



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00538/2013

THE IMMIGRATION ACTS

Heard at Stoke
on 15th January 2014

Determination Promulgated
on 21st January 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

A O
(Anonymity order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Rutherford instructed by Dicksons Solicitors

For the Respondent: Mr Lister – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel of the First-tier Tribunal composed of First-tier Tribunal Judge Sommerville and Mr H G Jones (hereinafter referred to as 'the Panel' who dismissed the Appellant's appeal against a decision to deport him to Italy. AO is an Italian national.
2. The Panel accepted AO resided in the UK lawfully for five years, between 1994 and 1999 [17], but that he had failed to discharge the burden upon him to prove

he has been lawfully resident in the UK for the ten years between 1989 and 1999 [18].

3. As a result of the conclusion AO has only established five years lawful residence, and so acquired a right of permanent residence, the Panel assessed the merits of the appeal by reference to whether there are serious grounds of public policy, security, or health pursuant to Regulation 21(3) of the EEA Regulation 2006 (as amended) warranting his deportation.

Discussion

4. The key challenge to the determination is that in proceeding to apply the 'serious ground' test the Panel legally erred as this is the wrong test. It has not been found that AO left the UK for a period of two years, or at all, such as to mean he lost his right of permanent residence, and so the Panel must have been satisfied that he has remained in the UK since entering in 1989. The right of permanent residence acquired would only be lost, under Article 16(4), if the Union citizen concerned was absent from the host state for a period of two years. He has been in the country in excess of ten years.
5. The Panel found he had not established ten years lawful residence. In McCarthy v SSHD [2008] EWCA Civ 641 the Court of Appeal said that lawful residence referred to in Article 16 of the Citizen's Directive was residence which complied with Community Law and the requirements of the Directive. In this case AO has lived in the UK with a right of permanent residence and so it is arguable he has lived lawfully and in accordance with Community Law for that period.
6. Mr Lister sought to rely upon the non binding opinion: [Opinion of Advocate-General Bot: PI v Oberbürgermeisterin der Stadt Remscheid \(Case C-348/09\)](#). In this case Advocate-General Bot considered that the Appellant's conduct - rape of a minor - and the way in which the acts were committed showed that the true position was that he was not actually integrated and could not, therefore, benefit from the enhanced protection. The Citizens Directive contained a simple presumption of integration, which was rebutted in the present case by the acts committed. Although the integration of a Union citizen was, in fact, based on territorial and time factors, it was also based on qualitative elements.
7. The submission the nature of the offences committed by AO put his case at the same level as that considered by the Advocate-General is not made out on the facts.
8. AO has served periods of imprisonment but in Secretary of State for the Home Department v FV (Italy) [2012] EWCA Civ 1199 it was held that the continuity of residence for the purpose of regulation 21(4)(a) was not broken by a period of imprisonment: Jarusevicius (EEA Reg 21 - effect of imprisonment) [2012] UKUT 120 (IAC) approved. The question whether the requirement of a continuous

period of ten years' residence was established at the date of the decision to deport turned on the degree of integration established at that time. That was a question of fact for the Tribunal. Periods of absence during the ten years immediately preceding the decision did not, of themselves, disqualify and neither did a period of imprisonment. The period of imprisonment was, however, relevant as a factor to be considered when deciding upon integration at the date of decision. Integration would not normally be established by the time spent in prison save that it might have limited relevance by contributing to the severance of links with the country of origin. If integration had been established prior to the custodial term, it would not necessarily be lost by that term. The decision would turn on an overall qualitative assessment having regard to all relevant factors, including the length of residence, family connections and any interruptions in integration. (Per Aikens and Rafferty LJJ) The key questions for the Tribunal to ask when considering whether there had been a period of ten years' residence prior to the decision to deport were whether imprisonment involved either the transfer to another State of the centre of the personal, family or occupational interests of the person concerned, and/or whether the "integrating links" previously forged with the host Member State had been broken: Tsakouridis followed.

9. I find it arguable the Panel erred in their assessment of whether AO has not resided in the UK for a continuous period of ten years, such as to deny him the protection of the enhanced rights, for the reasons stated. The appeal will have to be considered further and the issue of whether AO has ten years continuous residence, and whether such integration has been lost or not through periods of imprisonment, investigated and appropriate findings made. If it is found AO has ten years qualifying residence the Tribunal will have to consider whether the higher 'imperative' test is satisfied and conduct an assessment of the remaining elements of the Regulations, if required.
10. I set the determination aside. As there has been no examination of all relevant issues by the First-tier Tribunal it was agreed the appeal must be remitted to be heard afresh. The following directions shall apply to the future conduct of the appeal:
 - i. The appeal shall be remitted to the First-tier Tribunal sitting at Sheldon Court Birmingham to be heard by a Designated or salaried judge of that tribunal with sufficient knowledge of EU law on a date nominated by Resident Judge Renton in light of the current operational requirements of the centre. Time estimate 3 hours.
 - ii. The parties shall file with the Tribunal and sent to the opposing party a consolidated, indexed, and paginated bundle containing all the evidence upon which they intend to rely no later than 7 days before the hearing. Skeleton arguments must be

included in the bundles. Witness statements shall stand as the evidence in chief of the maker. Those responsible for the preparation of the bundles must note the adverse comments to be found in paragraph 10 of the First-tier determination regarding the poor quality of the evidence produced to date and ensure that all available relevant evidence is included in the bundle.

- iii. An Italian interpreter is required

Decision

- 11. **The First-tier Tribunal Panel materially erred in law. I set aside the decision of the original Panel. The appeal shall be remitted to the First-tier Tribunal for the decision to be remade in accordance with the directions given above.**

Anonymity.

- 12. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed.....
Upper Tribunal Judge Hanson

Dated the 17th January 2014