IAC-AH-LEM/SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00087/2015

THE IMMIGRATION ACTS

Heard at Birmingham Magistrates' Court	**Decision & Reasons Promulgated**
On 19 April 2016	**On 12 May 2016**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KARIM KALED MOHAMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Mills, Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. The appellant (hereinafter the Secretary of State or SSHD) challenges a decision of First-tier Tribunal (FtT) Judge Matthews promulgated on 28 August 2015 allowing

the appeal of the respondent (hereinafter the claimant) against a decision dated 25 February 2015 to make a deportation order following the claimant's conviction at Birmingham Crown Court on 7 April 2014 for an offence of robbery for which he was sentenced to four years and 3 months' imprisonment. The claimant is a citizen of France as are both his parents. He is aged 24. The judge allowed the claimant's appeal on the basis that the SSHD had failed to show that there were imperative grounds of public policy or public security to justify his deportation under the Immigration (European Economic Area) Regulations 2006.

2. Before his 2014 conviction the claimant had a record of previous convictions including for offences of burglary, failures to comply with suspended sentences, common assault and criminal damage.

3. The claimant appeared before me unrepresented. He said he could not afford a solicitor but wanted to proceed. In order to ensure that during the proceedings the claimant was not disadvantaged by lack of representation, I took steps to ensure at all stages (when necessary through an interpreter) that he understood what was happening and had proper opportunity to comment and respond.

4. At the outset I raised with the parties the matter of whether the SSHD in her grounds of challenge and the original decision and the FtT judge may have overlooked one possible basis for considering that the claimant had accrued ten years' continuous residence in fulfilment of the conditions set out in regulation 21(4) namely by virtue of being the family member of an EEA national parent exercising Treaty rights. I pointed out that there was very little information about whether the claimant's parents had exercised Treaty rights since arrival in the UK circa 1996. Mr Mills undertook to make inquiries and I stood the case down until the end of my list to enable him to make enquiries within the Home Office as to whether the claimant's parents had ever received or obtained residence documentation. Upon reconvening Mr Mills said that his enquiries had found no record of any residence documentation.

5. However, I then ascertained that the claimant's father, Mr Karim Ali Mohamed, was present in court along with the claimant's elder brother, Hamza. With the agreement of Mr Mills I asked questions of the father through an interpreter. Mr Mohamed confirmed he was the claimant's father; that he had come to the UK with the claimant and other family members in 1996; that after a few months of arrival he had got a job but he had to give it up after a few months because of ill-health; that he had been unable to work since; that he has remained in ill-health ever since; and that his wife had never worked. I also heard evidence, again with Mr Mills' consent from the claimant's elder brother Hamza, who confirmed his father's account, although emphasising that his father's health was poor physically and mentally and he was illiterate in French and English.

6. I also established from the claimant and his elder brother that the last time he had worked was in 2013. The period concerned was several months. They also confirmed the claimant's relationship with his partner had broken down.

7. During the hearing the claimant produced a number of documents which I decided to admit into evidence in order to ensure I had as full a picture as possible of the background circumstances in existence at the date of his hearing before the First-tier Tribunal. They included, inter alia: a letter from his employer Magna Exteriors and Interiors Redditch confirming the claimant had been employed with them as a factory associate between 11 November 2013 and 22 November 2013, a letter appearing to be from the same employer stating that the claimant worked for them from 2 October 2013 – 19 March 2014; a letter confirming receipt of Jobseekers Allowance dated 8 March 2013 and 17 October 2013; a letter from the claimant's father's GP confirming he suffered from Type 2 Diabetes, Asthma, Lower Back Pain, gout and renal problems.

8. I am in no doubt that the FtT Judge materially erred in law. His error was to find that the claimant had "accumulated a right of permanent residence" ([29]) based solely on the claimant having attended school in the UK, having lived with his parents and having "the period of residence that followed after his attendance at school" ([29]). This finding was erroneous because there was no evidential basis for the judge to find that the claimant had ever acquired permanent residence. It is well-established by leading cases that to acquire permanent residence a claimant must meet the conditions laid down in the Immigration (European Economic Area) Regulations 2006 and/or Directive 2004/EC/38 (the Citizens Directive). Under these legal provisions there are four possible routes to a finding of permanent residence for someone in the claimant's position.

