Neutral Citation Number: [2019] EWCA Civ 199

Case No: C9/2016/0318

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IAC)
Upper Tribunal Judge Hanson
DA/101788/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26.2.2019

Before:

LORD JUSTICE DAVIS
LORD JUSTICE SIMON
and
SIR STEPHEN RICHARDS

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Between:

Luis Lopes	**Appellant**
and	
Secretary of State for the Home Department	**Respondent**

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Zainul Jafferji (instructed by **Burton & Burton, Solicitors**) for the Appellant
Claire van Overdijk (instructed by **Government Legal Department**) for the Respondent

Hearing date: 12 February 2019

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Approved Judgment

Lord Justice Simon:

1. This is the appellant's appeal from the decision of the Upper Tribunal (Immigration and Asylum Chamber) promulgated on 13 November 2015 by UT Judge Hanson ('the UT Judge'). By his decision he allowed an appeal from a decision of the First-tier Tribunal ('FtT'), made on 23 December 2014, by FtT Judge Pooler which had allowed the appellant's appeal from the respondent's decision to remove him to Portugal under the provisions of the Immigration (European Economic Area) Regulations 2006 (2006 No.1003) ('the 2006 Regulations').

2. Permission to appeal was granted by Longmore LJ on some but not all the grounds of appeal on 20 December 2016.

3. The circumstances in which the appeal was not heard until February 2019 are unclear and more than regrettable.

4. The issue that arises on this appeal relates to the terms of the respondent's letter dated 10 June 2014, setting out the reasons for deciding to deport him to Portugal, and the respondent's subsequent approach to those reasons before the FtT and Upper Tribunal.

5. The appellant arrived in this country from Portugal with his family some time in 2002, when he was aged 6. He had remained in this country from that date until June 2014 when he was 18. On 27 October 2012, when he was 16, he committed serious offences of violence: wounding with intent to cause grievous bodily harm and unlawful wounding, contrary to sections 18 and 20 of the Offences Against the Person Act 1861. On 21 December 2012, he pleaded guilty to these offences; and on 13 March 2013, he was sentenced to concurrent terms of 4 years and 2 years youth detention. The decision letter followed 15 months later.

6. The 2006 Regulations implemented Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 ('the 2004 Directive') on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States.

7. Regulation 21 of the 2006 Regulations, which replicates part of Article 28 of the 2004 Directive, provides:

> 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 and public health grounds.
>
> (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) had 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 by the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1999
>
> (5) Where a relevant decision is taken on the grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of the 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.
>
> (6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.
>
> …

8. The 10 June 2014 letter set out a summary of the appellant's family background and schooling, including his enrolment in a Primary School on 15 January 2003. It is necessary to set out some of the further findings in more detail.

> 19. Using the above evidence it is accepted that you have been residing in the UK for approximately 10 years and 2 months. You have confirmed that you have attained qualifications in

> HMP Werrington whilst you have been serving your custodial sentence.
>
> 20. It is accepted that you have been in the UK exercising your treaty rights since 2003.
>
> Residence – permanent right to reside
>
> 21. It is accepted that you have obtained a permanent right to reside by virtue of five-year period of continuous residence in accordance with the EEA Regulations between 15 January 2003 to 11 March 2013. Although it is also accepted that you have resided in the United Kingdom for at least 10 years, the Home Office takes the view that you do not automatically qualify on imperative grounds of public security. The Home Office has applied the 'integration test' set out in recitals 23 & 24 of the Directive and in the CJEU case of *Tsakouradis* to establish whether the highest level of protection is available to you. The following factors have been considered:
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> > (a) the cumulative duration and frequency of any absences from the United Kingdom during the qualifying period (and the reasons for absences);
> >
> > (b) time spent in prison;
> >
> > (c) the overall length of your residence in the United Kingdom;
> >
> > (d) your client's family connections in the United Kingdom;
> >
> > (e) your client's links to your country of origin;
> >
> > (f) your client's age on arrival in United Kingdom.
>
> 22. Having assessed all these factors, the Home Office takes the view that you meet the integration criteria set out in *Tsakouridis*. As a result, it is necessary to establish that your deportation is warranted on <u>imperative</u> grounds of public security. [Underlining in the original]

9. Recital 23 in the preamble to the 2004 Directive, referred to in §21 of the letter provides:

> 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 [EC] Treaty, have become genuinely integrated into the host Member State. The scope for 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.

