Upper Tribunal

(Immigration and Asylum Chamber)

MG (prison-Article 28(3) (a) of Citizens Directive) Portugal [2014] UKUT 00392 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 May 2014	.....

Before

UPPER TRIBUNAL JUDGE STOREY

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MG

[ANONYMITY ORDER MAINTAINED]

Respondent

Representation :

For the Appellant: Mr R Palmer instructed by Treasury Solicitors

For the Respondent: Ms L Hirst instructed by the Aire Centre

(1) Article 28(3)(a) of Directive 2004/38/EC contains the requirement that for those who have resided in the host member state for the previous 10 years, an expulsion decision made against them must be based upon imperative grounds of public security.

(2) There is a tension in the judgment of the Court of Justice of the European Communities in Case C-400/12 Secretary of State v MG in respect of the meaning of the “enhanced protection” provision.

(3) The judgment should be understood as meaning that a period of imprisonment during those 10 years does not necessarily prevent a person from qualifying for enhanced protection if that person is sufficiently integrated. However, according to the same judgment, a period of imprisonment must have a negative impact in so far as establishing integration is concerned.

DETERMINATION AND REASONS

1. By a decision of 24 August 2012 this Tribunal requested a preliminary ruling from the Court of Justice of the European Union (CJEU) on several questions relating to the proper interpretation of Article 28(3)(a) of Directive 2004/38/EC (hereafter “the Citizens Directive”). This decision was reported as MG (EU deportation - Article 28(3) - imprisonment) Portugal [2012] UKUT 268 (IAC). Our questions arose as a result of the following events: (i) on 8 July 2010 the appellant (hereafter Secretary of State for the Home Department or SSHD) had refused the application of the respondent, MG (hereafter the claimant), who is an EEA national, for a permanent residence card and, in light of her conviction on one count of cruelty and three counts of assault against one of her own children, had ordered her to be deported on grounds of public policy and public security pursuant to regulation 21 of the Immigration (European Economic Area) Regulations 2006 (hereafter “the 2006 Regulations”) (which implement this Directive); (ii) her subsequent appeal to the First-tier Tribunal was successful; (iii) the SSHD had then been granted permission to appeal to the Upper Tribunal; (iv) the Upper Tribunal found that the First-tier Tribunal had erred in law and set its decision aside; (v) the Upper Tribunal concluded that it could not proceed to re-make the decision without a ruling from the CJEU. On 16 January 2014 the CJEU delivered its rulings both in this case, Case C-400/12, Secretary of State v MG and in Case C-387/12, Onuekwere v SSHD . Having now received answers from the CJEU, we are in the position of being able to complete our hearing in order to re-make the decision. It is as well to set out the relevant provisions of regulation 21 of the 2006 Regulations and of Articles 27 and 28 of the Citizens Directive which they seek to implement. We also include the CJEU ruling in MG as an Appendix. Regulation 21 provides:

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

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or 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 ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 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.

(6) 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 the 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."

In Chapter VI of the Citizens Directive ('Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health'), Articles 27 and 28 provide:

"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.'

9 Article 28 of Directive 2004/38, entitled 'Protection against expulsion', which also falls within Chapter VI, provides:

'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 security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years; or

(b) are a minor, except if the 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."

2. At the last hearing on 21 May 2012 (which resulted in the request for a preliminary ruling) the SSHD maintained her decision to deport but said she now accepted that the claimant had acquired permanent residence by virtue of the employment history of her husband who is also an EEA national. The respondent also said she accepted that if the claimant was entitled to the highest level of protection based on ten years' residence as set out in Article 28(3)(a), so that she could only be deported if there were "imperative grounds of public security", then her appeal must succeed because there were no such grounds. The respondent maintained, however, that the claimant's period of imprisonment between 27 August 2009 and 11 July 2010 (in service of a sentence of 21 months following conviction for the aforementioned offences) meant that her deportation was justified even under the second highest level of protection against deportation as set out in Article 28(2) which in respect of a person who had acquired permanent residence required the state to show there were "serious grounds of public policy or public security".

3. A fortiori , the respondent maintained, the claimant could not benefit from the lowest or baseline level of protection against deportation set out in Article 28(1) which required "grounds of public policy or public security".

