Upper Tribunal
(Immigration and Asylum Chamber)

Jarusevicius (EEA Reg 21 – effect of imprisonment) [2012] UKUT 00120(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 February 2012	**On 5 April 2012**
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Before

MR JUSTICE BLAKE, PRESIDENT

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

NERIJUS JARUSEVICIUS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr C Yeo, instructed by Global Immigration Solution

For the Respondent: Mrs M Tanner, Home Office Presenting Officer

1. In order to acquire a right of permanent residence under regulation 15 of the Immigration (European Economic Area) Regulations 2006 and the Citizens Directive 2004/38/EC a person had to show five years lawful residence within the meaning of EU law.

2. On the present state of the authorities, a period in prison does not count towards the acquisition of the five years residence.

3. Once a permanent right of residence is acquired it is not lost save by an absence from the United Kingdom for a period in excess of two consecutive years. The learning of the Court of Justice of the European Union suggests that the continuity of residence for the purpose of regulation 21(4) (10 years residence) is not broken by a period of imprisonment.

4. In the circumstances it seems probable that a period of imprisonment should not be equated to voluntary unemployment that may lead to loss of worker status and the loss of continuity of lawful residence for the purpose of acquiring the right of permanent residence and the decisions of the AIT in LG and CC (EEA Regs: residence; imprisonment; removal) Italy [2009] UKAIT 00024 and the UTIAC

in SO (imprisonment breaks – continuity of residence) Nigeria [2011] UKUT 00164 (IAC) that in addition to not counting towards the five-year period, prison also broke the continuity of residence for that period, may have to be re-examined.

5. Even where an appellant had acquired a right of permanent residence, the UKBA Criminal Casework Directorate Instructions (attached as Appendix B to LG and CC) are not to be treated as exhaustive or conclusive of which convictions would lead to an assessment of serious grounds of public policy or public security.

6. Conspiracy to handle stolen goods is different from the kinds of offences referred to in the UKBA Instructions note but the Tribunal was entitled to conclude that it amounted to serious grounds within the meaning of regulation 21(3). However, a conviction for conspiracy to handle stolen goods is unlikely to constitute conduct amounting to imperative grounds of public policy within the meaning of regulation 21(4).

DETERMINATION AND REASONS

1. The Appellant, a citizen of Lithuania, born on 30 June 1977, appealed against the decision of the Respondent dated 24 January 2011 to make a deportation order by virtue of section 5(1) of the Immigration Act 1971 ("the 1971 Act").

2. The Secretary of State decided that the Appellant would pose a genuine, present and sufficiently serious threat to the interest of public policy if he were to be allowed to remain in the United Kingdom and that his deportation was justified under regulation 21 of the Immigration (European Economic Area) Regulations 2006 ("the Regulations") in the light of his conduct as evidenced by his conviction on 1 June 2010 at Chelmsford Crown Court for conspiracy to handle stolen goods.

3. Consequential decisions were made to remove and prevent re-entry under regulation 19(3)(b) and regulation 24(3) requiring him to leave the United Kingdom and prohibiting him from re-entering while the order was in force. For the purpose of the order, section 3(5)(a) of the 1971 Act would apply. The Secretary of State thus proposed to give directions for the Appellant's removal to Lithuania, the country of which he was a national.

4. The Appellant's appeal was dismissed by the First-tier Tribunal in a determination promulgated on 8 April 2011 and permission to appeal was granted to the Upper Tribunal on the grounds that regulation 21 had not been properly applied in this case.

5. The brief immigration history of the Appellant is that he claims to have arrived in the United Kingdom in September 2004, although no record would have been kept of this entry because as an EEA national he would not have been treated as subject to immigration control at this time.

6. On 21 March 2007 at Stratford Magistrates' Court, he was convicted of driving a motor vehicle with excess alcohol and received a disqualification from driving for three years, a community order unpaid work requirement for 200 hours, a supervision requirement for twelve months and a curfew requirement for two months with electronic tagging.

7. On 20 May 2008 at Barking Magistrates' Court he was convicted of breaching a community order and received a curfew for one month with electronic tagging.

8. On 1 July 2010 at Chelmsford Crown Court he was convicted of conspiracy to handle stolen goods and was sentenced to 42 months' imprisonment. Consideration was given to his deportation thereafter.

