Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00167/2016

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 11th December 2017	**On 13th December 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

ISMAIL HUSSEIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Fripp, instructed by Duncan Lewis Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a national of the Netherlands born on 1 January 1984 and he appealed a decision of the Secretary of State dated 23 March 2016 to make a

Deportation order on the basis that the decision contravened Regulation 21 of the Immigration (European Economic Area) Regulations 2006 and represented a breach of his Article 8 rights under the European Convention.

The applicable Regulations

2. At the hearing on 2nd October 2017, I raised the issue of whether the EEA Regulations 2006 or 2016 applied. This was not a matter raised in the grounds for permission to appeal. The EEA Regulations 2016 came into force in full on 1st February 2017 prior to the hearing and promulgation of the First-tier Tribunal Judge's decision, which had applied the EEA Regulations 2006. Initially Mr Fripp contended that the 2016 Regulations applied but that this would not make a difference. Indeed that was agreed by the Secretary of State. I referred the parties to the transitional provisions (specifically schedule 6(5)) of the Immigration (European Economic Area) Regulations 2016. If the EEA Regulations 2016 applied the considerations would arguably vary and arguably have a material influence on the outcome.

3. I invited the parties to submit further written representations on the issue.

4. The Immigration (European Economic Area) (Amendment) Regulations 2017 (No. 1) state as follows:

> Schedule 4 (revocations and savings), new paragraph 3 (appeals)
>
> 4. After paragraph 2 of Schedule 4 insert—
>
> "Appeals
>
> 3.—
>
> (1) Notwithstanding the revocation of the 2006 Regulations by paragraph 1(1), *those Regulations continue to apply*—
> (a) in respect of an appeal under those Regulations against an EEA decision which is pending (within the meaning of regulation 25(2) of the 2006 Regulations) on 31st January 2017;
> (b) in a case where a person has, on 31st January 2017, a right under those Regulations to appeal against an EEA decision.
> (2) For the purposes of this paragraph, "EEA decision" has the meaning given in Regulation 2 of the 2006 Regulations and the definition of "EEA decision" in regulation 2 of these Regulations does not apply."

5. The explanatory memorandum to the Immigration (European Economic Area) (Amendment) Regulations 2017 (No. 1), which made technical changes to the 2016 Regulations, indicates at 7.5 that

> *'Paragraph 4 of the Schedule inserts a new paragraph 3 into Schedule 4 to the 2016 Regulations to clarify that the 2016 Regulations do not affect an appeal against or a person's right to appeal against an EEA decision made under the*

> *2006 Regulations. The provisions of the 2006 Regulations will apply to an appeal against a decision made under those Regulations irrespective of whether the appeal commences, or is to be continued after 1 February 2017'.*

6. The Explanatory Note to the Immigration (European Economic Area) (Amendment) Regulations 2017 (No. 1) states

> *'Paragraph 4 of the Schedule inserts a new savings provision in paragraph 3 into Schedule 4 to make it clear that the principal Regulations do not affect an appeal against, or a person's right to appeal against, an EEA decision made under the 2006 Regulations'.*

7. The seemingly contradictory wording in Schedule 6 paragraph 5 of the 2016 Regulations (commencing 1st February 2017) reads

> Removal decisions, deportation orders and exclusion orders under the 2006 Regulations
>
> 5-
>
> (1) A decision to remove a person under regulation 19(3)(a),(b) or (c) of the 2006 Regulations must, upon the coming into force of Part 4 of these Regulations in its entirety, be treated as a decision to remove that person under regulation 23(6) (a), (b) or (c) of these Regulations, as the case may be.
>
> (2) A deportation order made under regulation 24(3) of the 2006 Regulations must be treated as a deportation order made under regulations 32(3) of these Regulations.