4. At the time this Tribunal decided to request a preliminary ruling in August 2012, we observed that the evidence regarding the risk posed by the claimant to the public and whether she had a propensity to reoffend was "finely balanced". We noted that on the one hand there were positive comments made in some of reports by various professionals tending to indicate that even in July 2010 the claimant could not be seen as a present threat to society and that the risk of her re-offending was low. The family court judge in July 2011 did not rule out that she could rehabilitate. The latest medical report (from Dr Coffey) noted an improvement in her mental state and expressed similar hopes in relation to rehabilitation. On the other hand, in some reports there were serious concerns expressed as to whether she had faced up to her crimes or had demonstrated that she was free of her involvement with heroin and association with other substance-abusers; and in a July 2010 NOMS report the risk of her causing harm to her own children and others was assessed as high. In a psychiatric report of 9 December 2010 the medical opinion (from Dr Smith) was that she posed a risk to her own children were she to have unsupervised contact with them. In July 2011 the family court judge found she posed a high risk of emotional harm to her children and stated that "there is clearly a risk of direct physical harm to the children as well but this is not the highest risk as it could be addressed by adequate supervision of direct contact to secure the physical safety of the children".

5. Soon after we received the ruling of the CJEU on the questions asked of it regarding the claimant's case, we asked her representatives to produce evidence updating her circumstances. In response, her representatives submitted a number of documents, including a witness statement for the claimant and letters from her husband, her godmother, her godmother's son, her employer and a friend.

6. The Tribunal also requested the parties to prepare their submissions so as to address certain questions which it considered the CJEU ruling to have left arguably unclear. We shall allude to those where necessary below.

7. At the hearing before us MG gave evidence, adopting her previous and new witness statements as true and correct. In reply to questions from Mr Palmer for the SSHD she said that although there were no longer any family court proceedings, she continued to have only indirect contact with her children. She rang them most days. She had not seen them since they had come to see her when she was still in prison. Since she had been released on immigration bail in March 2012 she has been residing with her godmother (whom she had known back in Portugal) and her godmother's son. Her godmother had lived in the UK for some fourteen years. She had lived with her godmother in the UK

at an earlier period, between 2000-2001, but she had then gone to live by herself. In Portugal (Madeira) she had a father, two sisters as well as aunties and cousins.

8. As regards her employment, MG confirmed that she had only worked for a short period in May 1998-March 1999, which was shortly after she had arrived in the UK. However seven months ago, in November 2013, she started part-time work working 20 hours per week in a florists and that was continuing. (Before the Tribunal there was a letter from the owner of the florists attesting that the claimant had been a model employee, never having missed a day of work and being trusted with such tasks as locking up the shop).

9. Asked if she accepted that she had committed offences of cruelty and assault against one of her own children in 2008, the claimant said at that time her whole life was "broken" and she was now trying her best "to have her life back."

10. Asked when she had begun using drugs, the claimant said it was 2007; it was not in 2006 as her husband had apparently said to child professionals at one stage. Since she had been released from detention she had not used any drugs.

11. In re-examination and in reply to questions from the bench, the claimant said she called her children by phone every weekday shortly before their bedtime. On Saturday and Sunday they would call her using their father's phone. Although she and her husband remained permanently separated, he was now happy for her to have frequent telephone contact with the children. At Xmas the children sent her a card; and on Mother's Day a gift.

12. Asked if she continued to have contact with the set of friends with whom she had associated when she was using drugs, she said she no longer saw any of them. None had tried to contact her.

13. Asked if she continued to have a problem with alcohol, the appellant said it was not true she had ever had an alcohol problem but in any event she no longer consumed alcohol except occasionally in small quantities.

14. At the hearing Mr Palmer and Ms Hirst both developed their written submissions.

15. With reference to the terms of Article 33(2) of the Citizens Directive and the corresponding provision of regulation 24(5) of the 2006 (European Economic Area) Regulations (which requires the SSHD to enforce a deportation order within two years [1])), Ms Hirst contended that the lapse of time in this case meant the decision of the SSHD under appeal (made in July 2010) was no longer in accordance with the law. Mr Palmer argued that Ms Hirst's submission was based on a misreading of Article 33(2) which only operated from the time of the issue of removal directions ("expulsion order is enforced after it is issued"). Essentially it was only the decision to deport that was in question; removal directions had not yet been issued. He accepted, however, that through the appeal process the Tribunal was entitled (save for one caveat) to have regard to post-decision evidence about that decision.