9. The Appellant failed to provide the Secretary of State with evidence that he had been in the United Kingdom since 2004. It was therefore considered that there was no evidence of his residency in accordance with the Regulations for a continuous period of five years. The Appellant claimed to have a partner and two children in the UK but failed to provide the Secretary of State with any evidence of that claimed relationship.

10. On 3 December 2010 the Appellant wrote to the Secretary of State stating he wished to leave the United Kingdom and return to Lithuania under the Early Release Scheme. He subsequently changed his mind and appealed against the decision on the basis that he and his family had made their home in the United Kingdom, that he did not represent a present threat to public policy and deportation was disproportionate in all the circumstances.

11.
The first issue for the First-tier Tribunal was whether the appellant had acquired a right of permanent residence. Regulation 21, applying the provisions of the Citizens Directive, distinguishes between:

a.
Public policy, public security and public health (regulation 21(1));

b.
Serious grounds of public policy for those with a right of permanent residence (regulation 21(3))

c.
Imperative grounds of public policy for someone who has resided for a continuous period of at least ten years prior to the relevant decision (regulation 21(4)).

12. Regulation 15 sets out the circumstances in which a person acquires a right of permanent residence. An EEA national or the family of an EEA national who has resided in the United Kingdom in accordance with the Regulations for a continuous period of five years acquires the right of permanent residence.

13. In her Letter of Refusal dated 24 January 2011, the Secretary of State pointed out that consideration had been given to the Appellant's period of residence in the United Kingdom. In that context 'residence' meant residence within the wider community. She did not consider that the time the Appellant had spent in prison, constituted residence for the purpose of the Regulations.

14. Consideration had been given to the principles set out at regulation 21(5) that states that a decision to deport a person under the Regulations must 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case 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".

15. The Secretary of State observed that the Appellant had been involved in a highly organised car cloning organisation. Cars were stolen from peoples' homes and then sold on. False ID documents were prepared and the Appellant was involved in the selling of the cars and duping unsuspecting buyers.

16. It was further noted that His Honour Judge Hayward-Smith QC, had this to say in his sentencing remarks:

"There are a number of features relevant to the sentences I should pass. This was highly organised with cloned cars for sale very quickly after they had been stolen, there were expert documents that many people were taken in. False ID documents prepared, the speed and expertise with which this operation was carried out make it clear many others were involved.

Twenty eight cars were stolen and there were thirty three different indemnities found for the cars. Twenty were stolen in night time burglaries from dwellings, where the homes were entered, car keys taken and the cars stolen from outside resident's properties.

… were involved in selling cars and duping unsuspecting clients. It is said that you were attracted to easy money and coerced and you told the jury a totally unbelievable story. I reject any suggestion that you were innocents duped into this. You were thoroughly dishonest to a number of people and knew exactly what you were doing. There is no evidence that you knew about the burglaries but I take the view that you did not care. You are not ringleaders but lieutenants".

17. In addition it was noted that the judge went on to say that:

"Only a small fraction of the truth has been uncovered. None of (the defendants) made any attempt to tell the truth of what went on, with lying, obfuscation, blame on others or silence."

18. The Secretary of State considered that:

i) The Appellant committed this offence for financial gain.

ii) The Judge had stated the Appellant was attracted to easy money and knew exactly what he was doing and that it was illegal.

iii) The Appellant had stated that he came to the United Kingdom to work and had failed to provide any evidence that he had taken employment since 2004.

iv) It was therefore believed that the Appellant would re-offend if in need of funds.

v) All the available evidence indicated that the Appellant had the propensity to re-offend and that he represented a genuine, present and sufficiently serious threat to the public to justify his deportation.

vi) Deportation was the right course and a proportionate response having assessed the strength of the Appellant's connections with the United Kingdom pursuant to regulation 21(6) and Article 8 ECHR.

19. Given the nature of the offence the Appellant committed and the threat that he posed to society, the Secretary of State considered that even if the Appellant had permanent residence as a result of five years continuous residence in the United Kingdom, the requirement for serious grounds of public policy would have been satisfied.

20. Regulation 21(6) states that:

“Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 a person, the person’s length of residence in the United Kingdom, the person’s social and cultural integration into the United Kingdom and the extent of the person’s links with his country of origin”.