10. Recital 24 is in these terms:

> 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 …

11. The reference to *Tsakouridis*, in §§21 and 22 of the letter, was a reference to the case of *Land Baden-Württemberg v. Tsakouridis (Case C-145/09)* [2010] ECR I-11979 (*Tsakouridis*).

12. Having reached the decision that the appellant fell within Regulation 21(4) and was thus entitled to enhanced protection so that deportation had to satisfy the test of imperative grounds of public policy or protection, the 10 June letter went on to consider matters relevant to that issue in accordance with the principles set out in Regulation 21(5). The conclusion was expressed at §58:

> You have committed a serious criminal offence in the UK and, as explained above, the professional assessment is that there is a real risk that you may reoffend in the future. Account has been taken of the considerations outlined in EEA Regulation 21(6). Nevertheless, given the threat of serious harm that you pose to the public, it is considered that your personal circumstances do not preclude your deportation being pursued. It is considered that the decision to deport you is proportionate and in accordance with the principles of Regulation 21(5).

13. Consideration was also given to the appellant's rights under article 8; and the conclusion was drawn that the appellant's removal to Portugal would not amount to a breach of those rights.

14. So far as the present appeal is concerned, the relevant part of the decision was that set out in §§21 and 22 of the 10 June 2014 letter. In the light of an assessment of the specified factors, it was decided that his removal fell within Regulation 21(4) and his deportation had to be justified on imperative grounds of public security, and the decision was taken on that basis.

15. The appellant appealed to the FtT. There was a prior case management hearing at which the respondent's representative 'conceded' that the appellant fell within regulation 21(4) and could not be removed except on imperative grounds of public security. This was recorded in [11] of the FtT decision, which ended:

> This concession was clearly made in paragraph 22 of the respondent's letter of 10 June 2014 giving reasons for deportation.

16. Although expressed as a concession, in my view the contents of paragraph 22 are properly to be regarded as part of the decision, although not one that was the subject of any appeal.

17. The FtT considered the appellant's background and offending, and the respondent's argument that the totality of the evidence demonstrated imperative grounds for removal on grounds of public security. Paragraph 22 of the FtT decision was expressed in the following terms:

> Taking account of the appellant's offending history and the evidence concerning risk which I have outlined above, I am not satisfied that the appellant represents a genuine, present and sufficiently serious threat, and that his deportation is required on imperative grounds of public security.

18. At [23], Judge Pooler considered issues of proportionality, which were found to weigh against deportation in view of his relative youth (18 at the time of the hearing), the fact that he had never lived independently and had lived his formative years in this country, with all that this implied in terms of social and cultural integration.

19. As the appellant's appeal was allowed on 'EEA grounds', the FtT did not go on to consider the appellant's arguments on the application of article 8.

20. On 6 January 2015, the respondent applied for permission to appeal the FtT decision. There were three grounds. Grounds 2 and 3 were 'reasons' challenges. Ground 1 was a contention that the FtT had made a material error of law in failing properly to identify the threat posed by the appellant for the purposes of Regulation 21(4) and 21(5). It was not said that the error of law was in treating the case as falling within Regulation 21(4).

21. The respondent's application for permission to appeal was refused by FtT Judge Parkes on 15 January 2015 on the basis that the decision was properly and sufficiently reasoned, and that it disclosed no arguable errors of law.

22. On 29 January 2015, the respondent applied to the UT for permission to appeal. One of the points taken was:

> The concession recorded at paragraph 11 was incorrectly made and is withdrawn – see *Secretary of State for the Home Department v. MG* [2014] C-440/12 at paragraphs 29 to 39. Thus, regrettably, the Judge's acceptance of the concession is a misdirection of law. This is because the appellant was imprisoned within the 10 year period immediately preceding the relevant decision, made on 10 June 2014.

