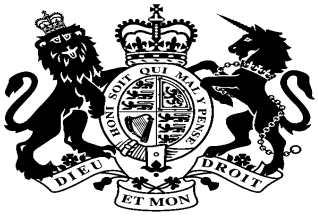

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15663/2011

THE IMMIGRATION ACTS

Field House	**Determination Promulgated**
On 2 October 2014	**On 6 October 2014**

Before

UPPER TRIBUNAL JUDGE WARR

Between

Mr Nnmadi Onuekwere

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Furner (Birnberg Peirce & Partners, solicitors)
For the Respondent: Mr R Hopkin, Home Office Presenting Officer

DECISION

1. The appellant is a citizen of Nigeria who claims to have arrived in the United Kingdom in 1999 as a visitor. He appeals the determination of First-tier Judge M A Khan who dismissed his appeal against the respondent's refusal on 24 September 2010 to grant him a permanent residence card under the Immigration (European Economic Area) Regulations 2006 as he had not completed 5 years residence in the light of the time the appellant had spent in prison. The judge found the appellant was entitled to a residence card however and allowed the appeal on that ground. He rejected the submission by counsel based on Tsakouridis [2010] EUECJ C-145/09 that as the appellant had lived continuously in the United Kingdom since 1988 he was entitled to permanent residence.

2. The appellant appealed the decision on the following ground:

The FTT erred in law in holding that the family member of the European Union (EU) national who, for a period of five years, resided with that EU national in the United Kingdom in exercise of a right to do so under EU law, does not have the right of permanent residence because for part of that period of five years he was imprisoned in the United Kingdom following conviction."

3. Permission to appeal was granted by upper tribunal judge McGeachy on 12 July, 2011 on the basis that the grounds were "just" arguable.

4. On 1 November 2011 the Upper Tribunal (Lord Bannatyne and Upper Tribunal Judge Jordan) decided to refer questions to the European Court of Justice for a preliminary ruling. On 16 January 2014 the Court gave its decision (Case C-378/12).

5. The background facts and questions referred are set out in the Court's decision as follows:

> 10 Mr Onuekwere is a Nigerian national. On 2 December 1999, he married an Irish national exercising her right of freedom of movement and residence in the United Kingdom. He had two children with her. On 5 September 2000, he obtained, as a family member of a Union citizen, a residence permit valid for five years in the United Kingdom.
>
> 11 On 26 June 2000, Mr Onuekwere was sentenced to a term of imprisonment of nine months, which was suspended for two years. That conviction did not give rise to actual imprisonment of the person concerned.
>
> 12 On 16 September 2004, Mr Onuekwere was convicted again for an offence committed in 2003. Although the prison sentence handed down was for two years and six months, Mr Onuekwere was released on 16 November 2005. However, by a decision of 18 November 2005, the Secretary of State ordered the expulsion of Mr Onuekwere from the United Kingdom. That decision was annulled on the ground that Mr Onuekwere was the spouse of a Union citizen exercising rights conferred by the EC Treaty.
>
> 13 During January 2008, Mr Onuekwere was imprisoned again for another offence. On 8 May 2008, he was sentenced to two years and three months of imprisonment. Mr Onuekwere was released on 6 February 2009, but the Secretary of State again ordered his expulsion from the United Kingdom. However, on 29 June 2010, the Upper Tribunal (Immigration and Asylum Chamber), London, annulled the Secretary of State's decision ordering that expulsion. While stating that the right of permanent residence within the meaning of Article 16 of Directive 2004/38 had been acquired only by Mr Onuekwere's wife, that tribunal held that the factors particular to Mr Onuekwere's circumstances prevailed over the public interest in his expulsion on grounds of public policy.

14 Mr Onuekwere subsequently submitted a request for a permanent residence card, which the Secretary of State dismissed by a decision of 24 September 2010. Whilst the First-tier Tribunal (Immigration and Asylum Chamber) held that Mr Onuekwere had a right of residence, that tribunal nevertheless confirmed that he had no right of permanent residence. Mr Onuekwere brought an action before the referring tribunal.

15 That tribunal observes that, if the periods of imprisonment of Mr Onuekwere, lasting three years and three months in total, are excluded from the calculation of the duration of Mr Onuekwere's residence in the United Kingdom, that residence, although interrupted by those periods, is of a duration exceeding five years. By contrast, if those periods must be taken into consideration, Mr Onuekwere's residence in the United Kingdom would be of a duration of nine years and three months at the date of the decision at issue in the main proceedings and of a duration of more than ten years at the date of submission of the request for a preliminary ruling.

