Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00631/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 January 2018	**On 2 March 2018**

Before

RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PAWEL [T]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr W Zalewski, Counsel instructed by Ardens Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against the decision of the Secretary of State to make him the subject of a deportation order. The case is in some ways complex and in an effort to make our decision easier to understand we say at this point that we have dismissed the Secretary of State's appeal. We are satisfied

that the First-tier Tribunal did err but we are also satisfied that unchallenged findings of fact made by the First-tier Tribunal supported a decision to allow the appeal. It follows therefore that the errors complained of are not material.

2. The claimant is a citizen of Poland. He was born in 1990. At paragraph 19 of its decision the First-tier Tribunal said:

> "The parents were, in my view, honest and frank, and gave a full account of how they had come to the UK and raised their son since he arrived in 2005, within the family home. They explained that he had either been in education or effectively in continuous employment or looking for employment since his arrival. That, combined with the [claimant]'s own account of his residence in the UK, satisfies me on the balance of probabilities that he has clearly been in the country for a period of ten years."

3. Further, as the judge accepted evidence that the claimant had either been in education or continuous employment the judge was satisfied that the claimant had been engaged in exercising treaty rights throughout that time.

4. At paragraph 17 of its decision the First-tier Tribunal reminded itself of the terms of Regulation 21(5) of the Immigration (European Economic Area) Regulations 2006 and particularly Regulation 21(5)(c) which states:

> "The personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."

5. The judge was clearly impressed with evidence about the claimant's future intentions. The judge noted that there was evidence that the claimant was thought to be unlikely to cause serious harm unless his circumstances changed in a way that triggered a reaction to their decline. The Judge had received a recent document from the claimant's offender manager dated 6 October 2017 confirming that since the claimant's release in June 2017 there was no evidence to suggest that he would return to his previous behaviour. The judge noted at paragraph 23 that the claimant had been contrite and straightforward in his evidence and said:

> "I think that there were circumstances that were peculiar to his lifestyle at the time, which he now realises he must leave behind. It was plain from the demeanour of his parents and his own embarrassment at describing those things in their presence, that he had come a long way from where he was two-three years ago."

6. The judge then acknowledged that the offence leading to the claimant's imprisonment was "nasty". The judge said at paragraph 24:

> "I am satisfied that his risk of offending is not so high as to mean that he now continues to present a risk."

7. It is clear to us that these findings support a conclusion that the claimant has obtained a right of permanent residence in the United Kingdom and

that his present behaviour is not a threat to one of the fundamental interests of society and do not support a finding to the contrary. It follows that on those findings the appeal should have been allowed unless the findings are for some reason overturned.

8. Mr Melvin had not settled the grounds of appeal. There are three points in the ground. Points 1(a) and (b) complain in different ways that the First-tier Tribunal failed to follow the law as explained in the decision of the European Court of Justice in **Secretary of State for the Home Department v MG (judgment of the court) [2014] EUECJ C-400/12 (16 January 2014)**. We return to these points later.

9. Ground 1(c) complains that the First-tier Tribunal "incorrectly determined the threat posed by the [claimant] and has imported requirements of the Immigration rules that application to the EEA Regulations". The ground then explains that criticism.

10. These grounds clearly do not challenge either the finding that the claimant has resided in the United Kingdom exercising treaty rights for more than five years, and has therefore acquired a permanent right of residence, or the finding that the risk of reoffending is not so high that the claimant's presence in the United Kingdom constitutes a present a risk.

11. Although the requirement of Regulation 21(5)(c) is correctly identified at paragraph 17 the wording of the Regulation is not followed strictly at paragraph 24 of the Decision and Reasons. Even so, we can only read paragraph 24 sensibly in a way that shows that the judge had in mind the requirements of 21(5)(c) and found that the claimant was not a person whose conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Rather the judge found that the claimant, having worked his way up through less serious crime and having then got himself into sufficiently serious trouble to warrant a sentence of two years' imprisonment, had responded to that intentionally disagreeable treatment by reflecting on his behaviour and resolving to live in a more responsible way.

12. It is said that this judge was particularly suited to make such findings because of experience in another jurisdiction. The judge did not say that in his reasoning and it is not a point that impresses us. Many judges in the First-tier Tribunal have experience in other jurisdictions and also experience in life that proves particularly helpful in certain cases. This decision was not made by reason of the judge's experience elsewhere but on the evidence before him. It was a rational view made on his impression of the claimant and his parents as witnesses and the clear evidence of the reports of those whose job it was to comment on the claimant's attitude to custody and offending. These findings are unchallenged and unchallengeable.

