Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00192/2019

THE IMMIGRATION ACTS

Heard at Birmingham Justice Centre	**Decision & Reasons Promulgated**
On 17th February 2020	**On 21st April 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AHMED [A]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer
For the Respondent: Ms K Tobin, Counsel instructed by Kalsi Solicitors

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr [A]. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr [A] as the appellant, and the Secretary of State as the respondent.

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2. The respondent appeals the decision of First-tier Tribunal Judge Colvin promulgated on 2nd July 2019 allowing the appellant's appeal under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") against the respondent's decision to make a deportation order.

Background

3. The appellant is a citizen of the Netherlands. He claims to have arrived in the UK when he was 9, in 2003, with his parents and three siblings. Between January 2010 and October 2016 he was convicted on seven occasions for eight offences that resulted in a community order, fines, a suspended sentence, an unpaid work requirement and a rehabilitation activity requirement. On 24th May 2017, the appellant was encountered at Coquelles Car Control, the UK border control operated in France. The appellant claimed that he was returning home to the UK from Germany. He was refused entry as there was no evidence of him having exercised treaty rights whilst in the UK. He lodged an appeal against that decision and his appeal was allowed for reasons set out in a decision of First-tier Tribunal Judge Graham promulgated on 7th March 2018.

4. On 10th May 2018, the appellant was convicted at Leicester Crown Court of two counts of conspiring to commit a violent disorder. On 12th October 2018 he was sentenced to 3 years imprisonment. As a result of that conviction he was issued with a notice of liability to deportation and after considering representations made by his representatives, the respondent reached a decision to make a deportation order. The appellant's appeal against that decision was allowed by FtT Judge Colvin.

5. Permission to appeal was granted by Upper Tribunal Judge Martin on 6th September 2019. She noted that it is arguable that the judge has erred in that she found that the appellant was entitled to the highest level of protection from removal under the EEA Regulations when it had not been established by either Judge Colvin or the previous Judge in 2018, that the

appellant had acquired permanent residence in the UK, which is a precondition for the highest level of protection; B (Citizenship of the European Union – Right to move and reside freely – Enhanced protection against expulsion) (C-316/16) and (C-424/16), a decision of the Grand Chamber of the European Court of Justice handed down on 17th April 2018.

6. The respondent claims in reaching her decision, FtT Judge Colvin erroneously proceeds upon the basis that the test for deportation to be applied is whether there are "imperative grounds of public security". In B v Land Baden-Wurttemberg Case C-316/16 (Joined Cases C-316/16, C-424/16), the Court of Justice held that a prerequisite for that enhanced protection, is that the person has acquired a permanent right of residence. Here, in March 2018 Judge Graham had accepted the appellant has lived in the UK for more than 10 years, but at paragraph [17] of her decision, had made it clear that she had not considered whether the appellant has acquired the right to reside in the UK permanently as set out in Regulation 15 of the EEA Regulations 2016, because the appellant had not provided evidence that he was dependent on his mother who was exercising treaty rights in the UK throughout the relevant 5 year period. It is said Judge Colvin erroneously adopted the previous conclusions of Judge Graham without considering whether the appellant had acquired the right to reside in the UK permanently for herself. Acquiring the highest level of protection against deportation required the appellant to have acquired a permanent right of residence *(i.e. by exercising treaty rights or as a dependent of his mother),* but no such determination had in fact been made.

7. Furthermore, in B the Court of Justice held the 10-year period of residence must be calculated by counting back from the date of the deportation decision and that period must, in principle, be continuous. Here, the 3-year sentence of imprisonment interrupted, in principle, the continuity of the 10 years residence. The judge was required to complete

an overall assessment of the situation of the appellant at the time when the question of expulsion arose, and although the period of imprisonment did not automatically deprive the appellant of enhanced protection, the judge was required to consider the strength of the integrative links the appellant had forged with the UK before his detention, as well as the nature of the offences, the circumstances in which that offences were committed and the behaviour of the appellant during the period of imprisonment. The respondent claims the judge failed to consider whether the appellant was entitled to the enhanced protection in all the circumstances. The respondent claims that insofar as the judge found the appellant has shown integration in the UK over the past 15 years and that this is unlikely to have been significantly altered by the prison sentence, the judge fails to give adequate reasons, or alternatively, the conclusion reached is irrational. The respondent also claims that in reaching her decision the judge failed to have regard to the totality of the appellant's offending over a number of years which militate against a finding that the appellant is a law abiding citizen who continues to be integrated into society; Binbuga -v- SSHD [2019] EWCA Civ 551.

