**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00462/2018

**THE IMMIGRATION ACTS**

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| **Heard at Field House, London** | **Decision & Reasons Promulgated** |
| **On Tuesday 12 November 2019** | **On Tuesday 19 November 2019** |

**Before**

**THE HON. MR JUSTICE NICOL**
**[SITTING AS AN UPPER TRIBUNAL JUDGE]**
**UPPER TRIBUNAL JUDGE L SMITH**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**DIOGO MENDES-GOMES**

Respondent

**Representation:**

For the Appellant: Mr T Lindsay, Home Office Presenting Officer
For the Respondent: Ms F Shaw, Counsel instructed by Freemans solicitors

**DECISION AND REASONS**

1. This is an appeal by the SSHD against a decision of FTTJ Onoufriou dated 27th June 2019. The appeal is brought with the permission of UTJ Mandalia granted on 27th August 2019.

2. The Respondent is a citizen of Portugal. He came to the UK July 2006. The SSHD has no record of his arrival. However, the SSHD can say that on 3rd August 2007 the Respondent was issued with a registration certificate as an EEA national dependent on his mother, Antonieta Mendes-Gomes.

3. The Respondent accrued seven convictions between January 2014 and February 2017 for a total of 12 offences. Seven of these were for drug offences. They were as follows:

    a. 21st January 2014 possession of cannabis – sentenced by West London Juvenile Court to 4 months referral order.

    b. 20th February 2014 possession of heroin and possession of crack cocaine with intent to supply. Sentenced by West London Juvenile Court to a youth rehabilitation order with 91 days activity requirement and a 6 month curfew with electronic tagging. This order was later revoked and replaced with a 10 month detention and training order.

    c. 29th April 2014 possession of cannabis. Sentenced by West London Juvenile Court to a 6 month detention and training order.

    d. 7th October 2014 possession of heroin with intent to supply. Sentenced by Isleworth Crown Court to 9 months youth rehabilitation order with 9 months suspended sentence, 3 months curfew requirement, 30 days activity requirement and 9 month parenting order with 8 days programme requirement. In July 2015 this order was revoked and replaced with a 12 month detention and training order.

    e. 13th February 2017 possessing cocaine and heroin with intent to supply. Sentenced by Luton Crown Court to 42 months detention in a Young Offenders Institution.

4. Following the last sentence, on 8th June 2018 the SSHD made a decision to deport the Respondent to Portugal. The SSHD did so under the Immigration (European Economic Area Regulations 2016 ('the EEA Regulations') regulation 26(6)(b) and regulation 27 on grounds of public policy/public security. The SSHD acknowledged that, if he had acquired the right of permanent residence in the UK by living in the UK for a continuous period of 5 years, the Respondent, as the family member of an EEA national, could only have been deported on 'serious grounds' of public policy or public security.

5. If a person with EEA Free movement rights has resided in the UK for a continuous period of 10 years prior to the deportation decision he or she may only be deported if there are 'imperative' grounds of public security (regulation 27(4)). The SSHD therefore considered whether the Respondent had been resident in the UK for a continuous period of 5 or 10 years. Time in prison will normally break the continuity of residence (regulation 3(3)(a)). The regulation uses the term 'imprisonment'. Because of his age, the Respondent has never been sentenced to imprisonment, but rather to detention and training orders or to detention in a Young Offenders' Institution. Nonetheless, we accept that the regulation should not be limited to 'imprisonment' in the strict sense but should be interpreted to include such forms of detention of young offenders – see

*SSHD v Viscu* [2019] EWCA Civ 1052 at [48]. The SSHD concluded that the Respondent had not been able to show that he had resided continuously in the UK for even 5 years. The SSHD concluded that the Respondent posed a genuine, present and sufficiently serious threat to one of the fundamental interests of UK society and it was in the interests of public security, public policy or public health for him to be deported.

6. The respondent exercised his right of appeal to the FTT. The Appellant gave oral evidence before Judge Onoufriou. The Judge noted that the SSHD did not challenge the Respondent's evidence that he had always resided with his parents in the UK whenever he had not been in detention. The Judge accepted that the Respondent had been a 'family member of an EEA national' (i.e. his mother). He therefore did not have to demonstrate that he himself had been a student throughout the relevant period (see EEA Regulations regulation 7(2)). At paragraph 44 of his decision Judge Onoufriou said,

> 'As the appellant's mother was entitled to PR [Permanent Residence] from at least 2011, i.e. 5 years after her arrival, then similarly the appellant would be entitled to PR at the same time ... It therefore follows that the appellant is entitled to enhanced protection and therefore a decision to deport cannot be made against him except on "serious grounds of public policy and public security".'