21. It was considered that the Appellant was 33 years of age and believed to be in good health. He claimed to have a partner and two children in the United Kingdom but had failed to provide any evidence about their residence previously in the United Kingdom. He had spent his youth and formative years in Lithuania and had stated that he wished to leave the United Kingdom under the Early Release Scheme. It was therefore not accepted that his removal from the United Kingdom would result in a breach of the United Kingdom’s obligations under Article 8 of ECHR.

22. The First-tier Tribunal took account of both the Appellant’s witness statement of 18 March 2011 and his oral evidence before them.

23. It was noted that the Appellant had remained in Lithuania until approximately 1999 or 2000 when he went to Spain to look for work. He was trained as a carpenter but was forced to leave due to the poor employment situation, to look for a better future abroad. Having spent approximately four years in Spain and due, again, to the lack of work, he heard from a friend that work was available in the United Kingdom and decided to come here. The Appellant’s mother had come to the United Kingdom in or around 2002 or 2003 in order to find work and the Appellant believed he could live with his mother here until he found employment.

24. It was whilst living in Spain that the Appellant met his partner, and soon after they met, the couple started living together and the Appellant’s partner agreed to come to the United Kingdom with him. She also gave evidence before the Tribunal that after she came to the United Kingdom the couple lived together until the Appellant was remanded in custody and after the Appellant was sentenced to imprisonment.

25. The First-tier Tribunal took account of the Appellant’s evidence as to his employment record.

26. It was further noted that the Appellant claimed to have no family in Lithuania. He stated that his father had separated from his mother when he was about 10 years old and his father had died in 2010. His only brother lived in Spain. The Appellant claimed that his partner had no close family in Lithuania since her mother was in Spain and her brother was in the United Kingdom. He had not lived in Lithuania since 2000 and any friends that he had there were from about ten or eleven years previously.

27. The Appellant and his partner gave evidence before the Tribunal that their two daughters had made their lives in the United Kingdom and the Appellant’s partner gave evidence that neither she nor her daughters would return to live in Lithuania even if the Appellant was deported.

28. The First-tier Tribunal accepted the Appellant’s account of his immigration history his account of his employment record and family life.

29. However, with regard to the Appellant’s conviction for conspiracy to handle stolen goods, the First-tier Tribunal were not satisfied that the Appellant’s involvement was as limited as he claimed or that he was as naïve as he suggested and that the reasons for the commission of the offences was solely to gain money to support his family. The reality was that the Appellant’s partner was claiming state benefit as a single parent to which she was not entitled. She had given evidence that she was

totally unaware that the Appellant was involved in this conspiracy and therefore did not receive any money from the Appellant, resulting from his criminal conduct, which undermined the Appellant's reasons as to why he committed the criminal offences.

30. The Tribunal took full account of the sentencing remarks of His Honour Judge Hayward-Smith QC.

31. Having further taken account of the case law to which they were referred, the Tribunal were satisfied that the offences of conspiracy and handling stolen goods, the particular circumstances and aggravating features of that conspiracy and the fact that they were serious offences, could constitute serious grounds of public policy or public security.

32. There was no parole report or any other report from the prison, other than a letter from Officer McNeil dated 23 March 2011. The Tribunal had no reason to doubt the details contained in his letter and was satisfied that the Appellant had completed a variety of courses including improving his potential for employability and that he was in a very trusted position whilst he was in prison.

33. The Tribunal considered that the evidence given by the Appellant and his partner with regard to family in Lithuania was contradictory. For the reasons given at paragraph 38 of their determination, they concluded that they were satisfied that the Appellant had numerous relatives living in Lithuania including cousins and aunts.

34. The First-tier Tribunal concluded that notwithstanding their finding that the Appellant had provided reliable evidence as to his work record in the United Kingdom, they were not satisfied that he had worked for a continuous period of five years. The Tribunal also took the view that time spent in prison "could not be counted as residence in accordance with the EEA Regulations" and they were not satisfied that the Appellant lived and worked in the United Kingdom in accordance with the Regulations for five years at the time of his arrest and nor were they satisfied that the Appellant was a qualified person in accordance with regulation 6(1) (c) that related to a self-employed person. Accordingly the Appellant had not acquired a right of permanent residence.

