Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00486/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 April 2016	**On 19 April 2016**

Before

UPPER TRIBUNAL JUDGE R CHALKLEY
DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

MR SERGEJ NEJMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Fijiwala, Senior Home Office Presenting Officer
For the Respondent: Mr D Sellwood, counsel instructed by Reiss Edwards Solicitors

DECISION AND REASONS

1. This is an appeal against a decision of First Tier Tribunal Judge N J Osborne, promulgated on 27 January 2016, in which he allowed the respondent's appeal against a decision to deport him.

Background

2. The respondent, originally a Croatian national, last arrived in the United Kingdom during 1996. He was issued a residence card in August 1999, following his marriage to an EEA national. A further 5-year residence card was issued on 16 February 2005. The appellant acquired Italian citizenship and was issued with an Italian passport during October 2006.

3. Following a conviction for affray and possessing an offensive weapon, the respondent was sentenced to 18 months imprisonment. There had also been a number of previous convictions, which did not result in the respondent's imprisonment.

4. In deciding to deport the respondent, the Secretary of State accepted that permanent residence had been acquired but not that the respondent had been continuously resident for a 10-year period. With regard to the assessment of the threat said to be posed by the respondent, reliance was placed on an OASYS assessment, which concluded that he posed a medium risk of harm to the public. Reference was also made to the respondent's offending history, the link with alcohol misuse and a lack of evidence to show that he had adequately addressed his offending behavior. Consequently, the Secretary of State was of the view that there remained a risk of re-offending and a risk of harm to the public. The Secretary of State accepted that the respondent had settled into and integrated into United Kingdom society, but not to a degree sufficient as to render his deportation disproportionate. In terms of rehabilitation, it was noted that the respondent had undertaken a relevant programme and engaged with the Turning Point charity.

5. Article 8 ECHR was considered by the Secretary of State outside the Rules, however it was not accepted that the respondent had a genuine and subsisting relationship with his children or that it was unduly harsh for the children to remain in the United Kingdom while the respondent was deported. There were said to be no exceptional circumstances as the respondent's mental health concerns could be treated in Croatia.

The hearing before the First Tier Tribunal Judge

6. The First Tier Tribunal Judge heard an application to adjourn the appeal in order to enable the respondent to seek and obtain treatment for his "*well-established*" mental health difficulties. That application was withdrawn owing to the judge's view that the matter could proceed with only brief evidence from the respondent. The judge heard oral evidence from the respondent and his wife which he accepted as credible and concluded that the respondent had been living continuously in the United Kingdom from May 1997 until the date of the hearing and was therefore entitled to the highest level of protection under the Regulations. The First Tier Tribunal Judge accepted the presenting officer's concession that the offences in question did not reach the threshold of seriousness for deportation on imperative grounds and concluded that the residence issue was determinative of the appeal both under the Regulations and Article 8 ECHR.

Error of law

7. There were two grounds of application. The first was that the judge had erred in his approach to the issue of continuous residence in view of the judgment in *Warsame v SSHD* [2016] EWCA Civ 16. It was argued that the First Tier Tribunal Judge had taken "*any*" 10- year period as his starting point rather than calculating the period back from the decision in question. It was said that, following *Warsame* the judge failed to consider the level of integration achieved by the respondent in the 10 years prior to his imprisonment, including his history of offending. In this, reference was made to the Advocate General's opinion in *Onuekwere v SSHD* [2013] EUECJ C-378/12. It was said that the First Tier Tribunal Judge implied that the respondent constituted a genuine, present and sufficiently serious threat, as there would have been no material need to consider the length of residence if Regulation 21(5)(c) was not met. The second ground briefly commented on the judge's failure to apply sections 117B and C of the Nationality, Immigration and Asylum Act 2002 (as amended).

8. Designated Judge Peart granted permission on the basis sought.

9. The respondent's Rule 24 reply of 8 March 2016 indicated that the application was opposed, that the FTTJ had considered the total period of the respondent's continuous presence in the United Kingdom and not just the period between 1997 and 2007. With regard to *Warsame*, it was noted that this judgment was dated after the decision in the instant case was promulgated. Nevertheless, it was argued that the First Tier Tribunal Judge considered factors relevant to integration as well as the respondent's offending history. It was disputed that the judge had found, by implication, that the respondent constituted a genuine, present and sufficiently serious threat. With regard to the second ground, it was said that the judge did not need to address the last two stages in R (*Razgar*) v SSHD [2004] UKHL 27, as he had allowed the appeal under the Regulations.

