Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA004932016

THE IMMIGRATION ACTS

Heard at Manchester	**Decision and Reasons promulgated**
on 2 August 2017	**On 7 August 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KISHAN PATEL
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr McVeety Senior Home Office Presenting Officer
For the Respondent: Mr Moksud instructed by International Immigration Advisory Service (Levenshulme).

ERROR OF LAW FINDING AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Malik, promulgated on 20 February 2017, in which the Judge allowed Mr Patel's appeal under the Immigration (EEA) Regulations 2006 against the order for his deportation from the United Kingdom.

Background

2. Mr Patel is a Spanish national born on 23 January 1992 and who arrived in the United Kingdom in 1996.
3. On 15 February 2016 Mr Patel was convicted for failing to stop after an accident and causing serious injury by dangerous driving, as a result of which he was served with notice of liability for deportation.
4. The Judge notes Mr Patel's criminal history at [12-13] of the decision under challenge.
5. The Judge noted the Secretary of State accepted that Mr Patel had acquired a right of permanent residence in the United Kingdom but did not accept that he had been continuously resident in the UK for 10 years in accordance with the 2006 Regulations.
6. The Judge carefully considered the evidence and found the witnesses to be credible [37] leading to it being concluded in that same paragraph that "Having done so I find, on balance, the appellant has been continuously resident in the UK in excess of 10 years [sic] prior to the deportation order having been made".
7. The Judge writes at [42]:

> "42. I accept the appellant has been convicted of a serious offence [sic] and this is my starting point; yet his personal conduct does not, on the evidence before me, suggest he represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society; nor do I find the threshold of the imperative grounds of public security has been met to justify deportation. Consequently I allow the appeal."

8. The Secretary of State sought permission to appeal arguing that the Judge had applied the wrong test when assessing whether Mr Patel was entitled to the higher level of protection, namely that 'imperative grounds' were required to deport Mr Patel. Permission to appeal was granted by a Designated Judge of the First-tier Tribunal on 22 May 2017.

Error of law

9. The Judge clearly calculated the qualifying period that the appellant had remained in the United Kingdom from the date of entry as, arguably, did the Designated Judge in appearing to find there was no merit in the respondent's argument that such an approach is infected by arguable legal error.
10. Case law relevant to determining whether the Judge erred in such an approach includes *SSHD v MG* Case no c-400/12 CJEU (second chamber) it which it was held that unlike the requisite period for acquiring a right of permanent residence, which began when the person concerned commenced lawful residence in the host Member State, the 10 year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) must be calculated by counting back from the date of the decision ordering

that person's expulsion. All relevant factors should be taken into account when considering the calculation of the 10-year period including the duration of each period of absence from the host Member State, the cumulative duration and the frequency of absences. A period of imprisonment was in principle capable both of interrupting the continuity of the period of residence needed and of affecting the decision regarding the grant of enhanced protection provided there under, even where the person concerned had resided in the host member state for 10 years prior to imprisonment albeit that the fact that the person had been in the member state 10 years prior to imprisonment was a factor to be taken into account.

11. In *MG (prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392* it was held that (i) Article 28(3)(a) of Directive 2004/38/EC contained the requirement that for those who had resided in the host member state for the previous 10 years, an expulsion decision made against them must be based upon imperative grounds of public security; (ii) there was 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; and (iii) the judgment should be understood as meaning that a period of imprisonment during those 10 years did not necessarily prevent a person from qualifying for enhanced protection if that person was sufficiently integrated. However, according to the same judgment, a period of imprisonment must have a negative impact in so far as establishing integration was concerned.

12. In *Warsame [2016] EWCA Civ 16* it was held that in Secretary of State for the Home Department v MG (Portugal) (Case C-400/12) it was established that the ten-year period of residence required to benefit from the enhanced protection of imperative grounds must in principle be continuous and be calculated by counting back from the date of the deportation decision. The Court of Justice of the European Union ("CJEU") found that, in principle, periods of imprisonment interrupted the continuity of periods of residence for the purposes of granting the enhanced protection. However, the CJEU also held that claimants could still qualify for enhanced protection if they could show that they had resided in the UK during the ten years prior to imprisonment, but that depended on an overall assessment of whether integrating links previously forged with the host Member State had been broken. On the facts, because of an earlier period of imprisonment which also broke continuity, this appellant was not one of those in the narrow "maybe" category of cases contemplated in MG (Portugal) where a person has resided in the host state during the ten years prior to imprisonment, for which a more detailed individual assessment of links to the host and home state would be required.

