Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00280/2017

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 20 November 2017	**On 20 December 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VALENTINA BUFALO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr M Fraser, Counsel, instructed by the Aire Centre

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (Appellant) against the decision of Judge of the First-tier Tribunal Chohan (the judge), promulgated on 7 September 2017, allowing the appeal of Ms V. Bufalo (the Respondent) against a decision dated 8 May 2017 to remove her from the UK pursuant to regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations).

Relevant background

2. The Respondent is an Italian national, date of birth 4 November 1978. She claims to have entered the United Kingdom in 2003, although this has been disputed by the Appellant. On 26 October 2015 the Respondent was convicted of 18 counts of theft by an employee, 15 counts of other dishonestly offences, and one count of possessing or controlling an article for use in fraud. She received a total sentence of 4 years imprisonment on 20 June 2016.

3. In making a deportation order the Appellant accepted that the Respondent had been continuously resident in the UK between 2004 and 2013, and that she had attained a permanent right of residence (requiring the Appellant to demonstrate the existence of 'serious grounds of public policy and public security' to justify her expulsion – regulation 27(3) of the 2016 Regulations). The Respondent was not however satisfied that the Appellant provided adequate evidence of her residence in the UK since 2003, and there was said to be a lack of evidence confirming her presence in the UK beyond 2013. The Appellant was not therefore satisfied that the Respondent had resided in the UK for a continuous 10-year period. She could not therefore avail herself of the highest level of protection as described in regulation 27(4)(a) of the 2016 Regulations ("a relevant decision may not be taken except on imperative grounds of public security").

4. The Appellant considered the Respondent's offences to be very serious, noting that she offended from 12 March 2012 until 2015, and that her offending involved an abuse of trust. The Appellant noted the impact of the offending on the Respondent's victims. While noting that, according to an OASys assessment, the Respondent posed a low risk of reoffending, the Appellant concluded that any reoffending would entail serious harm. The Appellant considered the Respondent's presence posed a significant threat to the safety and security of the public and that, having regard to her age and circumstances and prospects of rehabilitation, her expulsion was proportionate.

The First-tier Tribunal decision

5. One of the key issues at the appeal hearing, at which the Respondent gave oral evidence, was whether she was entitled to the highest level of protection available to an EEA national who has resided in the United Kingdom for a continuous period of at least 10 years prior to the relevant decision. The relevant decision is, in the context of the instant appeal, the making of the deportation order.

6. The judge briefly set out the Respondent's account of her arrival in the UK on 6 June 2003 and the work she claimed to have started on 14 June 2003. Although there were no tax records for the years 2014 and 2015 the judge was shown the Respondent's bank statements for

those years showing transactions that, it was submitted, established her presence in the UK. At paragraph 9 the judge, without any other reasoning, accepted the Respondent as a truthful witness and found, with reference to the bank statements, that she had been in the UK in 2014 and 2015.

7. In paragraph 10, having accepted that the Respondent was present in the UK from at least 2004 up until the time of her conviction on 26 October 2015, the judge found that she had accumulated a period of over 10 years residence in the UK. The judge consequently found that the Respondent could only be removed on imperative grounds of public security because she had been in the UK for a continuous period of at least 10 years prior to the expulsion decision.

8. The judge thereafter considered whether the Respondent's offending justified her expulsion on imperative grounds with reference to *VP (Italy) v SSHD* [2010] EWA Civ 806 and *LG (Italy) v SSHD* [2008] EWCA Civ 190. The judge found the Appellant had not discharged the evidential burden of establishing the existence of imperative grounds noting, *inter alia*, the findings of the OASys report, and the evidence that the Respondent had been a 'model prisoner'.

The grounds of appeal, the grant of permission, the rule 24 response and the Upper Tribunal hearing

9. The grounds submitted that the judge materially miss-directed himself in concluding that the Respondent was entitled to the highest level of protection. Although the Respondent had resided in the UK for at least 10 years prior to her imprisonment, the 10-year period was assessed by counting back from the expulsion decision. The Respondent had been detained for approximately 2 years at the date of the expulsion decision. Reliance was placed on the authority of *Ahmed Warsame v SSHD* [2016] EWCA Civ 16. The question whether the Respondent still qualified for the highest level of protection depended on an overall assessment of whether the integrating links previously forged by her in the UK had been broken. It was submitted that the judge failed to engage in this assessment. Permission was granted on this basis.

