



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00516/2014

THE IMMIGRATION ACTS

Heard at Field House
On 2 March 2015

Determination Promulgated
On 6 March 2015

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NATHAN ODURO BEKO QUIAFO
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the appellant: Mr C Avery, a Senior Home Office Presenting Officer

For the Secretary of State: Mr R Abdar, instructed by Kesar & Co, solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (First-tier Tribunal Judge Pedro) allowing the claimant's appeal against her decision on 14 March 2014 to make a deportation order by virtue of section 5(1) of the Immigration Act 1971. The claimant is a citizen of the Netherlands, and is therefore also an EEA citizen. He entered the United Kingdom in 1996 as a minor, to join his mother here. He was granted first an EEA residence permit, and

on 23 July 2005, indefinite leave to remain as his mother's dependent, in accordance with the provisions of the Immigration (European Economic Area) Regulations 2006 (as amended). He has permanent resident status under regulation 15 of those regulations.

Regulation 21: 'serious grounds' and 'imperative grounds' for removal

2. Pursuant to regulation 21 of the EEA regulations, EEA citizens may be removed from the United Kingdom only on grounds of public policy, public security or public health, and not to serve economic ends.
3. Where a permanent right of residence has been acquired under regulation 15, then the power to remove is further constrained by sub-paragraphs 21(3), 21(4), 21(5) and 21(6) thereof of the Regulations. Sub-paragraphs 21(3) and 21(4) concern, respectively, the position of those with permanent residence, and those who have resided in the United Kingdom for 'a continuous period of at least 10 years prior to the relevant decision' or are minors:

"Decisions taken on public policy, public security and public health grounds

21. ... (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.
4. Sub-paragraphs 21(5) and 21(6) set out the matters which must be taken into account when considering the proportionality of removal and the personal conduct and circumstances of the EEA citizen:

"21 (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.

(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. ..."

5. The First-tier Tribunal did not hear detailed argument on the correct standard to be applied in this appeal since (see paragraph 8 of the determination) the Secretary of State at the hearing, and in her letter of decision of 17 March 2014, accepted that the claimant met the integration criteria and that 'As a result it is necessary to establish that your deportation is warranted on imperative grounds of public security'.
6. The writer of the deportation decision in March 2014 did not have the benefit of the guidance given in the decision of the Upper Tribunal in *MG* in August 2014 as to how to apply the decision of the European Court of Justice in *Secretary of State for the Home Department v MG (Judgment of the Court)* [2014] EUECJ C-400/12.
7. I am not aware that any further deportation decision has been taken since August 2014.

Background

8. The claimant is a Netherlands citizen of Ghanaian origin, who has been in the United Kingdom, albeit with one significant interruption, since 1996. He was born on 16 April 1988; when he arrived in the United Kingdom to join his mother, he was 8 years old.
9. The claimant has an unedifying record of United Kingdom criminality. He pleaded guilty to all but one of the recorded offences. He is first recorded as having come to adverse attention on 20 April 2004, when he received a warning for assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861. He was then just 17 years old. On 13 January 2006, he was reprimanded for the possession of cannabis, a class C controlled drug, contrary to section 5 of the Misuse of Drugs Act 1971. That was his first recorded adult offence.
10. In 2004/5, he went to Ghana to see his father and spent approximately 9 months there.
11. On 12 April 2006, the claimant committed two offences of robbery, for which he was sentenced at Harrow Crown Court on 14 September 2006 to a community

order, supervised by the probation service. On 19 May 2006, the claimant was found in possession of cannabis and on 17 November 2006, he received a conditional discharge for that offence. On 15 July 2006, the claimant committed a further cannabis offence, for which on 17 July 2006 at Thames Magistrates Court, he was sentenced to £80 or one day in prison. He did not pay the fine. On 18 November 2006, the claimant was found in possession of a class A drug, cocaine, as well as cannabis. On 23 February 2007, at Thames Magistrates Court he was sentenced to a further community order under probation supervision. On 30 December 2008, the claimant was arrested for travelling on the railway without paying. He was convicted of that offence at Stratford Magistrates Court on 11 May 2009. There is no record of his plea. He was fined £150 plus costs of £30 and £4 compensation.

12. There was then a hiatus in the claimant's criminal record until on 9 March 2010, he was arrested found in possession of larger supplies of unspecified Class A drugs, more than required for his personal use. He was bailed to appear at Winchester Crown Court, but while on bail, on 22 March 2010, he committed an attempted robbery contrary to section 8 of the Theft Act 1968. On 14 July 2010 he was sentenced to a total of 4 years' imprisonment, 2 years to be served concurrently on four drugs offences of possession with intent to supply, and two years to be served consecutively for the robbery. The claimant was now 22 years old.
13. On 15 March 2012, the claimant was served with a deportation notice, against which he appealed. He was granted bail on 5 April 2012 and on 2 October 2012, his appeal was allowed, on the basis that he had shown remorse, and his girlfriend was pregnant. The claimant was still on licence in relation to the 4 year sentence. On 22 June 2012, the claimant was arrested in possession of cannabis and cannabis resin and was fined £75 at East London Magistrates Court, with costs of £85 and a £15 victim surcharge. On 16 November 2012, he was sent a warning letter by the Home Office to his release address.
14. On 9 January 2013, the claimant's partner gave birth to his first and only child, a daughter. On 26 January 2013, while still on licence, the claimant in one incident committed a further offence of possession of cannabis with intent to supply and four driving offences. He appeared before Cambridge Magistrates Court on 28 January and his driving licence was endorsed for driving otherwise than in accordance with a licence. He was later sentenced by Cambridge Crown Court to 21 months' imprisonment on the remaining charges of failing to provide a specimen for analysis, failing to comply with a no entry sign, driving while uninsured, and possession of cannabis with intent to supply. His relationship with his girlfriend appears to have broken down at around this time.

