Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00622/2017**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 12th March 2018	**On 1st May 2018**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LEONARDO BASILIO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr A Eaton, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Portugal born on 20 July 1991. His appeal against the refusal of his protection claim was allowed by First-tier Tribunal Judge S L Farmer on 30 January 2018 under the Immigration (EEA) Regulations 2016.

2. The Secretary of State appealed on the grounds that the Appellant was a repeat offender who had 24 convictions for 37 offences between 2005 and 2017 such that his conduct demonstrated a genuine, serious and present threat to public policy. It was submitted that the judge had applied a purely binary calculation to justify the heightened protection. A period of

imprisonment in principle breaks the continuity when calculating the 10 year period which is to be counted back from the date of the deportation decision. The judge misdirected herself by failing to assess the imperative grounds tests adequately or in accordance with relevant authorities. There was no qualitative assessment accounting for the Appellant's behaviour, conduct and substance of residency.

3. Further there was no finding that the Appellant had acquired a permanent right of residence. The Supreme Court made a referral to the ECJ on this point and the opinion of the advocate general was that the acquisition of a permanent right of residence is a prerequisite of qualification for enhanced protection (FV (Italy) [2016] UKSC 49).

4. The Appellant's behaviour has shown a lack of regard for UK society and a lack of social and cultural integration, such that without any heightened protection, his behaviour clearly warrants deportation as he remained a present and serious threat to society. If the matter was assessed under Regulation 27(1), with no added protection, it would be proportionate to deport the Appellant despite his long-standing connections with the UK

5. Permission to appeal was granted by Designated First-tier Tribunal Judge Peart for the following reasons: "The judge's first task was to establish whether the appellant had been in the UK exercising treaty rights such as to acquire a permanent right of residence. The next task was to assess the appellant's criminal offending against Regulation 27. The appellant might or might not have been entitled to an enhanced level of protection. Regrettably there was no analysis or any adequate analysis in that regard."

6. In the Rule 24 response, the Appellant stated that the Appellant had been in the UK since at least the age of five. The judge found that the Appellant's 17 years' residence prior to his first conviction was a factor which could be taken into account when assessing whether the integrating links forged by him could be broken. He did not find that the Appellant was entitled to the highest level of protection. The judge did carry out a holistic approach and considered the trigger offence, the judge's sentencing remarks, the assessment of reoffending, rehabilitation whilst in prison, the Appellant's friends and family, his on going relationship with his son, and that the Appellant was committed to addressing his offending behaviour.

Submissions

7. Mr Jarvis submitted that the judge had not dealt with which level of protection applied and this must be inferred from paragraph 18. The judge must accept that there was an on going risk and must accept the Appellant's conduct. However the judge had erroneously taken into account the Appellant's 10 years' residence. The nature of the Appellant's residence was relevant in assessing whether the Appellant qualified for EU integration. Paragraph 18 of the decision had no relevance unless it is the judge's consideration of the level of protection. There was no evidence and no finding that the Appellant had comprehensive sickness insurance

and, therefore, he was lawfully resident for the ten-year period as a student. There was no evidence or finding that the Appellant was a family member of someone exercising Treaty rights. It was clear from the refusal of 10 October 2017 these matters were in issue.

8. The judge's approach to integration was unlawful. Although the judge mentioned schedule 1 at paragraph 19 she failed to properly apply it. Integrating links were weakened by offending behaviour. Integration was affected by conduct and the judge was required by schedule 1 to consider this. The judge also failed to consider the considerable history of offences and their nature, which showed an escalation in offending behaviour. Paragraph 25 was not a lawful direction in accordance with the schedule and was not sufficient to show that the judge understood integration.

9. In summary, Mr Jarvis submitted that the judge had failed to indicate the level of protection applicable in the Appellant's case. Secondly, the Appellant was not entitled to enhanced protection because he had not shown that he had acquired permanent residence or that he held comprehensive sickness insurance or that he was a family member of someone exercising Treaty rights. Thirdly, the approach to integration was unlawful because the judge had failed to apply schedule 1.

10. Mr Eaton submitted that when considering enhanced protection the clock started from the decision to deport counting backwards and that imprisonment would break the continuity of that residence. The Appellant was not entitled to enhanced protection. However, 10 years' residence could be taken into account in the proportionality assessment. At paragraph 18 the judge in effect stated that imperative grounds were not applicable, but she could still give the Appellant the benefit of his length of residence as a factor in assessing proportionality. The judge only applied the first level of protection. There was no suggestion that the Appellant had acquired a permanent right of residence because the evidence was insufficient to show that he was a student, due to the lack of sickness insurance, or that he was a family member of someone exercising Treaty rights.

11. Mr Eaton submitted that 10 years' residence was relevant to integrating links. The Supreme Court's view was that it was not necessary to show permanent residence and the Attorney General's opinion was not before the Tribunal. It was an opinion not a judgment of the CJEU. In assessing 10 years' residence the judge was considering integration not whether the Appellant complied with the Regulations.

12. Mr Eaton submitted that non-compliance with schedule 1 was not pleaded in the grounds and schedule 1 was of dubious legality. In any event, the judge referred to schedule 1 and carried out the task in substance. She considered the trigger offence, the OASYS report, the future risk and behaviour in prison. The judge considered the level of protection afforded to EU Nationals and the Appellant's contact with his child. The judge complied with schedule 1 in substance.

13. If the judge had erred in law in failing to specifically state which level of protection was applicable, then such an error was not material. The judge took into account all factors and her findings were open to her on the evidence.

