



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00038/2014

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 29 July 2015

Promulgated

On 12 August 2015

Before

**THE HONOURABLE MR JUSTICE KNOWLES
UPPER TRIBUNAL JUDGE McWILLIAM**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR NORBERT FACUNA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant/Secretary of State for the Home Department: Mr Tom Wilding,
Home Office Presenting Officer

For the Respondent: Mr Titus Ojo, Counsel instructed by Graceland Solicitors

DECISION AND REASONS

1. The respondent is a citizen of Slovakia. His date of birth is 11 July 1991. We shall refer to him as the appellant as he was before the First-tier Tribunal.
2. This matter appears before the Upper Tribunal today as a result of permission to appeal being granted by Upper Tribunal Judge Chalkley on 9 September 2014. Upper Tribunal Judge Chalkley regarded it as arguable that the First-tier Tribunal, comprising Judge of the First-tier Tribunal Miles and Dr J O de Barros (non-legal member), may have erred in law in the

Determination and Reasons promulgated on 12 June 2014. In light of the conclusion that we have reached and the submissions that we have received we will deal with the matter briefly and consciously refrain from entering into some of the aspects of the case in detail.

3. The central point urged on behalf of the Secretary of State in the course of the helpful and concise submissions from Mr Wilding is that the panel materially erred in finding that the appellant was entitled to enhanced protection without making the assessment or evaluation required in the light of the decisions in MG [2014] EUECJ C- 400/12 and Onuekwere [2014] EUECJ C- 378/12 so as to determine the level of protection. In particular a qualitative assessment was required in relation to the matter of the integration or degree of integration of Mr Facuna, in the context of ascertaining the consequences of his having served a period of imprisonment for criminal offences.
4. The reasoning of the First-tier Tribunal indicates at paragraph 8 that their consideration in this area was affected by what they termed a statement from the representative of the Secretary of State. On that occasion Mr Vaghela said that if the evidence of Mr Facuna was accepted then Mr Facuna was entitled to protection under Regulation 21(4) of the 2006 Regulations, which would therefore require a finding of imperative grounds of public security to justify his removal. That statement, as recorded by the First-tier Tribunal, has at times been described, in particular by the representative today for Mr Facuna, as a concession.
5. If it is a concession then the Secretary of State today says that it involves a misapprehension of the legal position and therefore the matter must still be addressed and the fact of a concession is no answer to that.
6. We are not persuaded that the passage referred to by the First-tier Tribunal is necessarily properly or safely treated as a concession strictly so-called, but even if it was to be so treated we do not regard that, in the circumstances of the present case, as constituting a sufficient barrier to the matter being treated in accordance with the legal framework that applies.
7. There have been additional arguments advanced on behalf of Mr Facuna.
8. The Secretary of State maintained that in accordance with authority one must look back from the date of the relevant decision. In this case that is 11 January 2014. When one is calculating in the first instance the answer to the question whether there are ten years one must have regard to the circumstances in which periods of imprisonment may interrupt the continuity of residence, but what is called for in this connection is an evaluation of integration. (It is further not accepted by the Secretary of State that the appellant was exercising Treaty rights since 1 May 2004 when Slovakia joined the EU, or that the appellant had a right of permanent residence.)

9. Mr Ojo maintained, on behalf of Mr Facuna, that (a) the quality of Mr Facuna's presence in the jurisdiction changed in 2004 and (b) that regard should be had to the period between 1998 and 2004 which he argues at least has some additional bearing on the question of integration.
10. In our view, the panel materially erred because they found that the appellant was entitled to enhanced protection under regulation 21 (4) of the 2006 without giving adequate reasons and without directing themselves fully in relation to the calculation of the relevant period and the consequence of the imprisonment. The starting point at paragraph 8 of the decision is likely to have contributed to this, and we do not criticise the panel.
11. However, for this reason we set aside the decision to allow the appeal under the 2006 Regulations.
12. The representations from the Secretary of State accept that if their argument is correct the matter will have to be considered further and having asked both representatives before us today whether the further consideration is best undertaken before the First-tier Tribunal or by the Upper Tribunal the balance of submission points towards the First-tier Tribunal. That is an approach that we respectfully support. There is a fact finding assessment to be undertaken in relation to the level of protection potentially available to the appellant which may involve an evaluative exercise to assess integration. This is an area in which the factual content is such that it is desirable that, once findings have been made, if those findings need to be reviewed by an Appellate Tribunal, then the Appellate Tribunal should be the Upper Tribunal and not, as would be the case if the findings were made by the Upper Tribunal, a review by the Court of Appeal. And so we will allow the appeal and remit the matter to the First-tier Tribunal.
13. We add that the panel found that the appellant's evidence in relation to his education here was credible; however, the finding alone may not be sufficient to establish permanent residence and this is an issue that the First-tier Tribunal will also need to consider.
14. It is important that it is understood by all that the exercise before the First-tier Tribunal will include the question of the relevance or otherwise of the matter of permanent residence and if relevant whether there is permanent residence, and the question whether the appellant has resided here for ten years or whether the imprisonment has interrupted the ten years.
15. Given that those areas are going to need to be considered by the First-tier Tribunal and in order that they can be properly, and this time completely, traversed by both sides we propose to direct an exchange of skeleton arguments forward from this point. These can be brief skeleton arguments but sufficient to inform each side as well as to inform the First-tier Tribunal. Subject to any refinement we are invited to require, we think the Secretary of State's skeleton should come first in 21 days from today and is to be followed by a skeleton argument from Mr Facuna's legal

representatives 21 days after that. Both parties must be in a position to grapple with the issues that we have identified at the hearing before the First-tier Tribunal.

Notice of Decision

The respondent's appeal is allowed and the matter is remitted to the First-tier Tribunal for a fresh hearing.

We direct the parties to file and serve skeleton arguments in accordance with paragraph 15 of this decision. This was communicated orally to the parties at the hearing.

Signed
2015

Date: 4 August

Mr Justice Knowles