23. The disengaged language was inappropriate. If there had been a concession that it was sought to withdraw, there should have been an application to withdraw it and not

simply an assertion that it had been withdrawn; and if the Judge had misdirected himself as a result of an incorrect concession, the matter of regret was that the misdirection had been caused entirely by the respondent.

24. On 27 April 2015, UT Judge Warr granted permission noting that it was regrettable that, if it were an error, it had not been corrected before. He granted permission on the basis that 'the concession sought to be withdrawn is one of law rather than fact.'

25. It is convenient at this point to identify what the respondent identified as an error in §§21 and 22 of the decision letter. It was said that the letter failed to take proper account of the decision handed down on 16 January 2014 by the CJEU in *Secretary of State for the Home Department v. MG (Directive 2004/38/EC)* Case C-400/12 (the MG Case). The relevant issue was the calculation of the 10-year period of residence referred to in article 28(3)(a) of Directive 2004/38. MG had been sentenced to a term of imprisonment and the question was whether the period of imprisonment broke the 10-year residence period in the host member state prior to the expulsion decision that was required in order that the citizen benefit from highest level of protection, see judgment at [21]. The second chamber decided that the period of imprisonment had the effect of interrupting the continuity of residence for the relevant purpose; but that in order to decide whether the non-continuous nature of the period of 10 years preceding the decision prevented the person concerned from enjoying the highest level of protection, it was necessary to carry out an overall assessment of the person's situation at the time when the question of expulsion arose, see [33]-[35]. The Court added, at [36], that although periods of imprisonment interrupted the continuity of residence:

> … such periods may - together with the other factors going to make up the entirety of relevant considerations in each individual case - be taken into account by the national authorities responsible for applying article 28(3) of that directive as part of the overall assessment required for determining whether the integrating links previously forged with the host Member State have been broken, and thus for determining whether the enhanced protection provided for in that provision will be granted (see, to that effect, *Tsakouridis*, paragraph 24).

26. It follows that there must be an assessment of those factors which have the potential to establish or impact adversely on the integrating links to see if they have been broken. The assessment in §21 of the 10 June 2014 letter did this. Items (b), (c), (d) and (f) were all material to this evaluation. A material error might have been made if the appellant's term of imprisonment had not been brought into the assessment; but it plainly had been. In substance, the respondent's argument rested almost entirely on the failure to mention the *MG* case, in addition to the case of *Tsakouridis*. It may be that the writer of the letter was entirely unaware of the *MG* case decided in the CJEU six months earlier, but I am not prepared to assume that this is so or that a mistake was made. In any event, the *MG* case did not substantially change the CJEU approach to regulation 23(4) set out in *Tsakouridis* to which frequent reference was made in the *MG* case, see also *Tsakouridis* at [34]. There was no inconsistency between *MG* and the 10 June 2014 letter, which took the appellant's period of imprisonment duly into account in item (b) when assessing the appellant's level of integration.

27. The appeal to the Upper Tribunal was heard on 5 August 2015. The decision addressed what were described as 'error of law findings' at [5]-[26]; and it is necessary to refer to some of these paragraphs.

> 7. Ordinarily it is not acceptable for a party in relation to whom an adverse decision has been made to expect to be permitted to materially alter the nature of their case in an application for permission to appeal, and then claim on such basis that permission should be granted.
>
> 8. A Judge cannot be criticised for noting the concession as it formed part of the case before him. It may, however, be argued that the Judge erred if it is shown he treated the concession as determinative of the issue of Mr Lopes's status in law, when this is not the case and is wrong. The concession was not one of fact but of law …

28. The Judge set out the terms of the refusal letter and referred to a decision of the Upper Tribunal in *MG (Prison - Article 28(3)(a) of the Citizens Directive) Portugal* [2014] UKUT 00392, which summarised the effect of the *MG* case in the CJEU as being that:

> 15. …a period of imprisonment during those 10 years does not necessarily prevent a person from qualifying for enhanced protection if that person is sufficiently integrated. However, according to the same judgment, a period of imprisonment must have a negative impact in so far as establishing integration is concerned.