8. The Secretary of State made written representations under the authorship of Mr P Deller. He acknowledged the tension between Schedule 4, as amended by the Immigration (European Economic Area) (Amendment) Regulations 2017 (No. 1) and Schedule 6 of the EEA Regulations 2016. He submitted Schedule 4 applied to 'pending appeals' and Schedule 6 applied to 'operational functions' and therefore it was Schedule 4 which applied. Schedule 4 Paragraph 3(2) imported the meaning of 'EEA decision' from the 2006 Regulations. Accordingly for relevant pending appeals the Tribunal should apply the 2006 Regulations in this instance.

9. Initially Mr Fripp contended that the 2016 Regulations applied but that this would not make a difference. At the resumed hearing Mr Fripp agreed that it was indeed the EEA Regulations 2006 which applied.

10. I am surprised Schedule 6 does not specifically acknowledge its scope (that it is subject to Schedule 4) and further that the amending regulatory provision did not address this point. The Secretary of State argued that Schedule 6 paragraph 5 dealt

with the *operational consequences* of decisions made under the 2006 Regulations. An appeal commenced on 1st February 2017 or later against a deportation decision made under the 2006 Regulations would be considered under the scheme applied by the 2006 Regulations. Thus eventually when a deportation order was made in the light of a deportation decision, it should, after 1st February 2017 be made in accordance with regulations.

11. I conclude, however, that Schedule 6 paragraph 5 cannot not override Schedule 4 paragraph 3 which specifically governs pending appeals. To do otherwise would render the effect of paragraph 3 otiose.

12. In my view the anomaly may be the result of piecemeal amendment but in the light of the clear direction under Schedule 4 that pending appeals, which this is, should be heard in line with the 2006 Regulations, I will follow that paragraph and conclude for the purposes of this appeal that the 2006 will apply.

The Appellant

13. The appellant was born in Somalia in 1984 where his mother died and in 1984 he was taken by relatives to the Netherlands for a reunion with his father and then recognised as a refugee. Both are nationalised citizens of the Netherlands. The father came to the United Kingdom in 1997 to work followed by the appellant in 1998 and he maintains he has been continuously resident in the UK since that time, that is eighteen years and six months.

14. The appellant has had three periods in custody. First, following a conviction for robbery on 4 December 2000, he was sentenced to three years' confinement in a youth offender's institution serving eighteen months in custody prior to release on 4 June 2002. Secondly, the appellant was sentenced to nineteen months in aggregate following conviction on 16 October 2012 and he served nine and a half months in custody before being detained under immigration powers for a further seven months. Thirdly on 10 June 2015 the appellant was convicted of possession of an offensive weapon in a public place and other offences and sentenced to thirteen months' imprisonment. In total he was in custody for seven months.

15. When the Secretary of State refused his human rights claim and made the deportation order the appellant appealed.

Dismissal by First-tier Tribunal

16. In the event First-tier Tribunal Judge Cassel dismissed the appellant's appeal on all grounds and the appellant appealed on the following grounds.

Grounds of Appeal

17. It was submitted before the First-tier Tribunal by the appellant's representatives that his period of residence in the United Kingdom was one which met the requirement for enhanced protection under Regulation 21(4)(a) that is 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 the relevant decision. This transposed Article 28(3)(a) of Directive 2004/38/EC. It was submitted that the respondent accepted that the appellant was resident in the UK in accordance with the EEA Regulations for five years between 2006 and 2011 but not that he reached ten years' continuous residence. This was because (i) he had not provided any evidence that he had been exercising his treaty rights since 2011 and/or because, secondly, time in prison had broken the accumulation of relevant time.

18. The failure to exercise the EEA treaty rights since 2011 was irrelevant because the Secretary of State had accepted that the appellant had five years' continuous residence on or before 2011 and therefore his continued residence did not depend on exercising his EEA rights. The Secretary of State had conceded that he had permanent residence and thus he needed merely to continue to reside in the UK.