16. Mr Palmer's caveat was that in respect of application of the ten year requirement set out in Article 28(3)(a), the Tribunal was confined to a consideration of matters as they stood at the date of decision of 8 July 2010. That followed from the CJEU ruling in **MG** that the 10 year period of residence referred to in that provision "must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned" (paragraph 28). If it were otherwise, the ten year threshold would be subject to ever-changing variation.

17. Ms Hirst argued that Mr Palmer's caveat in respect of the ten year test made no sense as it would mean that the SSHD could dictate whether or not applicants could seek to rely on positive features

about their life following release from prison. The SSHD could simply decide to make the decision, as she often did, whilst an applicant was still in prison.

18. Mr Palmer's principal contentions regarding the meaning of the CJEU ruling in respect of Article 28(3)(a) and the ten year requirement were that it established that:

(i) any period of prison falling within the ten years prior to the deportation decision cannot be taken into account for the purposes of granting enhanced protection under Article 28(3)(a);

(ii) in principle, periods of prison interrupt the continuity of that period of residence;

(iii) the implication of an applicant's period of residence being non-continuous due to a period of imprisonment is that such a period cannot positively accrue to his or her benefit for the purposes of Article 28(3)(a). Deciding whether periods of prison deprive applicants of protection under Article 28(3)(a) requires an overall assessment of the quality of the integrative links (or lack of them) an applicant had forged whilst in the host member state. The exercise here is all about considering degrees of integration in the context of the particular circumstances of an applicant's case. On the logic of paragraphs 23 and 24 of MG , there could be degrees of integration ranging from low quality to high quality. The circumstances in the CJEU judgment in Case C-145/09 Tsakouridis [2010] ECR-I-11979, were to do with absence abroad, a feature that did not necessarily break integrative links. By contrast, as the CJEU had made clear in MG , integrative links cannot be established by reference to time spent in prison and integrative links can be broken by virtue of an applicant's subsequent imprisonment.

19. Applying the CJEU ruling in MG to the facts of the claimant's case, Mr Palmer urged that the Tribunal regard her as having forged only relatively weak links with the UK between her arrival in the UK in 1998 and her conviction in July 2009. The fact that she had exercised Treaty rights by working (albeit only for a brief period of ten months in 1998/9) and had had three children in the UK were offset by the fact of her drug use, her association with drug users and her criminal conduct. As regards her time in prison, the MG ruling made clear that that could not be treated as having any relevant integrative features – regardless of educational courses etc. She had not expressed remorse. Not only did prison break her relatively weak links with the UK, but against that background the claimant cannot be said to have regained integrative status. She had only accrued nine years eleven months in the UK before she was arrested. Her drug use started in 2007 (if not 2006). Although she had married she had separated in 2006, her contact with her children was extremely limited, confined to indirect contact. The father and the children have moved away. She has no other family in the UK.

20. The other important feature of the claimant' case, submitted Mr Palmer, was that the conditions which had led to her offending had not gone away and there was no evidence that she was no longer at risk of reoffending. The MAPPA assessment made some time ago contemplated she would remain a risk for five years and in any event that period has not yet come to an end. Ms Hirst was wrong to cite R (Oyston) v The Parole Board [2000] Prison LR 45 as authority for the proposition that lack of remorse was not a relevant factor. In that judgment the Court of Appeal had held that whilst "not necessarily conclusive", lack of remorse was always a factor. The report on the claimant from Dr Smith noted that she had been having problems with anger management and said that she had no insight into her personal difficulties. There was no evidence that her prospects of rehabilitation would be adversely affected in Portugal.

21. Ms Hirst said that in terms of understanding of the main principles established by the CJEU in MG , her position and that of Mr Palmer were not now that far apart. In her written submission she had stated that according to the CJEU judgment periods of imprisonment during the requisite 10-year period of residence will not automatically exclude a Union Citizen from relying on the protection of

Article 28(3)(a). They would only do so if, in light of all relevant factors, the integrative links previously forged with the host Member State had been broken. By reiterating the principle, first enunciated in Tsakouridis , that “all relevant factors must be taken into account in each individual case”, the CJEU makes clear that this principle applies more generally. Thus an individual, fact-sensitive, assessment is always required when considering the impact of any factors capable of breaking continuity of residence. In relation to Article 28(3)(a), the CJEU had departed from the hard line it had taken in Onuekwere to Article 16(2) (dealing with acquisition of permanent residence). Given that one of the principles enshrined in EU law was that prison sentences should aim at reintegration into society and that the European Court of Human Rights had held that people in prison continue to enjoy their rights whilst in prison, whether integrative links have been broken by a period of imprisonment will be a fact-sensitive question.