29. The UT Judge continued:

> 17. The issue in relation to the challenge is one of materiality. Judge Pooler found Mr Lopes is entitled to a higher level of protection. Mr Lopes was imprisoned within the 10 years immediately preceding the relevant decision but this was not the only factor as otherwise no one would be entitled to the benefit of the higher degree of protection if imprisoned before attaining ten years residence.

30. He then set out the facts in relation to the appellant's conviction, an ASSET pre-sentence report and a number of post-decision events.

31. The latter part of §24 reads as follows:

> …There was insufficient evidence of social and cultural integration in the United Kingdom before the First-tier Judge but this was not an issue canvassed as a result of the concession. Reliance on the concession is arguably material and in this regard the determination must be set aside.

32. The Judge's view that the reliance on the concession was 'arguably material' was matched by a later finding in §26 that the concession was 'arguably wrong in law'.

These were unsatisfactory findings. The fact that the concession was arguably material and arguably wrong in law meant no more than the respondent had satisfied the threshold for permission to appeal. The Judge had as a minimum to find that there had been a material error of law, if he were to interfere with the FtT findings.

33. The appellant was not legally represented at the hearing before the Upper Tribunal; but a family friend (Mr Beard) was present on his behalf. At §27 and §28, the Judge described how he had given Mr Beard an opportunity of discussing with the appellant whether he wanted the matter remitted to the FtT to be further considered there or for there to be an adjournment to prepare the case on the basis the question of integration needed to be considered further. He was told that the appellant 'wanted to proceed before the Upper Tribunal today'.

34. As noted above, although the hearing took place on 5 August, the determination and reasons were not promulgated until 13 November. The Upper Tribunal decided that the FtT had materially erred in law; its decision was set aside and was remade by allowing the respondent's appeal.

35. Mr Jafferji for the appellant raised a number of points on the appeal; but his central point was that there was no proper basis for treating the FtT's approach to paragraphs 21 and 22 of the respondent's 10 June 2014 letter as an error of law.

36. He also submitted that the respondent should not have been allowed to withdraw the concession made before the FtT. He referred to the decision of the IAT (Collins J and Mr CMG Ockelton) in *Carcabuk v. Secretary of State for the Home Department* (2000) 00/TH/01426. That case provided relevant guidance in terms of the adjudicators' (as they then were) approach to applications to withdraw concessions. In effect, if a presenting officer wishes to withdraw a concession in a refusal letter, he must inform the party or his advisor as soon as is possible and it will be for the Judge to decide if an application for an adjournment to enable the new case to be met is made, and whether to grant it. If he does not, the concession will stand. The Judge must always bear in mind that an appellant may have prepared his or her case on the basis of the concession, and so must ensure that the appellant is not prejudiced.

37. He further argued that, having allowed the respondent to withdraw the concession and having erroneously identified an error of law in the FtT's determination, the Upper Tribunal itself carried out a flawed analysis on the basis that the appellant's case fell within Regulation 21(3).

38. Ms Van Overdijk argued that whether or not an EU citizen falls within Regulation 21(4) was ultimately a question of law. It followed that the respondent's conclusion in the 10 June letter that the appellant fell within Regulation 21(4) was an error of law, albeit 'informed' by a factual assessment. The decision was 'untenable' because the respondent did not consider whether the period of imprisonment interrupted the 10-year period prior to the decision date. In any event, on the basis that the appellant was either a permanent resident, as defined by Regulation 21(3), or was entitled to enhanced protection, under Regulation 21(4), a further assessment still had to be made by reference to Regulations 21(5) and 21(6); and the issues raised by the latter provisions were properly considered by the Upper Tribunal, as they had been by the respondent and the FtT.

