



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00427/2016

THE IMMIGRATION ACTS

Heard at Stoke
On 6th September 2017

Decision & Reasons Promulgated
On 8th September 2017

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AYUB AHMED
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C. Bates, Senior Presenting Officer

For the Respondent: Miss C. Warren, Counsel instructed on behalf of the Respondent

DECISION AND REASONS

1. The Appellant is a citizen of the Netherlands.
2. The First-tier Tribunal did not make an anonymity order and there has been no application by either party for such an order or any grounds advanced as to why such an order is necessary.

3. The Secretary of State, with permission, appeals against the decision of the First-tier Tribunal (Judge Pooler) who in a determination promulgated on the 16th February 2017 allowed his appeal against the decision of the Secretary of State to make a deportation order against him under the provisions of Regulation 19(3) (b) and Regulation 21 of the (EEA) Regulations 2006 (hereinafter referred to as “the 2006 Regulations”). It is common ground between the parties that the Immigration (EEA) Regulations 2016 were applicable to this appeal (see paragraph 2 of the determination).
4. Whilst this is the Secretary of State’s appeal, I intend to refer to the parties as they were before the First-tier Tribunal for ease of reference.
5. The Appellant claims that he first arrived in the United Kingdom with his parents and siblings in July 2005 when he was eight years of age. He had continued to live in the United Kingdom and had not sought to leave.
6. The Appellant’s offending history can be summarised as follows. He was cautioned theft of the vehicle in March 2014. His first conviction was on 9 October 2015 for theft and he was sentenced to detention for 12 weeks, which was suspended for 18 months with an unpaid work activity and curfew requirements. On 26 November 2015 he was convicted of using threatening or abusive words or behaviour and was fined £80.
7. On 4 March 2016 the Appellant was convicted by the Crown Court of aggravated vehicle taking and using a vehicle whilst insured and without a licence and was sentenced on 11 March to 46 weeks in a Young Offenders Institution and disqualified from driving for two years. As he was in breach of a suspended sentence he was also sentenced to a period of six weeks to be served consecutively making a total of 52 weeks. The judge set out the sentence remarks of the Recorder at paragraph 20 in full. In July 2016, for an offence of robbery and theft from a person, he was sentenced to 6 weeks imprisonment to run consecutively with the sentence given for the offence in March 2016. There were no details given by the Secretary of State about that offence in the papers before the First-tier Tribunal and the decision letter refers to the sentence to run “concurrently”.
8. As a consequence of that sentence of imprisonment, the Appellant was notified of his liability to be deported on the 29th March 2016 and on the 5th July 2016 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 under Regulation 19(3) (b) and Regulation 21 of the 2006 Regulations.
9. The relevant decision taken by the Respondent made reference to his convictions and that the Secretary of State had considered the offences for which he had been convicted and his conduct, in accordance with Regulation 21 of the 2006 Regulations.
10. It is recorded that the Appellant did not reply within 20 days and therefore the deportation order was served on 5 July 2016. However he lodged an out of time

appeal against the decision which resulted in a supplementary decision letter of 18 November 2016.