15. On 20 March 2014, a further deportation decision was taken. That is the decision which is the subject of the present appeal. On 23 June 2014, the claimant was released again on licence, to live at his mother's address. His former partner and child live elsewhere but visit regularly and the claimant is said to be 'amazingly close' to his baby daughter, who he sees daily and takes on outings to the park. His ex-partner has another daughter, who is very fond of the claimant. He has two sisters: one has Down's syndrome, while the other assists in her sister's care and supports their mother as well. The claimant's licence for the latest offence expired on 2 December 2014. For that six-month period, the claimant complied with the terms of his licence. No further offences have been relied upon in the first two months of 2015.

The First-tier Tribunal decision

16. In his decision, the First-tier Tribunal Judge confirmed (paragraph 4) that he had carefully considered all of the evidence before him. He took into account the previous determination in relation to the earlier deportation decision, taking that as his starting point, applying *Devaseelan (STARRED Secretary of State for the Home Department v D (Tamil)* [2002] UKIAT 00702). He adopted the findings of the first Tribunal as to the length of time that the claimant had been in the United Kingdom before the relevant decision and applied the higher 'imperative grounds of public policy' test to the proposed deportation, relying on the concession by the Secretary of State and the 2012 finding that the 10-year period had been established. The judge applied regulation 21(5) and 21(6).
17. The First-tier Tribunal judge then considered the recent evidence of rehabilitation and the claimant's private and family life in the United Kingdom. He took into account a NOMS (National Offender Management Service) report prepared in June 2013 which showed positive indications: the claimant had not recently committed any violent offences and had taken various courses under the Moving On Project. There were said to be 'strong indications of his inability to refrain from committing further offences' but he had expressed a desire to abstain completely from drugs and that 'his choice of lifestyle needs an overhaul given the added responsibility of fatherhood', referring to the birth of his child, just before the final offence which had led to the second deportation decision.
18. In considering proportionality, the judge gave weight to the claimant's links to his daughter, his partner and her other child, his mother and his disabled sister as part of his overall family life in the United Kingdom. The judge stated that he believed that the birth of the child might have become a catalyst for good and that removal of the claimant would not now be proportionate. The core of the judge's reasoning is at paragraphs 16-17 of the decision:

“16. The claimant’s full integration into United Kingdom society was already considered and decided upon by the Tribunal in the determination promulgated on 2 October 2012. By that time, the Tribunal was satisfied that full integration had been established. That integration and the claimant’s prospects of full rehabilitation can only have been extended and enhanced by the birth of his child and the conduct he has shown since his release in taking on board his full responsibility as a father and the love and devotion he has shown to that child. He has no known links with the Netherlands and he clearly has firm and established links and family life in the United Kingdom. I would add that he must surely be aware that any decision I make on his appeal may give him one last final chance to prove himself and that any deterioration in his behaviour and conduct may well result in him facing removal on a future occasion involving separation from his child and family members. I would hope that he would very seriously take this on board.

17. Having carefully considered the principle of proportionality and all other factors to be considered pursuant to regulation 21(5) and (6), I find that I am not satisfied that the Secretary of State’s decision to remove the claimant meets the high threshold required to be considered imperative on grounds of public security. Therefore, I find that the Secretary of State’s decision does breach the claimant’s rights as an EEA national under the community treaties in respect of residence interest in the United Kingdom and I allow his appeal.”

Secretary of State’s grounds of appeal

19. The Secretary of State appealed. Despite her failure to raise the point at the hearing or in her deportation decision, or formally to withdraw the concession made at the hearing, she now contended that the First-tier Tribunal had erred in treating as settled the question whether the claimant was entitled to the higher ‘imperative grounds’ test for removal of EEA citizens with 10 years’ residence preceding the decision to deport. She contended that the proper approach was to apply the ‘serious grounds’ test in rule 21(3), not the ‘imperative grounds’ test in rule 21(4), and that the Secretary of State had demonstrated sufficient ongoing risk from this appellant’s criminality to meet the ‘serious grounds’ test.
20. The Secretary of State accepted that the claimant was integrated into United Kingdom society but argued that the degree of his integration was not as great as contended, having regard to the serious nature of his offending behaviour, over a very long period. The small family network in which the claimant moved was not sufficient to establish integration in the wider society, particularly as the relationships in question had been in existence throughout the period of his offending behaviour. He had been aware that he was about to become a father when the final offence was committed, and his baby daughter should not be a ‘trump card’ on that basis.
21. The Secretary of State contended that the claimant’s assertion of remorse and of having addressed his offending behaviour was the same assertion which had been

