IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43968/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 December 2015	**On 13 January 2016**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MR HARYSHAN KANDIAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B Asanovic, Counsel
For the Respondent: Mr E Tufan, HOPO

DECISION ON ERROR OF LAW

1. The Secretary of State is the party that has been granted permission to appeal the determination of First-tier Tribunal Judge Miles and Mrs L R Schmitt JP lay member who in a determination promulgated on 25 March 2015 allowed the appellant's appeal against the decision of the Secretary of State made on 5 November 2014 that he should be removed from the United Kingdom under Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006. The appellant appealed under Regulation 26.

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2. Although the Secretary of State is the appellant in these proceedings, I shall maintain the titles for ease of reference.

3. The appellant is a citizen of Holland born on 7 October 1986. He claims to have entered the United Kingdom in July 1999 with his parents and siblings. In April 2004 he was convicted in Warwickshire Juvenile Court for three offences of possessing an offensive weapon, affray and burglary for which he was sentenced to a detention and training order for six months. Between 9 May 2005 and 8 August 2014 he was convicted of 40 additional offences for which he received various sentences including community orders, unpaid work requirements, driving disqualifications and licence endorsements, financial penalties, electronic monitoring and sentences of imprisonment both suspended and immediate. His last sentence was a term of twelve months' immediate imprisonment on each of three counts of handling stolen goods, in each case a motor vehicle.

4. In his appeal, the appellant submitted that he is a person who has resided in the United Kingdom for a continuous period of at least ten years prior to removal decision and therefore may only be removed on imperative grounds of public policy or public security. In the alternative, he argued that he has established a permanent right of residence under Regulation 15 of the 2006 Regulations which meant that his removal could only be justified on serious grounds of policy or security.

5. The FtT accepted that the appellant has resided in the UK for over 15 years since his initial entry in July 1999. They were satisfied that the appellant established significant integration into the UK, despite his record of offending. They concluded that in the particular circumstances of this case, the appellant's continuity of residence has not been broken for the purposes of assessing his claim to have achieved the highest level protection under the 2006 EEA Regulations, in accordance with the guidance in **MG** i.e. **C-400/12 Secretary of State for the Home Department v MG,** judgment given on 16 January 2014.

6. The FtT further held that they were unable to conclude that the appellant with his offending can be characterized as a person whose removal is justified on *imperative grounds* of public policy simply on that basis. Furthermore, and even if that proposition was arguable, they would find that removal of the appellant would not be a proportionate response to his offending given his integration into the UK since his entry and significant evidence of his article 8 human rights.

7. The First-tier Tribunal however found that it was not necessary to consider the appellant's appeal under Article 8 ECHR because they had concluded that the appellant's removal would not be in accordance with the 2006 EEA Regulations.

8. Permission was granted to the respondent on grounds which challenged the FtT's decision on the basis that the FtT failed properly to engage with the appellant's periods of imprisonment in relation both to the question of

permanent residence and ten years' lawful residence and misdirected themselves in law. There was arguable merit in the grounds, in particular considering the panel's failure to consider the Upper Tribunal's more recent decision in **MG (Prison – Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 392** when applying the guidance in **Case C-440/12 Secretary of State v MG**. The respondent was permitted to argue all grounds.

9. I find that the panel's decision is flawed and I shall give my reasons below.

10. In the judgment of the European Court in **MG** 16 January 2014, the court ruled:

> "1. On a proper construction of Article 28(3)(a) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to remove and reside freely within the territory of the Member States amending Regulation (EEC) ... the 10 year period of residence referred to in that provision must, in principle, be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned.
>
> 2. Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host member state for the ten years prior to imprisonment. However, the fact that that person resided in the host state for the ten years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with a host member state have been broken."

11. **MG** came back to the Upper Tribunal for determination. In its head note the Upper Tribunal held:

> "(1) Article 28(3)(a) of Directive 2004/38/EC contains the requirement that for those who have resided in the host member state for the previous ten years, an expulsion decision made against them must be based on imperative grounds of public security.
>
> (2) There is a tension in the judgment of the Court of Justice of the European Communities in **Case C-400/12 Secretary of State v MG** in respect of the meaning of the 'enhanced protection' provision.
>
> (3) The judgment should be understood as meaning that a period of imprisonment during those ten 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 insofar as establishing integration is concerned."

12. The panel found that the appellant had been residing in the UK for over fifteen years and therefore had been residing for more than ten years before the decision to remove him, which is dated 5 November 2014, was taken. They noted however that in the period from 5 November 2004 until

5 November 2014, the appellant has also been sent to prison, on the basis of his record, on five occasions for sentences cumulatively totalling 138 weeks and would therefore have served 69 weeks of the total term.

13. I find that the FtT erred in law in their interpretation of the "*ten years prior to imprisonment".* The ten years must be counted back from the date of the respondent's decision, in this case, 5 November 2014 to 5 November 2004. The ten year period has to be continuous and there must no offending in that ten year period. It is on this basis that Headnote 1 of the Upper Tribunal's decision in **MG** becomes applicable i.e. *an expulsion decision made against them (the appellant) must be based on imperative grounds of public security.* It is when the appellant has reached the 10 year threshold, that an overall assessment is required in order to determine whether the integrating links previously forged with the host Member State have been broken by periods of imprisonment.

14. In light of the FtT's finding that the appellant was sent to prison on five occasions during the ten year period, the appellant could not arguably qualify for the enhanced protection.

15. As the appellant having entered the United Kingdom in July 1999, and was first convicted in April 2004, could he meet the five year period of residence for the low basic level of protection? This is an issue that also needs to be considered.

16. In light of the above, I find that the FtT's decision is flawed. The decision cannot stand.

17. The decision is remitted for rehearing by a panel other than First-tier Tribunal Judge Miles and Mrs L R Schmitt JP.

Signed Date

Upper Tribunal Judge Eshun