IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00044/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 December 2015	**On 6 Janaury 2016**

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAVIER DACOSTA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr P R Collings, Counsel, instructed by Caulkner & Co, solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against her decision to remove him to Spain pursuant to Regulation 21 of the Immigration (European Economic Area) Regulations 2006 (as amended). The claimant is a Spanish citizen.

Preliminary issue

2. There was a preliminary issue in relation to a bundle of documents filed by the claimant's solicitors shortly before the hearing. The Home Office Presenting Officer was disadvantaged, having had no opportunity to prepare to deal with the new bundle, despite the plain direction given with the notice of hearing that 'The Upper Tribunal will not consider evidence which was not before the First-tier Tribunal unless the Upper Tribunal has specifically decided to admit that evidence' and in the accompanying Directions, that:

> "2. The parties are reminded of the need to make an application pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, where appropriate, and of the requirements of that Rule:
>
> (2A) In an asylum case or an immigration case –
>
> (a) If a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party –
>
> (i) Indicating the nature of the evidence; and
>
> (ii) Explaining why it was not submitted to the First-tier Tribunal; and
>
> (b) When considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.".

3. No such notice had been prepared or served. The information required by paragraph 15(2A)(a) was not available. We received no explanation either of the bundle's late production, or of the failure to produce its contents before the First-tier Tribunal.

4. Mr Collins accepted that in the circumstances, the Tribunal would be entitled to refuse to admit the additional bundle. He told us that the contents of the new bundle was mainly a repetition of the evidence already produced, together with a statement from the claimant's partner in which she set out the unsuccessful efforts she had made to find more traces of integrating links to the United Kingdom for this claimant.

5. It seems, therefore, that the documents would have added very little of relevance to the appeal: we are quite prepared to accept that it has not been possible to produce more evidence of integrative links. We refused to admit the documents, which we did not consider to be relevant to the error of law under consideration.

Error of law

6. The First-tier Tribunal, when allowing this appeal, applied to the claimant the highest level of protection for EEA citizens as set out in paragraph 21(4)(a) (the 'imperative ground'), which requires 10 years' continuous residence in accordance

with the Regulations before the date when the relevant decision (the removal decision). The proper application of that test was clarified Court of Justice in *Secretary of State for the Home Department v MG (Judgments of the court]* [2014] EUECJ C400/12 which was published on 16 January 2014

> "1. On a proper construction of Article 28(23A) of Directive 2004/38EC of the European Parliament and of the Council of 28 April 2004 ... the ten year period of residence referred to in that provision must in principle be continuous and must be calculated by counting back from the date of the decision ... the expulsion of the person concerned.
>
> 2. Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning this period of imprisonment is in principle capable of both of interpreting the continuity of the period of residence for the purposes of that provisions and of affecting the decision regarding the grant of the enhanced protection provided for hereunder even where the person concerned resided in the host member state for the 10 years prior to imprisonment. However the fact that that person resided in the host member state for years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host member state had been broken."

7. It is not now in dispute that the First-tier Tribunal erred in law by erroneously calculating the qualifying period of 10 years forward from the date of the claimant's putative arrival in the United Kingdom rather than backwards from the removal decision. Having applied the wrong test the First-tier Tribunal erroneously reached the conclusion that the imperative test was applicable.

8. Given the lower standard of EEA Regulations protection available under Regulation 21(1) and 21(2), we are satisfied that such error is material to the outcome of the appeal. We set aside the decision and now proceed to remake it.

Factual matrix

9. The factual matrix in this appeal is as follows:

   (a) The claimant claims to have arrived in the United Kingdom sometime in the early to mid-1970s, having been born in Spain in 1970. By 1979, the Spanish consulate was aware of his presence, and that of his father, in the United Kingdom. We have before us a letter confirming that. The claimant is a healthy man, now age 45, with a British citizen partner and two children aged 10 and 7.

