IAC-TH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00301/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 February 2016	**On 23 March 2016**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[A V]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr K Norton
For the Respondent: Mr A Sesey

DECISION AND REASONS

1. For ease of reference the parties are hereafter referred to as they were before the First-tier Tribunal so that [AV] is referred to as the appellant.

2. [AV] is a citizen of Latvia who was born on [ ] 1973. He appealed to the First-tier Tribunal (IAC) against the respondent's decision of 30 June 2015 to make a deportation order against him under the Immigration (European Economic Area) Regulations 2006. He succeeded in that appeal before Designated Judge of the First-tier Tribunal J M Lewis.

3. The Secretary of State for the Home Department sought permission to appeal that decision. Summarising the grounds seeking permission it was argued that the judge took the wrong legal approach regarding the appellant's period of residence in the United Kingdom. Further, it was said to be wrong to find that the appellant had the benefit of enhanced protection from deportation from the UK as he had been continuously resident for ten years counting back from the date of the relevant decision. Furthermore, the judge did not engage with the issue of whether the appellant is integrated in the UK, given his offending and imprisonment.

4. Furthermore, the judge having decided that a decision to deport could not be taken except on imperative grounds of public security because the appellant had resided in the UK for a continuous period of at least ten years prior to the relevant decision, that was all that was needed in order to defeat the Secretary of State's intention to deport the appellant. It was therefore unclear as to why the judge engaged in a wholly unnecessary analysis of the prospects of disruption to rehabilitation. This was said to be (perhaps) further evidence that the judge was not clear as to the underlying law relating to EEA deports.

5. The grounds granting permission were put very simply. It was found arguable that the judge erred in calculating the appellant's period of residence from prior to his imprisonment and not from the date of decision.

6. The judge found, and was entitled to find, that the appellant has lived in the United Kingdom for at least ten years prior to the decision letter dated 30 June 2015. Although the respondent has referred to the appellant's imprisonment he has in fact never been to prison as a result of any criminal activity. He has been detained but this was by reason of a Hospital Order made in 2011 for detention under the Mental Health Act 1983. Even then a period of imprisonment during those ten years – which has not occurred here – does not necessarily prevent a person from qualifying for enhanced protection if that person is sufficiently integrated – see **MG (prison – Article 28(3)(a) of Citizens Directive) [2014] UKUT 392 (IAC)**.

7. It is argued that the judge failed to engage with the question of the appellant's integration, which was clearly put in dispute at paragraphs 10-11 of the refusal letter, and therefore falls into error by finding that an imperative grounds test was required.

8. What is not in doubt is that the appellant has resided in the UK for at least ten years prior to the decision being taken to deport him. **The Secretary of State for the Home Department v MG (Judgment of the Court) [2014] EUECJ C-400/12** interprets Article 28(3)(a) of Directive 2004/38 as meaning that a period of imprisonment is, in

principle, capable of both interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host member state for the ten years prior to imprisonment.

9. The case of **JO (qualified person – hospital order – effect) Slovakia [2012] UKUT 00237/IAC** indicates that an EEA national does not cease to be a qualified person as a result of being detained in a hospital pursuant to an order of the court under the Mental Health Act 1983, having not been convicted of any criminal offence. Although that authority was concerned particularly with the definition of illness under Regulation 5(7)(b) and whether detention in a secure mental health unit under a compulsory hospital order made by a criminal court is to be treated in the same manner as detention during a prison sentence, the case draws attention to a distinction between those who are serving a prison sentence following conviction as a result of "their own conduct" and those who are unable to work because of illness or accident (¶ 27). Also at paragraph 28:-

> "Other than the bare assertion that detention in a secure unit should be treated in like manner to a prison sentence following conviction, the Secretary of State's argument is unsupported by authority. In our view there is a fundamental distinction between these two forms of disposal, each of which may follow precisely the same behaviour (in the present case the appalling assault in Hereford in 2006). The distinction is that a prison sentence follows the choice of an individual to act in a criminal manner, whereas a Hospital Order results from a finding that the individual suffers from a mental disorder and is not therefore criminally responsible for their otherwise culpable behaviour. We consider that this distinction places those who are detained in a secure mental health unit in a completely different category, in the context of these Regulations, from those who are imprisoned following conviction. That is our conclusion without reference to the express reference to 'illness' in the 2006 Regulations; once the reference to 'illness' is taken into account, the distinction between the two contexts is all the more stark. ...".

10. In this case the appellant was convicted for assault but was not imprisoned. He became the subject of a Hospital Order made under the Mental Health Act 1983 and that is the difference. The Secretary of State appears to acknowledge that a period of imprisonment does not necessarily interrupt the ten year period of residence if the appellant shows that he is sufficiently integrated. Although the judge did not specifically consider the matter of integration this is almost certainly because he did not consider that this was necessary. The appellant had resided in the UK for at least ten years and had not been imprisoned as a result of any criminal convictions. The respondent's argument is, or appears to be, that the matter of integration – or perhaps lack of it – having been raised in paragraphs 10 and 11 of the decision to make a deportation order it was incumbent upon the judge to deal with that aspect and he fell into error by not doing so.

11. There appears to be an interesting argument which the respondent is seeking to develop here to the effect that despite the wording of Article 28(3)(a) that an expulsion decision may not be taken on imperative grounds of public security if the person has resided in the host member state for the previous ten years there is an overriding requirement under the ten year route in any event to show integration.

12. I consider that I do not need to consider that matter further because even if the First-tier Tribunal Judge should have dealt with this argument I have to decide only whether there is a material error of law in the decision such that it should be set aside.

13. The respondent accepts in the said paragraph 10 of the decision to deport that the appellant has acquired a permanent right to reside by virtue of five years of continuous residence in accordance with the EEA Regulations. Article 28(2) of the 2004/38 Directive shows that the host member state may not take an expulsion decision against union citizens who have the right of permanent residence on its territory except on serious grounds of public policy or public security. On any view the judge made clear findings which led to his conclusion at paragraph 38 of his decision that the conduct of the appellant does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The judge's findings could not have led to any decision other than the one to which he came. Therefore an expulsion decision on serious grounds of public policy or public security was not appropriate.

14. For these reasons I am drawn (inevitably) to the conclusion that whatever errors there may be in the decision they are not such as would have led to another decision had the judge applied the law correctly. Mr Norton on behalf of the respondent did not seek seriously to argue otherwise.

15. In all the circumstances therefore the decision of the First-tier Judge is upheld.

16. No anonymity direction was sought or is required in all the circumstances of this case.

Signed Date

Upper Tribunal Judge Pinkerton