Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00501/2016**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 23 May 2017	**On 24 May 2017**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAVID CHJRZANOWSKI

Respondent

Representation:
For the appellant: Mr McVeety, Senior Home Office Presenting Officer
For the respondent: None

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department ('SSHD') against a decision of the First-tier Tribunal dated 24 January 2017, in which it allowed the appeal of the respondent ('the claimant').

Background

2. The claimant is a citizen of Poland. He was born in 1994 and entered the UK with his parents in 1995, when he was a baby. He has remained in the UK since this. It is accepted that he has not acquired a permanent right of residence in the UK. Although Poland became part of the European Union on 1 May 2014 the claimant never exercised Treaty rights.

3. The claimant has a long offending history set out in a PNC record sheet. From 2008 the claimant amassed 20 convictions in relation to 29 different offences. These resulted in non-custodial sentences until 25 November 2014 when he was sentenced to 12 weeks in a young offenders institution. On 22 December 2015 he was sentenced to imprisonment of 8 weeks and on 4 August 2016 he was sentenced to 10 weeks imprisonment.

4. In a decision dated 30 September 2016 the SSHD decided to make a deportation order against the claimant. The reasons for this are set out in a very detailed letter running to 147 paragraphs.

FTT decision under appeal

5. One of the key issues for the First-tier Tribunal to determine was whether or not the claimant had acquired a period of 10-years residence prior to the deportation decision and was therefore entitled to benefit from the enhanced level of protection i.e. that his removal must be justified on imperative grounds of public security.

6. The First-tier Tribunal decided this issue in the claimant's favour at [38]. The First-tier Tribunal dealt with the issue in brief terms, finding that by the time that the claimant was imprisoned on 4 August 2016, he had already been resident for a continuous period of 10 years. The First-tier Tribunal then found at [40] that the claimant "*does present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*" but that "*whilst his removal from the UK may be desirable it cannot be presently be justified on imperative grounds of public security*".

Grounds of appeal

7. In granting permission to appeal in a decision dated 16 March 2017, Upper Tribunal Judge Taylor observed that for the reasons stated in the grounds, the First-tier Tribunal may not have properly calculated the 10-year residence period prior to the deportation decision. The grounds of appeal relied upon the submission that following SSHD v MG [2014] EUECJ C-400/12 the 10- year period must be counted back from the date of the decision.

Hearing

8. At the hearing Mr McVeety made very brief submissions. He relied upon SSHD v MG and invited me to find that notwithstanding the claimant's length of residence, his criminal offending was such that he could not be said to be integrated and in the premises, he did not meet the 10-year residency requirement and the enhanced level of protection did not apply.

9. I reserved my decision, which I now provide with reasons.

Error of law discussion

10. In SSHD v MG the ECJ considered the wording of Article 28 of Directive 2004/38. This states at (3) that:

> "an expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they: (a) have resided in the host Member State for the previous 10 years..."

11. The ECJ clearly found at [24] and [28] that the 10-year residency necessary for the grant of enhanced protection in Article 28(3)(a) must be calculated by counting back from the date of the decision ordering that person's expulsion.

12. The First-tier Tribunal did not adopt this approach and instead counted forward from the date Poland joined the EU. This is an error of law. This error was compounded by a second error of law. The First-tier Tribunal failed to consider all the relevant factors and the degree of integration involved, given the apparent interruption to the continuity of residence by the claimant's periods of imprisonment, in order to determine whether the 10-year residency requirement was met. This relevant test is set out by the ECJ in SSHD v MG at [25-37].

13. In MG (prison-Article 28(3)(a) of Citizens Direction) Portugal [2014] UKUT 392 (IAC) the Upper Tribunal made it clear that the ECJ's judgment in SSHD v MG should be understood as meaning that a period of imprisonment during the relevant 10 years does not necessarily prevent a person from qualifying for enhanced protection if that person is sufficiently integrated, albeit a period of imprisonment must have a negative impact in so far as establishing integration is concerned. This has been considered recently in Warsame v SSHD [2016] EWCA Civ 16. 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. This claimant plainly falls into this "maybe" category.

14. The First-tier Tribunal's decision fails to take into account the principles set out in the ECJ judgment of SSHD v MG and the Upper Tribunal's decision applying it.

15. Mr McVeety acknowledged that it is important to consider whether this is a material error. He accepted that there were strong factors

in favour of the claimant's integration and it may well be very difficult to argue that there would have been a different result if all the relevant factors were taken into account.

16. Had the First-tier Tribunal taken into account the principles established in the MG cases, I am satisfied that it would have inevitably reached the same conclusion on the 10 year residency requirement. It follows that the First-tier Tribunal has not committed a material error of law.

17. I accept the reasoning of the Upper Tribunal at [42-48] in MG (Portugal) regarding the correct approach to [33] of the ECJ's judgment in SSHD v MG. Had this reasoning been applied by the First-tier Tribunal to the facts accepted, the findings set out below would have been inevitable.

    (i) The claimant has had periods of imprisonment during the requisite 10-year period (counting back 10 years from the date of decision, 30 September 2016).

    (ii) Nonetheless it is still possible for him to qualify for enhanced protection in the "maybe" category, and an overall assessment needs to be made which takes into account all relevant factors. These include the following:

        a. The vast majority of the claimant's personal and family links are to the UK and no other Member State – he lived between foster care in the UK and with his mother in the UK, he has a girlfriend in the UK;
        b. The claimant is 23 years old and has lived in the UK since he was a baby;
        c. The claimant has not had any period of absence from the UK – this means that he resided in the UK during the 10 years prior to his first imprisonment in 2014;
        d. The claimant has very few links to Poland beyond his parentage. Although he was born there and is a citizen of Poland, he only speaks basic Polish and is unable to read or write in Polish.
        e. Although the claimant has had no employment in the UK and has an extensive history of criminal offending in the UK, he still has a substantial degree of integration by virtue of having lived the entirety of his life, save the first nine months, in the UK.

    (iii) The claimant's imprisonment and criminal offending have a negative impact upon the establishment of

integrative links, but his length of residence in and integrative links to the UK, and the absence of meaningful links to Poland, are such that he clearly qualifies for the enhanced level of protection in Article 28(3)(a).

Decision

18. The FTT decision does not contain a material error of law and is not set aside.

Signed:
Ms M. Plimmer
Judge of the Upper Tribunal

Date:
23 May 2017