Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/01058/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 March 2015	**On 11 March 2015**

Before

UPPER TRIBUNAL JUDGE PITT
UPPER TRIBUNAL JUDGE KEBEDE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VALDO ARAUJO

Respondent

Representation:

For the Appellant: Mr Tarlow, Senior Home Office Presenting Officer
For the Respondent: Ms Hooper, instructed by Birnberg Peirce & Partners

DETERMINATION AND REASONS

1. This is an appeal against the decision promulgated on 24 November 2014 of First-tier Tribunal Judge Nicholls which allowed the appeal against the respondent's decision of 20 September 2013 to deport the appellant.

2. For the purposes of this appeal we refer to Mr Araujo as the appellant and the Secretary of State as the respondent, reflecting their positions as they were before the First-tier Tribunal.

3. The appellant is a citizen of Portugal and he was born on 19 August 1991.

4. The ground of appeal before us was narrow and turned on the respondent's approach in the First-tier Tribunal to the "imperative" threat test which was applied by the First-tier Tribunal when considering the deportation of the appellant.

5. The respondent's reasons for refusal letter dated 20 September 2013 set out her case for deporting the appellant. At paragraphs 4 - 7 and 26 - 30 the respondent listed the steps taken to obtain and consider evidence on the appellant's claim to have been resident in the UK since 2000.

6. At paragraphs 9 – 13 the respondent set out the legal tests for expulsion of an EEA national, noting at paragraph 10 that, following Regulation 21 (4) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") where someone has resided for a continuous period of 10 years, deportation is only justified on "imperative" grounds of public security.

7. At paragraph 31, the respondent indicated that it was her case that the appellant had shown that he had been living in the UK as an EEA national for 10 years and that "[a]s a result, it is necessary to establish that your client's deportation is warranted on imperative grounds of public security". It was also her case that such "imperative" grounds were made out here.

8. At the hearing before the First-tier Tribunal, the respondent's representative confirmed that it was "accepted that the Appellant had been resident in the UK for more than 10 years and that to remove him from the UK it must be shown that there were imperative grounds of public security in accordance with Regulation 21 (4)"; see [2]. The same paragraph of the determination indicates that where that was so, it was not necessary to hear evidence and the appeal proceeded on the basis of submissions as to whether "imperative" grounds existed. Judge Nicholls did not find that they were and allowed the appeal. His reasoning in that regard is not under challenge here.

9. Rather, the grounds of appeal maintain that the First-tier Tribunal misdirected itself in following the respondent's "concession of law" as to there being a requirement here to show "imperative" grounds; see paragraph 4 of the grounds of appeal.

10. We saw no merit in that ground for a number of reasons. Firstly, if the respondent's position on 10 years' residence and "imperative" grounds can be properly characterised as a "concession", she relied on it throughout the proceedings before the First-tier Tribunal and only seeks to alter her position having lost the appeal. It is difficult to see how an error of law can be made out now where that is so.

11. In addition, the case law on which the respondent relies in support of being able to withdraw a concession, NR (Jamaica) v SSHD [2009] EWCA Civ 856, is factually different as the concessions there were withdrawn before the conclusion of the proceedings and promulgation of the relevant decision and does not support her being able to do so in the circumstances before us. As in FV (Italy) v SSHD [2012] EWCA Civ 1199 at [35], it appeared to us that it was not open to the respondent to withdraw the point now, in particular where, and in light of what we say below,

"[t]here is no duty on a Tribunal to take a point on behalf of the Secretary of State which the Secretary of State has not taken in the particular case"; see [35(f)] of FV.

12. Secondly, Mr Tarlow accepted at the hearing that this was a concession of fact not law. The respondent could not be said to have put forward a concession which could or should not, in law, have been made. The relevant EEA and domestic legislation and case law commenting thereon, summarised in MG (prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 392 (IAC) allowed the respondent to accept as a matter of fact in her refusal letter and at the First-tier Tribunal that this appellant had "resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision."

13. As put by Ms Hooper at paragraph 3 of her skeleton argument:

> "It is therefore clear that whilst periods of imprisonment in principle interrupt the continuity of residence for the purpose of meeting the 10 year requirement this only means that such periods must have a negative impact when considering whether the integrative links required to benefit from the enhanced protection provisions. It does not mean that as a matter of law a person sentenced to a term of imprisonment which in principle breaks continuity of residence cannot so benefit."

14. Nothing in the CJEU case of C-378/12 Onuekwere provides to the contrary.

15. For these reasons, we did not find that the grounds of appeal disclosed an error on a point of law.

Decision

16. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed:  Date 9 March 2015

Upper Tribunal Judge Pitt