   (b) Apart from his criminal history, those are almost the only official traces of the claimant's presence here in the 40 years he says he has spent in the United Kingdom. There are no extant records of his schooling and no records of his paying tax or National Insurance until 2003/4. The claimant's partner has tried hard to find more traces of his residence in the United Kingdom but has been unsuccessful. There is no reliable evidence that he spent all of that time living in the United Kingdom at all.

(c) In 1986 two things happened. The claimant was convicted of the offence of actual bodily harm and was fined £100. He was then, on his account, working as an apprentice carpenter, but that was short-lived. The claimant had a car accident and was out of work for 6 or 7 years.

(d) At the earliest, on his own evidence, the claimant resumed some kind of employment in 1992 or 1993, working 'cash in hand' at first and filing neither tax nor National Insurance returns until 2003/4. He did so for 2 years only, then stopped again.

(e) The claimant's parents in Spain are said to be deceased. He has two brothers and two sisters in the United Kingdom who have not seen him since he went to prison in 2009. The claimant has a relationship with the mother of his children and they have two children together. The elder child was born in November 2005 and the younger in November 2008: both they and their mother are British citizens. The claimant is not married to his partner.

(f) On 1 July 2009 the claimant was arrested and charged with possession of £100,000 of cocaine with intent to supply, and possession of criminal property, £51,000 in cash which he stated belonged to others, and which the sentencing judge considered to be likely to be the proceeds of drug dealing by others. His elder child was then 3 years old, and his younger child was 7 months old.

(g) The claimant pleaded guilty to the drugs charge but not the possession of criminal property offence; he was found guilty on both counts. On 5 March 2010, when sentencing him at Basildon Crown Court, the sentencing judge took a very serious view of the offences. He considered that the claimant had set up as a sole trader in the drugs business, not working with others. The claimant was sentenced to 6 years' imprisonment on the offence of possession with intent to supply and 2½ years on the offence of possession of criminal property, to run concurrently. The claimant did not appeal thos sentences. He was also ordered to pay compensation of £300,000, but it is unclear whether he did so.

(h) The Secretary of State accepted in her refusal letter that the relationship between the appellant and his British citizen partner and children was genuine and subsisting, but considered that it was proportionate to remove him to Spain and that it was a matter for the claimant and his partner whether they went together or whether he maintained his links by visits and modern methods of communication, which was the case while he was in prison.

(i) The children, who are now are now 10 years and 7 years old, have not seen the claimant while he was in prison. He spoke to them by telephone several times a week during his incarceration, but they were unaware that he was in prison, according to the claimant and his partner.

(j) The claimant was released from prison on 15 June 2015, when his criminal sentence ended. He did not attend the appeal hearing before us.

(k) The claimant's partner has a sister living in Spain, who has a successful business. That sister speaks Spanish: the claimant claims not to speak Spanish but accepts that he would be able to learn it as an adult. The claimant's family

visited his partner's sister for a week at some point before the claimant went to prison. For the claimant, Mr Collins accepted that English is widely spoken in Spain and that therefore, the claimant would not be likely to be in serious difficulty even if he were unable to learn Spanish once removed to his country of origin.

Discussion

10. Regulation 21 so far as relevant is as follows:

> "21. (1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (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. …
>
> (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."

11. The Secretary of State's decision was taken on the grounds of public policy and public security, as Regulation 21(1) requires. We are satisfied that it has not been taken to serve economic ends as prohibited by Regulation 21(2).

12. We are not satisfied that it is appropriate to apply Regulation 21(3) and treat the claimant as a person with a permanent right of residence under Regulation 15. The evidence of his presence in the United Kingdom in accordance with the Regulations

is very sparse, and does not to the ordinarily civil standard of balance of probabilities demonstrate a continuous period of EEA Regulations compliant resident for 5 years at any time before the decision to remove.