22. In respect of the application of Article 28(3)(a) to the claimant’s case, Ms Hirst considered that Mr Palmer was wrong to say that the Tribunal should confine itself to facts as they were at the date of decision. Integration can only sensibly be judged after the period of prison was over. The test was an ongoing one. If Mr Palmer was correct, the respondent could determine the level of protection by ensuring the expulsion order was always taken before the end of the period of imprisonment. The question of the level of protection (ten years or not) and the question of proportionality both stood to be assessed at today’s date.

23. Ms Hirst said that she was not seeking to rely as evidence of integration on the claimant’s period of imprisonment, but rather on the fact she had accrued ten years’ residence (including five years during which she acquired permanent residence) before she had gone to prison. Given that backdrop, it cannot be said that her relatively short period of imprisonment broke the integrative links she had previously forged with the UK, especially given that whilst in prison she had participated in a series of courses, including drug awareness, and anger management courses designed to facilitate her rehabilitation and resettlement into society; and that her period of imprisonment had come to an end in July 2010 and her criminal licence had expired in May 2011, since when she had been living in the community, had complied with all reporting restrictions and had not reoffended. She was employed and therefore exercising Treaty rights directly. She now had a much more positive living situation with her godmother and her godmother’s child. She was now in a steady job and there was a very positive reference from her employer.

24. Ms Hirst urged the Tribunal not to accept Mr Palmer’s attempt to argue that the CJEU drew a distinction between ‘good’ and ‘bad’ integration. That was contrary to the Court’s approach to the conduct of Mr Tsakouridis who had been involved in narcotics in and out of Germany. The purpose of the Directive was to facilitate free movement; beyond that it was silent. Someone meeting the conditions of the Directive as a family member is automatically someone who is integrated, simply by being here. Ms Hirst argued that once someone had acquired a right to permanent residence, he or she should be deemed to be integrated.

25. Ms Hirst took issue with Mr Palmer’s attempt to argue that the claimant was still at risk of reoffending. The NOMS report of August 2009 recorded the risk of her causing serious harm in the future to be medium, but that was completed by a probation officer who had not met the appellant. In the later October 2009 OASys report the risk of her reoffending was assessed as “low”. There was no evidence of drug use since she had been given immigration bail. It had not been possible to obtain a further OASys or NOMS assessment as she was no longer subject to supervision. Her prison licence had expired. Dr Smith in February 2009 said she posed a low risk to other children and was content to recommend she had supervised contact with her children. Whilst the psychiatric report of April 2009 had said there may well be abnormal features, there was no finding of mental illness. This was the

rare case where prison seems to have worked. It was very difficult to say the claimant was a “genuine, present and sufficiently serious threat”.

Our Assessment

26. We are grateful for the submissions we had from Ms Hirst and Mr Palmer both of whom also presented observations to the CJEU when MG was pending before the CJEU. Not least because of the great care they took, we will say something about those parts of their submissions dealing with the meaning of the Court’s eventual judgment, but as matters have turned out, it is not necessary for us to do so in order to decide this case. That is because we have concluded, having taken account of the further evidence now available, that the claimant is entitled to succeed in her appeal even on the basis of the lowest or “baseline” level of protection.

27. Mr Palmer has submitted that in respect of the highest level of protection (Article 28(3)(a)) the Upper Tribunal is constrained by its terms to confine ourselves to the facts as they stood at the date of the decision to deport. We think he is wrong about that. Once an appeal lies against that decision, then, via Schedule 1 to the 2006 EEA Regulations, the Tribunal has power under s.85(4) of the Nationality, Immigration and Asylum Act 2002 to “consider evidence about any matter which [it] thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.” The requirement set out in Article 28(3)(a) identifies the criterion which must be applied when an expulsion decision is being made against a person who has for ten years’ residence (specifying that such a decision must be based on imperative grounds of public security); it does not seek to identify the matters relevant to the substance of the expulsion decision itself. But even if we had considered Mr Palmer was correct to say that the key date for deciding an appeal based on Article 28(3)(a) was the date of decision, he himself accepts that the same did not apply either in relation to the second-highest or baseline levels of protection. In respect of these levels, he agreed that the Upper Tribunal was entitled to take into account matters as they stood now, only a few months short of four years since the date of decision (8 July 2010). Since we have decided the claimant is entitled to succeed in her appeal even on the baseline level of protection, we need say no more about this matter.