   (i) by virtue of the claimant's status as a school student (regulation 6(1)(c)).

   (ii) by virtue of the claimant's status as a dependent (minor) family member of an EEA national exercising Treaty rights by working or seeking work (regulation 6(1)(a) – (c)).

   (iii) by virtue of being a dependent family member of an EEA national exercising Treaty rights as a worker temporarily unable to work as the result of illness or accident (regulation 6(2)).

   (iv) by virtue of the claimant's status as a worker, self-employed person or job-seeker in his own right.

9. Dealing first with the principal basis the judge appeared to rely on, namely the claimant's status as a student, it is clear from regulation 4(d)(ii) that a student can only qualify if he has comprehensive sickness insurance cover in the UK for the requisite period. Such insurance must be private insurance: see **Lepko-Bozua [2010] EWCA Civ 909**; and **Ahmad [2014] EWCA Civ 988**. There was not a shred of

evidence to show the claimant had such insurance; indeed both the written and the or oral evidence before me indicated strongly that the claimant's father and mother had been entirely dependent on benefits for almost the whole of their time in the UK and had no resources to obtain such insurance.

10. Dealing with (ii), which was the possibility I myself raised at the outset of the hearing -that the claimant's parents might have been exercising Treaty rights whilst he was still a dependent child - it is evident from the further oral and documentary evidence before me that the claimant's mother never worked and his father worked only for several months in 2006, after which he never worked again for health reasons.

11. I turn then to (iii). Given that the father worked for a few months, I am prepared to accept for the purposes of this appeal that he was a worker in 1996 for several months and that immediately after he could not work due to illness. However by no stretch of the imagination can this situation be described as a temporary inability to work and it is also manifest that since his last employment he has never had a genuine chance of being engaged in employment.

12. As regards (iv), the only evidence of the claimant having worked spans (at best) the period October /November 2013 to 19 March 2014. Again I am prepared to accept for the purposes of the appeal that the claimant was a worker for this period, but on the evidence before me he never worked after that and since he was sentenced to a term of imprisonment on 5 June 2014, he had come nowhere near accruing the requisite period of five years exercising Treaty rights in order to qualify for permanent residence. (It may indeed be that he ceased being a worker before he was taken into custody, although for present purposes I will assume he was still such.) Once he began time in prison, he ceased to be able to accrue time towards permanent residence: see Case C-378/12. Onuekwere.

13. Hence it is plain that the judge had no evidential basis for his finding that the claimant had acquired permanent residence, under regulation 21(3).

14 The question remains whether this error on the part of the judge was a material one. If a person cannot qualify under the ten years residence level of protection provided for in regulation 21(4) unless he has first acquired permanent residence, then the error was patently material. But the CJEU rulings in the two cases, Case C-145/09 Tsakouridis [2010] ECR I-11979Case C-400/12 and Secretary of State v MG, ECLI:EU:C:2014:9 of January 2014, appear to leave open the possibility of a person being considered to have the requisite 10 years of residence notwithstanding that he never acquired permanent residence. In paragraph 38 of MG, the CJEU held that:

> "38 In the light of the foregoing, the answer to Questions 1 and 4 is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, 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, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment. However, the fact that that person resided in the host Member State for the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken."

However, even assuming that the requisite 10 year period can be accrued notwithstanding the lack of permanent residence, it cannot be excluded that the judge in this case would have come to a different conclusion on the matter if he had found that the claimant had not acquired permanent residence.

15. Given that it was clearly central to the judge's reasons for allowing the appeal that the claimant stood to be considered under the ten year threshold under regulation 21(4) of "imperative grounds of public policy and public security", his error regarding the relevant period of residence was both fundamental and material. Accordingly the decision of the FtT Judge must be set aside.

16. I turned to consider whether I was in a position to re-make the decision without further ado. Although not strictly in accordance with Tribunal directions, the claimant has adduced further written evidence, which I summarised non-exhaustively earlier. I also had the benefit of of his own evidence and that of his father and elder brother. I have concluded I am in a position to re-make the decision.

