-TRA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr T Bobb, Aylish Alexander Solicitors

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of France born on 22 December 1989. He arrived in the United Kingdom in 1995 with his parents and subsequently accumulated a number of convictions; the most recent of which was on 25 January 2013 when he was convicted of supplying a controlled drug - Class A (heroin), possession with intent to supply a controlled class A drug (both heroin and cocaine) and having a bladed article which was sharply pointed in a public place. He was sentenced to 54 months' imprisonment on 30 January 2013.
2. As a consequence, on 21 May 2013 the appellant was notified of his liability to be deported and on 2 September 2014 the Secretary of State made a decision to deport him, having first taken into consideration the provisions of the Immigration (European Economic Area) Regulations 2006 (the 2006 EEA Regulations).

3. The appellant appealed this decision to the First-tier Tribunal. That appeal was heard by First-tier Tribunal Judge Perry on 6 January 2015 and dismissed on all grounds in a determination promulgated on 5 February. Permission to appeal to the Upper Tribunal was subsequently granted on 21 March 2015 by First-tier Tribunal Judge Cheales, and thus the matter comes before me.
4. The grounds seeking leave to appeal to the Upper Tribunal run to some 72 paragraphs and identify the following seven grounds:
  - (i) The First-tier Tribunal erred in applying an incorrect level of protection to the appellant; he ought to have had the benefit of the highest level of protection i.e. he can only be removed if the Secretary of State has demonstrated that there exists imperative grounds of public security for doing so;
  - (ii) The First-tier Tribunal erred in paragraph 46 of its determination in directing itself that *“the overarching framework for approaching the decision on deportation is not so much the personal circumstances of the appellant but the seriousness of the offence...”*;
  - (iii) The judge failed to assess and take into consideration the prospects of the appellant’s rehabilitation;
  - (iv) The First-tier Tribunal’s conclusion on the prospects of the appellant obtaining employment at the end of his sentence is unclear and/or perverse;
  - (v) The First-tier Tribunal erred in failing to provide adequate reasons for concluding the appellant to be at medium risk of re-offending;
  - (vi) The First-tier Tribunal erred in finding that the appellant had not acquired a right of permanent residence in the United Kingdom;
  - (vii) The First-tier Tribunal’s assessment of Article 8 ECHR is fundamentally flawed.
5. Turning first to ground (i), [as summarised above]. Regulation 21 of the 2006 EEA Regulations reads as follows:

**“Decisions taken on public policy, public security and public health grounds:**

21(1) In this regulation a ‘relevant decision’ means an EEA decision taken on the grounds of public policy, public security or public health.

- (2) A relevant decision may not be taken to serve economic ends.
- (3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.
- (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 at least ten years prior to the relevant decision; or

- (b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989...".

6. In paragraphs 41 and 42 of its determination the First-tier Tribunal conclude:

"41. The issue is whether the appellant has resided in the UK for a continuous period of at least ten years prior to 2 September 2014. I accept the finding in the determination prepared on 21 October 2007 that 'the appellant has been in the UK since 1995'. The Home Office wrote to the appellant on 3 July 2014 requesting information as to how he had been exercising treaty rights in the UK. However as the refusal letter states 'the appellant has not provided any evidence to confirm your length of residence' - paragraph 15. No further evidence has been provided by the appellant. There are no general practitioner details or places of residence in Milton Keynes or employment details that would clarify the position. The burden of proof is upon the appellant to provide such information and this he has failed to do. Accordingly I find that the appellant had not proved that he has resided in the UK and exercised treaty rights for a continuous period of ten years since 2 September 2004.

42. As the appellant correctly states at paragraph 18 of the skeleton argument 'the three levels of protection against the risk of expulsion are therefore those who present a genuine, present and sufficiently serious threat to public policy; those who present such a threat but have a permanent right of residence and who therefore can only be removed on serious grounds of public policy; and those who reside in the United Kingdom for a continuous period of ten years and can therefore only be removed on imperative grounds of public security. I find that the appellant can only be deported if he presents a genuine, present and sufficiently serious threat to public [sic] to public policy. He has no permanent right of residence and he has not resided in the UK for a continuous period of ten years prior to the deportation order dated 2 September 2014."

7. The issue as to the circumstances in which an individual can acquire the highest level of protection has recently attracted the attention of the Court of Justice of European Union in the cases of C-400/12, Secretary of State v MG and C-387/12, Onuekwere v SSHD. These decisions were considered in some detail by the Upper Tribunal (UTJ Storey and UTJ Allen) in the reported decision of MG (prison - Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392 (IAC) - the Tribunal concluding therein as follows:

"42. Prior receiving further evidence regarding the claimant's up-to-date circumstances, but after receipt of the judgment of the Court, we wrote to the parties asking them to comment on a possible tension in the text of the answers given by the Court and an apparent contradiction between:

- (1) its seemingly categorical statement in the first part of paragraph 33 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
- (2) 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 purposes of that provision.”

...

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 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 v FV (Italy) [2012] EWCA Civ 119 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.”

8. Mr Bramble accepts that the First-tier Tribunal erred in its approach to the consideration of whether the appellant was entitled to the highest level of protection i.e. that identified in Regulation 21(4) of the 2006 Regulations, in that it failed to consider whether the appellant is a person sufficiently integrated into the UK to obtain such protection, irrespective of the fact that he has served a lengthy prison sentence immediately prior to the issue of the deportation decision. In short, it is accepted that the First-tier Tribunal failed to apply the approach commended to it by the Upper Tribunal in its decision in MG – a decision which the First-tier Tribunal failed to have regard to at all in its determination.
9. Despite making the aforementioned concession Mr Bramble nevertheless submitted that the appellant’s appeal ought to be dismissed because the error of law identified

above is not one capable of affecting the outcome of the appeal - there being only one answer to the question of whether the appellant was integrated into the United Kingdom and, consequently, entitled to the highest level of protection, that answer being, according to Mr Bramble, that the appellant is not entitled to such protection because he is not sufficiently integrated here.

10. Mr Bobb also submitted that there to be only one answer to question of whether the appellant is integrated here such that he is entitled to the highest level of protection - that being that he is. In so submitting Mr Bobb relied on the date of the appellant's arrival in the United Kingdom, his age on arrival, the extent of his family relationships here, the fact that he attended school here and his lack of connection to his home country.
11. The consideration of whether the appellant is integrated into the United Kingdom and is entitled to the highest level of protection is one which is deeply rooted into the facts of the case and in my view it cannot be said on the basis of the information before me that there is only one answer to this question. Given this finding, and the concession made by Mr Bramble which was undoubtedly properly made, I conclude that the First-tier Tribunal's determination contains an error on a point of law capable of affecting the outcome of the appeal and I set it aside.
12. Having announced this conclusion at the hearing both parties submitted that the only proper course would be for the appeal to be remitted back to the First-tier Tribunal to be determined *de novo*. I agree that this is so.
13. For the sake of completeness I observe, in relation to other six grounds of appeal relied upon by the appellant, that I heard Mr Bobb in relation to only one of them, i.e. whether the First-tier Tribunal erred in its consideration of the appellant's entitlement to permanent residence. For my part I can find no error in the First-tier Tribunal's consideration of this issue given the evidence before it. Nevertheless, I do not direct that the scope of the First-tier Tribunal is in any way restricted. This issue will be a matter for the First-tier Tribunal to determine afresh on the evidence placed before it.

### **Notice of Decision**

The appeal before the Upper Tribunal is allowed. The determination of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal to be determined afresh.

No anonymity direction is made.

Signed:



Upper Tribunal Judge O'Connor

Date: 12 June 2015