35. The Tribunal concluded, however, that even if they had been so satisfied, it was apparent that the Appellant's offences would constitute serious grounds for justifying his removal. It took account of regulation 21(5) and the judge's sentencing remarks, as well as the relevant jurisprudence, on whether it would be reasonable to expect the wife and children to relocate to Lithuania and the impact of removal on the best interests of the children. It concluded:

"We are satisfied the Appellant was involved in a highly organised car cloning operation where vehicles were stolen from people's homes at night time as part of burglaries and that false ID documents and other expert documents had been prepared when selling the cars and in duping unsuspecting buyers of those vehicles. The Judge was satisfied the Appellant told the jury a totally unbelievable story and that he knew exactly what he was doing. Whilst we accept that the Appellant has acted with credit whilst in prison, in the absence of any other reliable documentary evidence, the lack of honesty by the Appellant as to the reasons for the commission of this offence and his part within the conspiracy, we are satisfied that the Appellant has a propensity to reoffend and that he represented a genuine present and sufficiently serious threat to the public to justify deportation".

36. The Appellant sought permission to appeal on the basis that the Tribunal had erred:-

i) in discounting the period the appellant had spent in custody on remand as contributing six months to the period of five years for permanent residence;

ii) in adding to the qualifying period the six months spent on bail prior to his sentence when he was self employed and or looking for employment;

iii) in overlooking that the European Court of Justice in the cases of C-482/01 and C-493/01 Orfanopoulos and others and C-383/03 Dojan had made it clear that a person who was excluded from the labour market as a result of detention rather then choice, but who became a worker or jobseeker on release, should not be treated as having ceased to be a qualifying person;

iv) if the Appellant had acquired a permanent right of residence the Tribunal, was wrong in concluding that his conduct engaged serious grounds of public policy;

v) in placing reliance on LG and CC (Italy) [2009] AIT 00024, where the Tribunal had referred to the UKBA Criminal Casework Directorate Case Owners Process Instructions set out at Appendix B to the decision and the list of offences that might constitute serious grounds of public policy or public security. It was submitted the offences contained in that case, did not suggest that the offence of which the Appellant was convicted, should be regarded as sufficient grounds to justify his removal on serious grounds of public policy of security;

vi) in giving inadequate reasons why the Appellant represented a present threat to public policy, even if he had not acquired a right of permanent residence;

vii) in giving inadequate consideration to the Article 8 rights of the Appellant's partner and two young children that should have been regarded as crucial matters to be taken into account, particularly in view of the requirements of section 55 of the Borders, Citizenship and Immigration Act 2007 to safeguard and promote the welfare of children in the United Kingdom.

37. The application was refused by Judge Spencer who had this to say:

"In SO (imprisonment breaks – continuity of residence) Nigeria [2011] UKUT 00164 (IAC) the Tribunal, presided over by Silber J, held that time spent in prison however short, was to be disregarded in the calculation of the period required to obtain a permanent right of residence with the consequence that that period had to start again on release.

It is clear from reading the determination, that the Tribunal did consider the proportionality of the Appellant's deportation, as its reference to Article 8(2) of ECHR as paragraph 48 of its determination shows. It is also the case the Tribunal had regard to the best interests of the Appellant's children as the reference to the case of ZH (Tanzania) and LD (Article 8 – best interests of the child) in paragraph 47 of the determination shows. The Tribunal was entitled to find that it would be reasonable for the Appellant's partner and children to accompany him to Lithuania, of which country they were all nationals."

38. The Appellant made further application to the Upper Tribunal for permission to appeal, submitting inter alia, that the case of SO was "immaterial" and that the Appellant had established a right to permanent residence. On this occasion the Appellant's application was successful and in granting permission to appeal Senior Immigration Judge Allen (as he then was) had this to say:

"I am less sure than the draftsman of the grounds that time spent on remand must count towards residence under the Directive but I think the point is arguable. I also see arguable merit in the point at paragraph 3 of the further grounds in respect of the Tribunal's conclusion that the Appellant had a propensity to reoffend and there is also force in the challenge to the Article 8 findings in respect of the children".

39. Thus the appeal came before us for consideration on 14 February 2012. The Appellant relied on the grounds set out at [47] above. Our first task was to decide whether the determination of the First-tier Tribunal disclosed a material error of law, that being an error of law that might have materially affected the outcome of the appeal.