17. Considering the claimant's appeal in the light of the evidence as a whole, including the father's evidence adduced and given before me and the oral evidence of the claimant and his brother, two things are incontrovertibly established. First he has never acquired permanent residence and the most that he can possibly lay claim to is that has been a worker for a short period in 2013/2014. Hence he cannot benefit from the higher thresholds of protection set out in Regulation 21(3) ("serious grounds of public policy or security"). Nor can he benefit from the highest (10 year) threshold set out in regulation 21(4) ("imperative ground ...") – it is convenient to deal with my reasons for saying that at the end. All that he can seek to argue is that the SSHD was not entitled to consider there were grounds of public policy or public security under regulation 19 (the so-called "baseline" or lowest form of protection").

18. In assessing this question I have to apply the principles set out in regulation 21(5) – (6).

19. In this context it is unnecessary to detail all aspects of the claimant's particular circumstances because three features stand out as being of particular importance in his case. First, in terms of his personal conduct, he not only had a history of offending going back to February 2006 but in February 2014, the level of seriousness of his offending escalated, culminating in him being sentenced to 4 years 3 months

for robbery. There is no evidence to state that since that period he has rehabilitated and in my view that offence was a serious indication that his personal conduct represented (and still represents) a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. To the contrary, in addition to the fact that his most recent offence represents an escalation in his level of criminality, the OASys assessment made in January 2015 assessed him to pose a medium risk of harm to the public in the community and no evidence has been adduced to suggest that assessment has altered.

20. The second stand-out consideration is that the claimant no longer has a relationship with his partner and their children. For the past year or so he has either lived on his own or with his parents. On his older brother's own account, the claimant has been leading an independent life. Thus his present circumstances do not demonstrate that he has close family ties over and above normal emotional ties with his parents and siblings.

21. A third feature which is very clear from his history is that he has not been in work for any significant period and that he has a history of being in receipt of public funds.

22. I take into account in the claimant's favour, inter alia, that: he was a minor when he came to the UK and when he began committing criminal offences, that whether or not in exercise of Treaty rights he has been in the UK almost twenty years; that it cannot have been easy for him growing up in a family where his father's ill-health prevented him from being a breadwinner; that he has not only a mother, father and siblings in the UK but also aunties, uncles and cousins; that even though he has no subsisting relationship with them or their mother, he has two children born in the UK. However even taking these factors in his favour at their highest, they fall well short of a set of personal circumstances that make the decision to deport a disproportionate one. The respondent has clearly established that there are cogent public policy reasons for his deportation.

23. I said at [17] above that I would state at the end my reasons for concluding that the claimant cannot benefit from the 10 year level of protection set out in regulation 21(4). It is convenient to do so because my reasons are informed by certain of the considerations set out in [18]-[22] above. Even assuming that the CJEU rulings in Tsakouridis and MG allow for the 10 year level to be accrued in the absence of acquisition of permanent residence, it is clear that this requires a finding that there has been sufficient quality to a claimant's residence prior to imprisonment and that his integrative links with the host Member State have not been broken. In the claimant's case, for the period in the UK (which commenced in November 1996) when he was still a dependent child, his father exercised Treaty rights for one period of a few months in 1996 only and shortly thereafter ceased to exercise them. Except for that very brief period, therefore, the claimant has never been the family member of an EEA national exercising Treaty rights. It is also clear that for all of that period save for those few months his family has been reliant on public funds. Once the claimant reached adulthood, he himself never exercised Treaty rights in his own

right except for a very short period only – at best a period between October 2013 and March 2014. Further, since 2006 he began a history of offending and his latest offence, for which he was imprisoned for over three years, demonstrates an escalation in the level of seriousness of his offending. Outside his parent's family and relatives, he has no ongoing relationship with a partner or with his biological children. In short, his period in the UK of just under 20 years is one in which he has never acquired links of any significant quality and the evidence of his integration is either lacking or extremely thin. Even assuming that he had acquired integrative links of a relatively weak kind, his history of criminal offending which began in 2006 weakened them further and the plain effect of his imprisonment in April 2014 has been to break them altogether. Counting back from the decision to make a deportation order against him, it is my clear finding that his period of imprisonment broke the necessary period of 10 years in order for him to have been able to qualify for protection under regulation 21(4).

Notice of Decision

24. For the above reasons the decision I re-make is to dismiss the appellant's appeal.

No anonymity direction is made.

Signed H H Storey Date: 27 April 2016

Dr H H Storey
Judge of the Upper Tribunal