Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00180/2015

THE IMMIGRATION ACTS

Heard at : Field House	**Decision and Reasons Promulgated**
On : 9 March 2016	**On 21 March 2016**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SALOME ROXANNE GREEN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: No Appearance

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Ms Green's appeal against the decision to deport her from the United Kingdom pursuant to Regulation 19(3)

(b) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Ms Green as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of France, born on 11 November 1989. She claims to have arrived in the United Kingdom in October 1995. She first came to the adverse attention of the authorities here in January 2006 when reprimanded for shop-lifting. Between April 2006 and October 2014 she was convicted 23 times for 42 offences including an offence against the person, theft and kindred offences, offences relating to police, courts and prisons, drugs offences and a miscellaneous offence. She received short sentences of imprisonment or detention as a result of some of those convictions.

4. On 25 July 2014 the appellant was convicted of one count of supplying a Class A controlled drug, cocaine, and two counts of breach of conditional discharge. On 2 October 2014 she was sentenced to two years' imprisonment.

5. On 26 January 2015 the appellant was informed of her liability to deportation. On 6 May 2015 the appellant was served with a decision to make a deportation order dated 29 April 2015 and she appealed against that decision.

6. In the reasons for deportation letter, the respondent accepted, on the basis of the appellant's evidence of school attendance between 1996 and 2004, that she had acquired the right to permanent residence. It was not accepted that she had been continuously resident in the UK for ten years. Consideration was therefore given to whether her deportation was justified on serious grounds of public policy or public security. The respondent considered that deportation was justified, noting that the OASys report had assessed her as posing a high risk of re-offending and concluding that she posed a genuine, present and sufficiently serious threat to the public. The respondent considered that the decision to deport the appellant was proportionate and in accordance with the EEA Regulations. It was considered further that her deportation would not breach her Article 8 rights under the ECHR.

7. The appellant appealed against that decision and her appeal was heard on 12 June 2015 by First-tier Tribunal Judge Mayall. The appellant appeared in person and was not represented. The judge noted the respondent's concession as regards the acquisition of permanent residence and found, with the Home Office Presenting Officer's agreement, that the appellant fell within the provisions of Regulation 21(4) of the EEA Regulations, having resided in the UK for a continuous period of at least ten years prior to the relevant decision. The judge was satisfied that there were no imperative grounds justifying a decision to deport and found that the decision did not comply with the principle of proportionality. Accordingly he allowed the appeal under the EEA Regulations.

8. The respondent sought permission to appeal to the Upper Tribunal on the grounds that the judge's acceptance that the appellant was entitled to the higher level of protection on the basis of ten years' continuous residence in the UK did not take account of the relevant jurisprudence in Secretary of State for the Home Department v MG (Judgment of the Court) [2014] EUECJ C-400/12. The grounds asserted further that the judge's decision lacked clear findings on the appellant's risk of re-offending, given the evidence that she posed a high risk of re-offending.

9. Permission to appeal was initially refused, but was subsequently granted by Upper Tribunal Judge Gill on 14 October 2015.

10. At the hearing before me, there was no appearance by the appellant. I was concerned as to whether she was aware of the grant of permission to the respondent and of the hearing, or even of the outcome of her appeal before the First-tier Tribunal, as the decision was sent to her at her place of imprisonment, HMP Send, but the Tribunal's records showed that she had been transferred to Yarlswood detention centre at some stage and had been released from there on 28 August 2015. Nevertheless, the notice of hearing for today's hearing had been sent to the last known address on the Tribunal's system, which I note from the papers was her grandparents' address where she had lived previously and it had not been returned undelivered. Mr Jarvis made some enquiries himself and confirmed that the Home Office database showed the same address, although it also recorded that she reported as homeless to Wembley police in October 2015.

11. In such circumstances it seemed that no purpose would be served by adjourning the proceedings and, since this was the respondent's appeal, there was no option other than to proceed.