The Regulations

40. In addition to those regulations to which we have above referred, the following are also relevant.

41. Regulation 15(1) provides as follows:

"The following persons shall acquire the right to reside in the UK permanently

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years".

42. Regulation 21(6) provides as follows:

"Before taking a relevant decision on the grounds of public policy or grounds of public security in relation to a person 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 the person, a person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

43. Regulation 21(5) and (6) incorporates the requirements of Article 28 of Council Directive 2004/38/EC that govern restrictions on the right of residence on the grounds of public policy, public security or public health and Article 8 more particularly relates to protection against expulsion.

Its provisions are as follows:

"(1) Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host member state and the extent of his/her links with the country of origin.

(2) The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

(3) An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public policy as defined by Member States if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are minor, except if expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989".

44. Article 28(2) does not tell us how a person acquires a right of residence. For that we must go to Article 16 and more particularly 16(1):

"Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there."

Submissions

45. Mr Yeo, in the course of his oral submissions, made reference to Tsakouridis (European Citizenship) [2010] EUECJ C-145/09 [23 November 2010]. This was a reference for a preliminary hearing concerning the interpretation of Article 16(4) and 28(3)(a) of Directive 2004/38/EC. Mr Yeo referred us to paragraphs 32 to 34 of that decision:

“32. As to the question of the extent to which absences from the host Member State during the period referred to in Article 28(3) (a) of Directive 2004/38, namely the 10 years preceding the decision to expel the person concerned , prevent him from enjoying enhanced protection, an overall assessment must be made of the person’s situation on each occasion at the precise time when the question of expulsion arises.

33. The national authorities responsible for applying Article 28(3) of Directive 2004/38 are required to take all the relevant factors into consideration in each individual case, in particular the duration of each period of absence from the host Member State, cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State. It must be ascertained whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned.

34.
The fact that a person in question has been the subject of a forced return to the host Member State in order to serve a term of imprisonment there and the time spent in prison may, together with the factors listed in the preceding paragraph, be taken into account as part of the overall assessment required for determining whether the integrated links previously forged with the host Member State have been broken.

35.
It is for the national court to assess whether that is the case in the main proceedings. If that court were to reach the conclusion that Mr Tsakouridis’s absences from the host Member State are not such as to prevent him from enjoying enhanced protection, it would then have to examine whether the expulsion decision was based on imperative grounds of public security within the meaning of Article 28 (3) of Directive 2004/38.”

46. The court in Tsakouridis pointed out that in the application of Directive 2004/38 a balance had to be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary, at the time when the expulsion decision was to be made. In that regard reference was made inter alia to the joined cases C–482/01 and C- 493/01 Orafanopoulos and Oliveri [2004] ECR 1-5757 paragraphs 77 to 79, by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity and, if appropriate the risk of re-offending (para 50).

47. Mr Yeo also referred us to Maria Dias v SSHD [2011] EUECJ-C-325/09. Dias was a reference for a preliminary ruling concerning the proper interpretation of Article 16 of the Directive. Ms Dias was a Portuguese national who, in May 2000, was issued with a residence permit pursuant to the predecessor provisions of the Citizens Directive valid for five years. The Court concluded:

58 Inasmuch as periods of residence of a Union citizen in a host Member State which were completed on the basis solely of a residence permit validly issued under Directive 68/360, but without the conditions governing entitlement to any right of residence having been satisfied, cannot be regarded as having been completed legally for the purposes of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38, the question then arises as to what the effect is on

that acquisition of such a period of residence which occurred before 30 April 2006 and after a period of five years' continuous legal residence already completed prior to that date.

59 In that connection, it should be borne in mind, first of all, that the Court has already ruled that Article 16(4) of Directive 2004/38 refers to loss of the right of permanent residence by reason of absences of more than two consecutive years from the host Member State and that such a measure may be justified because, after an absence of that duration, the link with the host Member State is loosened (see Lassal , paragraph 55).

60 Next, the Court has also held that that provision falls to be applied independently of whether the periods of residence in question were completed before or after 30 April 2006, for the reason that, since residence periods of five years completed before that date must be taken into account for the purpose of acquisition of the right of permanent residence provided for in Article 16(1) of Directive 2004/38, non-application of Article 16(4) thereof to those periods would mean that the Member States would be required to grant that right of permanent residence even in cases of prolonged absences which call into question the link between the person concerned and the host Member State (Lassal , paragraph 56).

