Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00239/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 18 January 2016	On 15 March 2016

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RUI BARBOSA
[NO ANONYMITY ORDER]

Respondent

Representation:

For the appellant: Mr S Whitwell, a Senior Home Office Presenting Officer

For the respondent: Mr M Mukulu of Counsel, instructed by RBS 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 Portugal, his country of origin, under the Immigration (European Economic Area) Regulations 2006 (as amended). The claimant is a citizen of Portugal and thus an EEA citizen.

2. The Secretary of State accepted that the claimant had permanent residence in the United Kingdom by 2008, but by reason of his prison sentence, contended that the 'imperative grounds' protection was not available to this appellant because he could not show 10 years' residence in accordance with the Regulations, immediately preceding the decision of the respondent to make a deportation order on 28 May 2015.

Background

3. The claimant came to the United Kingdom with his mother in 1999, aged about 7. She had left Portugal and travelled first to Spain, where they spent about 5 years, and then travelled on to the United Kingdom. The claimant does not recall, but his mother does, that they returned to Portugal for a time before making the journey to the United Kingdom.

4. The claimant's father, and his step-father, were abusive to him and his mother. The claimant's principal language now is English. He claims not to speak Portuguese. He is dyslexic and has never learned to read and write in Portuguese. He has very little ability to read and write in English either.

5. In 2000, when he was 9 years old, the claimant was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). He has also developed trichotillomania, which causes him to pull out his hair. He has contracted Hepatitis B. While in prison, the claimant was monitored hourly because he is known to have thoughts of self-harm, although there is no evidence that he has acted upon them.

6. The claimant's history after coming to the United Kingdom was an unhappy one: his relationship with his mother was difficult, because of her own difficulties, including her difficulties with his step-father. The claimant was a looked-after child who lived in various care homes. Much of the documentary evidence to establish whether he was in education, where he was living, and what he was doing, and in particular, whether he remained in the United Kingdom during this period, is no longer available.

7. By 2007, his criminal history began and he was excluded from school. He became a Kids Company client. He received a caution in early 2007, when he was 15. In August 2007, he was convicted of destroying or damaging property and battery, and received a Referral Order. In November 2007, he was convicted of having an offensive weapon in a public place, and breach of his Referral Order. He was made the subject of a Supervision Order. In March 2008, the claimant was convicted of breaching his Supervision Order.

8. In January 2009, when he was 16 years old, the claimant was convicted of common assault and sentenced to a community punishment and a Community Rehabilitation Order. He was using drugs. In October 2009, the claimant was convicted of robbery and sentenced to a Community Order. In September 2010, he was convicted of failure to comply with his Community Rehabilitation Order. That was his last juvenile offence.

9. The claimant's adult offending began in March 2011 with a conviction for breach of his Youth Rehabilitation Order. In June 2011, he was convicted of travelling on the railway without payment of the fare, and also on a separate occasion, of handling stolen goods. In November 2011, he was convicted of possession of a controlled drug (cannabis). He spent time at Feltham Young Offenders Institution (Feltham YOI).

10. In November 2012, now age 19, he was convicted of burglary and theft, and received a suspended sentence. In March 2013, age 20, he was convicted of breach of a non-molestation order and harassment, in relation to his then partner. He was still being supported by Kids Company, but by now was living in a chaotic personal situation.

11. On 30 July 2014 the claimant was convicted of the index offences, comprising 4 counts of domestic burglary and theft, and two additional counts, one of making false representations for gain, and one of failure to comply with 3 suspended sentences (at a time when he stated he was homeless). The claimant's account is that all of these offences were committed to fundamental his escalating drug use. He was sentenced at Southwark Crown Court on 17 September 2014 to 30 months' imprisonment, credit being given for an early guilty plea.

12. On 28 May 2015, the respondent made the decision to deport him under the Regulations.

First-tier Tribunal decision

13. The First-tier Tribunal found that the claimant began using drugs age 9, just 2 years after arriving in the United Kingdom, and that he became a looked-after child when he was 14, because his step-father, like his natural father, was hitting the claimant and beating his mother. He had visited Portugal only once in 16 years, for a brief holiday. He has a grandmother there, but she is old and lives in a care home.

