Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00381/2016**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 31st July 2017	**On 4th August 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

RB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jasiri, Counsel instructed on behalf of appellant
For the Respondent: Mr Singh, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Poland.

2. **Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014**

The FTT made an anonymity order and there has been no application by either party to discharge that order .Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who in a determination promulgated on the 15th March 2017 dismissed his appeal against the decision of the Secretary of State to make a deportation order against him under the provisions of Regulation 19(3)(b) and Regulation 21 of the Immigration (EEA) Regulations 2006 (hereinafter referred to as "the 2006 Regulations").

4. The appellant claims that he first arrived in the United Kingdom on 26 October 2003. However in later representations, he claimed that he had arrived on 26 October 2002. He had stated that he had lived in the United Kingdom 12 years. The appellant is a Polish national but had provided no evidence of leave to remain in the UK before Poland joined the EU Member States on 1 May 2004. In June 2003 he was convicted of attempting to travel without paying a rail fare which he received a fine of £30 and associated awards of compensation and costs.

5. The appellant's history also demonstrates that he made an application for naturalisation as a British citizen which was refused on 29 October 2015 and a reconsideration was refused on 14 June 2016.

6. On 16 June 2014 he was convicted of conspiracy to commit fraud and possessing, controlling a false, improperly obtained false identity document to which he was sentenced to 58 months imprisonment with 2 months consecutive (total 60 months).

7. As a consequence of that sentence of imprisonment, the Appellant was notified of his liability to be deported on the 16th October 2015 and on 27 July 2016 the Secretary of State made a decision to deport him, having first taken into consideration the provisions of the Immigration (European Economic Area) Regulations 2006 under Regulation 19(3)(b) of the 2006 Regulations on account of his conviction on the 16th June 2014. On the 29th April 2016 a confiscation order was made on the sum of £384,915.

8. The relevant decision taken by the respondent made reference to his conviction in 2014 and that the Secretary of State had considered the offence for which he had been convicted and his conduct, in accordance with Regulation 21 of the 2006 Regulations.

9. As to his residence, the respondent did not accept that the appellant had been resident in the UK for a continuous period of five years or more in accordance with the 2006 Regulations and that as he had been serving a sentence of imprisonment that this would not count as lawful residence in the UK. Whilst he had claimed to have lived in the UK 12 years, the respondent took the view that he did not qualify for the enhanced protection of Regulation 24 (1) relating to imperative grounds of public security because he had not acquired a permanent right to reside by virtue of residing in the United Kingdom for a continuous period of five years in accordance with the EEA Regulations. Furthermore, it failed to demonstrate lawful residence 10 years prior to his term of imprisonment.

10. The decision set out that the Secretary of State was satisfied that he would pose a genuine, present and sufficiently threat to the interests of public policy if he were to

be allowed to remain in the United Kingdom and that his deportation was justified under Regulation 21. The decision also made reference to Article 8 of the ECHR.

11. The full reasons for that decision are set out in a letter of the Respondent dated the 27th July 2016.

12. The Appellant appealed against that decision to the First-tier Tribunal. The appeal came before the First-tier Tribunal on the 8th March 2017. In a determination promulgated on 15 March 2017 his appeal was dismissed. The judge made reference to whether there were "serious grounds" and to whether "the appellant was a person with a permanent right of residence under Regulation 15 of the 2006 Regulations" (see paragraph 7). At paragraph 8, the judge made reference to the evidence before him as to the appellant's employment. He found that there was sporadic employment and claims of continuous employment but "that there was not the evidence in any reliable form to show that he was exercising treaty rights for the continuous period of five years." At paragraph 9 the judge stated that the appellant had not lived in the United Kingdom 10 years prior to his term of imprisonment, at least lawfully resident in the United Kingdom in that period." He therefore found that the appellant did not fall to be considered under imperative grounds for removal by reference to Regulation 21 (four) of the 2006 Regulations. He recorded that the continuous period of 10 years prior to the relevant removal decision needed to be lawful and was not on the evidence what occurred (see paragraph 10). However the judge did not make any reference to any relevant case law nor did he set out the evidence upon which he had reached that conclusion.

13. The judge then went on to consider Regulation 21 (5) the 2006 Regulations and found that the decision to remove complied with the principle of proportionality and whether the appellant continue to present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. He did not find that the appellant had "rehabilitated" his behaviour nor that it was an ongoing process in the UK.