11. As to his residence, the Respondent did not accept that the Appellant had been resident in the UK for a continuous period of five years or more in accordance with the 2006 Regulations and that whilst he stated that he had resided in the United Kingdom for over 10 years with his family, he had provided no evidence of when he had arrived in the United Kingdom and the supporting evidence was limited.
12. The decision set out that the Secretary of State was satisfied that he would pose a genuine, present and sufficiently threat to the interests of public policy if he were to be allowed to remain in the United Kingdom and that his deportation was justified under Regulation 21. The decision also made reference to Article 8 of the ECHR.
13. The full reasons for that decision are set out in a letter of the Respondent dated the 18th November 2016.
14. As a consequence of the decision to deport the Appellant, he was removed from the United Kingdom on 20 September 2016. As he had no family in the Netherlands he had been taken to Germany as he had an aunt who was present in that jurisdiction (see paragraph 16 of the determination).
15. The Appellant appealed against that decision to the First-tier Tribunal. The appeal came before the First-tier Tribunal (Judge Pooler) on the 8th February 2017. In a determination promulgated on 16th February 2017 his appeal was allowed. The judge had the advantage of hearing members of the appellant's family, his mother and sister, although did not hear any oral evidence from the appellant, who was overseas. He also had the documentary evidence submitted on behalf of the appellant. The judge was satisfied on the evidence before him that the appellant had entered the United Kingdom in July 2005 along with his parents and siblings when he was 8 years of age (see paragraphs 9 - 11). At paragraphs 12 onwards, he set out his findings of fact relating to the appellant's circumstances both in the United Kingdom and in the Netherlands which included at paragraphs 19 to 22 his criminal offending. Having set out the relevant law under the Regulations and by reference to the case law (see paragraph 26), the judge considered that notwithstanding his length of residence, the appellant's sentence of detention broke his continuity of residence, subject to Regulation 3(4) which he had previously set out at paragraph 26. The judge's conclusions at paragraphs 28 to 30 were based on the unchallenged evidence and the findings of fact that he had made in the earlier part of the determination and having made an overall assessment of the appellant's situation found that his continuity of residence was not broken and that "accordingly the appellant was entitled to the highest level of protection against deportation" (see paragraph 30).
16. The Secretary of State sought permission to appeal that decision and on the 18th May 2017 First-tier Tribunal Judge Grant-Hutchinson granted permission.

17. Thus the appeal came before the Upper Tribunal. Mr Bates, appeared on behalf of the Secretary of State. Miss Warren, who appeared before the First-tier Tribunal appeared on behalf of the Appellant.
18. Mr Bates sought to rely only on the second ground (in the written grounds) that the judge had failed to give adequate reasons as to why Appellant had integrated into society and that residence alone was not evidence of integration. The written grounds make reference to the " Appellant's persistent offending demonstrates that he failed to respect the values of society this had not demonstrated that he had integrated into society".
19. He expanded on that in his oral submissions by stating that the judge had erred in law by failing to adequately factor in all the issues that needed to be assessed. In this context the judge failed to give adequate reasons as to why the criminal offending and the nature of those offences had not broken the integrating links. In particular, he had not had regard to the nature of the offending and the Appellant's "antisocial behaviour". The judge had wrongly focused on the prison sentence and had ignored the key facts that had led him to offending. He conceded that the case on behalf of the Secretary of State was set out at paragraph 31, namely that the presenting officer did not advance any submissions to the effect that, if the Appellant had acquired the highest level of protection, there were imperative grounds of public security such as to justify deportation. However he submitted that the judge did not give adequate reasons as to the issue of integration.
20. Mr Bates did not seek to rely on the Supreme Court decision in Secretary of State for the Home Department v Franco Vomero [2016] UKSC 49 or make any reference to that decision. The primary question before the Supreme Court related to that set out at paragraph 25. As the decision demonstrates the majority of the Supreme Court favoured the view that possession of a right of permanent residence was not needed in order to enjoy enhanced protection under Article 28(3)(a) of the Directive. However a minority regarded the position as being unclear and thus the court referred the question to the CJEU. It was not argued before the First-tier Tribunal that there the appellant was required to achieve permanent residence in order to avail himself of the imperative level of protection. It is right to observe that the Supreme Court did refer a further question to the Court of Justice at (3) as to what the true relationship is between the 10 year residence test and the overall assessment of an integrative link.
21. Miss Warren on behalf of the Appellant relied on the Rule 24 response which set out that the judge was entitled to reach the conclusion that he did on the particular facts of this case and the findings that he had made within the determination. She was critical of the written grounds which she submitted did not demonstrate any arguable error of law and failed to take account of the findings of fact made by the judge.
22. She further submitted that the judge was required to make an overall assessment by taking into account all the relevant factors and that the judge, in this particular case,

clearly had regard to the offending history and did not dispute the seriousness of the offences. However he was entitled to consider the level of integration in the United Kingdom which he did, but also whether there were any links with the former Member State. In this case the Appellant came as child and had no connection to the Netherlands. The judge set out the issue of integration at paragraph 28 – 30 and did so in the light of the EU principles of integration (see paragraphs 35 and 36 of the ECJ decision in MG). Thus she submitted the decision reached by the judge was a sustainable one and did not demonstrate any arguable error of law