19. Further, the ten year period was counted back from the date of the Secretary of State's deportation order dated 23 March 2016. The ten year period encompassed two periods of imprisonment, one of nine and a half months in 2012 to 2013 and one of nearly eight months between November 2014 and June 2015. It was argued that the periods of imprisonment did ***not automatically*** break the continuity of residence and the ability to show ten years' relevant residence. Further to **MG (prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392 (IAC)** paragraph 48 reads:

> *"Despite our difficulties, we have concluded that a categorical reading of (1) cannot be what the Court meant or at least that what it must have had in mind was to draw a distinction between a positive taking into account and a negative interruption. If the Court in MG had meant to convey by the terms "cannot be taken into account" that* ***periods of imprisonment automatically disqualify a person from enhanced*** *protection under Article 28(3)(a) protection, it would not have seen fit to proceed in paragraph 35 to accept as a possibility that the "non-continuous" nature of a period of residence did not automatically prevent a person qualifying for enhanced protection.* ***Nor would it have chosen in paragraph 38 to describe periods of imprisonment as "in principle****, capable both of 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…" It would have had to say that, if they fall within the 10 year period counting back from the date of decision, periods of imprisonment always prevent a person qualifying for enhanced protection. In addition, what the Court goes on to say in paragraph 37 about the implications of the fact that a person has resided in the host Member State during the 10 years prior to imprisonment is clearly intended to underline that* ***even though such a person has had a period of imprisonment during the requisite 10 year period (counting back from the date of decision ordering the expulsion: see para 27) it is still possible for them to qualify for enhanced protection and in this regard their prior period of residence "may be taken into consideration as part of the overall assessment referred to in paragraph 36 above"****. We also bear in mind, of course, as did Pill LJ in Secretary of State for the Home Department v FV (Italy) [2012] EWCA Civ 1199 at*

> *[42] that in Tsakouridis the CJEU Grand Chamber did not consider the fact that Mr Tsakouridis had spent a substantial period of time in custody in Germany in the year prior to the decision to expel him (taken on 9 August 2008) as defeating his eligibility for enhanced protection under Article 28(3)(a). Nevertheless (and this is where we consider Mr Palmer right and Miss Hirst wrong), the fact that the Court specifies that "in principle" periods of imprisonment interrupt the continuity of residence for the purposes of meeting the 10 year requirement can only mean that so far as establishing integrative links is concerned such periods must have a negative impact."*

Further to paragraph 20 of **SSHD v Franco Vomero (Italy) [2016] UKSC 49:**

> *"The ten year previous period is, in contrast**, only 'in principle' continuous, and may be non-continuous**, where, for example, interrupted by a period of absence or imprisonment. Whether the ten years is to be counted by including or excluding any such period of interruption is however unclear."*

It was argued before the First-tier Tribunal that the appellant had long been integrated into the United Kingdom and remained linked to the community during his imprisonment by contact with and visits from family and friends and even if the months of imprisonment were not counted he reached more than ten years' relevant residence. He had an overall residence of eighteen years of which three years had been spent in custody. It was put to the First-tier Tribunal if that was not accepted then the 'serious grounds' test should be used.

20. In sum the grounds were as follows:-

21. Ground (i). The judge erred in his approach to the level of protection afforded to the appellant and the test to be applied. He misdirected himself that the appellant had to show evidence of continuous exercise of EEA rights after 2011 as the appellant had permanent residence prior to this date. Further the question of whether the short periods of imprisonment broke the continuity of residence was in issue and the judge failed to address. The **Vomero** decision in which the Supreme Court indicated the two year period of absence marked a bright line which point the continuous residence was broken. A period of imprisonment of less than two years will not have this effect and even cumulatively the applicant's two periods of imprisonment did not meet this requirement. The judge gave inadequate reasoning as to the question of whether the two relatively short periods of imprisonment broke the continuous residence. There was an assessment of the wider circumstances required. It had been argued the appellant had a relatively short residence in the Netherlands, four years compared with eighteen years in the United Kingdom, reference made to the short periods in which he has been imprisoned, the presence in the United Kingdom of all his significant connections, his wife, his former wife and their child, his father and other relatives.