16 It was against that background that the Upper Tribunal (Immigration and Asylum Chamber), London, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) In what circumstances, if any, will a period of imprisonment constitute legal residence for the purposes of the acquisition of a permanent right of residence under Article 16 of [Directive 2004/38]?

(2) If a period of imprisonment does not qualify as legal residence, is a person who has served a period of imprisonment permitted to aggregate periods of residence before and after his imprisonment for the purposes of calculating the period of five years needed to establish a permanent right of residence under [Directive 2004/38]?'

6. The Court answered the questions referred as follows:

1. Article 16(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as meaning that the periods of imprisonment in the host Member State of a third-country national, who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods, cannot be taken into consideration in the context of the acquisition by that national of the right of permanent residence for the purposes of that provision.

2. Article 16(2) and (3) of Directive 2004/38 must be interpreted as meaning that the continuity of residence is interrupted by periods of

imprisonment in the host Member State of a third-country national who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods.

7. Directions were issued by Upper Tribunal Judge Jordan and the matter set down for hearing today. The respondent had not complied with the directions and the parties requested the Tribunal to deal with the matter as a case management hearing.

8. Mr Hopkin apologised for the failure to comply with directions. I pointed out that there had been no error of law hearing. Mr Hopkin submitted that the respondent's position had been all along that the First-tier Judge had not erred in law.

9. Mr Furner said the appellant had brought a separate appeal in the First-tier Tribunal following the refusal of the respondent to endorse the appellant's new Nigerian passport with the appellant's existing residence card.

10. I asked Mr Furner whether, given the decision of the ECJ, it was clear there was no material error of law in Judge Khan's decision.

11. Mr Furner submitted he was not instructed to concede matters and had not been prepared for a hearing. Although the appellant's position was to an extent protected by the appeal to the First-tier Tribunal the respondent had not agreed to transfer the residence card – this was despite his appeal being allowed on this issue by Judge Khan. Moreover the appellant had the benefit of legal aid before the Upper Tribunal.

12. On the question that there was only one issue before the Tribunal Mr Furner submitted that had he drafted the grounds he would have taken additional or other points.

13. Mr Hopkin pointed out that the appellant had a right which did not depend on documentary evidence. He further observed that the appellant had now accrued the requisite period of residence (five years continuous residence) and subject to the formal requirements – such as the marriage continuing about which there appeared to be no issue – the appellant would be entitled to permanent residence since he had continuously resided since 6 February 2009. Finally, he would take charge of matters at the First-tier Tribunal and make sure the difficulties to which Mr Furner had alluded were addressed.

14. As I mentioned previously, there has been no error of law hearing. Absent a material error of law the decision of Upper Tribunal Judge Khan stands. The Upper Tribunal has no jurisdiction to interfere with a decision absent a material error of law.

15. Mr Furner submitted he was not in a position to deal with the issues. However, this matter was listed for hearing today and no indication had been given that the Tribunal would be inhibited from proceeding because of the respondent's breach of directions. Both parties had no reason to suppose the Tribunal would simply adjourn the matter to another date the matter having been listed for a whole day.

16. Secondly Mr Furner is widely experienced and indeed acknowledged that he might have taken additional points in this appeal. I have no doubt that the appellant's interests were fully protected. The appellant has had ample time to seek to amend or add additional grounds.

17. Thirdly the appellant's position is protected by the pending appeal before the First-tier Tribunal and by Mr Hopkin's undertaking to assist in progressing matters by taking charge.

18. Finally, Mr Hopkins had accepted, subject to the formalities, that the appellant now qualified for permanent residence.

19. Mr Furner said the appellant had the benefit of legal aid which would be lacking before the First-tier Tribunal. However it would be quite wrong to prolong proceedings at public expense where that was no longer warranted.

Conclusion

Judge Khan's decision to allow the appeal to the extent that the appellant is entitled to a residence card stands as does his request to the respondent to issue one.

In the light of the answers given by the European Court of Justice to the questions referred, Judge Khan did not materially err in law in finding that the appellant did not qualify for permanent residence as a result of periods of imprisonment.

Appeal dismissed

Upper Tribunal Judge Warr 2 October 2014