14. At paragraph 17 the judge concluded as follows; "for my own part, I am satisfied and find that the appellant has been shown to be properly engaged with Regulation 21 of the 2006 Regulations and accordingly he should be deported." It is not clear, in my judgement what that paragraph meant.

15. At paragraphs 18 -24 the judge went on to consider Article 8 and the appellant's relationship with his partner and minor child. Whilst he concluded that the appellant had a private and family life United Kingdom, he found the circumstances of the appellant's criminality demonstrated amply why deportation would not breach rights under Article 8 of the ECHR he therefore dismissed the appeal.

16. The appellant sought permission to appeal that decision and on 12 June 2017 First-tier Tribunal judge Kelly granted permission.

17. Thus the appeal came before the Upper Tribunal. Mr Jasiri, who did not represent the appellant before the First-tier Tribunal, appeared on behalf of the appellant. Mr Singh appeared on behalf of the respondent. The written grounds at ground one

assert that the judge failed to consider the 2006 Regulations provided for three different standards of removal; the three different categories of residence of EEA nationals. At paragraph 7 of the grounds, it was said that the judge erred in law by focusing his attention on lawful residence/exercising EEA treaty rights in his consideration of the appeal. The grounds noted paragraph 10 of the determination which the judge stated "I find that the continuous period of residence the 10 years prior to the relevant removal decision needs to be lawful and was not on the evidence what occurred." Thus the grounds state that it is not a requirement of the Regulations of the 10 years residence be "lawful" rather that the Regulations provide that the residents must be "continuous".

18. The grounds also assert that the judge erred in law by discounting periods of imprisonment. At paragraph 8 of the grounds it is stated the term of imprisonment is only discounted when dealing with permanent residence under Regulation 15 and that Regulation 21 (4) (a) does not discount periods of imprisonment. The grounds cite a decision of the Tribunal in Essa (EEA; rehabilitation/integration) [2013] UKUT 00316 which in turn made reference to the decision in Tsakouridis.

19. Ground two related to the failure to consider Article 8 and section 117C the 2002 adequately. In particular paragraph 13, there was no reference in the determination to the oral evidence given by the appellant's partner.

20. Whilst the written grounds made reference to the issue of the enhanced protection and whether it was a requirement for 10 years residence to be "lawful" and whether term of imprisonment should be discounted, there had been no reference to the relevant and more recent case law in this area since the decision of Essa. In particular the decision of the Court of Justice of the European Communities in Case C-400/12 Secretary of State v MG or the decision of the in MG (prison – Article 28(3) (a) of Citizens Directive) Portugal [2014] UKUT 00392, the decision of the Court of Appeal in Warsame [2016] EWCA Civ 16 and the Supreme Court decision in in Secretary of State for the home Department v Franco Vomero [2016] UKSC 49. There was also no reference to any legal principles arising from the jurisprudence in the determination of the First-tier Tribunal.

21. Whilst the determination made reference to a skeleton argument provided by Counsel, (referred to in the determination at paragraphs 10 and 25) this was not in the papers of either advocate nor in the Tribunal file. It was therefore not possible to know basis upon which the case was advanced on behalf of the appellant beyond that in the determination, which was unclear. Mr Jasiri informed me that the appellant had now changed his solicitors and that he did not have all of the documentation which included the skeleton argument. He therefore could not assist as to what legal principles or case law had been provided to the judge. Mr Singh, having considered his file, could not find a copy of the skeleton argument and could not shed any light on what had been argued by the advocates.

22. Mr Jasiri re-formulated the written grounds in his oral submissions and in particular made reference to the issue of the appellant's imprisonment. He submitted that the judge should not have necessarily discounted the period of imprisonment when

considering the 10 year period without more. He said the judge had not formed any distinction and had given no reasons in the determination for reaching that view.

23. There was some discussion between the advocates and the Tribunal as to the exact dates of the appellant's time in custody. The trial record sheet at (B1-B3) made reference to the proceedings in the magistrates court and also made reference to the appellant being in custody prior to conviction in June 2014 but it was not ascertained with any certainty the exact period of when his detention began. It was also unclear on the evidence when the offending conduct began and over what time period. There was no copy of the indictment in the papers and the sentencing remarks do not set out the timescale. As will become clear, that evidence is of importance when considering the issue of enhanced protection under the 2006 Regulations.