Assessment of the claimant’s circumstances

28. At the date of decision (in July 2010) the claimant was still in prison, under Immigration Act powers having only just served her sentence. Whilst she was in prison the family court granted her the right to have supervised contact with her children in public, but on 5 July 2011, in response to a local authority application, a family court judge decided to restrict contact to indirect contact and also to make a prohibited steps order, stating that the appellant had yet to show she could maintain a stable, drug-free life. Bearing in mind that at that time the family court had before it several reports, including a NOMS Report of August 2009 rating her risk of causing serious harm in the future as medium, a MAPPA report rating her a high risk to her own children and children in general, we consider that at that time the respondent was more than justified in concluding that there were serious grounds of public policy and public security for deporting her. Given the action taken by the family court, it could not be said that it was in the best interest of her children for her to play a significant role in their lives and thus to be able to remain in the UK.

29. At the date on which this Tribunal decided to make an order for reference (August 2012), we made clear (as noted already) that we regarded the decision on whether there were serious grounds of public policy and public security to be “finely balanced”. By then there had been a psychiatric report by Dr Coffrey (dated 23 January 2012) which concluded that her behaviour in prison had been generally settled and that there was an improvement in her mental state, but Dr Coffrey’s prognosis

for her future rehabilitation in the community was stated as being largely dependent on whether on release she would engage with various support agencies and be able to abstain from illicit drugs.

30. The position now, in May 2014, however, is strikingly different. Although the claimant still only has indirect contact with her children, there are no longer any ongoing family court proceedings and in a signed letter dated 15 April 2014 her husband (who lives in a different area of the UK) has written stating that despite separation he and the claimant maintain a friendship relation and "we have been trying to solve together concerns about the education of our three sons….I believe that if we not in the same country anymore that could bring emotional damage for our sons, and I'm very concerned about it…it is my wish that [MG] can stay near us….our family has been through lots of emotional damage, specially our boys, and all we are asking is the right of being a free family again".

31. Mr Palmer did not seek to dispute the claimant's evidence that she had frequent, almost daily, contact with her children by telephone. There were affectionate letters from them to her.

32. From a position where the claimant had been a user of class A drugs, including heroin, and had lived on her own and had associated with other users of class A drugs and where there was no clear evidence that the improvements in her mental state and behaviour in prison would be sustained once released, the claimant's evidence before us was that she no longer used drugs. We note of course that we did not have any evidence from probation or medical professionals who had given reports on her earlier, but we did have the clear evidence from her employer that she has been in work for over six months and has been a good employee who had not missed a day's work for over 6 months. Although we attach less weight to them because they are close personally, we also attach credence to the written statements from the claimant's godmother and the latter's son, which confirm that the claimant lives with them and no longer associates with drug users. Mr Palmer did not seek to challenge any of this evidence.

33. The claimant has still never made a clear statement of remorse accepting her guilt, but we take the thrust of her evidence before us to be that she accepts that at the time of the offence her life was falling apart. She was no longer voicing outright denial of guilt.

34. Mr Palmer has sought to argue that on the basis of the professional assessments made of the claimant's risk of reoffending, although the October 2009 MAPPA report was several years old, its risk assessment looked forward five years and saw her as continuing to be a medium risk for the duration of that unfinished period. We do not think that a report of that vintage can be treated as determinative of the claimant's present risk of reoffending. It is a factor we have taken into account, but one which we consider outweighed by the current state of the evidence.

35. From the claimant's evidence she still has family members in Portugal but her links with them are not strong.

36. It must be borne in mind that Article 27(1) states that "previous criminal convictions shall not in themselves constitute grounds for taking [deportation] measures" and Article 27(3) stipulates that "the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". Further, under the same provision, justifications that are "isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted". This last provision stands in sharp contrast to the more rigorous proportionality test to be applied to foreign criminals seeking to rely on Article 8 of the ECHR, where it is legitimate to take account of the public interest and the principle of deterrence in general: see Shahzad (Art 8: legitimate aim) [2014] UKUT 85 (IAC) at paragraph 66.