The hearing

10. Ms Fijiwala clarified that it was not disputed that the respondent had been residing in the United Kingdom continuously since 1997, however the Secretary of State's argument was that the judge had not made it clear that the respondent's links to the United Kingdom had not been broken by his period of imprisonment. She argued that there had been no overall assessment of the respondent's circumstances other than that his relationship with his wife had been taken into account. With reference to headnote 3 of *MG (prison-Article 28(3) of Citizens Directive) Portugal* [2014] UKUT 392 (IAC), Ms Fijiwala said that the judge failed to take account of past convictions in relation to breaking integration links. In relation to the second ground, she accepted that this was dependent on the first ground.

11. For his part Mr Sellwood reiterated what was stated in the Rule 24 response and drew our attention to various parts of the decision where, he argued, the judge had considered various factors relating to integration. He commented that there had been reference in the grounds to *Onuekwere,* however this was not an authority to support an assertion that previous convictions broke continuity of residence, particularly where there had been no previous imprisonment as in this case.

12. With regard to ground two, Mr Sellwood stated that the judge was plainly entitled to halt his Article 8 consideration at the third stage as he had allowed the appeal under the Regulations.

13. In reply, Ms Fijiwala emphasised that the First Tier Tribunal Judge had not asked the correct question, that is, whether the respondent's integration links had been broken. He had only addressed the length of residence. She argued that the judge had not taken into account relevant factors such as that the respondent was now separated from his wife and that he had been convicted of soliciting services as a taxi driver. She added that the judge ought to have taken evidence as to the details of the relationship with his daughters. When referred by the panel to the detailed witness statements of the respondent and his wife, which were before the judge, Ms Fijiwala did not pursue this line of argument further.

14. At the end of the hearing, and after brief discussion, we indicated that we were content that the decision did not contain any material errors of law and we would, therefore, be dismissing the appeal.

Error of Law

15. The decision in *Warsame* was not available to the judge at the time of writing his decision and reasons and therefore it is unsurprising that he made no reference to it. The case of *MG* was, however, available and we have been guided by what was said by the Upper Tribunal, following the European Court of Justices' preliminary ruling in the same case. As indicated by Ms Fijiwala, the following extract from the headnote is relevant

> *"(3) The judgment should be understood as meaning that a period of imprisonment during those 10 years does not necessarily prevent a person from qualifying for enhanced protection if that person is sufficiently integrated. However, according to the same judgment, a period of imprisonment must have a negative impact in so far as establishing integration is concerned."*

16. The judge found that the respondent was sufficiently integrated at [25] of his decision where he said as follows; "*I find that the (respondent) is integrated in the UK and that he has obtained a protected right of residence and that he has been resident in the UK for more than ten years before the deportation decision."* It is abundantly clear from the three, separate, aforementioned findings, that the judge did not merely calculate the length of the respondent's residence but separately considered the level of his integration prior

to finding that he had obtained enhanced protection under the Regulations.

17. The judge carried out an overall assessment as to the respondent's level of integration prior to reaching his conclusion. The factors he considered included, at [24], the total length of the respondent's residence in the United Kingdom, which at the time of the hearing was a period of eighteen years. At [18] of the decision, he discusses the respondent's marriage to his wife. While there is no express mention of the fact that the couple were separated, this evidence was before the judge in the form of highly detailed witness statements from both the respondent and his wife.

18. Also relevant to the issues of integration were the respondent's many years of employment in the United Kingdom as well as his previous studies, mentioned at [19] of the decision. At [25], the judge explores the respondent's relationships with his children in some detail and concludes that he has an active parental relationship with his eldest daughter but not with his youngest daughter.

19. It was argued on behalf of the Secretary of State that the judge failed to consider the respondent's criminal convictions, including those, which preceded the index offence but which did not result in him serving custodial sentences. This is not the case. At [23], the judge considers each and every one of these matters and at [23] he assesses the seriousness of that offending. At [2] the judge sets out the detail of the index offence under the heading "Substantive issues under Appeal." Additionally, at [26] the full circumstances of the index offence are considered in the context of the remarks of the sentencing judge.

20. The judge heard arguments from the presenting officer, which included reliance on the reasons for the decision in question provided in the refusal letter; indeed he says as much at [10-11] of the decision. Consequently, we find that the judge was aware that the respondent's offending would have a negative impact on the degree to which he could be said to be integrated, given that this is part of the Secretary of State's case which he has confirmed that he has taken into consideration. Ultimately, the judge did not agree with the Secretary of State's view that the respondent's offending meant that he was not sufficiently integrated in the United Kingdom. We find that was a conclusion he was entitled to reach.

21. As we found no material error of law in relation to the first ground of appeal, it follows that the judge did not err in his decision to end his *Razgar* consideration at stage three.

22. The Secretary of State's appeal is dismissed.

23. No anonymity direction was made by the First Tier Tribunal Judge and we see no reason to make one now. This decision is the decision of us both.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal is upheld.

Signed Date: 15 April 2016

Deputy Upper Tribunal Judge Kamara