Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00381/2017**

THE IMMIGRATION ACTS

Heard at Manchester
On 1 February 2018

Decision & Reasons Promulgated
On 5 February 2018

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BRAJAN DROZD

Respondent

Representation:

For the Appellant: Mr Bates, 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 ('FTT') dated 20 September 2017, in which it allowed the appeal of the respondent ('the claimant').

2. The claimant was assisted by a Mr Tomeczek of Bluestone Legal Ltd, during the course of the hearing. Mr Tomeczek accepted that he was not qualified in this jurisdiction but was able to assist the claimant to understand the submissions being made and the relevant legal framework, in order to respond to the SSHD's grounds of appeal.

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Background

3. The claimant is a citizen of Poland, and therefore an EEA citizen. He was born in 1997 and entered the UK with his mother in 2006 when he was 8 years old. He has remained in the UK since this time and not returned to Poland.

4. In her decision dated 27 June 2017 making a deportation order against the claimant, the SSHD noted that the claimant was convicted of robbery on 15 February 2016 and burglary on 5 May 2016, and sentenced to a total of 45 months detention in a Young Offender Institution. The SSHD did not accept that the claimant acquired a permanent right of residence or had resided in the UK for a continuous period of 10 years and therefore assessed whether his deportation was justified on grounds of public policy or public security.

FTT decision under appeal

5. The FTT focused its attention almost entirely upon whether or not the claimant had acquired a period of 10-years residence prior to his detention and concluded that he had. The FTT therefore found that the claimant was 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 FTT decided this issue in the claimant's favour at [27]. The FTT dealt with the issue in brief terms, finding that by the time that the claimant was "*sent into detention…he had been lawfully resident in the UK for 10 years*".

Grounds of appeal / submissions

7. In her grounds of appeal, the SSHD submitted that the claimant fell short of the requisite 10 years by some 8 months. This was calculated as follows: the only evidence supporting the claimant's residence in the UK dated back to November 2006; and therefore by the time of his detention from 15 February 2016, he had not been in the UK for 10 years. The grounds of appeal did not clearly point out that following SSHD v MG [2014] EUECJ C-400/12 the 10-year period must be counted back from the date of the deportation decision. That is also the position under the Immigration (EEA) Regulations 2016 ('the 2016 Regulations') which state as follows (my emphasis):

> "**Decisions taken on grounds of public policy, public security and public health**
> **27.**—(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health…
> (4) 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; or…"

8. I decided that this was an arguable obvious error of law, in the sense explained in Robinson v SSHD [1997] Imm AR 568, and granted Mr Bates permission to argue the point.

9. Mr Bates also drew my attention to B v Land Badem-Wurttemberg and SSHD v Vomero (Directive 2004/38/EC), Joined Cases C-316/16 and C-424/16, Opinion of AG Szpunar, delivered on 24 October 2017. In response to a request for a preliminary ruling from the Supreme Court the AG reached the following conclusions:

   (i) The acquisition of permanent residence is a pre-requisite to qualify for enhanced protection.
   (ii) The 'previous ten years' residence required for enhanced protection must be continuous, subject to reasonable absences.
   (iii) Imprisonment allows doubt to be cast on integrative links but should not be excluded from the calculation of the 10-year period.
   (iv) The expression 'the previous ten years' must be interpreted as referring to a continuous period, calculated by looking back from the precise time when the question of expulsion arises, that includes any periods of absence or imprisonment, provided that none of those periods of absence or imprisonment has had the effect of breaking the integrative links with the host Member State.
   (v) The overall assessment of integrative links cannot be confined solely to the criteria of long-lasting settlement in the host Member State and the absence of any link with the Member State of origin. That assessment must instead take account of all the relevant factors of the individual case and must take place at the time when the authorities are ruling on the expulsion decision.

10. I then heard from the claimant and Mr Tomeczek, who reminded me that the FTT made an express finding of fact in the claimant's favour.

Error of law discussion

11. The relevant legal framework is undoubtedly complex but it is now sufficiently clear 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 – see regulation 3 of the 2016 Regulations and MG v SSHD (Case C-400/12), [2014] 2 CMLR 40, Warsame v SSHD [2016] EWCA Civ 16, SSHD v Vomero [2016] UKSC 49, the AG's recent opinion in Vomero (supra).

12. In this case that would mean counting back from the deportation order dated 27 June 2017. The FTT did not adopt this approach and instead counted back from the date of the claimant's detention. This is an error of law. This error necessarily involved a further error of law. The First-tier Tribunal failed to consider all the relevant factors and the degree of integration involved, given the claimant's imprisonment from February 2016 for two serious offences, prior to the deportation decision.

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. In Warsame (supra) the Court of Appeal appears to have accepted at [9] that there is a "maybe" category of case 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. The AG in Vomero made it clear that imprisonment did not necessarily break continuity of residence, albeit integrative links needed to be carefully considered.

14. On any view, the FTT was required to count back from June 2017, and failed to do so. It therefore failed to consider the impact of the claimant's detention on his integrative links. This constitutes an error of law and needs to be re-examined.

15. Mr Bates submitted that this should be done afresh by another FTT. Mr Bates also submitted that no findings of fact should be preserved because the FTT provided inadequate reasons for finding the claimant had been continuously resident in the UK from 2006. This is not a criticism to be found in the grounds of appeal and it was too late to raise this at the hearing. There was no 'Robinson-obvious' point of law arising from the FTT's finding of fact that the claimant resided in the UK from 2006. The FTT provided adequate reasons for accepting this aspect of the claimant's evidence. The reasons for this finding are to be found at [25-27] and are adequate and were entirely open to the FTT. The FTT did not specify when in 2006 the claimant arrived in the UK and this is a matter that can be addressed upon remittal.

16. This FTT has already assessed the evidence available to it and made factual findings open to it that the appellant has lived in the UK continuously since 2006 and it would be proportionate for the same FTT to make further findings albeit counting back from the date of the deportation decision.

17. There is the additional issue of whether possession of a right to permanent residence is necessary for there to be enhanced protection. Although the AG has concluded that it is a prerequisite, it should be noted that the majority in the Supreme Court did not support that view (see [27] of its decision), and we are yet to hear from the ECJ on the subject. The FTT shall need to reflect on the best course given the stage of the proceedings in Vomero and the extent to which this is likely to be a live issue in any event as the claimant resided in the UK as a child / student for well over five years.

Remittal

18. The decision should be remade by the FTT. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the same FTT.

19. The FTT has already made factual findings regarding the claimant's residence in the UK. These factual findings are not infected any error of law. The FTT has omitted to count back from June 2017 and omitted to assess integrative links, in light of the period of detention. It would be proportionate for the same FTT to consider these issues and make any further findings of fact relevant at the date of hearing bearing in mind that the claimant has been released from prison on licence.

Decision

20. The FTT decision contains a material error of law and is set aside.

21. The appeal is remitted to the same FTT, which shall remake the decision in line with the preserved factual finding that the claimant has resided in the UK since 2006.

Signed:
Ms M. Plimmer
Judge of the Upper Tribunal

Date:
2 February 2018