7. The Judge then went to consider whether the Respondent had accrued 10 years of continuous residence. The Judge accepted the evidence of the Respondent's mother that the whole family had come to the UK in 2006. The Judge said, 'This means that the 10 years continuous residence would have been achieved by the [respondent] in July 2016.' The Judge was aware of regulation 3(3) (a) and its effect on continuity of residence, but he also had regard to regulation 3(4) which says,

> 'Paragraph 3(a) applies, in principle, to an EEA national who has resided in the UK for at least 10 years, but it does not apply where the Secretary of State considers that –
>
> (a) Prior to serving a sentence of imprisonment, the EEA national had forged integrating links with the UK;
> (b) The effect of the sentence of imprisonment was not such as to break those integrating links; and
> (c) Taking into account an overall assessment of the EEA national's situation, it would not be appropriate to apply paragraph 3(a) to the assessment of the EEA national's continuity of residence.'

8. In this case Judge Onoufriou said,

> 'In view of the fact that the [respondent] had resided in the UK for some 8 years before his first incarceration and had gone to school here since his arrival, I am satisfied that he "had forged integrating links with the UK" and that the effect of his imprisonment was not such as to break those integrating links. Furthermore, I take into account an overall assessment of his situation and do not consider it appropriate to apply paragraph 3(a) to the assessment of the continuity of residence.

9. The Judge said that it followed that the Respondent could only be deported if there were 'imperative' grounds of public security. Applying the standard in *VP Italy* [2010] EWCA Civ 806 and *MG and VC Ireland* [2006] UKAIT 0053 at [26] the Judge did not consider that that test was made out.

10. However, at [48] of his decision the Judge added this,

> 'Even if I am wrong about the 10 years continuous residence and the [respondent] has to rely on the permanent residence, the appellant's offences do not comprise "serious grounds of public policy" as opposed to mere "public policy". In this respect I take into account the OASys report of 12th March 2019 in which it is reported that the [respondent] accepted full responsibility for his actions, was ashamed and bitterly regretted his involvement in drug possession, considered his period in custody as a "significant wake-up call", very importantly had acknowledged his mistake, has understood his association with his peers has not helped him take any positive steps, has shown enthusiasm to change his course of life, has been designated as low risk of reoffending and has supportive family. I am aware of the negative aspects of the report, especially that if [the respondent] is unemployed there is a risk he might reoffend in order to obtain income and if he becomes involved again with his peers who apparently encouraged him in the first place, but I consider that the positive factors outweigh these negative factors, especially when applying the enhanced level of protection. I have also taken into account the sentencing Judge's remarks, especially that he had not learnt from his previous sentences for drug offences and that this was an aggravating factor, but I weigh against this the positive progress he appears to have made whilst incarcerated and the efforts he has made since his release on licence.'

11. Finally, the Judge added this,

> 'In reaching my decision, I have also taken into account Schedule 1 of the 2016 Regulations. He obviously has close familial links with his family who are of the same nationality and with whom he speaks Portuguese, but I am satisfied he also has a wider cultural and societal integration. I have also taken into account the length of his custodial sentence which is not to be trivialised, and the fact that he has been a persistent offender, but in view of his apparent reform whilst in prison and upon release, I think this outweighs his negative criminal record. This reflects the provisions of paragraph 5 of Schedule 1.'

12. Mr Lindsay on behalf of the SSHD first submitted that the Judge's decision that Respondent had acquired permanent residence was flawed. The Respondent had to establish that he had resided continuously in the UK for 5 years.

    a. First, the Judge was wrong to proceed on the basis that it had not been challenged that the Respondent had always resided with his parents when he had not been incarcerated. As the Judge had recorded at paragraph 22 the SSHD's representative had drawn attention to the lacuna in the documentary evidence for the period June 2007 to April

2010. While the Respondent's parents may have remained in the UK during this period, it did not follow that the Respondent himself had stayed here.

The Judge's phrasing was infelicitous, but it is plain from other parts of his judgment that he was well aware that the SSHD placed reliance on this lacuna in the documentary evidence (see for instance paragraph 45). However, the Judge had heard oral evidence from the Respondent's mother and he accepted her evidence that the whole family had moved to the UK in 2006 and that the Respondent had always resided with his parents.

b. Next, Mr Lindsay argues that the Judge had failed to have regard to the views expressed in *TK (Burundi) v SSHD* [2009] EWCA Civ 40 that a Judge should be cautious about accepting oral evidence where reasonably available potentially corroborating evidence had not been supplied. Mr Lindsay argued that was the case here. One of the schools which the Respondent claimed to have attended had been unable to supply records, but had said that these had been passed to another college where he had studied. Furthermore, Mr Lindsay argued the Judge had given no reasons for accepting the mother's evidence.

   We do not find these submissions persuasive. In *TK (Burundi)* the immigration judge had not believed the witness. The Court of Appeal 's decision at [21]-[22] held that he was entitled to come to that conclusion. That is far from saying that, in the absence of documentary evidence which might be reasonably available, an immigration judge is *obliged* to disbelieve a witness. Nor do we regard the absence of reasons to be an error of law. It was sufficient for the Judge to say, as he did here, that he accepted the witness's account. In addition, it does not appear that *TK (Burundi)* was cited to the Judge.

c. Thirdly, Mr Lindsay submitted that the Judge had misunderstood the burden of proof. He had said at paragraph 39,

   > 'In deportation appeals, the burden is on the respondent to show that the appellant satisfies the criteria for deportation to the civil standard of balance of probabilities.'

