Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/49895/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 26 November 2015	**On 8 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DANIEL KOWALEWSKI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Holmes, Senior Home Office Presenting Officer
For the Respondent: Ms S Bassiri- Bezfoali (counsel) instructed by A2 solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal

Judge Colyer, promulgated on13 April 2015, which allowed the Appellant's appeal against the respondent's decision to make a deportation order under the Immigration (EEA) Regulations 2006.

Background

3. The Appellant was born on 13 July 1994 and is a national of Poland.

4. On 13 November 2014 the respondent decided to make a deportation order relying on regulation 19(30(b) of the 2006 regulations.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Colyer ("the Judge") allowed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 02 July 2015 Upper Tribunal Judge King gave permission to appeal stating

> *"The issue arises as to imperative grounds of public security and the Judge for sound reasons found there to be none.*
>
> *"However the offending history of the appellant dates from 2006 and is a bad one. A pattern of antisocial behaviour raises the issue of integration within the community. In those circumstances the respondent seeks to rely upon MG(EUECJ C-400/12) a decision in 2014.*
>
> *"It does not seem to have been raised at the hearing and its relationship with the EEA regulations will also need to be considered."*

The Hearing

7. Ms Holmes, for the respondent, moved the grounds of appeal. She told that she did not intend to place any great emphasis on the first ground, drawing my attention to [21] & [27] to [32] of the decision. She relies on the second ground of appeal and argued that the Judge was wrong to accept that the appellant has been resident in the UK for 10 years and more, and so could only be deported on Imperative grounds of public policy or security. She told me that inadequate consideration had been given to the appellant's history of offending behaviour, which (it is argued) mitigates against his integration into the UK for the relevant 10 year period. It was argued that the Judge had incorrectly applied the *ratio* in the case of MG (EUECJ C-400/12. Ms Holmes argued that the Judge had taken far too lenient a view of risk and had made only selected use of the evidence of risk, leading the Judge to conclusions inconsistent with the OASyS report placed before him. She argued that the Judge had misdirected himself in regard to risk and incorrectly found that the appellant was at low risk of reoffending, when the OASyS report says he is at medium risk of reoffending. Ms Holmes told me that the errors made by the Judge

are material errors of law which also taint his article 8 ECHR assessment. She urged me to allow the appeal and set the Judge's decision aside.

8. For the appellant, Ms Bassiri-Bezfoali told me that the decision does not contain any material errors of law, but is a carefully worded & carefully considered decision which reaches a conclusion justified by the evidence presented to the Judge. She reminded me that none of the appellant's witnesses were cross examined and that the Home Office presenting officer at first instance declined to make a submission to contradict the evidence that the appellant had been in the UK for more than 10 years. At [9] the Judge makes a specific finding that the appellant's 10 years residence in the UK was completed before his first custodial sentence. She argued that the case law supported the appellant's appeal, and that the *ratio* of MG (relied on by the respondent) has been properly applied by the Judge. She urged me to dismiss the appeal and allow the Judge's decision to stand

Analysis

9. In Land Baden-Württemberg v Tsakouridis (Case C-145/09) CJEU (Grand Chamber), the Claimant was a Greek national. He had lived in Germany for almost 30 years and since 2001 had had an unlimited residence permit in that country. He had regularly worked in Greece during the period. The Grand Chamber held that the decisive criterion for granting enhanced protection under Article 28(3)(a) was whether the Union citizen had resided in the host Member State for the 10 years preceding the expulsion decision. The national authorities responsible for determining that question were required to take into account all relevant considerations in each particular case, in particular the duration of each period of absence from the host Member State, the cumulative duration and frequency of those absences and the reasons why the person left the host Member State.

10. In Secretary of State for the Home Department v FV (Italy) [2012] EWCA Civ 1199 it was held that the continuity of residence for the purpose of regulation 21(4)(a) was not broken by a period of imprisonment: Jarusevicius (EEA Reg 21 – effect of imprisonment) [2012] UKUT 120 (IAC) approved. The question whether the requirement of a continuous period of ten years' residence was established at the date of the decision to deport turned on the degree of integration established at that time. That was a question of fact for the Tribunal. Periods of absence during the ten years immediately preceding the decision did not, of themselves, disqualify and neither did a period of imprisonment. The period of imprisonment was, however, relevant as a factor to be considered when deciding upon integration at the date of decision. Integration would not normally be established by the time spent in prison save that it might have limited relevance by contributing to the severance of links with the country of origin. If integration had been established prior to the custodial term, it would not necessarily be lost by that term. The decision would turn on an overall qualitative assessment having regard to all relevant factors, including the length of residence, family connections and any interruptions in integration. (Per Aikens and Rafferty LJJ) The key questions for the Tribunal to ask when considering whether there had been a period of ten years' residence prior to the decision to deport were whether imprisonment involved either the transfer to another State of

the centre of the personal, family or occupational interests of the person concerned, and/or whether the "integrating links" previously forged with the host Member State had been broken: Tsakouridis followed.