22. Ground (ii). The First-tier Tribunal inadequately addressed the issue of rehabilitation and provided no adequate assessment of the evidence heard such as family support by his father. The judge's decision is posited on the applicant having no permanent right of residence.

23. Ground (iii) it was apparent from the determination that the judge failed to adequately deal with all the evidence from the witnesses such as the appellant's father and had failed to adequately deal with the medical evidence and does not substantively deal with the independent social worker's evidence of Miss Christine Brown.

24. Permission to appeal was initially refused but granted by Upper Tribunal Judge King.

The Hearing

25. At the hearing before me Mr Fripp argued that the question was which of the Regulation 21 rubrics should be applied to the appellant and whether it was 'serious grounds' or 'imperative grounds' that should be applied. The judge when he had set out the relevant Regulation had omitted Regulation 21(4) and stated N/A. This showed he did not consider 'imperative grounds'. There were two bases on which the appellant could reach the ten year enhanced protection and that was by having had his permanent residence accepted by the Secretary of State and then a continuous five years but then a second avenue would be through the reasoning of **Vomero** whereby the permanent residence was not required as a precursor to having the ten year protection. The judge seemed to deal with the case not even granting the middle level of protection to the appellant and he did not address the ten year submission at all.

26. By the date of the 'October 2012 sentence' the appellant had been in the UK for thirteen years and had extensive links in the UK. He had integrated. He had served nine and a half months and it was argued this did not break continuity. As to the second conviction he had spent only seven months in prison in 2014 and it was argued that this did not break continuity either. He submitted that **MG** suggested that protection could be lost but not for imprisonment under one year.

27. Mr Fripp also submitted that the judge had inadequately considered the rehabilitation and his approach had been on the basis that there was no right of residence and that was an error. Further, the judge had failed to address the evidence of the witnesses fully or the reports.

28. Mr Tufan resisted the application pointing out that the appellant had had two periods of imprisonment and indeed in 2000 he had spent three years in a young offenders' institution. Mr Fripp countered that this had been prior to the granting of the permanent residence and not relied on at the First-tier Tribunal by the Home Office Presenting Officer. Nonetheless Mr Tufan submitted that there had been an extensive record of the appellant offending with periods of imprisonment and the issue was centred on integration as per **MG**. The judge cited **MG** and recited the law there was no legal basis for the permanent residence and if the matter went back to the First-tier Tribunal that concession would be withdrawn. Nonetheless the judge was aware of the concession. The case of **Warsame v Secretary of State for the Home Department [2016] EWCA CIV 16** considered **MG** and the four months'

imprisonment in 2007 given to that appellant was sufficient to prevent him from fulfilling ten years' residence.

29. Mr Fripp did not suggest that any period of imprisonment could be counted in the calculation of ten years but pointed out that the four months' imprisonment prevented the appellant from reaching a cumulative period of ten years rather than the period of imprisonment undermining his integration.

30. Mr Tufan submitted that the appellant had continued to offend this was the case as regards integration.

31. With respect to ground (ii) and rehabilitation, he pointed out that Upper Tribunal Judge King had identified no error on the assessment of rehabilitation and with respect to ground (iii) evidence that was given was identified at paragraphs 17 and 18.

32. Mr Fripp repeated that the judge had failed to deal with the ten year point and failed to address the effect of paragraph 48 of **MG** which had been identified in the skeleton argument at page 8. The appellant had continuous residence of ten years and he did not need the permanent residence.

33. At the resumed hearing Mr Tufan handed me the opinion of the Advocate General Szpunar dated 24th October 2017 in **B v Land Baden-Wurttenberg and the Secretary of State for the Home Department v Franco Vomero** (Directive 2004/38/EC) Joined Cases C-316/16 and C-424/16. Mr Tufan advanced that this confirmed that permanent residence would be a requirement prior to obtaining the highest level of protection against removal under European Union law on imperative grounds. Should this case be remitted back to the First-tier Tribunal the concession on permanent residence would be retracted.