8. Mr McVeety adopted the respondent's grounds of appeal and submits the FtT Judge relies upon various passages from the decision of FtT Judge Graham, in which it appears that FtT Judge Graham accepted the appellant has lived in the UK for more than 10 years and is entitled to permanent residence in the UK and enhanced protection under the Directive. However, Mr McVeety submits that at paragraph [17] of her decision, FtT Judge Graham made it clear that she had not considered whether the appellant has acquired the right to reside in the UK permanently as set out in Regulation 15 of the EEA Regulations 2016. FtT Judge Graham expressly noted the appellant had not provided evidence that he was dependent on his mother who was exercising treaty rights in the UK throughout the 5-year period. In any event, the judge failed to consider, counting back from the date of the deportation decision, whether the appellant has resided in the United Kingdom for a

continuous period of at least 10 years, taking into account whether the period of detention had broken his integration in the UK.

9. Ms Tobin submits FtT Judge Graham had found that the appellant has a right to permanent residence in the UK. She submits FtT Judge Graham was satisfied that the appellant and his mother gave their evidence in a cogent and largely consistent manner. She was satisfied that they are credible witnesses and she accepted their oral evidence. At paragraph [12] of her decision Judge Graham confirmed that she accepts the appellant has resided in the UK continuously for more than 10 years and the appellant meets Regulation 24(4)(a) *(sic)*. At paragraph [16] of her decision, she stated "*... I have accepted that the appellant has lived in the UK for more than 10 years, therefore he has a right to permanent residence in the UK, under the Regulations".* At paragraph [19] she stated *"... I accept that the appellant is entitled to permanent residence in the UK and enhanced protection under the Directive …"*. Ms Tobin submits those findings were not challenged by the respondent, and Judge Colvin was entitled to rely upon them.

10. Ms Tobin acknowledges that in B, the Court of Justice held that in principle, a period of imprisonment can interrupt the continuity of the period of residence, for the purpose of Article 28(3)(a) of Directive 2004/38, and it is necessary, in order to determine whether the period of imprisonment had broken the integrative links previously forged, to carry out an overall assessment of the situation. However, she refers to paragraph [71] of the judgement of the Court of Justice:

> "71. Indeed, particularly in the case of a Union citizen who was already in a position to satisfy the condition of 10 years' continuous residence in the host Member State in the past, even before he committed a criminal act that resulted in his detention, the fact that the person concerned was placed in custody by the authorities of that State cannot be regarded as automatically breaking the integrative links that that person had previously forged with that State and the continuity of his residence in that State for the purpose of Article 28(3)(a) of Directive 2004/38 and, therefore, depriving him of the enhanced protection against expulsion provided for in that provision. Moreover, such an interpretation would deprive that provision of

> much of its practical effect, since an expulsion measure will most often be adopted precisely because of the conduct of the person concerned that led to his conviction and detention."

11. She submits the fact that the appellant had lived in the UK continuously for more than 10 years prior to his imprisonment was particularly relevant and his imprisonment could not be regarded as automatically breaking the integrative links that he had forged with the United Kingdom. She submits that at paragraphs [25] and [26] of her decision, Judge Colvin noted the appellant has been in the UK since the age of nine, has been educated in the UK and has lived the majority of his life in the UK. She submits it was open to the judge to conclude that the appellant has shown integration in the UK over the past 16 years particularly through his education and that this is unlikely to have been significantly altered by the prison sentence. She submits, taking all matters into account, it was open to the judge to conclude that the respondent has not shown on a balance of probabilities that there are "imperative grounds of public security" for the deportation of the appellant. She submits the decision was one that was open to the judge and the grounds of appeal amount to nothing more than a disagreement with that decision.