   Mr Lindsay submitted that this was not correct in terms of showing the level of protection which the Respondent had as an EEA national. In other words, it was for the Respondent to prove that he had permanent residence and it was for the Respondent to prove that he had accrued 10 years continuous residence.
   However, we do not read paragraph 39 as dealing with this issue. In retrospect it may have been better if the Judge had been more explicit, but we do not see any sign that in determining the level of protection and whether the Respondent had accrued the necessary periods of continuous residence, the Judge was under the mistaken impression that the burden of proof was on the SSHD. A further difficulty with this complaint is that it did not feature in the SSHD's

> grounds of appeal. In the course of the hearing Mr Lindsay applied to amend the grounds. Ms Shaw, for the Respondent, resisted the application since it had been made so late. In our view there would have been merit in that objection, but, since the point goes nowhere, it does not assist the SSHD in any event.

13. It follows that we are not persuaded that Judge Onoufriou erred in law in his finding that the Respondent had become permanently resident in the UK.

14. Mr Lindsay was on firmer ground when he argued that the Judge had erred in law in concluding that the Respondent had the benefit of regulation 27(4) and that the deportation decision had to be justified by 'imperative reasons'. Regulation 27(4)(a) says,

> '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 UK for a continuous period of at least 10 years prior to the relevant decision ...'

15. As Mr Lindsay submitted, it is then necessary to count *backwards* from the date of decision to see if, at that stage the individual had resided in the UK continuously for 10 years. What Judge Onoufriou did was to count *forwards* from what he decided was the date of the Respondent's arrival in the UK. We agree that it was an error of law. (We add in parenthesis that Mr Lindsay did not allege that the same error infected the decision that the Respondent had acquired the right of permanent residence. Mr Lindsay accepted that for that purpose the Judge was correct to count forwards from the date of arrival in the UK). Significantly, at the date of decision (which, we remind ourselves, was 8th June 2018) the Respondent was in the course of or had recently completed the custodial part of his term of 42 months detention in a Young Offenders' Institution. We agree with Mr Lindsay that Judge Onoufriou did err in law in this regard.

16. That said, this error on Judge Onoufriou's part was not material. The reason is that, as we have shown, in paragraph 48 of his decision he found that there were not 'serious grounds of public policy' for the deportation decision. Thus, the SSHD was not entitled to deport the Respondent even if he had not accrued 10 years continuous residence.

17. Mr Lindsay sought to argue that the Judge's conclusion in paragraph 48 was also infected with errors of law. However, in our view, his submissions in this regard were no more than a disagreement with Judge Onoufriou's factual findings. They did not constitute errors of law. We need expand on only one of Mr Lindsay's submissions in this regard. He submitted that there was not really a discrete and separate consideration of the 'serious grounds' justification for the deportation order since Judge Onoufriou had acknowledged the negative factors in the OASys report but had found these were outweighed by the positive factors 'especially when applying the enhanced level of protection'. Mr Lindsay argued that the term 'enhanced level of protection' referred to the need to show 'imperative grounds' where 10 years continuous residence prior to the date of decision had been established.

The difficulty with that submission is that the phrase 'enhanced protection' is ambiguous. It was used by Judge Onoufriou in two ways. As Mr Lindsay observed, in paragraph 47 of the decision it is applied to the protection enjoyed under regulation 27(4) by an EEA national with 10 years continuous residence. But in paragraph 44 Judge Onoufriou used 'enhanced protection' to describe the position of an EEA national who had acquired the right of permanent residence. Since paragraph 48 is addressing the position on the assumption that Judge Onoufriou was wrong about 10 years continuous residence, we think that his use of the expression 'enhanced protection' in this paragraph was more likely to have been an allusion to the protection which an EEA national enjoyed once he had the right of permanent residence. Ms Shaw submitted and we accept that by "enhanced protection" the Judge intended to refer to both higher levels of protection and that, read in context, therefore, the Judge at [48] must be taken to be referring to permanent residence when he says what he did about the OASys report.

18. Our conclusion remains that the only error of law which we have identified was not material.

19. It follows that the SSHD's appeal is dismissed. The decision of Judge Onoufriou to allow the Respondent's appeal stands

## Notice of Decision

**We are satisfied that there is no material error of law disclosed in the decision of First-tier Tribunal Judge Onoufrio promulgated on 27th June 2019. That decision is therefore upheld with the consequence that the Respondent's (Mr Mendes-Gomes') appeal stands allowed.**

No anonymity direction is made.

Signed **A NICOL** Dated 14 November 2019

Mr Justice Nicol sitting as an Upper Tribunal Judge.