Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18697/2013

THE IMMIGRATION ACTS

At Royal Courts of Justice
on 23.11.2015

Decision and Reasons Promulgated
On 20.01.2016

Before

Upper Tribunal Judge John FREEMAN
Upper Tribunal Judge Susan KEBEDE

Between

Mario Sergio VÁLIDO PONTES

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: *Adrian Berry* (counsel instructed by Wilson Barca)
For the Respondent: Mr Keith Norton

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Keith Kimnell and a lay member), sitting at Hatton Cross on 13 – 14 April, to allow a deportation appeal by a citizen of Portugal, born 27 March 1994.

2. On 24 August the writer gave permission to appeal in the following terms:

(a) The point on the appellant's continuity of residence, and hence the need, or lack of it, for 'imperative grounds' for his removal under the Immigration (European Economic Area) Regulations 2006 [the EEA Regulations] is clearly arguable, in the light of *Onuekwere* [2014]

NOTE: no anonymity direction made at first instance will continue, unless extended by me.

EUECJ C-378/12 and *MG* [2014] EUECJ C-400/12. This was the main point on which the first-tier panel allowed the appeal.

(b) The appellant is arguably a foreign criminal under ss. 117C-D of the Nationality, Immigration and Asylum Act 2002, by his sentence of 12 months' detention and training for robbery in 2011. If so, the panel needed specifically to consider whether he met exceptions 1 or 2; and, if not, whether there were 'exceptional and compelling circumstances' for a claim under article 8 to succeed outside the Rules, under *MF (Nigeria)* [2013] EWCA Civ 1192 and authorities since then.

(c) The panel's approach to police intelligence evidence was arguably too strict, in the light of *V* [2009] EWHC 1902 (Admin).

(d) The public interest involved in removing someone with the appellant's repeated criminal convictions and with what is said to be his history of gang membership, arguably justifies, by analogy with *Virk & others* [2013] EWCA Civ 652 , allowing the Home Office to withdraw what, in the light of the authorities referred to, was clearly a mistaken concession on (a).

3. As Mr Norton accepted, the crucial point is (a). While the appellant had a very bad record for someone of his age, as the very experienced first-tier panel noted, it could not be suggested that they were wrong in taking the view that there were no 'imperative grounds' for his removal, if 'reg. 21 (4) of the Immigration (European Economic Area) Regulations 2006 [the EEA Regulations] applied to him. The relevant part reads:

> 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 [*sic*] the relevant decision …

4. In dealing with that point, the panel said no more than this:

> … the respondent accepts that the appellant has been present in the United Kingdom for more than ten years and that a decision to deport may not be taken against him except for "imperative grounds of public security" …

While they did refer to a second supplementary decision letter of 30 December 2013, this was not of course in the original Home Office bundle, and there was nothing to bring it to the writer's attention till the present hearing. Neither the original letter of 19 June, nor the first supplementary decision letter of 2 July 2013 conceded any period of qualifying residence for this appellant at all, so that the basis for the respondent's concession before the panel seemed to have been no more than accepting on the facts that the appellant had been here over ten years, without considering the quality of his residence.

5. If that had been the case, it is common ground that this Tribunal would have been entitled to consider the case, not on such a mistaken view of the law, but on the correct up-to-date one, as set out in *Onuekwere* [2014] EUECJ C-378/12 and *MG* [2014] EUECJ C-400/12, and further explained in *MG* (prison-Article 28(3) (a) of Citizens Directive) [2014] UKUT 392 (IAC). However, the terms of the second supplementary decision letter, at paragraphs 28 – 29, suggest otherwise. The decision-maker begins by accepting that the appellant had acquired a permanent right of residence, on completion of five years' stay. This turned out to have been wrong, in the light of *Onuekwere* (paragraph 32); but that is not the question with which we are concerned.

6. The decision-maker went on to accept that the appellant had been here for at least ten years; but continued that the Home Office took the view that

> … you do not *automatically* [our emphasis] qualify for the protection of imperative grounds of public security.

They went on to consider the factors set out in *Tsakouridis* (European citizenship) [2010] EUECJ C-145/09, and concluded at 29:

> Having assessed all these factors, the Home Office takes the view that you meet the integration criteria, as set out in *Tsakouridis*. As a result, it is necessary to establish that your deportation is warranted on imperative grounds of public security.

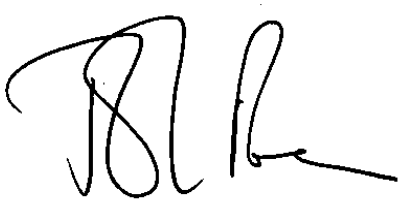
7. While the approach taken in *Tsakouridis* has been further refined in *Onuekwere* and *MG*, Mr Norton was unable to refer us to anything in those decisions that show there was anything positively wrong in the *Tsakouridis* approach (by the way, the only one in the European jurisprudence available to the decision-maker at the time of writing). In the circumstances, the panel were fully entitled to take the Home Office concession about the need for imperative grounds of public security at face value, and it follows from what we have said at **3** that this appeal must be dismissed.

8. However, we should not leave it without making two final points:

(a) this appellant should not imagine that his European citizenship gives him a charmed life in this country, so far as criminal convictions are concerned: if he acquires any more, following his eventual release at the conclusion of these proceedings, then a future decision-maker may have not only to re-assess the degree of his integration into this country, but to consider whether further repeated offences do not amount to imperative grounds of public security for his removal; and

(b) Home Office decision-makers and tribunals should now consider cases of this kind in the light of *Onuekwere* and *MG* , noting in particular the difference in approach (see *Onuekwere* paragraphs 27 and 32) between five-year cases, where the qualifying period is irretrievably broken by imprisonment; and ten-year cases, where periods of imprisonment do not count towards the qualifying period, but may not irretrievably break it.

Appeal dismissed



(a judge of the Upper Tribunal)