48. We drew the parties' attention to the decision of the Court of Appeal in Carvalho [2010] EWCA Civ 1406, decided December 2010 in which their Lordships considered the extent to which the time spent in prison, might count towards the qualifying period for permanent residence under regulation 15(1)(a). The Court noted:-

i) A series of domestic decisions of the United Kingdom courts indicating that time spent in prison did not count towards the qualifying period (see HR (Portugal) [2009] EWCA Civ 371 and Bulale [2008] EWCA Civ 806;

ii) the ECJ authorities of Nazli [2000] ECR 1-957, Dogan [2005] ECR 1-6237 and Orfanopolous and Oliveri [2004] ECR-1 5257 where periods of imprisonment on remand or serving a sentence were held not to break the continuity of status as a worker long resident in the host Member State;

iii) the view of the AIT in the case, that a distinction was to be made between the circumstances giving rise to the acquisition of permanent residence rights by lawful residence in accordance with the Directive and circumstances where a person who had acquired those rights lost them;

iv) the guidance note of the Commission from July 2009 that 'Member States are not obliged to take time actually spent behind bars into account when calculating the duration of residence under Article 28 where no links with the host Member State are built'.

The Court dismissed Mr Carvalho's appeal.

49. We informed the parties, that we had additionally considered LG and CC (Italy) [2009] UKAIT 00024 that held that time spent in prison did not count towards the ten years' residence which would give an EEA national a higher level of protection against expulsion (regulation 21(4)). However, time in prison did not remove a right of permanent residence that had been acquired before the prison sentence.

50. Finally we had considered SO that held that time spent in prison, however short, was to be disregarded in the calculation of the period required to obtain a permanent right of residence, with the consequence that that period had to start again on release.

51. In summary Mr Yeo submitted:-

i) that periods of residence did not have to be continuous residence.

ii) Tsakouridis indicated that imprisonment could be taken into account in establishing links (see paragraphs 33 and 34). Imprisonment was only one factor to take into account in the assessment. It was not suggested that periods of imprisonment were an absolute bar to residence.

iii) in any event the Tribunal's conclusions as to the Appellant's propensity to re-offend really was no more than speculation. He contended that there was no evidence to support the Tribunal's finding in that regard. There was no probation report or any other report or evidence that related to the Appellant's risk of reoffending before the Tribunal. There was nothing to suggest that the Appellant was at high or medium risk of offending.

iv) in the assessment under Article 8, it was not open to the First-tier Tribunal to say that the Appellant's children could maintain contact with the Appellant by "modern means of communication". Further, that because the Appellant did not spend enough time with them this was a further factor in the Tribunal's assessment of proportionality as to the Appellant's removal from the United Kingdom.

52. Ms Tanner responded as follows:

i) The determination of the First-tier Tribunal disclosed no error of law.

ii) The Tribunal were perfectly correct in finding that the Appellant had not established five years' residence.

iii) The period of imprisonment spent by the Appellant on remand in custody, did not count towards residence.

iv) It was open to the Tribunal on the evidence to reason that the Appellant had a propensity to reoffend. He had not accepted his culpability. He had lied before the court.

v) She referred us to paragraph 38 of the Tribunal's decision where they found that the evidence given by the Appellant's partner was contradictory as to their situation in Lithuania. Although that did not directly go to Article 8, it showed that it was an aspect of the Appellant's conduct and character, that the Tribunal took into account at paragraph 42 of their determination in relation to which, the Tribunal noted that this was reflected in the Judge's sentencing remarks.

vi) The Tribunal had considered the best interests of the Appellant's children and found that those interests would be best served by their living with their parents as a family unit in Lithuania.

53. We reserved our decision.

Conclusions: (1) Permanent residence

54. The First-tier Tribunal found reliable evidence that the Appellant was working from March 2005. In our judgment the question whether he had acquired a right of permanent residence depends on whether he had resided 'in accordance with these Regulations for a continuous period of five years' (regulation 15 (1)(a)).