<u>Discussion</u>

12. It is useful to begin with the European Regulations 2016. Regulation 23(6)(b) provides that an EEA national who has entered the United Kingdom may be removed if the respondent has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27. Regulation 27 insofar as it is material to this appeal provides:

> 27.— (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> …

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

(4) 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 10 years prior to the relevant decision; or

…

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

…

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

13. To justify interfering with the appellant's rights to free movement and residence in the UK, the respondent must establish the appellant's removal is justified on grounds of public policy and public security. In B the ECJ was requested by a German and a UK court to give a preliminary ruling concerning the interpretation of Directive 2004/38 art.28(3)(a),

under which persons who have resided in the host Member State for the previous 10 years qualify for enhanced protection against expulsion. The requests were made in proceedings, first, between B, a Greek national who had resided in Germany, and the Land Baden-Wurttemberg (Case C-316/16), and second, the SSHD and Mr Franco Vomero, an Italian citizen who had resided in the UK (Case C-424/16). In the German case, the Greek national had been living in Germany with his mother since 1993 and committed an offence in 2009 of which he was convicted. In the UK case, the Italian citizen had resided in the UK since 1985 and was convicted of manslaughter in 2001. Expulsion measures prompted by the criminal convictions for the offences mentioned above were ordered against the persons concerned, following their periods of imprisonment. At paragraph [60] of its judgment, the Court of Justice stated:

> "60 A Union citizen who has not acquired the right to reside permanently in the host Member State because he has not satisfied those conditions and who cannot, therefore, rely on the level of protection against expulsion guaranteed by Article 28(2) of Directive 2004/38 cannot, a fortiori, enjoy the considerably enhanced level of protection against expulsion provided for in Article 28(3)(a) of that directive."

14. It is clear therefore that the protection against expulsion provided for in the Directive 2004/38 gradually increases in proportion to the degree of integration of the EU citizen concerned in the host Member State. There was clearly some discussion at the outset of the hearing before FtT Judge Colvin regarding the conclusions reached by FtT Judge Graham previously. At paragraph [3] of her decision, Judge Colvin stated:

> "As a preliminary matter Ms Martin for the respondent accepted that it has been previously found in the appeal decision of 7 March 2018 that the appellant has permanent residence and 'enhanced protection' under the Directive and therefore the test for deportation is whether there are "imperative grounds of public security"

15. At paragraph [11] of her decision, Judge Colvin noted that in the respondent's decision, the respondent did not accept that the appellant has been continuously resident in the UK for 10 years in accordance with the EEA Regulations 2016. The judge however noted that that was

subject to what had been said the Presenting Officer and recorded at paragraph [3] of her decision. At paragraphs [21] and [22] of her decision, Judge Colvin refers to the previous decision of Judge Graham, noting at [21] that FtT Judge Graham was satisfied that the appellant had resided in the UK continuously for more than 10 years and met the test for enhanced protection in Regulation 27(4)(a). F*t*T Judge Colvin noted, at paragraph [22] that Mrs Martin, the Presenting Officer "*was asked whether she was putting forward any new evidence that may alter these findings. She accepted that there was no such new evidence to be put forward and accepted that the appellant is entitled to the status of enhanced protection …".* It was against that background that Judge Colvin considered the appeal applying the test of "imperative grounds of public security".

16. I have carefully read the decision of FtT Graham and in my judgement, she did not in fact find that the appellant had acquired the right to reside in the United Kingdom permanently. She expressly states at paragraph [17] of her decision that she has "*not considered whether the appellant meets Regulation 15, for permanent residence after five years residence in the UK because the appellant has not provided evidence that he was dependent on his mother who was exercising Treaty rights in the UK throughout the five-year period.".* Although she refers to the appellant having a right to permanent residence in the UK, what is said at paragraphs [16] and [19] of the decision of FtT Judge Graham appears to be at odds with what is said at paragraph [17]. In my judgement, the final sentence of paragraph [12] of her decision provides some assistance. Judge Graham appears to accept the appellant has resided in the UK continuously for more than 10 years and the appellant is entitled to the enhanced protection provided for in Regulation 27(4)(a) of the EEA Regulations 2016. In view of the conflicting findings set out in the decision of FtT Judge Graham, in my judgement it was for FtT judge Colvin to determine whether the appellant has in fact acquired permanent residence.