successfully made to the 2012 Tribunal in respect of the first deportation order: his subsequent conduct did not support those assertions and the second Tribunal, on *Devaseelan* principles, should have treated the later offences as new facts and reassessed his rehabilitation and remorse on that basis. The First-tier Tribunal had failed to engage with the core of the proportionality assessment: in the light of the claimant's serious offending and his continued failure to address his offending triggers, combined with the lack of genuine integration, and the independent assessment that he remained a risk, as recently as June 2013, the proposed deportation was proportionate.

22. First-tier Tribunal Judge Brunnen considered the proposed grounds of appeal to be arguable and granted permission.
23. The claimant did not serve a Rule 24 Reply.
24. That was the basis on which this appeal came before me. I heard submissions and reserved my decision, which I now give.

Error of law hearing

25. For the Secretary of State, Mr Avery argued that the decision of the European Court on the Upper Tribunal reference in *MG's* case (*Secretary of State for the Home Department v MG (Judgment of the Court)* [2014] EUECJ C-400/12) established that in principle, a prison term was capable of disrupting the 10-year period required for the 'imperative grounds' protection level, although the effect of such sentences could be mitigated, depending on the circumstances. In the present case, the First-tier Tribunal judge had erroneously taken the opposite approach, treating the 10 year period as established by the 2012 determination. It was difficult to see how a sustainable decision could be made if that were an erroneous basis in approaching regulation 21(4). Mr Avery made no reference to the concession made at the hearing by the presenting officer that 'imperative grounds' was indeed the correct test, nor to an express statement to that effect in the second deportation decision.
26. Mr Avery relied on the guidance given by the Upper Tribunal in *MG (prison-Article 28(3) (a) of Citizens Directive)* [2014] UKUT 392 (IAC), applying the guidance given by the European Court, which also considered the decision of the Court of Appeal in *Secretary of State for the Home Department v FV (Italy)* [2012] EWCA Civ 1199. In the Upper Tribunal decision in *MG*, they indicated that the European Court decision was difficult and that they would have been prepared to grant permission to appeal to the Court of Appeal had it been sought.
27. Mr Avery asked me to find a material error of law and substitute a decision dismissing the claimant's appeal.

28. For the claimant, Mr Abdar argued that he was entitled to the higher 'imperative grounds' level of protection. He had come to the United Kingdom in 1996 and had acquired that protection by 2006. Once the protection was achieved, it could not be lost. Mr Abdar accepted that it would be possible for the claimant to be deported lawfully, in appropriate circumstances, even if he had that higher level of protection, but submitted that the facts of the present case did not reach the 'imperative grounds' standard, having proper regard to the integration and proportionality tests in sub-paragraphs 21(5) and 21(6). Mr Abdar contended that the 10-year protection, once acquired, could not be lost, and if the Tribunal agreed, then there was plainly no material error of law in the First-tier Tribunal determination.
29. In the event that the Tribunal found that only the 'serious grounds' protection level was available on the facts of this appeal, Mr Abdar submitted that the First-tier Tribunal had taken into account the claimant's integration and all relevant factors. The claimant had been in the United Kingdom for almost 20 years and the Secretary of State's grounds gave that insufficient weight. The claimant's absence in 2004/5 was not such as to break the continuity of his residence: EU law permitted absences of up to two years and the claimant had been absent for less than a year. He asked me to dismiss the Secretary of State's appeal and uphold the First-tier Tribunal determination.

Discussion

30. The first question is the standard of protection applicable to this appellant. Given the claimant's history before the second deportation decision on 20 March 2014, the Secretary of State's statement in her deportation decision, and her concession at the hearing that the 'imperative grounds' test was the correct one seems generous, since for the 10 years immediately preceding the decision, that is to say, between 20 March 2004 and 20 March 2014, the claimant had been absent in Ghana for 8/9 months in 2005/6, in prison for almost 2 years of a 4-year sentence between June 2010 and April 2012, and in prison again from January 2013 - 23 June 2014, a further 18 months. However, in my judgment, the First-tier Tribunal did not err in law, given that the Secretary of State did not put the question of the 'imperative grounds' test in issue, in proceeding on the basis that such was the correct test.
31. The First-tier Tribunal's decision took into account all relevant material and the evidence of the claimant, his ex-partner and his mother as to proportionality. The decision reached was open to the First-tier Tribunal on that evidence, if integration and the 'imperative grounds' test were not in issue. Accordingly, I find that there is no material error of law in the determination and I uphold it.

Conclusion

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Date: 5 March 2015

Signed

A handwritten signature in black ink, appearing to be 'J. Gleeson', written over a light grey rectangular background.

Upper Tribunal Judge Gleeson