14. His maternal uncle is still based in Portugal but travels internationally: the uncle is away from Portugal so often that he rents properties when he returns there. There was no guarantee that his maternal uncle would be prepared to assist an estranged nephew with a troubled past. The claimant does not know him.

15. At the hearing in October 2015, the claimant's mother said that she was prepared to offer him a home when he is released until he can get accommodation of his own. I noted that at the end of the hearing when his

mother spoke to the claimant who was in the dock, the conversation between them was in Portuguese.

16. The claimant claimed to have converted to Islam which had brought him peace, but the First-tier Tribunal found that no evidence to support the conversion had been provided. He said he had a partner, but no partner attended the hearing and there was no supporting evidence from such a person before the First-tier Tribunal.

17. The claimant's evidence was that, since going to prison, he had stopped using drugs and was taking courses with a view to obtaining employment on release.

18. The First-tier Tribunal considered the claimant's offending history, and an OASys report dated 1 June 2015. It found that the claimant was entitled to the highest level of protection from removal under Regulation 21(4) (the 'imperative grounds' protection level) because he had accrued 10 years' residence in the United Kingdom in accordance with the EEA Regulations before the decision to deport him in May 2015. The claimant had been in the United Kingdom for 10 years by 2009, 6 years before the decision to deport.

19. The First-tier Tribunal then reviewed the decisions of the Court of Justice of the European Union in *Land Baden-Wurttemburg v Tsakouridis (European citizenship)* [2010] EUECJ C-145/09, *PI v Oberburgermeisterin der Stadt Remscheid* [2015] UKUT 00520 (IAC), *Essa v Secretary of State for the Home Department* [2012] EWCA Civ 1 and *MC* (Essa principles recast) Portugal [2015] UKUT 00520 (IAC), directing itself that it should assess the relative prospects of rehabilitation in Portugal and the United Kingdom. It concluded that the prospects were greater in the United Kingdom because of the support from his mother, partner, and offender supervisor. The Kids Company support was no longer available because the charity had closed down. The claimant had mental health and housing support, and his mother had now offered to accommodate him.

20. The First-tier Tribunal found that the 'imperative grounds' standard was not met and that deportation of the claimant to Portugal would be unlawful. The appeal was allowed under the Regulations and no anonymity direction was made.

Permission to appeal

21. The Secretary of State appealed. She argued that the First-tier Tribunal had misdirected itself in applying Regulation 21(4) to the claimant's circumstances and in particular in failing properly to apply the decisions of the Court of Justice of the European Union in *Land Baden-Wurttemburg v Tsakouridis (European citizenship)* [2010] EUECJ C-145/09 and in *Secretary of State for the Home Department v MG (Judgment of the Court)* [2014] EUECJ C-400/12.

22. The Secretary of State contended that the claimant was entitled only to the intermediate 'serious grounds' protection level provided by Regulation 21(3) and not the 'imperative grounds' level of protection applied by the First-tier Tribunal because he could not show 10 years' residence in the United Kingdom in accordance with the Regulations, immediately before the decision to deport in May 2015. She relied on *MG* to support that as the correct approach.

23. The Secretary of State challenged the First-tier Tribunal's approach to Regulation 21(5), having regard to the OASys report which said that the claimant presented a high risk of reoffending and a medium risk of serious harm if he did reoffend. She argued that there was not much evidence of rehabilitation in this case, and that the judge should have found that the appellant did present a genuine, present and sufficiently serious risk to the fundamental interests of society such that removal would be lawful.

24. In relation to the comparative prospects of rehabilitation in Portugal and the United Kingdom, she relied upon *Secretary of State for the Home Department v Dumliauskas* [2015] EWCA Civ 145, arguing that Portugal as a European Union Member State must be considered to have comparable rehabilitative provisions to those in the United Kingdom and that even if no rehabilitation support were available, that of itself would not normally render deportation disproportionate. The greater the risk of reoffending, the greater the justification for removal of the claimant from the United Kingdom.