13. The claimant is of course entitled to the benefit of consideration under Regulations 21(5) and 21(6). Regulation 21(5) requires that the decision should comply with the principles of proportionality and be based exclusively on the personal conduct of the person concerned, which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Regulation 21(5)(e) states that previous criminal convictions do not in themselves justify a decision to remove: the approach required is more holistic than that.

14. Drugs offences do represent a sufficiently serious threat to one of the fundamental interests of society, and in this case, the drugs in question were on the industrial scale: the claimant had in his possession £60,000 worth of cocaine and £40,000 in money. That is sufficient to affect and cause harm to a great many people. The sentencing judge in his remarks took a very serious view of the claimant's offence. He considered that the claimant had not merely been holding the funds and the cocaine for a friend as he said he was, and that he was in fact a major drug dealer who had had the misfortune to be discovered. There is before us an OASys Report which, whilst it states that there is a low risk of the claimant reoffending, nevertheless finds that there is a 17% risk of proven reoffending within two years. That may be what OASys regards as low but it is not what society would in general regard as a low risk, since it approaches a one in five risk of reoffending in less than two years from release.

15. We consider that the Secretary of State's decision to remove this claimant to Spain is proportionate. It is based not only on the index offence but also has regard to his conduct during his alleged time in the United Kingdom, which has left barely any official traces. We know that in 1979 the Spanish Embassy was aware of him being in the United Kingdom; that in 1986, he was here, because he was the subject of a criminal conviction; and that, given that his children were born in 2005 and 2008 he must have been here a year or so earlier. We know that he was here in 2009 when he was arrested, and that thereafter, until 2015, he was imprisoned here.

16. Regulation 21(6) requires the Secretary of State to consider the claimant's age, state of health, family and economic situation, what is known about his residence in the United Kingdom and his social and cultural integration and also the extent of his links with his country of origin. The claimant is a man of middle years, about 45 years old, and in good health as far as is known. He has served his sentence and is currently at liberty in the community, not in immigration detention. It is impossible to be clear as to the length of his residence in the United Kingdom and that he appears to have very little social and actual integration here, and equally it is impossible to be sure whether he is telling the truth about the extent of his links with his country of origin. It would have been of assistance if the claimant had been here himself to assist with these matters but he has chosen not to attend the hearing, as is

his right, and accordingly we can do no more than to consider the evidence which was before the First-tier.

17. There is no reliable evidence of the claimant's social or cultural integration into the United Kingdom or even that he has been here consistently. It is entirely possible that he has been coming and going between the United Kingdom and Spain, or alternatively living in the United Kingdom "below the radar" without any significant attempt to integrate himself into British society.

18. The only real point on integration in the United Kingdom concerns his relationship with his partner and their two children. The children's relationship with the claimant has been by telephone for most of their lives, with the children unaware that he was telephoning them from prison. The Secretary of State did have regard to the relevant factors and her reasons for considering that the interests of the United Kingdom outweighed the claimant's family and private life are set out at paragraph 26 of the decision.

Article 8 ECHR

19. We have considered whether we should have regard to part VA of the Nationality, Immigration and Asylum Act 2002 and in particular to paragraph 117B and 117C thereof. We note that the appeal was not allowed on Article 8 ECHR grounds and that Article 8 does not appear to have been in issue before the First-tier Tribunal. The claimant has not filed a rule 24 Reply engaging Article 8 ECHR and there being no family and private life decision by the First-tier Tribunal, the Secretary of State has not appealed such a decision. We consider that we are not seised of any Article 8 point and therefore that part 5A is not in issue in this appeal.

Decision

20. The error of law by the First-tier Tribunal is plain, undisputed and material. When the proper test is applied, the claimant's appeal cannot succeed. We therefore allow the Secretary of State's appeal and substitute a decision dismissing the claimant's appeal against her removal decision under Regulation 21.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision. We re-make the decision in the appeal by dismissing the claimant's appeal against the Secretary of State's removal decision.

Signed Date: 29 December 2016

Upper Tribunal Judge Gleeson