Discussion:

23. I am satisfied that the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I shall set out my reasons for reaching that decision. The issue arises as to the Appellant's length of residence in the UK and what level of protection should be applied to his case by the Secretary of State.
24. In Secretary of State for the Home Department v MG (Case no c-400/12 CJEU) (second chamber) it was held that unlike the requisite period for acquiring a right of permanent residence which began when the person concerned commenced lawful residence in the post Member State, the 10 year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3) (a) must be calculated by counting back from the date of the decision ordering that person's expulsion. All relevant factors should be taken into account when considering the calculation of the 10 year period including the duration of each period of absence from the host Member State, the cumulative duration and the frequency of absences. A period of imprisonment was in principle capable both of interrupting the continuity of the period of residence needed and of affecting the decision regarding the grant of enhanced protection provided there under, even where the person concerned had resided in the host member state for 10 years prior to imprisonment albeit that the fact that the person had been in the member state 10 years prior to imprisonment was a factor to be taken into account.
25. In MG (prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 392 it was held that (i) Article 28(3)(a) of Directive 2004/38/EC contained the requirement that for those who had resided in the host member state for the previous 10 years, an expulsion decision made against them must be based upon imperative grounds of public security; (ii) there was a tension in the judgment of the Court of Justice of the European Communities in Case C-400/12 Secretary of State v MG in respect of the meaning of the "enhanced protection" provision; and (iii) the judgment should be understood as meaning that a period of imprisonment during those 10 years did not necessarily prevent a person from qualifying for enhanced protection if that person was sufficiently integrated. However, according to the same judgment, a period of imprisonment must have a negative impact in so far as establishing integration was concerned.
26. In the decision of Warsame [2016] EWCA Civ 16 it was held that in Secretary of State for the Home Department v MG (Portugal) (Case C-400/12) it was established that

the ten-year period of residence required to benefit from the enhanced protection of imperative grounds must in principle be continuous and be calculated by counting back from the date of the deportation decision. The Court of Justice of the European Union ("CJEU") found that, in principle, periods of imprisonment interrupted the continuity of periods of residence for the purposes of granting the enhanced protection. However, the CJEU also held that applicants could still qualify for enhanced protection if they could show that they had resided in the UK during the ten years prior to imprisonment, but that depended on an overall assessment of whether integrating links previously forged with the host Member State had been broken. On the facts, because of an earlier period of imprisonment which also broke continuity, this Appellant was not one of those in the narrow "maybe" category of cases contemplated in MG (Portugal) where a person has resided in the host state during the ten years prior to imprisonment, for which a more detailed individual assessment of links to the host and home state would be required.

27. The Court of Appeal appears to have accepted at [9] that there is a "maybe" category of cases where a person has resided in the host state for the 10 years prior to imprisonment depending on an overall assessment of whether integrating links have been broken, and that in such cases it might be relevant to determine the degree of integration in the host state and the extent to which links with the original member state have been broken.
28. This issue therefore arises in this case as to whether the Appellant falls into this "maybe" category. The exercise required the counting back from the date of the deportation decision and assessing the extent of links forged in the UK and whether they had been broken. The submission made by Mr Bates is that the judge failed to adequately take into account the nature of the Appellant's offending history. He submits that the decision at paragraph 29 only considered the length of the sentence and that was insufficient. The judge should have taken into account the nature of the offences and that whilst he had identified them at [20] this was insufficient in all the circumstances. He submitted that the offences showed as strong "antisocial nature" and he had not indicated that he was rehabilitated which was pertinent to whether he had broken links with the UK society. Thus he submitted there was a failure to provide adequate reasons for reaching the conclusion at [30].
29. I have considered the determination of the judge. It is plain from reading the determination at paragraphs 17 - 22 that the judge set out the Appellant's offending history. At paragraph 20 he set out the sentencing remarks of the Recorder in full.
30. Consequently the judge did make reference to the Appellant's serious offending carried out in the UK and this is relevant to the issue of integration as a person who is integrated will want to ensure he respects the laws of the United Kingdom, which acts of criminality do not demonstrate. At paragraph 29, the judge properly took account of the effect of the sentence of imprisonment. Whilst it is submitted that it is the nature of the offences that were relevant, it must be the case that the effect of the sentence and the length of such a sentence is also of importance. The longer the length of the sentence the greater is the absence from the community and thus