14. Mr Jarvis submitted that this case was not a disagreement with the facts. It was concerned with a proper application of a legal scheme and the judge's approach was incorrect. The judge found that the Appellant had established lawful residence. Lawful could only mean in respect of EU law. Accordingly, the judge's findings at paragraphs 17 and 18, were that the Appellant had been residing in the UK in accordance with EU law. It was accepted that he had not. The judge had erred in finding that the Appellant's residence was lawful and, therefore, her proportionality assessment was flawed. Qualifying residence means in accordance with the Regulations and any assessment must be made within that legal context. The judge did not make reference to the requirements and therefore could not be sure that the Appellant was integrated when there was no evidence of sickness cover. The Appellant was a career criminal and this affected the level of integration. On the facts the Respondent had shown that the Appellant's deportation was justified, applying the lowest level of protection. The Appellant was not integrated and therefore his deportation was proportionate.

Discussion and Conclusion

15. The Appellant is 26 years old and has lived in the UK for about 21 years. He has committed 37 offences resulting in 24 convictions including assault occasioning actual bodily harm, burglary, theft, assaulting a police officer, possession of cannabis, battery, damage to property, shoplifting, possession of a class B controlled drug. He received three warning letters from the Secretary of State. On 30 June 2017, the Appellant was convicted of theft, assault occasioning actual bodily harm and breach of a suspended sentence. He was sentenced to 12 months imprisonment.

16. The judge made the following findings:

> "17. I am therefore satisfied and I find that the appellant has been resident in the UK since 1996 and has remained a resident here. I accept his evidence, and the evidence of his witnesses, in particular Ms Barrow, who said she had seen him frequently and regularly even after he left primary school.
> 18. Mr Eaton accepted on behalf of the appellant that periods of imprisonment do not count towards his continuous residence but his first custodial sentence was in 2013 and prior to this he resided in the UK for about 17 years. He has therefore established lawful residence of [sic] in excess of 10 years prior to any period of imprisonment and I find that I can take this into account as part of the overall consideration in order to determine whether the integrating links forged with the host Member State have been broken (SSHD v MG [2014] EUECJ C-400/12).

19. I have given consideration to the principles set out in Regulation 27(5), which state that the decision to deport must comply with a principle of proportionality and be based exclusively on the conduct of the person concerned. That conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society taking into account and that of the appellant. Schedule 1 of the EEA Regulations 2016 provides a non exhaustive list of the fundamental interests of society in UK. These include maintaining public order, preventing social harm, maintaining the confidence of the public to take action against EEA nationals with convictions and combating the effects of persistent offending and protecting the public."

17. The judge went on to consider the sentencing remarks, the most recent trigger offence, when the Appellant was sentenced to 12 months imprisonment, and the OASYS assessment, which found that the Appellant posed a medium risk of reoffending. The judge accepted the Appellant's oral evidence that he had engaged with rehabilitation services in prison and that he was committed to stopping drinking and would take up the support offered. The judge found that the Appellant had taken steps to improve his situation and was currently motivated to avoid further offending.

18. At paragraph 25 the judge concluded: "I find that the Appellant's most recent offence (March 2017) has met the respondent's minimum threshold for considering deportation. Against this and I put into the balance the fact that he has been in the UK since he was 4 years old. His family is in the UK and he has a young child (aged 6 years) who is in the UK and who I find he has an on-going and committed relationship with. I accept the evidence of his ex-partner as to the level of contact and her on-going commitment to maintaining that relationship. I also find that the appellant has committed to finding work on his release, avoiding alcohol and his offending behaviour. When taking into account his length of residence in the UK and his ties to the UK which I find are strong and the fact that whilst he has a long history of offences they are, in the main, petty offences with only the last reaching the minimum threshold I find that the appeal should be allowed and it would not be proportionate to return the appellant to Portugal."

19. In MG the CJEU concluded that the fact that a person resided in a host member state for 10 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 the host Member State have been broken.

20. I find that the judge did not find that the Appellant was entitled to enhanced protection. She applied the lowest level of protection, a genuine, present and sufficiently serious threat affecting one of the fundamental interest of society, which she set out at paragraph 19. Her findings at 18 show that she considered the Appellant's length of residence could be

taken into account in determining whether integrating links had been broken. This was relevant to her later assessment of proportionality.

21. There is some merit in Mr Jarvis' point that lawful residence should been residence in accordance with the EEA Regulations. The judge's reference to 'lawful' residence was unfortunate because it was accepted that the Appellant had not shown that he had comprehensive sickness insurance or that he was a family member of a person exercising Treaty rights. However, I find that it was not material to the overall assessment of proportionality where the judge was entitled to take into account the Appellant's length of residence.

22. On the facts, the Appellant did have strong integrating links given that he came to the UK when he was about four or five years old and there was credible evidence that he had attended school. There was no challenge to the judge's findings at paragraphs 16 and 17 of her decision. The judge found that he had resided in the UK since 1996.

23. I find that there was no error of law in the assessment of the level of protection and the judge specifically stated the test that she applied. On that basis, the arguments made in relation to acquiring permanent residence were not relevant. I find that the judge properly considered Regulation 27(5) in accordance with schedule 1. She specifically referred to it and set out some of its provisions. It is clear from her findings at paragraphs 20 to 25 that she had regard to schedule 1.

24. The judge took into account all relevant matters in her assessment of proportionality. The Appellant's family was in the UK and he had an on-going and committed relationship with his six year old son. She considered his length of residence and ties to the UK to be strong and balanced this against his long history of offences. Her finding that it would not be proportionate to deport the Appellant and return him to Portugal was open to her on the evidence before her.

25. Accordingly, I find that there is no material error of law in the decision of 30 January 2018 and I dismiss the Respondent's appeal.

Notice of Decision

Appeal dismissed.

Signed

J Frances

Date: 28 March 2018

Upper Tribunal Judge Frances