55. Applying the guidance in Dias that means determining whether he was a worker or exercising other Treaty rights that give rise to a right of residence under Article 7 of the Citizens Directive. Mere residence under national law or intending to find work does not suffice for this purpose.

56. The Appellant was remanded in custody in June 2009, nine months before he would have acquired a right of permanent residence by employment or self employment. He was out on bail for six months before he received his sentence in June 2010. Even if this period were to be added to the 4 years and 3 months he had apparently achieved by June 2009, he would not have acquired 5 years residence continuous or otherwise unless his period on remand were to count in his favour.

57. We are bound by the authority of Carvalho to conclude that periods spent in detention do not count towards the accrual of the five years continuous lawful residence necessary to achieve a right of permanent residence.

58. We conclude that the decision in Tsakouridis neither requires nor entitles us to reach a contrary result. That case was one where the right to permanent residence had been acquired long before the claimant spent time in prison. The right was not lost by his short absence abroad and nor was it lost by his remand in custody and subsequent sentence on return. We note that in the calculation of the ten years residence, EU law requires the decision maker to count back from the date of the decision to deport, whilst the acquisition of permanent residence means counting forward from the date that it is first established by economic activity or other means under Article 7 of the Directive.

59. In our judgment all the cases cited draw a distinction between acquisition of the right to reside permanently and the loss of that right. The learning from the Court of Justice suggests that:-

i)
once a right of permanent residence has accrued it is not lost by a remand in custody or a short sentence or a sequence of them (Nazli , Dogan) ;

ii)
prison is not to be equated to voluntary unemployment that may lead to loss of worker status and the loss of continuity of lawful residence for the purpose of acquiring the right of permanent residence (Orfanopoulos and Oliveri);

iii)
the continuity of residence for the purpose of regulation 21(4)(a) (ten years residence) is not broken by a period of imprisonment (Tsakouridis).

60. This may mean that the conclusions of the decisions of the AIT in LG and CC (Italy) and the UTIAC in SO that in addition to not counting towards the five year period, prison also broke the continuity of residence for that period may have to be re-examined. It is one thing to conclude that a period spent serving a sentence of imprisonment is not lawful residence for the purpose of acquiring an EU right of residence, it is another to conclude that lawful residence prior to such a sentence could not be aggregated with lawful residence after service of it. It is difficult to see why if such a period of imprisonment does not break “continuous” residence for the purpose of regulation 21(4)(a), it should do so for the purpose of regulation 15(1)(a). Equally it is difficult to reconcile the conclusion of the AIT in LG and CC that service of a sentence of imprisonment in the 10 years before the decision to deport prevents the greater protection of ”imperative grounds” arising, with the conclusion of the CJEU in Tsakouridis reached on the basis that it could. In a case where this issue is central to the outcome, it may be necessary to consider whether the UT is able to reach its own conclusion on the matter, or should make a reference to the CJEU or is bound by a CA decision pending any reference that is made by that court.

61. However, neither of these problems is before us in the present appeal. We conclude that the Appellant did not acquire the right of permanent residence because:

i)
He had not worked or exercised any other Article 7 Directive rights for 5 years from March 2005.

ii)
His period of remand in custody June 2009 to December 2009 did not count towards such a period as he was not exercising Treaty rights during that period. We note that this period subsequently counted towards sentence by direction of the trial judge.

iii)
We are doubtful whether the evidence was sufficient to establish that the Appellant was exercising Article 7 rights during the six months on bail before conviction and sentence.

iv)
Even if he were still to be considered a worker when released on bail and even if the period of remand in custody did not break the continuity of lawful residence for the purpose of regulation 15 (1) (a), this would still not amount to a total period of 5 years.

v) The period spent in prison between June 2010 and the date of the deportation decision in January 2011 did not count towards lawful residence for the same reason as in (ii) above.

Conclusions: (2) Public policy

62. We reject the submissions that the tribunal misdirected itself and/or was not entitled to conclude that in January 2011 or at the date of the appeal before it, the Appellant's continued residence was contrary to public policy within the meaning of regulation 21(5).

