Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00489/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 May 2016	**On 19 July 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SIICID ABDUL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Respondent: Mr A Fouladvand, Legal Representative from MAAS

DECISION AND DIRECTIONS

1. The appellant in these proceedings is the Secretary of State. However, I continue to refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of the Netherlands, born on 1 August 1989. Following his convictions on 17 December 2014 for supplying class A drugs (10 counts) and his sentence of 36 months' imprisonment with an

antisocial behaviour order imposed, the respondent made a decision to deport him under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

3. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge O'Garro ("the FtJ") on 22 February 2016. She allowed the appeal.

The grounds of appeal and submissions

4. The respondent's grounds contend that the FtJ failed to take into account that the appellant's periods of imprisonment broke the continuity of his residence. Furthermore, those custodial sentences affected his ability to claim that he was integrated in the UK over a 10 year period. The FtJ had erred in failing to appreciate the need to count backwards from the date of the respondent's decision in order to assess whether the appellant had acquired the relevant 10 years residence. The FtJ had misapplied the decision in *Warsame v Secretary of State for the Home Department* [2016] EWCA Civ 16 in this respect.

5. It is also argued that the FtJ failed to take into account the submissions made on behalf of the respondent at the hearing and the cross-examination of the witnesses in her conclusions that the witnesses were credible. A Home Office minute is referred to in the grounds, although it was not provided with the grounds. The minute was provided to me at the hearing.

6. In a 'rule 24' response on behalf of the appellant, it is argued that it was open to the Tribunal to find that the appellant should not be deported, in the light of the FtJ's findings. The respondent's decision in terms of rehabilitation and integration, in the context of proportionality, was wrong.

7. It is also said that the appellant had produced ample evidence, including from his mother and sister, and with reference to documentary evidence, that he had 10 years continuous residence in the UK. It is said that in these circumstances, and in the light of the finding that the appellant did not represent a genuine and present threat to public security, the FtJ was bound to allow the appeal.

8. In submissions Mr Kotas relied on the grounds. He referred to the decision in *Secretary of State for the Home Department v MG* [2014] EUECJ C-400/12 in relation to the issue of 10 years residence and the level of protection from deportation that the appellant had established.

9. It was also argued that the FtJ had not assessed the extent to which the appellant's 10 years residence was broken by periods of absence from the UK, the FtJ having stated at [44] that the appellant had been absent for short periods but not longer than two years.

10. So far as credibility is concerned, it was submitted that the FtJ's conclusions at [63] about the appellant's integration into the UK and no

ties to the Netherlands failed to take into account the arguments advanced on behalf of the respondent at the hearing.

11. Mr Fouladvand sought initially to put before me what was said to be an email from the appellant. However, he accepted that this was material that was not before the FtJ and was on the face of it therefore, not relevant to the issue of whether the FtJ had erred in law.

12. Insofar as I understood Mr Fouladvand's submissions, he sought to suggest that the appellant had acquired a permanent right of residence in the UK on the basis of the exercise of Treaty rights over a period of five years, although as I reminded him on more than one occasion, this was a matter that was resolved against the appellant by the FtJ.

13. On behalf of the appellant the decision in *Gheorghiu (reg 24AA EEA Regs – relevant factors)* [2016] UKUT 00024 (IAC) was relied on, although it was not then, and is not now, clear to me the basis upon which it is said that that decision supports any argument on behalf of the appellant.

14. Generally, it was submitted that the FtJ's reasons for allowing the appeal were sustainable.

My assessment

15. At [47], relying on the decision in *Secretary of State for the Home Department v FV (Italy)* [2012] EWCA Civ 1199, the FtJ stated that it was there held that the continuity of residence for the purposes of reg 21(4)(a) was not broken by a period of imprisonment. The FtJ stated that the court had said that the question of whether the requirement of a continuous period of 10 years residence was established at the date of the decision to deport, turned on the degree of integration established at that time, which was a question of fact for the Tribunal. At [48], with reference to the decision in *Warsame* she stated that:

> "it was held that when considering a foreign criminal's appeal against deportation, and whether he had accrued 10 years' continuous lawful residence in the UK under the [EEA Regulations], the Upper Tribunal had erred by including periods spent in prison"

In the next paragraph the FtJ stated that by the date of the respondent's decision the appellant had already been resident in the UK for 10 years, even if time spent in prison was taken into account. Accordingly, she found that the appellant had been continuously resident in the UK for more than 10 years by the date of the respondent's decision.

16. In coming to these conclusions, I am satisfied that the FtJ erred in law. She failed to take into account the decision in *MG* which states that "in principle" periods of imprisonment interrupt the continuity of residence, and that the 10 year period of residence necessary for the grant of enhanced protection from deportation, must be calculated by counting back from the date of the decision ordering the person's expulsion. It

appears that the FtJ misunderstood the effect of the decision in *Warsame* which, amongst other things, said that *FV (Italy)* was no longer good law. The conclusion that by the date of the respondent's decision the appellant had been resident in the UK for 10 years is legally flawed, on the basis of the decision in *MG*, which in fact is quoted in *Warsame*.