34. Mr Fripp rejoined that this was not the substantive decision of the Court of Justice of the European Union.

Conclusion

35. Ground (i) To my mind the judge did address the question of whether the appellant was entitled to the highest level of protection. Despite having recorded 'N/A' next to Regulation 21(4), it is clear that he turned his mind to that question by the substance of his decision. The judge referred to **MG**, properly realising that time spent in prison did not automatically bar the appellant from acquiring the highest level of protection. The judge looked at the period of residence and also addressed the level of the integration of the appellant and as a result of that integration as to whether his periods of imprisonment could be taken to interrupt ten years' residence rendering him with a lower level of protection.

36. The judge set out the basis facts of the appellant's convictions and sentences in the decision. The appellant had three periods of imprisonment accompanied by a series of convictions which did not lead to imprisonment. In fact a deportation order was

made on 25th April 2013 following the appellant's conviction on 4th September 2012 for affray for which he was sentenced to 19 months imprisonment. That deportation order was withdrawn. The appellant was again convicted of assault and arrested on 7th November 2014 and sentenced on 10th June 2015 to 13 months in prison and the Deportation order giving rise to the decision under challenge was made on 23rd March 2016. The time of ten years is counted back from the date of the deportation order – that is 23rd March 2016.

37. The judge reasoned in his decision as follows:-

> *"28. In giving evidence the Appellant accepts that all of the convictions are correctly recorded in the decision letter save that which is recorded for 27 September 2000 at Southwark Crown Court for common assault and for threatening behaviour and 27 February 2004 at Tower Bridge Magistrates Court for public order offences.* ***I am prepared to accept his evidence but that still leaves very many criminal offences covering a range of offences, many of which involve possession of controlled drugs or offences linked to serious breaches of public order, and include the possession of weapons.*** *The Appellant relies on* ***MG (prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392 (IAC)*** *and that time that he has spent in prison does not necessarily prevent him from acquiring the highest protection counted back from the date of assessment in March 2017. At paragraph 48 of that judgment is the following comment ".. the fact that the Court specifies that "in principle" periods of imprisonment interrupt the continuity of residence for the purposes of meeting the 10 year requirement can only mean that so far as establishing integrative links is concerned such period must have a negative impact." In the Appellant's case there are two periods of imprisonment. The first was imposed by Woolwich Crown Court on 16 October 2012 when he was sentenced to 12 months for affray, 6 months consecutive for offensive weapon in a public place, 3 months for destroying or damaging property, to run consecutively and a further one month for failing to comply with an earlier suspended sentence. The second period of imprisonment was imposed by Inner London Crown Court on 10 June 2015 when for possession of controlled drugs and offensive weapons he was sentenced to 13 months imprisonment. As part of the overall assessment,* ***and I accept that the periods of imprisonment do not automatically disqualify h****im from enhanced protection under the regulations, and that he has lived in the UK for many years beforehand, I find that although in themselves the criminal convictions do not determine the issue, the Crown Courts having found* ***that the nature of the offences are serious ones*** *which merited periods of imprisonment which are not insubstantial* ***they do have a negative impact, do interrupt the continuity of residence and he is not entitled to enhanced protection.***
>
> *29. The Respondent accepts that the Appellant has resided in the United Kingdom in accordance with the Regulations for a "continuous period of 5 years" as required by regulation 15(1)(a). It is well established law that that protection once acquired is not lost by subsequent periods of imprisonment. I have to consider his case in accordance with regulation 21 and in particular whether the decision is*

proportionate. In doing so I have to consider if the Appellant is rehabilitated or making good progress with his rehabilitation and if so whether that rehabilitation is or is likely on present evidence to be durable. I have been assisted in considering this issued by the following guidance to be found in ***Essa [2012] EWCA Civ 1718****:*

