Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00637/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 May 2015	**On 3 July 2015**

Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE CANAVAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JOAO PEDRO CORREIE LOPES
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr A Seelhoff, Solicitor, A Seelhoff Solicitors

DECISION AND REASONS

1. The respondent, (hereinafter "the claimant") is a national of Portugal and hence an EEA national. He came to the United Kingdom in August 2001 and entered employment soon after. On 27 June 2012 he was sentenced to four years' imprisonment for causing death by dangerous driving and twelve months (concurrent) for knowingly causing a recording of false data relating to his lorry tachograph. The victim was an elderly woman. This conviction came on top of another incident in February 2009 when a cyclist went under the wheels of his lorry

and died for which he received three points on his licence and a £200 fine. On 24 February 2014 the respondent decided to make a deportation order against him under the Immigration (European Economic Area) Regulations 2006 (hereafter the "2006 EEA Regulations"). His appeal against that decision came before a First-tier Tribunal panel (Judge Talbot and Non-Legal Member S E Singer). In a decision sent on 22 September 2014 they allowed his appeal. The claimant had completed his prison sentence on 22 July 2014.

2. The panel noted that comprehensive documentary evidence had been produced to show that the claimant had been in continuous employment in the UK for over ten years prior to the respondent's decision. Accordingly, it considered that the claimant could only be deported, if there were "imperative grounds of public policy" for deporting him.

3. Article 28 of ECO/2004/38 (the Citizens Directive) and Regulation 21 of the 2006 EEA Regulations provide as follows:-

> *Article 28: Protection against expulsion*
>
> (1) Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
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> (2) The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
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> (3) An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
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> (a) have resided in the host Member State for the previous ten years; or
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> (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.
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> Regulation 21:Decisions taken on public policy, public security and public health grounds
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> (1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
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> (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) 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.

(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."

4. The appellant's (hereafter "the Secretary of State's" or "SSHD's") grounds of appeal challenged the panel's decision on two main counts. First, it was contended that it had erred in considering that the claimant was entitled to the highest level of protection ("imperative grounds of public policy"). In this regard it was argued that the panel should have applied the binding authority of the Court of Justice rulings in C-400/12 Secretary of State v MG as elaborated by the Upper Tribunal in MG [2014] UKUT 392 (IAC) and in calculating whether the claimant had the requisite ten years' continuous residence it should have found that he did not because that period had been broken by his period of imprisonment. This, together with his involvement in

two fatal accidents and disregard of the court in 2009, demonstrated that he had not integrated into the UK and had no respect for the laws of the UK. As a result the claimant could only be considered to have accrued residence afresh since 2012 and as a result the SSHD only needed to show that there were grounds of public policy for deporting him.

5. Secondly, it was submitted that even in the event that the claimant had acquired ten years' continuous residence the panel erred in declining to find that there were imperative grounds of public policy because the claimant had caused two fatalities and the second was caused solely through the claimant's disregard for the condition imposed on him to wear glasses while driving. The claimant had not learnt from his causing a fatal accident in 2009 and had caused the death of a second innocent pedestrian. The claimant, it was submitted, was a dangerous offender, a present, genuine and sufficiently serious threat and there were imperative grounds of public policy to deport him.

6. In amplifying the grounds Mr Melvin upbraided the First-tier Tribunal panel for dealing very cursorily with the issue of ten years' continuous residence and for applying the wrong standard of protection. He submitted that the claimant had given evidence in Portuguese, which added to the other factors pointing against integration.

7. Mr Melvin was asked to clarify whether it was accepted that the claimant had accrued ten years as a worker before he was imprisoned. Mr Melvin said that the SSHD had not challenged the finding of the panel to that effect but factually it seemed to him that the claimant only began employment in 2003 and the sentence was passed in 2011. Mr Melvin was also asked to clarify why he was now submitting that the claimant should have been assessed by reference to the lowest standard of protection when even the SSHD's decision letter had accepted the relevant standard was "serious grounds of public policy". He said he left that as a matter for the Tribunal.

8. The SSHD's basic point, submitted Mr Melvin, was that the panel had erred by failing to consider whether the claimant's ten year period of residence had been broken by his period of imprisonment.

9. Mr Seelhoff for the claimant urged the Upper Tribunal not to re-open matters unchallenged by the SSHD in her grounds of appeal. There was evidence before the panel to show that the claimant had been in employment since 2001. The whole family had given evidence and there was no dispute about the facts prior to Mr Melvin seeking to re-open them at this hearing. Asked what response he had to the SSHD's contention that the First-tier Tribunal panel had erred in failing to consider whether prison broke the claimant's continuity of residence, Mr Seelhoff said it was implicit in its conclusion that the panel was satisfied the claimant had retained integrative links, notwithstanding his imprisonment. There was no evidence he had lost such links. His family had visited him in prison. He was no danger to the public now as he had lost his licence. Specific consideration would have resulted in the same factual conclusions.

