



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/05686/2015

THE IMMIGRATION ACTS

Heard at Field House
On 14th December 2015

Decision & Reasons Promulgated
On 19th January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

FABIO JORGE BRAGA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Halim, Counsel; Birnberg Peirce & Partners

For the Respondent: Ms S Sreeraman, Senior Presenting Officer

DECISION AND REASONS

1. For ease of comprehension, the parties are referred to by their appellate status and positions before the First-tier Tribunal.
2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Nicholls allowing the Appellant's appeal against the Secretary of State's decision to remove him under the provisions of Regulation 19(3) of the Immigration (European Economic Area) Regulations 2006 ("2006 Regulations").

3. The First-tier Tribunal promulgated its decision allowing the Appellant's appeal against the Respondent's decision on 2 June 2015.
4. The Respondent appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge Heynes. The grounds upon which permission was granted may be summarised as follows:
 - (i) It is arguable that the judge erred in failing to make a finding on whether the Appellant had acquired a permanent right of residence.
5. I was provided with a Rule 24 response from the Appellant (drafted by alternate counsel). I was also provided with a copy of *MG (prison-Article 28(3) (a) of Citizens Directive)* [2014] UKUT 392 (IAC) by Ms Sreeraman. These documents were available to the all parties and sufficient time was given prior to the hearing in order that those documents could be comprehensively addressed.
6. It is of note that the Respondent made several concessions before the First-tier Tribunal which are reflected at §2 of the determination. It is not suggested by Ms Sreeraman that those concessions were incorrectly made her junior colleague nor incorrectly recorded by the First-tier Tribunal.

No Error of Law

7. I do not find that there was an error of law in the decision such that it should be set aside. My reasons for so finding follow shortly.
8. Turning to the Respondent's main ground, the judge is criticised because of an alleged failure to make a finding as to whether the Appellant had acquired a permanent right of residence.
9. Ms Sreeraman first submitted that the judge's findings to support contention that permanent right of residence is acquired are not supported by the evidence. I reject that submission. It is clear from paragraph 1 of the Respondent's grounds that the submissions therein represent nothing more than a mere disagreement with the findings and outcome of the appeal.
10. Ms Sreeraman next submitted that at §15 of the determination, the judge accepts that the documentary evidence in the Appellant's bundle showed that he had resided for 13 years but the judge had made no finding on whether acquired permanent residence. She contended that there is a requirement under Regulation 21(3) of the 2006 Regulations that the judge acknowledge that permanent residence was met before being in a position to turn to whether imperative grounds are required. She submitted that the issue outlined by the judge at §4 had not been resolved.
11. In relation to the resolution of the issue of permanent residence, I find that it is apparent from the judge's findings at §15 that the Appellant had acquired a permanent right of residence. This is so given that the judge finds that the documentary evidence since 2000 shows:

“... a consistent and coherent record of life in the UK which is sufficient to show that the Appellant had, on a balance of probabilities, lived in the UK for at least 13 years at the date of imprisonment. I find, therefore, that he has shown that the decision to remove him should have been considered within the provisions of regulation 21(4)”.

12. It is clear from the above that the judge has found that the Appellant has maintained his life in the UK for at least 13 years given his “whole range” of official documents including “education, medical records, income tax records, JobCentre records of training and search for employment as well as payslips and job applications”. Therefore, the judge has made findings that the Appellant was exercising treaty rights in one form or another for at least 13 years pursuant to Regulation 6 of the 2006 Regulations, including time spent as a jobseeker. That implicitly resulted in the acquisition of a permanent right of residence pursuant to Regulation 15(1)(a) of the 2006 Regulations. Therefore, I find that the judge did not omit to resolve the issue of whether the Appellant had acquired the permanent right of residence or not.
13. Notwithstanding the above findings, for the purpose of deciding the application of Regulation 21(4) of the 2006 Regulations so far as necessary in considering the Respondent’s grounds, it will be useful to set out the statute in relevant part:
 - ‘21. Decisions taken on public policy, public security and public health grounds
 - (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(a).
 - (5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles-
 - (a) the decision must comply with the principle of proportionality;
 - (b) the decision must be based exclusively on the personal conduct of the person concerned;

- (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
- (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
- (e) a person's previous criminal convictions do not in themselves justify the decision.'

