



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001870

First-tier Tribunal No: DA/00047/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

26th October 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FABIO MANUEL FREITAS COELHO
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms A Ahmed, Home Office Presenting Officer

For the Respondent: Ms K Wass, Counsel, instructed by David Benson Solicitors

Heard at Royal Courts of Justice on 4 September 2023

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal. He is a citizen of Portugal. His date of birth is 12 September 1985.
2. On 4 January 2022 the First-tier Tribunal (Judge L K Gibbs) granted the SSHD permission to appeal against the decision of the First-tier Tribunal (Judge Cohen) to allow the Appellant's appeal against the decision of the SSHD on 26 November 2019 to make a deportation order against him pursuant to the Immigration (European Economic Area) Regulations 2016. The matter came before me in order to determine whether Judge Cohen made an error of law.
3. The Appellant claims to have come to the UK in August 1998 with his mother when he was aged 12. He has committed a number of offences culminating in a conviction for burglary on 30 April 2019. He was sentenced on 17 June 2019 to two years and three months' imprisonment. The SSHD made a deportation order.

4. At paragraph 21 of the judge's decision he indicated that it was agreed that the appeal should proceed on the basis of submissions. This is peculiar because it is clear that there were issues on which the parties did not agree. The issue of the level of protection that was applicable in this case was a matter that had not been agreed by the parties.
5. The judge went on to make the following findings:-
 - “24. The burden of proving that the decision of the respondent was not in accordance with the law and the relevant Regulations rests upon the appellant. The standard of that proof is the balance of probabilities. The relevant date for the purposes of this appeal is the date of the hearing (LS Gambia).
 25. I note that having reference to the Regulations that a person's previous criminal convictions do not, in themselves, justify the decision on grounds of public policy or public security. Having regard to the case of LG and CC (EEA Regs) Italy [2009] UKAIT 00024 I note the hierarchy of levels of protection referred to and summarised therein. I find that the appellant has been resident in the UK since 1998, as claimed and therefore for 23 years being 10 years before he commenced his prison sentence. I have evidence before me to indicate that the appellant worked, albeit intermittently over the course of his time in the UK as well as having studied in the UK for 4/5. (sic) Having regard to the substantial evidence of employment in the UK including reliable evidence including HMRC breakdowns, that the appellant has achieved a five year employment in the (sic), in particular for the period 2014-2019. The appropriate documentation is contained at pages 13-19 of the appellant's bundle. There is evidence of the appellant working before this period and also claiming jobseekers allowance, which I find to be indicative of the fact that the appellant was additionally exercising treaty rights by seeking employment in the UK. Having regard to the totality of the evidence before me, I find that the appellant continuously exercised Treaty Rights for a period of (sic) and has achieved permanent residence in the UK which is not disputed by the respondent.”
6. The judge said that the Appellant has excellent English skills and had studied in prison in order to improve his situation upon release. He took into account that he has undertaken rehabilitative courses. He took into account that the Appellant has a relationship in the UK and two children and that he plays an active role as a parent following his release from prison. The judge found at paragraph 28 that the Appellant “has dedicated himself to improvement. He has studied and undertaken rehabilitative courses. He has a positive current reference. His family previously excluded him but have now welcomed him back. He has not reoffended since the release from prison”.
7. The judge said at paragraph 29 that he had had regard to the case of Tsakouridis. He said that he found that the Appellant had undertaken significant rehabilitative work in the UK and that “his removal to deportation will significantly impaired his ability to continue to rehabilitate into society”. The judge found that the Appellant “does not present a threat to the functioning of the institutions in essential public services and the survival of the population”. The judge found that the Appellant's deportation was not the only means by which the public may be protected and that they may be protected through his rehabilitative actions. The judge found that the Appellant has lived in the UK for in excess of twenty years and that he has integrated into the UK and has very little in way of connections with Portugal. He concluded that “the appellant does not present a genuine, present and sufficiently serious threat to society in the UK or that his deportation is proportionate in light

of the very high tests identified above". He acknowledged that the Appellant's offending spanned a period of time and covers multiple offences but he said that the Appellant was under the influence of drugs and alcohol at the time of offending and that he has learned from this experience and his experience in prison and that he was highly unlikely to reoffend in the future. The judge found that the Appellant was not frequenting with the same circle and so many of the risk factors which led to the Appellant's offending behaviour had been removed.

8. The judge at paragraph 31 said that he had regard to the Appellant's long residence in the UK and his integrated links. The judge said that he found that the Appellant "has significantly integrated into British society and that he does meet the grounds of the imperative grounds test". The judge said at paragraph 31 "the respondent did not question that the appellant had been residing in the UK in accordance with the Regulations for 10+ years". The judge concluded at paragraph 32 that in all the circumstances the Appellant's removal was not justified on imperative grounds of public security.

The Grounds of Appeal

9. The grounds of appeal are very lengthy and insufficiently particularised. I will attempt to summarise the points made therein:-
 - (1) The SSHD did not accept that the Appellant is entitled to permanent residence under the Regulations in contrast to what the judge stated at paragraph 8 of his decision which in any event was inconsistent. This is a reference to paragraph 8 of the judge's decision where he set out that the Respondent's position was that the Appellant had not resided in the UK exercising treaty rights for a continuous period of five years however in the next sentence the judge stated that it was acknowledged and accepted that the Appellant had acquired a permanent right of residence in the UK. Furthermore at paragraph 31 the judge stated that "the respondent did not question that the appellant had been residing in the UK in accordance with the Regulations for 10+ years." The judge did not understand the position of the SSHD.
 - (2) The judge accepted that the Appellant had permanent residence on the basis of his employment however he did not engage with the issue raised by the Respondent with reference to Begum (EEA - worker - jobseeker) Pakistan [2011] UKUT 275 and DV and Her Majesty's Revenue and Customs (CHB) (Rev 1) [2017] UKUT 155 both which were relied upon by the Presenting Officer at the hearing.
 - (3) The judge did not properly reason how the Appellant qualifies for the highest level of protection against expulsion on imperative grounds.
 - (4) Even if the judge was correct in finding that the Appellant had been in the UK for ten years under the Regulations he did not make a reasonable finding concerning whether his integrative links were broken by repeated offending and imprisonment. The judge did not properly consider case law in respect of rehabilitation namely MC (Essa principles recast) Portugal [2015] UKUT 520.
 - (5) The judge did not consider Regulation 27(8) of the 2016 Regulations.