> *"32. We observe that for any deportation of an EEA national ... to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in the case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. In such a case, if there is acceptable evidence of rehabilitation, the prospects of future rehabilitation do not enter the balance, save possibly as future protective factors to ensure that the rehabilitation remains durable.*
>
> *33. It is only where rehabilitation is incomplete or uncertain that future prospects may play a role in the overall assessment. Here we must take our guidance from the Court of Justice in* ***Tskouridis and the Court of Appeal*** *in the present case remitting the matter to this Tribunal. It is in the interests of the citizen, the host state and the Union itself for an offender to cease to offend. This is most likely to be the case with young offenders who commit a disproportionate number of offences, but many of whom will stop offending as they mature and comparatively few of whom go on to become hardened criminals and persistent recidivist offenders. We can exclude consideration of offenders beneath the age of 18 as EEA law will prevent their deportation save in the unusual event that it is in their own interest (Article 28 (3) (b) of the Citizens Directive).*
>
> *34. If the very factors that contribute to his integration that assist in rehabilitation of such offenders (family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like) will assist in the completion of a process of rehabilitation, the that can be a substantial factor in the balance. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation.*
>
> *35. At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, we cannot see how the prospects of rehabilitation could constitute a significant factor in the balance.*

> *Thus recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with impulses to commit sexual or violent offences and the like may well fall into this category".*"

38. As can be seen from above the judge was clearly aware that the appellant was reliant on **MG** such that he had derived the highest level of protection counting back from the date of the deportation order. The judge undertook a wider assessment recognising that convictions themselves did not determine the issue. The judge cited directly from **MG** at paragraph 28 that the court specifies "*in principle*" that '*the period of imprisonment interrupts the continuity of residence for the purposes of meeting the ten year requirement can only mean that so far as establishing integrative links is concerned such periods must have a negative impact*'. However, the judge assessed the extent of the appellant's convictions and noted the extensive criminal record that the appellant had as part of his overall assessment. It was not just the extent of his imprisonment but the nature of his offending and the variety of the offending which affected the approach to whether the appellant was integrated.

39. The judge also in the decision as a whole considered the scant documentary evidence showing the appellant's activities prior to his obtaining permanent residence. As such the judge concluded, in his overall assessment, that the convictions and their sentences had a negative impact on the appellant's integration, and therefore did interrupt any continuous residence. The weight that the judge afforded to the evidence and his assessment was open to him. He considered the evidence and directed himself appropriately in relation to the imperative grounds. The appellant entered the UK in 1998 but was imprisoned between 2000 and 2002 but it is not evident that the judge took this into account as a negative factor.

40. That the appellant was not sentenced for two years does not undermine the finding of the judge that in his view the overall convictions and sentences of imprisonment – that is two spells of imprisonment in the four years prior to the deportation order - undermined the claim of integration and thus the continuity of residence was broken. That was sufficiently reasoned on the part of the judge.

41. It was argued that a period of imprisonment of less than two years did not break continuity and even cumulatively the applicant's two periods of imprisonment did not meet this length of sentence. I do not accept that **Vomero** lays down a hard and fast rule and it is open to the judge to decide on both whether the sentence is capable of breaking continuity of residence and integration. **Vomero** refers to the loss of permanent residence through the absence from the host member state. That is not the position here and mere absence is wholly different from being imprisoned. At paragraph 10 stated

> *'Under article 16(4) a right of permanent residence acquired in the past may be lost "through absence from the host member state for a period exceeding two consecutive years". The thinking behind article 16(4), as explained in Lassal (Case C-162/09) paras 53-58, is that a two-year absence affects "the link of integration" with the host member*

state of the Union citizen concerned. In Dias (Case C-235/09) this thinking was developed in a more complex situation'.

Vomero also underlined the importance of the integrative link.