37. We consider that we must exercise a certain degree of caution as regards the current state of the evidence before us shedding light on the claimant's propensity to reoffend and any risks she might

pose to her own children or children in general. Ms Hirst has correctly pointed out that given expiry of the claimant's prison licence, and the cessation of family court proceedings, there is no statutory obligation on any of the probation or child professional bodies to provide an expert report. Nevertheless it would have been open to those instructed by the claimant to have commissioned a report from an independent social worker or child professional. At the same time, the prescribed grounds for expulsion being a restriction on a fundamental freedom under EU law (see recitals 22 and 23), it is for the state to justify such restriction and to show that serious grounds of public policy or public security exist. The claimant's representatives sent the further evidence relied on 22 April 2014. The SSHD did not lodge a response. We have not been told of any move by the SSHD to make enquiries in the claimant's case relating to whether she continued to pose a present, genuine and sufficiently threat affecting one of the fundamental interests of society. As observed already, Mr Palmer did not challenge any of the evidence relating to the claimant's current circumstances.

38. Even without evaluating the extent of the claimant's "social and cultural integration" (to use the phraseology of Article 27(4)) we cannot see that the SSHD can show that the Article 27(2) requirement (that the individual concerned must represent "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society") has been met in this case. In our judgment the evidence does not disclose that the claimant poses such a threat.

39. Even if we were wrong to find that the SSHD is not entitled to deport the claimant on grounds of public policy and security (the "baseline" level of protection), that would still not justify our dismissing her appeal because the SSHD now accepts that prior to her imprisonment she has acquired a permanent right of residence through a combination of her short period of work in 1998/9 and her status as the family member of an EEA national exercising Treaty rights (her husband) and so is entitled to be considered under the second highest level of protection. That was not accepted at the date of decision but was conceded by the respondent at the original hearing before us. Accordingly, in order to justify the deportation decision, it would be necessary for the respondent to show the existence of " serious grounds of public policy and security" under Article 28(2) (emphasis added). Although at the time we made the order of reference we saw the decision as to whether the claimant could benefit from this second level of protection as finely balanced, we have already made clear that we consider the position now to be strikingly different. The claimant is also now (once again) an EEA national exercising through employment her treaty rights in her own right, not just as a family member.

40. Accordingly we are satisfied that the decision we should re-make is to allow the claimant's appeal as it has not been shown that there are either grounds or serious grounds of public policy or public security justifying the deportation decision.

Interpretation of the CJEU ruling on Article 28(3)(a)

41. In light of the above it is not necessary for us to seek to resolve the dispute between the parties as to the proper interpretation of the answers given by the court in MG to questions asked about whether prison breaks continuity of residence for the purposes of being able to establish the requisite ten year period of residence.

42. Prior to receiving further evidence regarding the claimant's up-to-date circumstances, but after receipt of the judgment of the Court, we wrote to the parties asking them to comment on a possible tension in the text of the answers given by the Court and an apparent contradiction between:-

(1) its seemingly categorical statement in the first part of paragraph 33 that "periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) …"; and

(2) its seemingly defeasible statement in the second half of the same sentence (reinforced in paragraphs 35-36) that “in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision.”

Read together with (1), the Court’s ruling earlier in the same judgment that the ten year period of residence “must be calculated by counting back from the date of the decision ordering that person’s expulsion” (paragraph 24), would appear on its face to entail that if in the previous ten years prior to the decision to deport, the individual had any period of imprisonment, he cannot qualify for this (the highest) level of protection; the necessary qualifying period of residence is irretrievably broken because “periods of imprisonment cannot be taken into account”. Such a reading would, of course, give rise to some “hard cases”, as exemplified by the example of a person who in the last ten years had been sentenced to just one or two days’ imprisonment; but there would be hard cases on any reading, and, on the facts of such a case, it would be stretching matters to imagine that the Member State could demonstrate, as required by the integration and overriding proportionality requirements set out in Article 27, that such a person represented “a genuine, present and sufficiently serious threat to one of the fundamental interests of society”. It is clear from the Court’s ruling on the same day in Onuekwere in respect of Article 16(2), that the prospect of “hard cases” did not deter it in any way from reaching an unequivocal finding that” the periods of imprisonment in the host Member State… cannot be taken into consideration in the context of the acquisition …of the right of permanent residence for the purposes of that provision.”