17. That is reason enough for the FtJ's decision to be set aside. The FtJ concluded that the appellant was entitled to the highest level of protection from removal, that is to say that he could not be deported except on imperative grounds of public security. Imperative grounds apply where a person has accrued 10 years residence. This appellant at least "in principle" has not done so, by reason of his sentences of imprisonment. The appellant had been imprisoned on two occasions, once on 17 December 2014 for a period of 36 months and earlier than that on 14 March 2008, again for an offence involving class A drugs, for a period of 21 months.

18. In addition, the FtJ said at [63] that the appellant "is fully integrated into British society". Earlier, at [50] she said that by the time the appellant had been sentenced to imprisonment in December 2014, he was by then "well integrated" into British society. However, those conclusions fail to take into account the appellant's convictions, which the FtJ herself set out at the start of her decision. The appellant has been convicted on numerous occasions for various offences, some, admittedly as a young person. However, aside from the sentence of imprisonment of 21 months in March 2008, he has been convicted of possession of class B drugs and was involved in supplying class A drugs which led to his imprisonment on 17 December 2014. Albeit that submissions could be made about the relevance of some of the appellant's convictions in terms of integration, it does not seem to me that the FtJ took into account the appellant's offending in terms of whether he was integrated into society in the UK.

19. Furthermore, the FtJ's assessment in this respect fails to take into account that as part of his sentence on 17 December 2014 the appellant was subject to an antisocial behaviour order until December 2022.

20. Mr Fouladvand submitted that the OASys report before the FtJ said that the risk of reoffending was low. However, that cannot be the case, since the FtJ said at [59] that she had seen no recent OASys assessment. My attention was not drawn to any OASys assessment or other documentary risk assessment.

21. The respondent's grounds contend that the FtJ had failed to take into account the cross-examination of witnesses and the submissions made on behalf of the respondent when assessing the credibility of the witnesses called on behalf of the appellant and of the appellant himself. The Home Office minute relied on, in effect, states that the Presenting Officer submitted that all parties were less than truthful in their statements, as the appellant had been taught in Dutch, that he is not his mother's main carer as claimed and that there are ties to the Netherlands. The minute

continues that there were severe credibility issues with the assertions made both by the appellant and his witnesses.

22. In the rule 24 response, no issue is taken with the grounds in this respect, albeit that the Home Office Presenting Officer's minute was not provided with the grounds. Mr Fouladvand, who appeared for the appellant before the FtT, accepted before me that submissions were made in respect of the credibility of the witnesses. At the hearing before me it was not initially clear from my perusal of the FtJ's record of proceedings what submissions were made in terms of the witnesses' credibility. However, having had a further opportunity to look more carefully at the FtJ's manuscript notes, it is clear that on behalf of the respondent the credibility of the appellant and his witnesses was called into question. Broadly speaking, the matters reflected in the minute were put to the FtJ in submissions. The FtJ's record of proceedings records that it was submitted on behalf of the respondent that a credibility finding was sought in relation to a clear attempt to mislead the court. The respondent's representative before the FtJ took issue with the contention that the appellant provides care for his mother.

23. It is not apparent from the FtJ's decision that there was any evaluation of the arguments advanced on behalf of the respondent in terms of the credibility of the witnesses. This is relevant to the issue of rehabilitation and integration, and the proportionality of the appellant's removal to the Netherlands. I am satisfied that in this respect also, the FtJ erred in law.

24. In turn, this affects the FtJ's conclusions that the appellant does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, albeit that the FtJ did not express the matter in that way. In this respect I also note that at [59], with reference to the sentencing remarks, the FtJ pointed out that the sentencing judge had said that the appellant was no longer a class A drug user and that since 2008 the appellant had not been involved in the supply of drugs. Plainly however, the sentencing judge was referring to the interval between 2008 and 2014, because in 2014 the appellant was convicted of 10 counts of supplying class A drugs. He had therefore, since 2008, been involved in the supply of class A drugs contrary to what appears to have been concluded by the FtJ. At the very least, the FtJ's conclusions in respect of the risk of reoffending are not fully explained. In addition, issues of integration and rehabilitation are relevant to the risk of reoffending.

25. I am satisfied in all the circumstances that the errors of law made by the FtJ are such as to require the decision to be set aside, and I do so. I have carefully reflected on whether it is appropriate for the appeal to be remitted to the FtT. Certain, albeit limited, findings of fact are not infected by the error of law. In particular, there was a finding by the FtJ that the appellant had not acquired a permanent right of residence. So much is clear from [42] of her decision.

26. However, given that there will need to be a reassessment of credibility in the light of the matters I have referred to above at [21]-[24], and taking into account the Senior President's Practice Statement at paragraph 7.2, I consider that the appropriate course is for the appeal to be remitted to the FtT for a hearing *de novo*. Although the finding that the appellant had not acquired a permanent right of residence is not infected by the error(s) of law, given that the fresh hearing will consider significant credibility issues afresh, I consider that no findings of fact should be preserved.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge O'Garro, with no findings of fact preserved.

Upper Tribunal Judge Kopieczek 15/07/16