Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/02037/2013
DA/02038/2013

THE IMMIGRATION ACTS

Heard at Manchester Crown Court	**Determination Promulgated**
On 6 August 2014	**On 3 October 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MUBARIK ESSA (FIRST APPELLANT)
MOHAMMED ESSA (SECOND APPELLANT)
Respondents

Representation:

For the Appellants: Ms Johnstone, a Senior Home Office Presenting Officer
For the Respondent: Mr Nicholson, instructed by J R Jones, Solicitors

DETERMINATION AND REASONS

1. The first and second respondents are brothers and are citizens of the Netherlands. I shall hereafter refer to the respondents as “the appellants” and to the Secretary of State for the Home Department as the “respondent” (as they were respectively before the First-tier Tribunal). The appellants entered the United Kingdom in August 2002 when they were respectively age 9 and 11 years. On 6 February 2013, the appellants were convicted of conspiracy to defraud. They received sentences of 27

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months' imprisonment. On 25 September 2013, decisions were made to deport the appellants. The appellants appealed to the First-tier Tribunal (Judge Chambers; Ms S E Singer) which, in a determination promulgated on 3 March 2014, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The First-tier Tribunal stated the issue in these appeals as being,

> Whether, under Article 28 of Directive 2004/38, either of [the appellants] has resided in the United Kingdom for ten years counting back from the date of the respondent's decision ordering their expulsion, taking account of the fact that the periods of imprisonment interrupted the period of residence, as recently confirmed in the judgment of the Court of Justice of the European Union (Second Chamber preliminary ruling) in *Secretary of State for the Home Department v MG* (case C-400/12) (16 January 2004).

3. At [10], the Tribunal concluded:

> Doing the necessary calculation by the time of the making of the deportation orders (25 September 2013) they had been in the United Kingdom for eleven years and one month. Both appellants make out to the degree requisite on the evidence that they satisfy the requirements of Article 28 of Directive 2004/38. The Directive given effect under the Immigration (European Economic Area) Regulations 2006 provides that EEA nationals such as the appellants can only be deported on imperative grounds of public security. It is not shown that imperative grounds of public security are made out in either of the appellants' cases. We allow both appeals.

4. There are, in essence, two grounds of appeal. First, it is submitted, by reference to *MG*, that "counting back from the date of the deportation decision, the claimant's continuity of residence was broken by their 27 months' sentences of imprisonment. The FTT failed to engage with this reality." Secondly, accepting that the appellants had resided in the United Kingdom for ten years before they were imprisoned, the Tribunal had failed to have regard to [36] and [37] of *MG*. The Tribunal had carried out a "simple mathematical assessment" of the period of time of the appellants' residence in the United Kingdom and they should, following *MG*, have addressed the "much more complex issue" of the "qualitative assessment of the integration of the claimants."

5. Notwithstanding ground 1, the facts in the appeal do not appear to be in dispute. The ten year period calculated back from the date of the deportation decision is, indeed, broken by the 27 month imprisonment of the appellants. However, I accept Mr Nicholson's submission that the pre-conviction residence of ten years would appear (subject to the application [38] of *MG*) entitle the appellants to the higher level of protection. As Mr Nicholson submitted, if the analysis in the Secretary of State's grounds at [2] is accurate, then the Secretary of State could defeat all such appeals simply by making a deportation decision whilst an appellant is in prison (and thereby incapable of satisfying the condition of ten years' continuous residence). As the grounds appear to acknowledge, the real issue in this

case is the status of the ten years' residence which these appellants have enjoyed before they were imprisoned.

6. Mr Nicholson appeared before the appellants at the First-tier Tribunal hearing. Although he was reluctant to give evidence about the proceedings before that Tribunal, he told me that the Record of Proceedings should show that there was a detailed discussion between the representatives and the Tribunal as to the implications of *MG*. It is to be regretted, however, that the determination of the Tribunal deals only briefly with *MG*. The crux in this appeal is whether the Tribunal has dealt adequately with the ratio of *MG* and, in particular, the discretion ("the fact that the person resided in the host member state for ten years prior to imprisonment *may be taken* into consideration ...") which appears to be afforded by [38] of *MG*. In short, did the Tribunal exercise its judicial discretion as to whether to take into account "as part of its overall assessment ... whether the integrating links previously forged [by the appellants] with the host member state have been broken?"

7. The passage at [4] of the determination which I have quoted above certainly gives the impression that the Tribunal appeared to have believed that *MG* did little more than establish the principle of the ten year period that should be calculated by counting back from the date of the expulsion decision. I accept Ms Johnstone's submission that *MG* (in particular at [38]) goes beyond the calculation of the period of residence. The court made it clear that integration in the society of the host member state forms the basis of entitlement to the greater protection offered by the Directive. Having considered the determination carefully, I am prepared to accept that the Tribunal did have in mind this question of integration and that the Tribunal has engaged adequately with the ratio of *MG*. The Tribunal has directed itself to *MG* at [4] and, assuming that the Tribunal had *MG* in mind throughout its analysis, it ultimately found that "both appellants make out the degree requisite on the evidence that they satisfy the requirements of Article 28 ...". That conclusion follows a consideration of the evidence of the appellants' schooling and their employment history both before and after their convictions. I accept Mr Nicholson's submission that the fact that the appellants were employed after they had committed the offences for which they were imprisoned may be regarded as evidence of integration. I am satisfied that the Tribunal was aware that it needed to exercise a discretion and it has done so, although it is to be regretted that the determination does not make this entirely clear.

8. *MG* does not provide that decision makers must consider pre-offending periods of residence and integration forged during that time as necessarily broken by a period of imprisonment; such conduct "may" be taken into account. I am satisfied that the Tribunal did have that principle in mind when it allowed these appeals. In consequence, the Secretary of State's appeal is dismissed.

<u>DECISION</u>

These appeals are dismissed.

Signed Date 30 August 2014

Upper Tribunal Judge Clive Lane