13. The judge did err when considering if the claimant was entitled to rely on the special protection appropriate to a person with ten years'

uninterrupted lawful residence. The judge accepted evidence that the claimant's parents arrived in the United Kingdom in 2004, shortly after Poland joined the European Union, and the claimant and his brother stayed with their maternal grandparents until they joined their parents in 2005. The claimant was then 14 years old. The claimant left school at the age of 16 and obtained work and qualifications that enabled him to work as a chef. The claimant was sent to prison on 7 June 2016. Before that he had been on bail subject to electronic monitoring. It is not entirely clear from the papers when he lost his liberty but it is clear that he had been in the United Kingdom for ten years before that occurred. The judge erroneously thought this entitled the claimant to say that he had established at least ten years' continuous residence before the decision to deport him and that the ten years continuous residence was not disrupted by imprisonment. The decision was made on 15 June 2016. Residence was interrupted by prison. The claimant clearly had not established ten years' continuous residence *immediately* before the decision to deport him.

14. The correct approach to the interpretation of the residence requirements under Regulation 21(4) has proved vexing and clarification in part came from the decision of the European Court of Justice in **MG**. Precisely for the reasons set out in the grounds, **MG** is authority for the understanding that a period of ten years must be calculated "by counting back from the date of the decision ordering that person's expulsion" and not by counting forward from the time of arrival in the United Kingdom. However, the decision in **MG** is more nuanced than is suggested by this fact on its own.

15. We set out below the following paragraphs of the decision in **MG**:

> "33. It follows that periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 and that, in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision.
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> 34. As regards the continuity of the period of residence, it has been stated in paragraph 28 above that the ten year period of residence necessary for the granting of enhanced protection as provided for in Article 28(3)(a) of Directive 2004/38 must, in principle be continuous.
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> 35. As to the question of the extent to which the non-continuance nature and period of residence during the ten years preceding the decision to expel the person concerned prevents him from enjoying enhanced protection, an overall assessment must be made of that person's situation on each occasion at the precise when the question of expulsion arises (see, to that effect, *Tsakouridis*, paragraph 32).
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> 36. In that regard, given that, in principle, periods of imprisonment interrupts the continuity of the period of residence for the purposes of Article 28(3)(a) of Directive 2004/38, such periods may – together with the other factors going to make up the entirety of relevant considerations in each individual case – be taken into account by the national authorities responsible for applying Article 28(3) of that Directive as part of the overall assessment required for determining whether the integrating links previously forged with the host Member

> State had been broken, and thus for determining whether the enhanced protection provided for in that provision will be granted (see, to that effect, *Tsakouridis*) paragraph 34).
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> 37. Lastly, as regards the implication of the fact that the person concerned has resided in the host Member State during the ten years prior to imprisonment, it must be borne in mind that even though – as has been stated in paragraphs 24 and 25 above – the ten year period of residence necessary for the grant of enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of decision ordered that person's expulsion, the fact of that the calculation carried out under that provision is different from the calculation for the purposes of the grant of right of permanent residence means that the fact that a person concerned resided in the host Member State during the ten years prior to imprisonment may be taken into consideration as part of the overall assessment referred to at paragraph 36 above."

16. We have read the Secretary of State's "decision to make a deportation order" and note the concerns there about the claimant's lack of integration. They are, frankly, somewhat mean spirited. It is right that the claimant has not made a substantial contribution to the community. He is 27 years old and did not come to the United Kingdom until he was aged 14. It is to his detriment that in that time he has appeared before the courts on three occasions. On two of those occasions he was punished with community orders of some kind. He has also taken advantages of the education system and his time has been spent in education or employment or education related to his employment. This is not to his discredit. It is typical of a young person of his age in the United Kingdom. The papers do include supporting references from members of the community. Whilst he has not made a *strong* contribution, his home *is* in the United Kingdom. There is no evidence that he has any links with any other country. Neither can his criminal behaviour be characterised as so antisocial that he has severed his links with the United Kingdom or not established himself there. Whilst we accept, as we clearly must, that his imprisonment in principal interrupts his period of continuity of residence we are not satisfied that "the integrating links previously forged with the host Member State have been broken" by the period of imprisonment.

17. Mr Melvin made much about the appellant's escalating criminal behaviour. That has been considered and was the First-tier Tribunal Judge's rational view, clearly open to him, that his offending has not only escalated but it has peaked. Only time will tell if that finding is right but it is certainly a conclusion the Tribunal was entitled to reach and we do not intend to depart from it even if we could.

18. It follows therefore that we are persuaded that in fact this man should be treated as someone whose residence has not been interrupted and should only be removed on imperative grounds which patently do not exist here.

19. However that is not our primary finding. Our primary finding is that even if that is wrong the claimant is someone who the First-tier Tribunal

concluded was entitled to the protection of Regulation 21(5)(c) and who is not a person whose conduct represents "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".

20. We agree with the Secretary of State that the First-tier Tribunal Judge did misdirect himself. He should not have been concerned about the "very compelling circumstances". He should have been looking at the Regulations and **MG**.

21. However as indicated at the start of the decision the errors, although significant, are not material in this case.

22. The First-tier Tribunal allowed the appeal for proper reasons as well as an improper one. We do not interfere with the decision.

Decision

The Secretary of State's appeal is dismissed.

Signed
Jonathan Perkins, Upper Tribunal Judge Dated: 28 February 2018