17. Judge Colvin cannot be criticised for relying upon the concession that appears to have been made by the Presenting Officer. It is unfortunate that the decision of the European Court of Justice handed down on 17th April 2018 in B was not brought to the attention of Judge Colvin. That was a decision that post-dates the decision of FtT Judge Graham, but pre-dates the hearing before FtT Judge Colvin. At paragraph [12] of her decision, FtT judge Graham accepted the appellant has resided in the UK continuously for more than 10 years and the appellant meets Regulation 27(4)(a). That is, a decision may not be taken except on imperative grounds of public security in respect of an EEA national who has *inter alia* resided in the UK for a continuous period of at least 10 years prior to the relevant decision. In reaching that finding Judge Graham did not consider whether the appellant had acquired a permanent right of residence and as I have already said, at paragraph [17] of her decision, she expressly states she has not considered whether the appellant has acquired a permanent right of residence. In B, the Court of Justice, at paragraph [60] of its judgment confirmed that in order to establish an entitlement to the enhanced protection under Regulation 27(4) of the EEA Regulations 2016, the appellant must first establish that he would qualify for the protection afforded to those with a right of permanent residence under Regulation 15 as set out in Regulation 27(3).

18. In my judgment, the decision of FtT Judge Colvin proceeds upon a mistaken premise and this is an appeal where the decision should be revisited so that the law is properly applied. It was far from clear that FtT Judge Graham had found the appellant had acquired a permanent right of residence, such that the finding could be adopted. There appears to have been little consideration by the parties and the Presenting Officer in particular, as to the particular findings made by FtT Judge Graham and there was no reference by Judge Colvin to paragraph [17] of the decision of FtT Graham. Furthermore, as at the date of the decision of FtT Judge Graham, it was not altogether clear, as a matter of law, whether an individual relying upon Regulation 27(4)(a) of the EEA Regulations 2016

simply had to demonstrate that they had resided in the United Kingdom for a continuous period of at least 10 years prior to the relevant decision, or whether they had, in addition, to establish a permanent right of residence under Regulation 15. FtT Judge Graham appears to have proceeded at paragraph [12] of her decision, upon the premise that the appellant had resided in the UK continuously for more than 10 years and therefore qualifies for the enhanced protection. The position was made clear by the ECJ in B, intended down in April 2018.

19. In my judgement the decision of FtT Colvin is vitiated by a material error of law and the decision must be set aside so that the decision can be made applying the correct test. In the circumstances I do not need to consider the remaining grounds of appeal. In determining the test to be applied, the FtT judge must plainly have regard to the question whether the appellant has resided in the UK for a continuous period of at least 10 years, counting backwards and taking into account the extent to which, if any, the sentence of imprisonment is relevant or impacts upon his integration. As to disposal, in my judgement the appropriate course is for the matter to be remitted to the FtT for hearing afresh with no findings preserved. That will ensure the appellant has a fair and proper opportunity to ensure the First-tier Tribunal has before it all of the evidence required to establish whether he has acquired a permanent right of residence and whether he is entitled to the enhanced protection provided for in Regulation 27(4(a) of the EEA Regulations 2016. It is now clear that that the acquisition of permanent residence is a prerequisite for the entitlement to the enhanced protection. In all the circumstances, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012 I am satisfied that the nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

20. The appeal is allowed. The decision of FtT Judge Colvin promulgated on 2nd July 2019 is set aside, and I remit the matter for re-hearing de novo in the First-tier Tribunal, with no findings preserved.

Signed Date 9th April 2020

V. Mandalia
Upper Tribunal Judge Mandalia

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email