13. The authorities clearly show the Judge adopted a flawed approach, as rather than starting from the date of entry to the United Kingdom the Judge was required to count back from the date of the deportation decision. In this appeal the date of decision was 27 September 2016.

14. Even though the Judge arguably erred in failing to approach the matter in the manner set out above, it has not been made out that any error was material to the decision to allow the appeal.
15. The decision in *Warsame* clearly illustrates the need to assess whether a person subject to a deportation decision under the EU Regulations had resided in the UK during the 10 years prior to imprisonment based upon an assessment of whether integrated links previously forged within the United Kingdom had been broken. It was accepted by Mr McVeety that the Judge had undertaken the necessary investigation to ascertain whether Mr Patel had established he was integrated within the United Kingdom and whether those links forged had been broken. It was accepted Mr Patel has resided in the United Kingdom since the age of 3 and is in effect, with the exception of his passport, identical to a British citizen member of his peer group.
16. The assessment by the Judge that Mr Patel was entitled to the higher rate of protection has therefore not been shown to be infected by arguable material legal error.
17. The Secretary of State also raise the issue of whether, on the basis of serious grounds of public policy or public security, Mr Patel's history of offending combined with the seriousness of the index offence reflected in the 32-month prison sentence may have led to a different decision.
18. It is accepted that the personal conduct of the individual is an important aspect to be considered as measures taken on grounds of public policy or public security are to be based exclusively on the conduct of the person concerned, although Article 3(2) of Directive 64/221 specified that previous criminal convictions were not in themselves to constitute grounds for taking such measures although could be taken into account, but only insofar as the circumstances which had given rise to the conviction were evidence of personal conduct constituting a present threat to the requirement of public policy.
19. This is not a matter involving the commission of an exceptionally heinous offence, although it is accepted Mr Patel committed a serious driving offence.
20. Mr Patel is entitled to the higher level of protection. Guidance on how an appeal against a decision to deport should be considered when such a level of protection is available can be found in *LG (Italy) v SSHD EWCA Civ 190.* In this case the Court of Appeal confirmed that an EEA national who had been here for 10 years can only be deported on imperative grounds of public security, which bear a qualitative difference to the less stringent grounds applicable to deportation of those with shorter residence. 'Imperative' connoted a very high threshold and the ground requires an actual and compelling risk to public security, though public security need not be equated to national security. The Court said that "risk to the safety of the public or a section of the public" seemed reasonably consistent with the ordinary meaning of the test. The Court of Appeal seemed to be of the opinion

that the severity of the offence committed was not necessarily one to make removal "imperative".

21. In *VP (Italy) v SSHD [2010] EWCA Civ 806* the Court of Appeal endorsed *LG (Italy)* and said that imperative grounds of public security required not simply a serious matter of public policy but an actual risk to public security so compelling that it justified an exceptional course of removing someone who had become integrated by many years' residence in the host state. The severity of the offence could be a starting point for consideration but there had to be something more to justify a conclusion that that removal was imperative to the interests of public security. In that case, an Italian who had been here since 1986 and had served 9 years for attempting to murder of his ex-wife, including twice trying to cut her throat and inflicting 32 knife wounds, could not be removed when there was a low risk of reoffending albeit a medium risk of serious harm to others.
22. The Judge properly considered the above cases at [41] of the decision under challenge and the conclusion that the threshold of imperative grounds of public security had not been met is, arguably, the only decision available to the Judge on the facts of this case. The Secretary of States grounds refer to the second level of protection, serious grounds of public policy or public security, and ignore the fact Mr Patel is entitled to the higher level of protection.
23. This is not a 'domestic' deportation but one that must be considered in light of the provisions of relevant EU law.

Decision

24. There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.

Anonymity.

25. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 3 August 2017