The legal framework

10. The relevant statutory framework is the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

- “27.—(1) In this regulation, a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.
- (2) A relevant decision may not be taken to serve economic ends.
- (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.
- (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
- (b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(1).
- (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—
- (a) the decision must comply with the principle of proportionality;
- (b) the decision must be based exclusively on the personal conduct of the person concerned;
- (c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
- (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
- (e) a person’s previous criminal convictions do not in themselves justify the decision;
- (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.
- (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person (“P”) who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P’s length of residence in the United Kingdom, P’s social and cultural integration into the United Kingdom and the extent of P’s links with P’s country of origin.
- (7) In the case of a relevant decision taken on grounds of public health—
- (a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010(2); or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom, does not constitute grounds for the decision.

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.)”

11. There are a few principles of law concerning the determination of level of protection against expulsion which are not contentious and can be summarised as follows:-

- (1) Prison interrupts continuous residence for the purpose of acquiring permanent residence and periods spent residing in accordance with the Regulations before and after prison cannot be aggregated: case C-400/12 SSHD and MG [2014] I WLR 2441.
- (2) ten years’ residence is calculated counting backwards from the date of decision to deport and must be, “in principle”, continuous: SSHD and MG, supra and case C-316/16 B and Land Baden-Wurtttemberg [2009] QB 126.
- (3) Periods in prison in principle weaken integrative links but a holistic assessment must be made: case C-378/12 Onuekwere [2014] I WLR 2420.
- (4) Periods of imprisonment do not count positively towards calculating ten years’ residence. However periods residing before and after prison can be added together: Hafeez and SSHD [2020] EWCA Civ 406 (17 March 2020); [2020] EWCA CIV 406; [2020] 1 WLR 1928 at [33], [39] and [43].
- (5) A sentence of imprisonment includes periods of detention in young offenders institutions: SSHD and Viscu [2019] EWCA Civ 1052; [2019] 1 WLR 5376.
- (6) There must be an assessment of circumstances when the question of expulsion arises: case C-146/09 Tsakouridis 23 November 2010.

Error of Law

12. The Appellant is currently incarcerated; however, the reasons for this are not clear. Having looked at the PNC which was handed to me by Ms Ahmed at the start of the hearing it did not shed light on the matter. Neither representative was able to enlighten me. I could not ask the Appellant because he did not attend the hearing before me. The information from the prison was that he had refused to come out of his cell. Ms Wass did not object to the error of law hearing proceeding in his absence. Having regard to the overriding objective (Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (“the 2008 Rules”), I decided that it was fair and just to proceed in his absence.

13. Following submissions from both representatives, I communicated my decision at the hearing that the First-tier Tribunal materially erred. I set aside the decision of the First-tier Tribunal (Judge Cohen). I gave short reasons orally to the parties, to be followed by a written decision.

14. At the start of the hearing Ms Wass indicated that the Home Office Presenting Officer’s note of the hearing before the First-tier Tribunal was agreed. It was agreed that whether the Appellant had permanent residence was a live issue before the First-tier Tribunal. The judge twice made reference to the SSHD accepting that the Appellant has permanent residence at

[8] and [25]. This was not the case. However, in my view a proper reading of the decision indicates that the judge did not proceed on the basis that the SSHD had made a concession notwithstanding the references. I am satisfied that the judge was aware that permanent residence was an issue. He set out the SSHD's submission at [22] and made addressed his mind to the issue at [25].

15. I am, however, persuaded that the judge materially erred when concluding that the Appellant has permanent residence. The finding at [25] is inadequately reasoned and does not engage with the SSHD's submission in respect of work not being effective and the reliance on Begum. The judge said that there as substantial evidence of employment, but did not resolve the issue that it was not effective employment, a matter reasonably raised by the HOPO when considering the Appellant's earned income. This is a material error of law. If the Appellant does not have permanent residence, he cannot be entitled to the highest level of protection.
16. In any event, the judge further erred when assessing integrative links. The judge found that the Appellant was entitled to the highest level of protection, but failed to assess whether integrative links had been broken by imprisonment properly counting back from the decision to deport him. Furthermore it was not accepted by the SSHD that the Appellant had come to the UK in 1998 and therefore whether the Appellant had completed ten years' continuous residence before he was sentenced to imprisonment on 30 April 2019 was an issue. In any event what the judge did not do what he should have done is to count back ten years from the deportation decision. It s obvious that the period of ten years was interrupted by the imposition of a custodial sentence. The judge should have considered whether the Appellant's integrative links were severed at the material time. The judge gave inadequate reasons for finding that the Appellant's integrative links had not been broken by imprisonment.
17. I agreed with the parties that there would need to be a de novo-hearing and the appropriate forum was the First-tier Tribunal. I therefore remitted the case to the First-tier Tribunal for a re-hearing before a different judge.

Notice of Decision

18. The making of the decision concerned involved the making of an error on a point of law. I set aside the decision of the judge to allow the Appellant's appeal pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and remit to the First-tier Tribunal for a re-hearing.

Joanna McWilliam
Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 October 2023