43. One strong factor in favour of reading (1) as meaning that prison categorically breaks the qualifying period of residence is that if Article 28(3)(a) was to be read as simply an integration test (as seems to be implied, albeit in different ways, by both Miss Hirst’s and Mr Palmer’s submissions), there would be effectively two integration tests, one under Article 28 and one under Article 27, which, because Article 27 applies to all three levels of protection, would might be thought to render the overall protection scheme incoherent.

44. In one respect it is possible to reconcile a categorical reading of (1) with the defeasible language of (2) if the Court meant by the latter only to confirm that its ruling in Tsakouridis was a special case, turning on the significance of absences abroad, rather than on in-country events such as imprisonment, and if it was solely to recognise the absence abroad scenario that it chose to state that “in principle” (rather than categorically) continuity of residence could be maintained. That is one possible construction of paragraph 27 read in isolation. However, that would be to disregard the fact that the Court at paragraphs 33 and 28 was clearly talking about interruption of the continuity of residence by a period of imprisonment in the host Member State (not by absence abroad) and that is reinforced by the reference in paragraph 29 to the question of whether a period of imprisonment is “capable of interrupting the continuity of the period of residence” involved.

45. Doubtless compelled by such difficulties, both Ms Hirst and Mr Palmer, albeit in different ways, contend that on the Court’s reasoning imprisonment did not necessarily break the period of residence of ten years for the purposes of qualifying for enhanced protection under Article 28(3)(a) and that this provision was essentially just an integration test (albeit one premised according to Mr Palmer on prison breaking continuity of residence). Both pointed, tellingly, to paragraph 36 as a clear articulation of such a position.

46. We have some difficulty with accepting their submissions as they stand because if the ten year requirement is essentially just an integration test, then it makes no sense for the Court to have stated in the first sentence of paragraph 33 that “periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 23(3)(a).” Such language on its face is in the same categorical mode used in Onuekwere and neither Counsel suggested that in

respect of the latter the Court's words were meant to be read defeasibly. How can it be accepted that periods of imprisonment do not necessarily interrupt the continuity of residence in calculating the ten years, when it has previously been stated that they "cannot be taken into account"? Miss Hirst quite rightly emphasised the fact that the Court's approach to interpretation of EU legislation is highly teleological, but, as already intimated, it is not obviously consistent with the purpose of this Directive to apply Article 28(3)(a) as essentially just an integration test, when such a test is already applied by Article 27.

47. If the ten year residence test is essentially just an integration test, then it must be a conceptually different test from the five year residence test established by the Court's ruling of the same date in Case C-378/12, Onuekwere [2014] ECR I-0000. According to this test, it is " clear from the very terms and the purpose of Article 16(2) of Directive 2004/38,[that] periods of imprisonment cannot be taken into consideration for the purposes of the acquisition of a right of permanent residence." (para 22). That ruling is expressed without any qualification.

48. Despite our difficulties, we have concluded that a categorical reading of (1) cannot be what the Court meant or at least that what it must have had in mind was to draw a distinction between a positive taking into account and a negative interruption. If the Court in MG had meant to convey by the terms "cannot be taken into account" that periods of imprisonment automatically disqualify a person from enhanced protection under Article 28(3)(a) protection, it would not have seen fit to proceed in paragraph 35 to accept as a possibility that the "non-continuous" nature of a period of residence did not automatically prevent a person qualifying for enhanced protection. Nor would it have chosen in paragraph 38 to describe periods of imprisonment as "in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder…" It would have had to say that, if they fall within the 10 year period counting back from the date of decision, periods of imprisonment always prevent a person qualifying for enhanced protection. In addition, what the Court goes on to say in paragraph 37 about the implications of the fact that a person has resided in the host Member State during the 10 years prior to imprisonment is clearly intended to underline that even though such a person has had a period of imprisonment during the requisite 10 year period (counting back from the date of decision ordering the expulsion: see para 27) it is still possible for them to qualify for enhanced protection and in this regard their prior period of residence "may be taken into consideration as part of the overall assessment referred to in paragraph 36 above". We also bear in mind, of course, as did Pill LJ in Secretary of State for the Home Department v FV (Italy) [2012] EWCA Civ 1199 at [42] that in Tsakouridis the CJEU Grand Chamber did not consider the fact that Mr Tsakouridis had spent a substantial period of time in custody in Germany in the year prior to the decision to expel him (taken on 9 August 2008) as defeating his eligibility for enhanced protection under Article 28(3)(a). Nevertheless (and this is where we consider Mr Palmer right and Miss Hirst wrong), the fact that the Court specifies that "in principle" periods of imprisonment interrupt the continuity of residence for the purposes of meeting the 10 year requirement can only mean that so far as establishing integrative links is concerned such periods must have a negative impact.