24. Mr Jasiri submitted that time in custody did not necessarily break continuity of residents and that the judge was required to count back from the date of the decision to deport. In this respect the judges reasoning which was set out at paragraph 9 did not consider this issue. The timeframe is not provided nor is there any analysis or assessment of the issue. He also made reference to the fact that the appellant and his partner gave oral evidence before first-tier Tribunal which would have been relevant to the issue under the Regulations as well as under Article 8 but that was not reflected in the determination and it was not possible to know how the judge considered that evidence. As to ground 2, it challenges the judges' analysis and that the judge failed to engage with the evidence at paragraph 12.

25. Mr Singh on behalf of the Secretary of State relied on the rule 24 response which set out that the judge was entitled to reject the submission that the appellant had not demonstrated 10 years lawful residence in accordance with the Regulations. The reply goes on to state that the judge "finds the appellant cannot establish five years lawful residency exercising treaty rights." As to Article 8, the appellant been convicted of large-scale fraud which he continued to deny and that the judge took into account the family circumstances and that they could relocate to Poland or choose to remain in the UK without the appellant.

26. He could not assist the Tribunal as to how the case had been advanced before the First-tier Tribunal in particular what legal principles had been relied upon. He did, however, in his submissions make reference to the Tribunal's decision in MG (as cited) and the Supreme Court's decision in Vomero. He submitted that the appellant must meet five years lawful residence before he could be considered under the 10 year route therefore the judge was not wrong in reaching that conclusion. He submitted that have been the Secretary of State argument in Vomero. However he recognised that there was a contrary view at paragraph 26 and that the court made a reference to the Court of Justice in the terms as set out at paragraphs 27 and 28.

27. As to the issue of imprisonment and the effect upon the level of protection, he could not give any further detail as to the exact time the appellant was in custody other than the information I have referred to above. He submitted that the appellant was not sufficiently integrated in the UK society as a result of his offending therefore the period should be discounted when reaching a decision on whether the enhanced

protection was available to the appellant. He submitted that whilst the judge did not refer to any of the case law, his general findings can be ascertained from the determination that this was the route that he went along. Thus he invited me to reach the conclusion that the decision should stand.

28. Mr Jasiri made reference to paragraphs 8 and 9 of the determination and that the judge had not approach the question of the level of integration in the way suggested by the case law and that they have been a failure to engage in this.

29. I am satisfied that the decision of the First-tier Tribunal did involve the making of an error on a point of law. I shall set out my reasons for reaching that decision. The issue arises as to the appellant's length of residence in the UK and what level of protection should be applied to his case by the Secretary of State. Whilst the judge was aware of the appellant's claimed arrival in the UK and the length of his residence, it is not possible from the determination to assess how that issue was determined by reference to the applicable legal principles. I would accept that it is not necessary to set out large amounts of case law and recitals of legal principles but that it is sufficient for the decision to show how the legal principles that are relevant have been applied. There was a skeleton argument provided but it is not been possible to ascertain its contents and there is no real reference to the substance of that argument in the determination. The only paragraphs that deal with this issue are at paragraphs 7-9 whereby the judge found that he had not demonstrated that he had a permanent right of residence for a period of five years (paragraph 8) and that he had not lived in the UK lawfully resident prior to his imprisonment (paragraph 9).

30. In Secretary of State for the Home Department v MG (Case no c-400/12 CJEU) (second chamber) it was held that unlike the requisite period for acquiring a right of permanent residence which began when the person concerned commenced lawful residence in the post Member State, the 10 year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3) (a) must be calculated by counting back from the date of the decision ordering that person's expulsion. All relevant factors should be taken into account when considering the calculation of the 10 year period including the duration of each period of absence from the host Member State, the cumulative duration and the frequency of absences. A period of imprisonment was in principle capable both of interrupting the continuity of the period of residence needed and of affecting the decision regarding the grant of enhanced protection provided there under, even where the person concerned had resided in the host member state for 10 years prior to imprisonment albeit that the fact that the person had been in the member state 10 years prior to imprisonment was a factor to be taken into account.