25. Permission to appeal was granted on the that the First-tier Tribunal had arguably erred in law in the application of *Tsakouridis* and *MG,* in not considering that the claimant's imprisonment and offending broke his continuous residence in the United Kingdom, and by failing adequately to address the issue of the claimant's integration into United Kingdom society.

Rule 24 Reply

26. The claimant submitted a Rule 24 Reply. After setting out the procedural history, the claimant at paragraph 6 relied on *Tsakouridis* and noted that the First-tier Tribunal had had regard to his non-existent, or at best 'anaemic' connection with Portugal (at [29] in particular); his residence in the United Kingdom since the age of 6; the claimant's inability to speak or read Portuguese and the acceptance that English is his first language; and his acquisition of permanent residence status in the United Kingdom. All of those factors were relevant to the *Tsakouridis* analysis. The First-tier Tribunal had not overlooked that decision.

27. In relation to the decision of the Court of Justice that the 10 years' residence has to be calculated back from the date of the deportation decision, the claimant argued that the Court of Justice's decision must be read in the light of *Tsakouridis,* and that if it is, the asserted ground becomes unarguable.

28. Regarding rehabilitation, the claimant contended that the First-tier Tribunal found that the 'imperative grounds were not made out' and that the decision should be read as a whole, with particular reference to [33] and [23], which should be read together. On that basis he contended that the First-tier Tribunal did not misdirect itself as claimed.

29. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

30. For the Secretary of State, Mr Whitwell relied on the grounds of appeal and the erroneous failure to count backwards from the deportation decision when assessing whether the 'serious grounds' or the 'imperative grounds' test should be applied. He asked me to set aside the First-tier Tribunal and remake the decision.

31. At the hearing, Mr Mukulu for the claimant accepted that the wrong test had been applied and that, having regard to the Court of Justice's decision in *MG,* the claimant was not entitled to the 'imperative grounds' level of protection in Regulation 21(4), but only to the middle 'serious grounds' level in Regulation 21(3). He contended, however, that such error was immaterial to the outcome of the appeal and that the First-tier Tribunal had given serious consideration to the right of permanent residence acquired by the claimant.

32. The claimant had an uncle who lived in Portugal, he speaks but does not write Portuguese, and he has been in the United Kingdom now for 16 years. That was a significant period of residence and the claimant had not begun offending immediately he left secondary school. The threshold of protection for Regulation 21(3) was high and the Tribunal could not ignore the period before expulsion was ordered.

33. The claimant had lived in a chaotic situation throughout his time in the United Kingdom. He spent time in care and was supported by Kids Company before going to prison. He had integrated into United Kingdom society 'in a different manner' while he was in care and could not be regarded as being on the fringes of society. The claimant would rely upon *Essa* at [29] and also the First-tier Tribunal decision, again at [29]. Mr Mukulu asked me to dismiss the Secretary of State's appeal.

34. I reserved my decision, which I now give.

Discussion

35. There is now no dispute about the level of protection applicable to this claimant. It is that provided by Regulation 21(3) not Regulation 21(4) and accordingly there is an error in the First-tier Tribunal's decision. The decision in *Tsakouridis* on which the claimant relies is no longer relevant since it goes to the calculation of the 10-year period for 'imperative grounds' protection and that is no longer in issue. As Mr Mukulu recognised, *MG* is determinative of that question against the claimant.

36. The difference in the two standards is sufficiently great that it is plainly material to the outcome of the appeal. I must therefore consider whether I can remake the decision without the need for a further hearing. I have concluded that it would be inappropriate to do so and that further findings of fact may be required, having regard to the test in Regulation 21(3).

37. I therefore set aside the decision, which will be remade in the First-tier Tribunal.

DECISION

38. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.
I set aside the previous decision. The decision will be remade in the First-tier Tribunal on a date to be fixed.

Date: 3 March 2016 Signed Judith AJC Gleeson
Upper Tribunal Judge

Gleeson