The requirement of an overall assessment to identify whether or not a sufficient integrative link exists is also open in its meaning and effect. ***An overall assessment of integration appears on its face a different test from residence*** *"for the previous ten years". MG indicates that, in considering whether ten years' previous residence exists in a sufficiently integrative sense when the person ordered to be deported is or has recently been in prison at the date of the deportation order, account can and should be taken of the length of residence prior to such imprisonment. In MG itself, the Court of Justice said that, in assessing whether MG had ten years' residence previous to the deportation order, it was relevant to have regard to the period (which the court, somewhat confusingly, also described as a ten-year period - in fact it was well over 11 years) which she had spent at liberty before imprisonment.*

42. Nor do I accept that **MG** is authority for the proposition that less than one year sentence should not be taken into account. As that authority emphasised any decision was fact sensitive. It is not the case that the judge merely concluded that the periods of imprisonment excluded the appellant from claiming the enhanced protection outright. Although it was argued that two years of imprisonment and an absence of two years could be taken into account it is quite clear that there needed to be an overall assessment as to whether it was still possible for the appellant to qualify for enhanced protection and in the circumstances clearly the judge did not accept that it could. The judge did address the criteria under Regulation 21(4) and overall gave cogent reasoning for finding that the prison sentences had indeed broken the continuity of residence.

43. I do not accept that the judge's resistance to the appellant showing that he had sent sufficient documents to show periods of residence, demonstrated that the judge did not accept that the appellant had achieved permanent residence. That was part and parcel of the assessment of integration as I have alluded to above. That said the permanent residence was said to have been acquired between 2006 and 2011.

44. Further from the assessment of the limited evidence prior to 2006, the judge did not accept that the appellant had indeed proved with documentary evidence his continuous *residence* in the UK. Even the Directive requires the requisite residence. The Secretary of State accepted the evidence in relation to the period 2007 to 2011 for the purposes of 5 years residence. The judge's view of the evidence was more with a view to the integrative links that the appellant had rather than to conclude whether he had permanent residence or not, but the fact remains that the judge found there was scant evidence that the appellant had resided in the UK between his release in 2002 and 2007 from when the appellant provided documentary evidence. The judge stated at [27] with specific reference to the time of 10 years under the Regulations

'The Respondent maintains that he is unable to show 10 years continuous residence, and that no precise details in evidence have been provided The onus is upon him on the

balance of probabilities to establish that to be the case. Documents have been produced that show periods of residence and court appearances and in deed professional appointments referred to in reports and correspondence and in other documents which appear to show that he has been in the UK for substantial periods However there is simply no credible evidence to show that period of time as continuous as required under the regulations'.

45. The appellant was sentenced on 16th October 2012 and 10th June 2015 and those periods of sentences of imprisonment (at the very least served) would be deducted. Mr Fripp agreed that the prison sentence served should not contribute to the length of residence. The judge did not accept that the appellant had demonstrated residence prior to 2006. Counting 10 years back from the Deportation order in March 2016, would require the deduction of the served prison sentences (at least 16 ½ months), and would take the appellant into 2005. That was prior to the evidenced period and when the appellant was an adult (born in 1984). Between the appellant's release in 2002 and 2005 there was limited evidence of residence. As the judge found the appellant could not count back 10 years. **Vomero** in this instance does not assist the appellant as his permanent residence, as accepted by the Secretary of State, and accepted in the grounds of appeal would have commenced at the earliest in 2006.

46. Further and overall the judge gave an adequate assessment as to whether the appellant was integrated and concluded on grounds which were open to him that the appellant was not.

47. Exploring the position with regard the second level of protection or 'serious grounds', at paragraph 29 the judge realised that the appellant *had* been deemed to have permanent residence and indeed at paragraph 26 identified that relevant decision could not be taken in respect of a person with permanent residence except on serious grounds of public policy. Particularly at paragraph 30 the judge addressed the issue of rehabilitation, identifying that in the case of an offender with no permanent right of residence 'substantial weight' should ***not*** be given to rehabilitation **SSHD v Dumliasuskas & Oths** [2015] EWCA Civ 145. In this instances, the judge nonetheless proceeded to assess the prospects of rehabilitation, an exercise, as he directed himself, he would undertake when applying the 'serious grounds' test. I accept that the judge had the test of 'serious grounds' in mind.