31. In MG (prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 392 it was held that (I) Article 28(3)(a) of Directive 2004/38/EC contained the requirement that for those who had resided in the host member state for the previous 10 years, an expulsion decision made against them must be based upon imperative grounds of public security; (ii) there was a tension in the judgment of the Court of Justice of the European Communities in Case C-400/12 Secretary of State v MG in respect of the meaning of the "enhanced protection" provision; and (iii) the judgment should be

understood as meaning that a period of imprisonment during those 10 years did not necessarily prevent a person from qualifying for enhanced protection if that person was sufficiently integrated. However, according to the same judgment, a period of imprisonment must have a negative impact in so far as establishing integration was concerned.

32. In the decision of Warsame [2016] EWCA Civ 16 it was held that in Secretary of State for the Home Department v MG (Portugal) (Case C-400/12) it was established that the ten-year period of residence required to benefit from the enhanced protection of imperative grounds must in principle be continuous and be calculated by counting back from the date of the deportation decision. The Court of Justice of the European Union ("CJEU") found that, in principle, periods of imprisonment interrupted the continuity of periods of residence for the purposes of granting the enhanced protection. However, the CJEU also held that applicants could still qualify for enhanced protection if they could show that they had resided in the UK during the ten years prior to imprisonment, but that depended on an overall assessment of whether integrating links previously forged with the host Member State had been broken. On the facts, because of an earlier period of imprisonment which also broke continuity, this appellant was not one of those in the narrow "maybe" category of cases contemplated in MG (Portugal) where a person has resided in the host state during the ten years prior to imprisonment, for which a more detailed individual assessment of links to the host and home state would be required.

33. The Court of Appeal appears to have accepted at [9] that there is a "maybe" category of cases where a person has resided in the host state for the 10 years prior to imprisonment depending on an overall assessment of whether integrating links have been broken, and that in such cases it might be relevant to determine the degree of integration in the host state and the extent to which links with the original member state have been broken.

34. This issue therefore arises in this case as to whether the appellant falls into this "maybe" category. The exercise required the counting back from the date of the deportation decision and assessing the extent of links forged in the UK and whether they had been broken. Whilst Mr Singh sought to argue that this was the approach the judge had adopted, I do not find that that is reflected in the determination. This arguably required a more detailed individual assessment of links to the host and home state. It cannot be ascertained from the determination what conclusion he reached on this issue as there is no reference to it beyond reference to his employment. There was oral evidence given by the appellant and his partner, who was a British Citizen, but that is not reflected in any findings relevant to the issue of integration. The judge did make reference to the appellant's serious offending carried out in the UK and this is relevant to the issue of integration as a person who is integrated will want to ensure he respects the laws of the United Kingdom, which acts of criminality do not demonstrate. The question is whether the appellant was sufficiently integrated taking his circumstances as a whole. Whilst a period of imprisonment may break continuity this cannot mean that an appellant loses the benefit of any earlier integration.

35. I have therefore reached the conclusion that there the has been no proper consideration of the level of protection and whether this appellant is integrated into the United Kingdom and if so to what level, and the appropriate degree of protection available for which further detailed analysis and findings of fact are required. Once the appropriate level of protection has been properly identified it will be necessary to consider all other relevant factors to be taken into account when assessing an EEA deportation decision. As I have set out, it is unclear as to the date when the appellant first entered into custody and the period over which the offending conduct was carried out. That should be ascertained. The appellant's witness statement also makes reference to an application for naturalisation as a British citizen which was approved by the respondent on 6 January 2014 but that between the issuing of the approval decision and the naturalisation ceremony, the appellant was arrested and then convicted for the criminal offending to which he was sentenced to a substantial prison term. There is no information from the respondent concerning that issue. That information should be provided before the First Tribunal.

36. I need not reach any conclusion on the Article 8 analysis having found and error of law in the determination.

37. Therefore for those reasons the decision cannot stand and will be set aside. I consider that the correct course to adopt in a case of this nature would be for the appeal to be remitted to the First-tier Tribunal because it would enable the judge to consider the Appellant's evidence and that of his partner alongside the documentary evidence and to reach the necessary findings of fact.

38. Thus the appeal will be remitted to the First-tier Tribunal who will consider the matter afresh.

Decision:

The decision of the First-tier Tribunal involved the making of an error on a point of law. It is set aside and it is remitted to the First-tier Tribunal to be remade.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. The direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 1/8/2017
Upper Tribunal Judge Reeds