39. Paragraphs 21 and 22 of the decision letter contained a holistic assessment of the appellant's integrative links with this country. Items (c), (d) and (f) were positive links; item (b), the time in custody, was a negative factor. The balancing of these factors was the adoption of the approach set out by the CJEU in *Tsakouridis*, in the *MG* case and confirmed more recently by the CJEU in *FV (Italy) v. Secretary of State for the Home Department and B v. Land Baden-Württemberg* (Joined Cases C-424/16 and C-316/16) [2018] 3 WLR 1035.

40. The adoption of this approach had led the respondent to conclude that the appellant fell within Regulation 21(4) and that his deportation to Portugal had to be justified on imperative grounds of public security. While I would accept Ms Van Overdijk's submission that this was a legal categorisation, it was plainly based on an evaluation of the relevant facts. Very properly, Ms Van Overdijk did not feel able to submit that an overt consideration of the principles set out in the *MG* case would have led the respondent to a different view. She said it might have been different. In my view that is not enough.

41. The FtT hearing proceeded on the express understanding, characterised as a concession, that the appellant fell within Regulation 21(4). This had been specifically identified as material and had been accepted by the respondent at the prior Case Management Hearing. This is not a case in which no consideration had been given to what was an obvious point. The FtT decision was properly reasoned and contained no material error of law.

42. It follows that, contrary to the conclusion of the Upper Tribunal, the appellant's deportation had to be justified on imperative grounds of public protection, as had been accepted in the pre-determination hearing. Since no material error of law had been made by the FtT the Upper Tribunal was not justified in setting aside the FtT's finding and remaking the decision.

43. Furthermore, even if the 'concession' had been in relation to a matter of law, it did not follow that the respondent was entitled to withdraw it on appeal to the Upper Tribunal. UT Judge Hanson referred to the case of *Secretary of State for the Home Department v. Davoodipanah* [2004] EWCA Civ 106, and concluded at [25]:

> It is not essential to demonstrate prejudice before an application to withdraw a concession is refused. In the absence of prejudice, if a party has made a concession which appears in retrospect to be a concession which should not have been made, then probably justice will require that the party be allowed to withdraw that concession.

44. This is not the occasion for a general review of the law on withdrawal of concessions: much will depend on the circumstances, as the cases to which we were referred by the parties show. However, the passage in [25] set out above is unsatisfactory in a number of respects.

45. First, to the extent that the Upper Tribunal was setting out a general statement, it failed to take into account an overriding principle which encompasses both justice and fairness. Furthermore, the fact that the respondent allowed an entire day's hearing to proceed on what was later said to be a false basis should have been a matter of serious

concern, although it appears to have had little impact on either the Upper Tribunal or the respondent.

46. Secondly, it failed to take into account the prejudice to the appellant by the withdrawal of the concession. As the UT Judge Hanson had noted at [24]:

> There was insufficient evidence of social and cultural integration into the United Kingdom before the First-tier Judge but this was not an issue canvassed as a result of the concession.

As Mr Jafferji submitted, the appellant might have put in different or additional evidence or conducted the hearing before the FtT differently had the concession not been made.

47. Thirdly as already noted, a central question for the Upper Tribunal was whether the respondent's decision on Regulation 21(4) was wrong in law and not whether it appeared in retrospect that the 'concession' should not have been made.

48. It is clear that the UT Judge gave Mr Beard the opportunity to discuss with the appellant whether he wanted the case remitted to the FtT, and that the appellant wanted to continue. However, Mr Beard was not legally qualified and the implications of continuing in the Upper Tribunal, with limited rights of appeal, may not have been apparent. Again, there can be no generally applicable approach, but at the very least sufficient time should be given to allow for reflection on the issues that may arise.

49. In the light of these conclusions it is unnecessary to consider further Mr Jafferji's complaint that the Upper Tribunal went on to make factual findings which were inconsistent with those made by the FtT which should have been left undisturbed.

50. For the reasons set out above, I would allow the appeal and restore the decision of Judge Pooler in the First-tier Tribunal.

Sir Stephen Richards:

51. I agree.

Lord Justice Davis:

52. I also agree.