63. We make the following observations in support of that conclusion:

i)
The Appellant was convicted of a conspiracy to handle stolen goods. This was not a case of a single offence of handling but an agreement to play a significant part in organised criminality for financial gain over a period of time, involving a range of serious crimes and a number of criminals. Gang related crime of this nature is more serious than single acts of dishonesty.

ii)
The Appellant was not of good character before he participated in this conspiracy. While his previous convictions were completely different in character they represented some evidence of unwillingness to abide by the criminal laws of the United Kingdom.

iii)
The Appellant denied his guilt and the trial judge concluded that he had lied in his evidence by seeking to minimise his participation in the conspiracy. The Tribunal found that the Appellant continued to minimise his part in the conspiracy when he gave evidence before it. This was evidence that he showed little or no remorse, lacked insight into the seriousness of his activities and despite his sentence continued to be willing to mislead judges in courts and tribunals.

iv)
The Appellant did not produce any positive evidence of insight into his crimes and reformation. The evidence from the prison service of absence of disciplinary problems and co-operation with the

authorities is not the same as a NOMS or other evidence based assessment of a change of attitude and associations.

v)
The fact that the Appellant's wife was claiming benefit as a single person to which she was not entitled, was some evidence of financial need and a willingness to abuse residency rights.

Conclusions: (3) Serious grounds of public policy

64. This ground does not arise in the light of our conclusion on the absence of a right to permanent residence.

65. However, even if, contrary to our assessment, it were concluded that he had acquired a right of permanent residence, we do not regard the UKBA Criminal Casework Directorate Instructions (attached as Appendix B to LG and CC) to be exhaustive or conclusive of which convictions will lead to an assessment of serious grounds of public policy or public security. We recognise that conspiracy to handle stolen goods is different from the kinds of offences referred to in that guidance note, but like serious sexual and violent offences it carries a maximum penalty of more than ten years imprisonment.

66. For the reasons given above, the scale of the offences and the number of offenders who participated in the conspiracy, the burglaries of private dwelling houses to obtain the keys to steal the vehicles that were handled makes this a particularly serious form of crime.

67. Whilst we could not envisage this class of conduct giving rise to imperative grounds of public policy, we conclude that the Tribunal was in the alternative entitled to conclude in this case that it amounted to serious grounds.

Conclusions (4): Family Life and Proportionality

68. The Tribunal made a careful evaluation of all the relevant factors in the case and reached an overall conclusion to which it was entitled to come.

68.
Although the Appellant's mother and his wife and their children (aged 3 and 5 years) were all resident in this country, they were all nationals of Lithuania and could readily return to that country if they wanted to be with the Appellant. His wife and children had not acquired their own right of permanent residence as their residence rights derived from the Appellant himself. Their length of residence in the United Kingdom was not substantial and the evidence of community ties limited. If they preferred to remain in the United Kingdom in the event of the Appellant's removal to Lithuania that was very much a matter of choice for them rather than an obstacle of any degree of difficulty.

69.
We do not consider it is necessary to cite the extensive case law of the Upper Tribunal and the superior courts on the proper approach to the best interests of the child as a primary consideration. The Tribunal by its detailed reasoning was clearly aware of it and considered it in the light of their findings of fact.

70.
There was no evidence that either moving back to Lithuania or separating the children from their father would cause them positive harm. The loss of their father's company, if their mother chose to reside here with them, is of course a loss of a child's right to regular contact with a parent, but that

right is not a paramount consideration in deportation cases, and such separation may be justified where the father has committed serious crime: see Sanade and others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC). There is no question here of anyone being required to leave the European Union.

71.
We do not understand the Tribunal to be minimising the impact of the removal of their father on the children by its reference to the ability of the family to remain in contact by "modern means of communication". It would be an error of approach if they had, but in context, we conclude that it was merely observing that removal need not necessarily lead to a total and permanent rupture. As an EU national it was always open to the Appellant to apply to revoke a deportation order on the ground of change of circumstances.

72.
The ultimate question was whether the separation of the children from their father resulting from the mother's voluntary decision not to return to the country of her nationality could be justified in the present circumstances in the interests of public policy and public order. The Tribunal concluded it was. It was a decision to which they were entitled to come.

Decision

73.
For each of these reasons we can detect no misdirection of approach by the Tribunal, and none that would justify us setting aside the decision and remaking it. There is no material error of law. This appeal is accordingly dismissed.

Signed Date

Upper Tribunal Judge Goldstein 2 April 2012

Immigration and Asylum Chamber