10. In response Mr Melvin highlighted the fact that the claimant had spent the first 46 years of his life in Portugal and had only spent a small percentage of his life in the United Kingdom. The panel also expressed doubt about the truthfulness of his claim to have been nothing but a careful driver.

Our Assessment

11. We concur with Mr Seelhoff that it is not open to the SSHD to seek to raise for the first time at the hearing before us concerns about the claimant's employment history. There was documentary evidence before the First-tier Tribunal that the claimant began work in 2001 and there had been no challenge to this evidence either before the First-tier Tribunal or in the grounds of appeal. The clear and unchallenged finding of fact made by the panel was that the claimant had been a worker since 2001 and had thus established ten years' continuous residence.

12. However, by virtue of regulation 19, the claimant was only entitled to the highest level of protection on the basis of ten years' continuous residence if that period was not broken by his period of imprisonment which commenced on 1 August 2012 and ended just short of two years later on 22 July 2014. The centrality of this test has been established by the CJEU ruling in MG. That ruling also confirms that in calculating the ten years one counts back from the date of the decision to deport, in the claimant's case backwards from 24 February 2014.

13. One searches in vain for any apprehension that this was the correct test by the First-tier Tribunal panel. Its only justification for concluding that the claimant had the qualifying period of ten years was given in paragraph 22 which states:

> "The Appellant and his family have resided in the UK for many years and have clearly become integrated. We did not unfortunately have the benefit of risk assessment before us from the Probation Service. It is clear however that the risk relates to the Appellant's driving but he and his wife have said that he does not intend to drive again in the UK and we fervently hope that he keeps to this pledge. In the near term he is in any event disqualified from doing so. It is also reasonable to suppose that the Appellant would have finally gained some insight into how lethal a vehicle can be on a public highway after having been involved in two fatal accidents within a short period of time (despite his disappointing denial at the hearing that he had ever been other than a careful driver). Given the high threshold for removal, we find that it would not be in accordance with EEA law for the Appellant to be removed. We therefore allow the appeal under the EEA Regulations."

14. The panel clearly thought its only task was to ascertain, pursuant to regulation 21, whether it was proportionate for the claimant to be deported in light of his conduct (which had to represent a genuine, present and sufficiently serious threat to the fundamental interests of society) and having regard to a number of factors including his length of residence in the UK and his social and cultural integration. It simply assumed without any analysis that the claimant stood to be assessed on the basis of

ten years of continuous residence, notwithstanding his period of imprisonment. There was no reference at all to the possible impact on the claimant's asserted integration of his period of imprisonment. The representatives at the hearing did not refer the panel to the CJEU ruling in MG, nor did the panel refer to it themselves. It is impossible to avoid the conclusion that the panel simply failed to grasp what the correct test was. Its failure in this respect was a clear error of law.

15. At the same time we cannot allow the SSHD's appeal unless satisfied that the panel's error of law was a material one. Here we have great difficulty with the SSHD's submissions and Mr Melvin's oral development of these. From the guidance given by the CJEU in MG, it is clear that we have to consider whether the claimant's integrative links with the UK were broken in August 2012 by his imprisonment. Two factors seem to be of prime importance in this regard. First of all, by the time he was imprisoned he had lived and worked in the UK for over eleven years. Secondly, he also had a family life in the UK with his second wife, who is a Portuguese national, and his son H (d.o.b. 2/11/80) who has cerebral palsy and is severely disabled (he is also Portuguese). The claimant also has a daughter who has settled in the UK with her partner and child. The finding of fact made by the First-tier Tribunal panel – not challenged by the respondent – was that the claimant's family have become integrated into the UK. Thus his integration links consist not only of employment in the UK but also residence for a lengthy period by his family whose integration into the UK is not challenged. There are certainly factors that point to a lack of certain other types of integrative links – e.g. he chose to use a Portuguese interpreter at the hearing before the FtT; by the time he came to the UK he was already in his 40's, so his cultural links with Portugal would appear to be very entrenched. However, it cannot seriously be argued that the absence of such links negated the strong family links, coupled with his continuous engagement with the UK labour market.

16. A second factor of undoubted importance is the fact that the claimant's imprisonment was for a period of slightly less than two years. The SSHD is plainly right to emphasise the serious criminality of the claimant and the claimant's evident disregard for the law and lack of insight into his own behaviour as a driver. However, that does not alter the fact that his period in prison was less than two years and that, in deciding whether that broke his integrative links, this relatively limited period had to be balanced against his previous lengthy period of residence in the UK where he had established integrative links of some eleven years.