14. From the above, it is clear that the Appellant benefits from Regulation 21(4)(a) given that the judge has found that the Appellant has resided in the UK for a continuous period of 13 years, exceeding the requisite 10 years.
15. Notwithstanding the above findings, I was asked by *both* parties to make a finding upon whether Regulation 21(4)(a) requires the Appellant to have acquired a permanent right of residence before it can be engaged. Given my findings above at paragraph 12, this portion of my decision is clearly to be read as *obiter dicta*. Nonetheless, for my part, the wording of Regulation 21(4)(a) is distinct in omitting any mention of the acquisition of permanent status before one can benefit from that part. It is obvious that the higher form of protection is gauged in the number of years of continuous residence spent, rather than by acquiring status as a permanent resident as a condition precedent to that higher protection. This omission to mention the acquisition of permanent resident status is also reflected in recital 24 and Article 28(3)(a) of Directive 2004/38/EC which state as follows:

'(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, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.

Article 28

Protection against expulsion

...

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 10 years'

16. I am further guided in this view by [14] of *LG (Italy) v Secretary of State for the Home Department* [2008] EWCA Civ 190 wherein Carnwath, LJ (as he then was) stated as follows:

"The hierarchy and the "imperative grounds" test

14. As appears from the emphasised words above in regulation 21(1)-(4), the 2006 Regulations have introduced a new hierarchy of levels of protection, based on criteria of increasing stringency:

- 1) A general criterion that removal may be justified "on the grounds of public policy, public security or public health";
- 2) A more specific criterion, applicable to those with permanent rights of residence, that they may not be removed "except on serious grounds of public policy or public security";
- 3) The most stringent criterion, applicable to a person "who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision", who may not be removed except on "imperative grounds of public security".

The regulations provide no further guidance on the meaning of these expressions."

17. As stated above, the regulations provide no further guidance on the meaning of these expressions and consequently, I am unable to reach more than a discursive view on this matter, without more. It appears that a similar topic arose at [36-39] of *Secretary of State for the Home Department v FV (Italy)* [2012] EWCA Civ 1199, however in that matter the Respondent accepted that permanent residence had already been acquired.
18. There was passing discussion upon this subject at [46-50] of *LG and CC (EEA Regs: residence; imprisonment; removal) Italy* [2009] UKAIT 00024, wherein Carnwath, LJ (as he then was) stated as follows, following remittal of the *LG (Italy)* appeal to the Tribunal:

"Question (a) - What constitutes residence for the purposes of regulation 15(1)(a) - right of permanent residence after five years' legal residence in the United Kingdom?"

"Legal" residence

46. As already noted, we have used the expression "legal residence" in question (a) because Article 16.1 accords the right of permanent residence to "Union citizens who have resided legally for a continuous period of five years in the host Member State". Regulation 15(1)(a) does not use that or any equivalent term, but requires the five years' residence in the United Kingdom to be "in accordance with these Regulations". It is necessary to consider whether there is any material difference between the two expressions.
47. The Secretary of State's position is that there is no difference. In order to acquire a right of permanent residence, a person must demonstrate that, during any period upon which it is sought to rely for the purpose of establishing the requisite five years' residence, he or she was in the United Kingdom, exercising a Treaty right; that is to say as a "qualified person" within the meaning of regulation 6 (e.g. a job seeker, worker or student) or as a relevant family member of such a person

(within the scope of the Regulations). The expression used by the Regulations is consistent with recital 17 of the Preamble to the Directive which speaks in the same context of five years residence "in compliance with the conditions laid down in this Directive".