11. In SSHD v MG Case no c-400/12 CJEU second chamber 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 post 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.

12. In Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC) it was held that the Court of Justice's reference in Case C-145/09 Land Baden-Wurtemberg v Tsakouridis [2011] CMLR 11 to genuine integration, should mean people who have resided lawfully in the Host state for five years and so have the right to permanent residence, rather than people who have resided for ten years.

13. The focus in this appeal is on the calculation of 10 years residence in the UK and the impact that period of residence has. The case of MG was not argued at first instance, however at [34] the Judge finds that the appellant arrived in the UK in 2001, when he was seven years of age. At [8] the Judge makes it clear that he indicated to parties' agents that he would accept the evidence that the appellant had been in the UK for more than 10 years. Between [27] and [32] the Judge discusses the length of time the appellant has been UK. At [32] the Judge comes to the conclusion that the appellant "*… had been living (in the UK) for well over 10 years before he was arrested on 27 May 2013*".

14. Between [10] and [18] the Judge correctly sets out the law. No challenge is taken to what is said by the Judge between [10] and [18]. He has manifestly directed himself correctly in law.

15. No specific challenge is taken to the facts as the Judge found them to be, nor to his self-direction in law. The challenge of the respondent is in reality a fresh argument based on a restricted reading of the rubric (only) of the case of MG. The case-law set out above indicates that the length of residence in the UK is one of many factors to be taken into account when assessing the degree of integration. The case-law also makes it clear that the question of integration is a question of fact for the tribunal at first instance.

16. A fair reading of the Judge's decision makes it quite clear that the period of residence in the UK was one of a number of factors weighed by the judge in assessing integration. Having determined that the appellant had resided in the UK for more than 10 years prior to his arrest in 2013, the judge weighed that factor as part of the careful structure of other relevant factors set out in detail in his decision.

17. One of the central factors to be placed alongside the question of length of residence is an assessment of risk. The respondent challenges the Judge's assessment of risk, arguing that is inconsistent with the OASyS report produced. The flaw in the respondent's argument (raised for the first time at appeal) is that the OASyS report was only one strand of evidence to be taken into account in assessing the question of risk. Between [43] & [47] the Judge discusses the content of the OASyS report. Between [48] and [55] the Judge considers the prospects of rehabilitation.

18. At [64], after weighing all of those components, the Judge reaches reasoned conclusions in terms of the 2006 regulations. It is there that the Judge sets out the conclusion that the appellant has acquired a permanent right of residence in UK in terms of the 2006 regulations. It is there that the Judge finds that the appellant does not represent the level of risk which presents a challenge to the fundamental interests of UK society.

19. Those are conclusions which were open to the Judge to reach. They are conclusions which take guidance from, and are consistent with, the case-law set out above. The respondent does not like the conclusion that the Judge reached, but the conclusion is correct in law on the facts as the Judge found them to be.

20. It is not an arguable error of law for a Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Disagreement with a Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless a Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law.

21. In closing, Ms Holmes argued that the Judge's article 8 assessment was inadequate. That argument was entirely dependent on my findings in relation to the duration of residence, the assessment of risk and the question of integration. I find that there is no material error of law to be found in any of the arguments made by first four grounds of appeal. Between [65] and [85] the Judge considers the appellant's article 8 ECHR rights. It is not argued that the Judge misdirected himself in law. I find that the Judge's self-direction in law is correct. The Judge considers the factors weighing both for and against the appellant before reaching the conclusion that the respondent's decision is a disproportionate breach of the right to respect for private life in terms of article 8 ECHR.

22. The Judge's article 8 analysis is detailed. It is based on a correct application of the law applying to the facts as the Judge found them to be. Once again, the grounds of appeal amount to little more the Respondent's expression of dissatisfaction with a decision which went in the appellant's favour.

23. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him or her.

24. A fair reading of the Judge's decision indicates that there is no misdirection of law and that the fact-finding process cannot be criticised. As I have already indicated, the Judge's conclusions are conclusions which were reasonably open to him to reach.

25. I find that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

26. No errors of law have been established. The Judge's decision stands.

DECISION

27. The appeal is dismissed.

Signed

Deputy Upper Tribunal Judge Doyle Date 30/11/2015