relevant to the issue of “overall integration”. This is what the judge had regard to at paragraph 29. He properly applied the case law which he had previously set out at paragraph 26 that made it clear that in reaching a conclusion an “overall assessment of that personal situation on each occasion at the precise time when the question of expulsion arises” (see paragraph 35 of *SSHD v MG*) and that “as part of the overall assessment required for determining whether the integrating links previously forged with the host member state have been broken” (see paragraph 36).

31. The question for the judge was whether the Appellant was sufficiently integrated in the UK by taking his circumstances as a whole. Whilst a period of imprisonment may break continuity this cannot mean that an Appellant loses the benefit of any earlier integration. It is fact sensitive and must be seen in the light of the evidence.
32. The judge’s findings demonstrate that the judge properly had regard to the relevant circumstances when reaching a conclusion on this issue. They can be summarised as follows:
 - (1) As regards his degree of integration in the host member state, the judge considered his length of residence. The judge found that he had entered the UK with his parents and siblings in July 2005 when he was 8 years of age. He took into account the documentary evidence at [10] and the oral evidence of the family members which he found to be both credible and consistent (see paragraph 11 and 12). He also recorded at paragraph [12] that the Appellant’s sister had given unchallenged evidence concerning the length of residence but also had given unchallenged evidence as to the nature of that residence which included having been educated in the United Kingdom and having passed through the state education system and having gone to college.
 - (2) The judge also found that the Appellant had offered his time and commitment as a young leader to help challenge the lifestyle of local young people (paragraph 13) and that he had also been employed in the United Kingdom, which again was unchallenged (paragraph 13).
 - (3) The judge found that all of his close family members were in the United Kingdom.
 - (4) As regards the extent to which links with the original member state been broken (in this case the Netherlands), the judge found that he had no family members in the Netherlands (this was the unchallenged evidence of both witnesses at paragraph 15).
 - (5) He found that this was consistent with the evidence of the Appellant’s sister relating to the circumstances of his deportation and that he had been collected from the airport and had been driven to Germany because in aunt was present in that country (paragraph 16).

- (6) He found also that the Appellant was fluent in English and having lived in the UK since the age of eight, had lost any ability to speak Dutch.

33. Those findings were entirely open to the judge to make on the evidence that was before him and the grounds of the Secretary of State do not seek to challenge those findings of fact. I am satisfied that those relevant circumstances were taken into account by the judge along with the Appellants offending history (set out at paragraphs 20-22) when reaching his conclusions at paragraphs 28-30. He properly had regard by way of an overall assessment of the degree of integration the host member state and also the extent to which the links with the original member state had been broken. He properly had regard to the jurisprudence (the decision of the Court of Justice of the European Communities in Case C-400/12 Secretary of State v MG and the decision of the in MG (prison - Article 28(3) (a) of Citizens Directive) Portugal [2014] UKUT 00392,) see paragraph 26). It was therefore open to the judge to reach the conclusion that notwithstanding his imprisonment and criminal offending, which had a negative impact on the establishment of integrative links, that his integrative links in the UK, including the length of his residence, his education, employment, family, and linguistic links and the absence of any meaningful links to the Netherlands was such that he did qualify for the enhanced level of protection in Article 28 (3) (a). I agree with the submissions made by Ms Warren that the decision was a sustainable one and does not demonstrate any error of law.
34. Therefore for those reasons the decision of the First-tier Tribunal did not involve the making of an error on a point of law and the appeal is dismissed.

Decision:

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The appeal by the Secretary of State is dismissed.

SM Reeds

Signed
Upper Tribunal Judge Reeds

Date: 7/9/2017