10. The Respondent filed a response to the grant of leave pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The detailed response, dated 3 November 2017, helpfully set out the background to the appeal, the applicable legal framework and the applicable legal test for determining whether the 'imperative' threshold applied. The rule 24 response accepted that the judge erred in simply counting 10 years back from the date of the Appellant's decision.

11. At the outset of the Upper Tribunal hearing it was accepted by Mr Fraser, representing the Respondent, that the judge committed a

material error of law because of his failure to undertake an overall assessment of the Respondent's integrative links. I indicated that I believed Mr Fraser's concession was properly made and that the judge had indeed materially erred in law. In response to my observations relating to how the appeal should proceed given the identification of a material error of law Mr Fraser properly acknowledged that the judge's acceptance of the Respondent's credibility was not adequately reasoned, and that there was no satisfactory evaluation of the nature and quality of the Respondent's integrative links prior to her imprisonment. Although he accepted that there were limited findings in respect of the Respondent's integrative links Mr Fraser highlighted the Respondent's exemplary prison record and submitted that her conduct whilst in prison was very significant in respect of the 'overall assessment' test.

Discussion

12. Regulation 27(4) of the 2016 Regulations provides, so far as material:

> A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—
>
> (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision;

13. In *MG (prison – Article 28(3)(a) of Citizen's Directive) Portugal* [2014] UKUT 392 (IAC) the Upper Tribunal considered the judgement of the Court of Justice of the European Union in case C– 400/12 (*SSHD v MG*) with respect to the meaning of the "enhanced protection" provision. The CJEU case made clear that the 10-year period should be calculated by counting back from the date of the expulsion decision and that, in principle, periods of imprisonment interrupted the continuity of the period of residence. A period of imprisonment during those 10 years did not however necessarily prevent a person from qualifying for enhanced protection if that person was sufficiently integrated, even though, according to the same judgement, a period of imprisonment had a negative impact in so far as establishing integration was concerned.

14. In *Ahmed Warsame v SSHD* [2016] EWCA Civ 16 Counsel for the Secretary of State for the Home Department accepted that there is a "maybe" category of cases under *MG* where a person has resided in the host state during the ten years prior to imprisonment, depending on an overall assessment of whether integrating links have been broken, and that in such cases it might be relevant to determine, by way of 'overall assessment', the degree of integration in the host member state or the extent to which links with the original member state have been broken.

15. It is readily apparent from the judge's decision that he did not adopt this approach. The judge appears to have only counted back 10 years

from the Appellant's expulsion decision but has not taken any account of the Respondent's period of imprisonment. Given the apparent break in continuous residence it was incumbent on the judge, in considering whether the Respondent was nevertheless entitled to the highest level of protection, to undertake a detailed assessment to determine whether she fell into the 'maybe category' identified in *Warsame*. In my judgement, the First-tier Tribunal decision does not contain an adequate analysis of whether the Respondent's integration was of a degree sufficient to attract the operation of the highest level of protection. I am consequently satisfied that the First-tier Tribunal's decision cannot stand.

16. I have considered whether it is appropriate to retain the appeal in the Upper Tribunal or to remit it back to the First-tier Tribunal. In order to determine whether the integrating links previously forged by the Respondent within the UK have been broken by her imprisonment, it is necessary to engage in a qualitative assessment of her earlier level of integration. This is best achieved if the Respondent chooses to give oral evidence. The judge did not adequately engage in an assessment of the nature and quality of the life established by the Respondent in the UK. There was no assessment of her daily social and cultural experience and expectations as a resident in the UK, or of the nature and quality of the relationships that she has established. Nor was there any adequate assessment of her offending behaviour or the lengthy period during which her offending occurred. These primary findings have not been made. In these circumstances, it is appropriate for the matter to be remitted to the First-tier Tribunal for a *de novo* hearing to consider whether, by overall assessment, the nature, quality and length of the Respondent's residence prior to her incarceration is sufficient to catapult her into the 'maybe category' identified in *MG*, with reference to *Warsame* (at [9] and [10]), such that she is entitled to the enhanced category of protection.

Notice of Decision

The decision of the First-tier Tribunal is vitiated by a material error of law. The matter is remitted to the First-tier Tribunal to be determined in a fresh hearing by a judge other than judge of the First-tier Tribunal Chohan.

1 December 2017

Signed Date

Upper Tribunal Judge Blum