17. We observe that in the MG case the CJEU was asked what significance should be attached to a case in which an applicant had already been resident in the host Member State for ten years at paragraphs 35-37. The CJEU stated:

> "35. As for the question of the extent to which the non-continuous nature of the period of residence during the 10 years preceding the decision to expel the person concerned prevents him from enjoying enhanced protection, an overall assessment must be made of that person's situation on each occasion at the precise time when the question of expulsion arises (see, to that effect, *Tsakouridis*, paragraph 32).

> 36. In that regard, given that, in principle, periods of imprisonment interrupt the continuity of the period of residence for the purposes of Article 28(3)(a) of Directive 2004/38, 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 34).
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> 37. Lastly, as regards the implications of the fact that the person concerned has resided in the host Member State during the 10 years prior to imprisonment, it should be borne in mind that, even though – as has been stated in paragraphs 24 and 25 above – the 10-year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of the decision ordering that person's expulsion, the fact that the calculation carried out under that provision is different from the calculation for the purposes of the grant of a right of permanent residence means that the fact that the person concerned resided in the host Member State during the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment referred to in paragraph 36 above."

18. We are entirely satisfied that the First-tier Tribunal could only have concluded in the claimant's case that his imprisonment did not break his integrative links. In concluding thus we have given full weight to the fact that the claimant had not only spent time in prison but had also engaged in conduct in 2009 and 2011 that was both criminal and anti-social. He had shown disregard for the law in failing to have an eye test. He had tampered with his lorry tachograph. It is possible that his conduct for the entirety of the period between 2009 and 2011 was contrary to the fundamental interests of society. Nevertheless, such considerations cannot alter the fact that there was genuine integration established before that and the claimant's integrative links have to be looked at not just in relation to him on his own but in the context that his family included two other EEA nationals in the UK in their own right.

19. Whilst the FtT did not engage with the issue of whether integrative links had been broken we agree with Mr Seelhoff that it is clear from their findings of fact, having heard evidence from the claimant's wife, that the strength of his integrative links with the UK were such that their interruption by just under two years of prison did not break them.

20. Accordingly, we consider that the First-tier Tribunal, although it wrongly applied the relevant law regarding periods of imprisonment, arrived at a rational and lawful conclusion that the claimant's continuous residence in the UK could be taken to be over ten years.

21. The only remaining issue is whether the First-tier Tribunal erred in concluding that there were no imperative grounds of public policy for deportation of the claimant. Here, once again, we consider it pertinent to refer to CJEU guidance, this time

guidance given by its Grand Chamber on the meaning of imperative grounds of public security in Case C-348/09, P.I. v Oberbürgermeist erin der Stadt Remscheld, 22 May 2012, in particular at paragraph 33:

> "33. In the light of the foregoing considerations, the answer to the question referred is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it is open to the Member States to regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion measure under Article 28(3), as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it."

22. We have very considerable sympathy with the view of the SSHD as to the reprehensible nature of the claimant's conduct. He has been responsible for the deaths of two innocent people, one a cyclist, another an elderly pedestrian. In relation to the killing of the elderly pedestrian he was guilty of dangerous driving and the particulars of his case show that it came about through his own negligent and obtuse attitude to his own driving ability, coupled with falsification of his lorry tachograph details. The fact that he appears even today not to accept that this conduct was contumelious is chilling. At the same time, even cast in its worst garb, his conduct is clearly considerably short of what the CJEU had in mind for this level of protection, at paragraph 33 of P.I.

23. Another difficulty in the way of the respondent's case is that in relation to all three levels of protection it is necessary to show that a claimant is a genuine, present and sufficiently serious threat to the fundamental interests of society. Even accepting (as we have done) that the claimant was previously someone who posed a genuine and sufficiently serious threat to the fundamental interests of society, we cannot see that he was so at the date of hearing before the FtT in September 2014. By that time he had been banned from driving and the First-tier Tribunal appears to have accepted. On the strength of the evidence of the claimant's wife, that he would not drive again. Short of speculating that the claimant would either contravene the driving ban or hold specific intentions to regain his licence in the future, the SSHD cannot reasonably argue that he posed a "present" threat to society by driving again. That is true even if we accept he has a propensity to re-offend in respect of his driving. There has been no suggestion that he harbours criminal proclivities outside the context of driving.

24. Had we been applying UK law governing deportation of foreign criminals we may well have concluded that his deportation was both lawful and proportionate, but the claimant is an EEA national and his case must be decided under the relevant EU law provisions as transposed into our law by the 2006 EEA Regulations. It is not within

our legal power to direct, but we would express our hope that this man is never allowed to drive again.

Notice of Decision

For the above reasons we conclude that despite falling into legal error the FtT did not materially err in law and accordingly the appeal of the SSHD against its decision is dismissed. No anonymity direction is made.

Signed Date

Upper Tribunal Judge Storey