48. It is clear that the judge, although referring at paragraph 27, to there being no credible evidence to show that the appellant had spent a period of time continuous as required under the Regulation, nonetheless accepted that the respondent had considered the appellant had achieved a continuous period of five years, that is permanent residence, as required by Regulation 15(1)(a). The judge identified the requirement to take into account personal considerations and referred to the reports from Dr Abbas Lohawala, Dr Rachel Daly, Dr David Thomas and Dr Pankaj Agarwal which dealt at length with the appellant's mental stated which remained ' relatively stable'. The judge noted that the appellant had remarried and had two step children but did not live with them. His father had little success in preventing his son from further offending. Overall the judge found little evidence of employment in the UK

and a few family and friends with whom the appellant did not live. He struggled with the language in the United Kingdom and would be able to access the language in the Netherlands. The judge explored the criminal offending of the appellant and found every likelihood the appellant would persist in his criminal behaviour, which included violent behaviour, if allowed to remain in the United Kingdom. The judge found that the appellant remained a threat to society. It is implicit that the judge found the appellant's removal justified overall on 'serious grounds' having explored his personal circumstances and his offending (the reasons which I refer to below). The judge's reasoning was in parts intertwined but this does not undermine his conclusions overall.

49. Ground (ii). As stated in the permission to appeal, Upper Tribunal Judge King stated "I see no error on the matter of rehabilitation but it will be for the judge hearing the residence point to determine what if other arguments are relevant."

50. I find the judge's assessment of the rehabilitation was open to him. At paragraph 32, he identified the support the appellant had received from his father noting that the appellant had been assessed and the OASys Assessment of 18 December 2015 and which had concluded that the risk in the community was assessed as high and a risk of his re-offending as medium. The judge found that there was every likelihood that the appellant would persist in his criminal behaviour, that his offences had been accurately recorded and that the appellant was prepared to result to violent behaviour and possession of offensive weapons and drugs but reasoning in particular that

> *"apart from some course work in prison there is little by way of credible evidence that he has undertaken rehabilitative work. I consider he poses a threat. He will be able to continue to work towards rehabilitation when he returns to the Netherlands."*

51. The above shows that the judge did not just afford the appellant the lowest level of protection but considered him on the 'serious grounds' which was the alternative suggested in the skeleton argument of Mr Fripp before the First-tier Tribunal.

52. At paragraph 32 the judge stated

> *'the appellant has repeatedly failed to comply with court orders. He has reoffended with regrettable regularity notwithstanding the support he has received from his father among others and state and other agencies'.*

53. Contrary to grounds (iii) I am not persuaded that the arguments in relation to the assessment of the evidence have been made out. The judge has not ignored the evidence as listed in the grounds for permission to appeal. There are details at paragraph 33 of the reports that were submitted and further that none of the reports had made reference to the capability of the Netherlands Mental Health Services to assist the appellant, further the judge factored into his assessment that the Netherlands has a considerably higher number of psychiatric beds than the UK. I am not persuaded that the judge has failed to address the relevant evidence.

54. In conclusion it is clear that the judge has addressed the ten year issue and has concluded that the sentences themselves would have broken any ten year period of residence. It is clear the judge has taken into account paragraph 48 of **MG** and was well aware of the extent of time that the appellant asserted he had spent in the United Kingdom but first, the judge did not accept that the appellant could show ten years continuous residence and secondly the appellant was not integrated and therefore his sentences had interrupted any continuous residence. The judge found the appellant's offending had continued and was extensive despite the support from his family. It is evident from the findings of the judge that he had decided there was a present serious threat and the extent of that threat was such that there were serious grounds for his removal. The judge fully addressed the point on rehabilitation and there is no merit in the last ground that the judge failed to address the evidence.

55. I find no error of law and the decision shall stand.

No anonymity direction is made.

Signed *Helen Rimington* Date 12th December 2017

Upper Tribunal Judge Rimington