12. Mr Jarvis relied on his very detailed skeleton argument. He submitted that the judge had erred in law by taking the view that ten years' residence in itself was sufficient to benefit from the higher test and the Home Office Presenting Officer seemed to have simply agreed with his view. In so far as there was a concession by the Presenting Officer, Mr Jarvis asked that it be withdrawn as such a view was not correct in law and had failed to take account of the jurisprudence confirming that the ten years had to be counted back from the deportation decision and that prison time interrupted the ten years, or that alternatively there had to be a continuous ten year period prior to the term of imprisonment which could not have been demonstrated by the appellant as a result of her previous periods of imprisonment. Mr Jarvis relied in particular on the cases of MG, Nnamdi Onuekwere v Secretary of State for the Home Department [2013] EUECJ C-378/12 and Warsame v The Secretary of State for the Home Department [2016] EWCA Civ 16. With regard to the withdrawal of the Presenting Officer's concession, he relied upon the case of NR (Jamaica) v Secretary of State for the Home Department [2009] EWCA Civ 856.

13. Mr Jarvis submitted further that the respondent's acceptance of the appellant's acquisition of permanent residence was also wrong in law, as it was

unlikely that she had comprehensive sickness insurance, which was a prerequisite for the exercise of treaty rights as a student. Furthermore, the appellant's circumstances were similar to those in the case of Secretary of State for the Home Department v Vassallo [2016] EWCA Civ 13, according to which it was unlikely that she had acquired a right to permanent residence on 30 April 2006. He requested that the respondent's concession in regard to the acquisition of permanent residence also be withdrawn.

Conclusions on the Error of Law

14. For the reasons given by Mr Jarvis, it seems to me that the decision of the First-tier Tribunal Judge is unsustainable and must be set aside. In so far as the Presenting Officer's agreement with the judge's view can be considered as a concession, I accept the withdrawal of that concession since it was based upon a misapplication of the law.

15. The jurisprudence addressing the relevant ten year period for the purposes of Regulation 21(4) is prolific and the issues are complex. It is clear from that jurisprudence, as relied upon by Mr Jarvis and referred to above, that the ten year period is not simply calculated as ten years' continuous residence without more. It is to be counted back from the deportation decision and is to take account of periods of imprisonment which are likely to interrupt that period of continuous residence. The question of the relevant ten year period having been established, counting back from the period of imprisonment is also a relevant consideration, as is the question of integration. All of these matters have to be carefully considered in reaching a view as to the acquisition of the qualifying period and whether or not the higher threshold in Regulation 21(4) applies. However none of these matters were considered by the judge. Accordingly, his decision that the appellant had the benefit of the higher threshold under Regulation 21(4) cannot be sustained.

16. I also agree with Mr Jarvis that the respondent's concession as to the acquisition of permanent residence, on the basis that it was made, was wrong in law in that it failed to take account of the requirement for comprehensive sickness insurance and appeared also to be inconsistent with the findings now made in the recent case of Vassallo, or at least failed to take account of the considerations in that case. I therefore also accept that that concession is withdrawn.

17. Accordingly I set aside Judge Mayall's decision. The decision in the appellant's appeal must be re-made on the basis that all matters are open for consideration. It is for the judge re-making the decision to consider which level of protection the appellant is entitled to rely upon within the EEA Regulations, and to consider whether the appellant has acquired a permanent right of residence and whether she has acquired the relevant ten year qualifying period to entitle her to the higher level of protection, with reference to the relevant jurisprudence.

18. I would agree with Mr Jarvis that, since the effect of the judge's preliminary observation was that there was virtually no evidence taken from the appellant and no proper assessment of relevant matters, it would be appropriate for the case to be remitted to the First-tier Tribunal to be considered afresh. I considered whether there was, however, any point in remitting the case given the appellant's absence and the possibility that there was no longer any contact with her. Mr Jarvis advised me that there was the possibility of a more detailed search being conducted of linked databases, such as through the police, to ascertain if an address for contact could be found. Therefore, it seems to me that it is in the interests of justice to afford the appellant an opportunity of being able to attend her appeal and provide further evidence.

DECISION

19. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be dealt with afresh, before any judge aside from First-tier Tribunal Judge Mayall.

DIRECTIONS

The respondent is to keep the Tribunal informed of any contact details available for the appellant, further to any searches being conducted or enquiries being made.

Signed
Upper Tribunal Judge Kebede