48. Ms Hulse and Mr Karnik, on the other hand, contended that this interpretation is too narrow. Although neither submitted expressly that mere physical presence in this country was sufficient, both contended that rights of residence in host Member States, deriving from the Treaty, were wider in nature and that, even if a person could not at any particular point in time be described as a "qualified person" etc., he or she might nevertheless be lawfully in the United Kingdom for the purposes of the Directive and the Regulations.

49. This issue in our view must now be regarded as settled, at least up to the Court of Appeal. We have already noted Stanley Burnton LJ's statement in *HR (Portugal)* that:

"... it is clear from recital 23 that 'legally' in Article 16 means 'in the exercise of the rights and freedoms conferred on them by the Treaty', as was held by the Tribunal in *GN (EEA Regulations: five years' residence) Hungary* [2007] UKAIT 00073" (paragraph 22).

50. The quotation from recital 23 is taken from the passage dealing generally with integration, and is arguably wider than the formula in recital 16, which relates to the right of permanent residence. That refers specifically to compliance with the conditions of *the Directive* rather than to rights under the Treaty. However, since the point had been conceded, and nothing turned on the different wording, there was no need for the Court to discuss it in any detail."

19. The above passage from the LG (Italy) line of thought reflects the purposive European approach to interpretation of the Directive in relation to recitals 16 and 23 against Article 16. It appears that the judgment of *HR (Portugal) v Secretary of State for the Home Office* [2009] EWCA Civ 371 has further guidance to offer in relation to recital 24 and Article 28 at [21] of Stanley Burnton, LJ's judgment:

"21. Recital 23 is implemented in Articles 16 and 28.2; recital 24 is implemented in Article 28.3. What is significant in recital 24 is, first, the linkage with recital 23, signalled by "Accordingly" and the comparative adjective "greater" applied to "integration". "Integration" itself is explained in recital 23. It relates to "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". These recitals show that what was intended was a progression in the restrictions on expulsion, depending on the degree of integration of a person in the country in which he is present as demonstrated by the duration of his residence in the exercise of Treaty rights. In my view it follows that the Member States did not intend the restriction on expulsion envisaged in recital 24 to be applicable to someone who does not qualify for the protection envisaged by recital 23. It is clear from recital 24 that the reason for the restriction on the right of the state to expel someone who has been in this country for many years is his integration into this country. Recital 24 does not envisage that the restriction on expulsion to which it refers should be applicable to a person who has not availed himself of the rights and freedoms conferred on him by the Treaty, but has been compulsorily detained in this country."

20. The above passage indicates therefore that the wording of Article 28 is to be viewed with recital 24 in mind which makes clear that the Court of Appeal has viewed the higher form of protection from expulsion as applicable "...depending on the degree of integration of a person in the country in which he is present as demonstrated by the duration of his residence in the exercise of Treaty rights". Therefore, it would appear that notwithstanding that Article 28(3) is framed in terms of the duration of residence and does not explicitly mention acquisition of status as a condition precedent to engaging the higher form of protection, Article 28(3) is to be read in light of recital 24 that the residence of at least 10 years must be in pursuance of the exercise of Treaty rights. It appears therefore that as long as that condition is met, it does not matter whether a confirmation of exercise of Treaty rights and a right to reside has been previously obtained from the Secretary of State. However, given that the 10 years residence must be spent in exercise of Treaty rights, it would follow implicitly that if one has exercised those rights for at least 10 years, one would also automatically have acquired the permanent right of residence having already completed the shorter 5 year period to qualify for that status.
21. Finally, in terms of the complaint concerning the Tribunal's failure to take account of the Appellant's integration into society, to my mind that complaint is unfounded as the discussion within §15 of the determination demonstrates the judge has discharged that very task before stating in terms that the Appellant has resided in the UK for at least 13 years since 2000, before his imprisonment, making a finding on integration implicit from the years of residence spent in the UK by the Appellant exercising treaty rights.
22. Consequently, given my findings above, the grounds do not reveal an error of law such that the decision should be set aside.

Decision

23. The appeal to the Upper Tribunal is dismissed.
24. The decision of the First-tier Tribunal is affirmed.

Signed

Date

Deputy Upper Tribunal Judge Saini