49. Had it been necessary to our reaching a decision in the claimant's case, we would have given serious consideration to making clear in our decision that if there was an application for permission to appeal our decision to the Court of Appeal, we would have been likely to grant it, in order for an important point of principle, namely the precise meaning of regulation 21(4) of the 2006 Regulations and Article 28(3)(a) in the context of a period of residence which includes imprisonment, to be addressed by a national court superior to our own and in a case in which the issue was material. The

issue of deportation of foreign criminals is of compelling public importance. This would also enable the Court of Appeal to consider to what extent its judgment in Secretary of State for the Home Department v FV (Italy) (which considered that Article 28(3)(a) was essentially just an integration test) requires modification in the light of the CJEU rulings in Onuekwere and MG . It would also afford an opportunity for that Court to rule on whether, applying the doctrine of indirect effect, the requirement of regulation 21(4) that an EEA national must have resided in the UK "for a continuous period of at least ten years prior to the relevant decision" (emphasis added) is inconsistent with the CJEU ruling in MG , which clearly contemplates that even someone with "non-continuous" residence over that 10 year period can qualify for enhanced protection under Article 28(3)(a).

50. For the above reasons, we conclude:

The First-tier Tribunal erred in law and its decision has been set aside;

The decision we re-make is to allow the claimant's appeal against the deportation decision.

Signed Date

Upper Tribunal Judge Storey

Appendix

JUDGMENT OF THE COURT (Second Chamber)

16 January 2014 (*)

(Request for a preliminary ruling – Directive 2004/38/EC – Article 28(3)(a) – Protection against expulsion – Method for calculating the 10-year period – Whether periods of imprisonment are to be taken into account)

In Case C-400/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Immigration and Asylum Chamber), London (United Kingdom), made by decision of 24 August 2012, received at the Court on 31 August 2012, in the proceedings

Secretary of State for the Home Department

v

M.G.,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: M. Wathelet,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 June 2013,

after considering the observations submitted on behalf of:

– M.G., by R. Drabble QC, L. Hirst, Barrister, and E. Sibley,

– the United Kingdom Government, by A. Robinson, acting as Agent, assisted by R. Palmer, Barrister,

– the Estonian Government, by M. Linntam and N. Grünberg, acting as Agents,

– Ireland, by E. Creedon, acting as Agent, assisted by D. Conlan Smyth, Barrister,

– the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,

– the European Commission, by M. Wilderspin and C. Tufvesson, acting as Agents,

having decided, after hearing the Advocate General's Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 28(3)(a) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and – corrigenda – OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

2 The request has been made in proceedings between the Secretary of State for the Home Department (‘the Secretary of State’) and Ms G. concerning a decision to expel her from the United Kingdom.

Legal context

European Union law

3 According to recitals 23 and 24 in the preamble to Directive 2004/38:

‘(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.

(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child of 20 November 1989.’

4 Article 2 of Directive 2004/38, entitled ‘Definitions’, states:

‘For the purposes of this Directive:

1. “Union citizen” means any person having the nationality of a Member State;

2. “family member” means:

(a) the spouse;

…

3. “host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.’

5 Article 3 of that directive, entitled ‘Beneficiaries’, provides:

‘1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

…’

6 Chapter III of that directive, entitled ‘Right of residence’, comprises Articles 6 to 15. Article 6 concerns the ‘[r]ight of residence for up to three months’ and Article 7 makes provision, subject to certain conditions, for a ‘[r]ight of residence for more than three months’.

7 In Chapter IV of Directive 2004/38 (‘Right of permanent residence’), Article 16, which is entitled ‘General rule for Union citizens and their family members’, provides:

‘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. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.’

8 In Chapter VI of Directive 2004/38 (‘Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health’), Article 27, which is entitled ‘General principles’, provides:

‘1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later

than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.'

9 Article 28 of Directive 2004/38, entitled 'Protection against expulsion', which also falls within Chapter VI, provides:

'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 security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years; or

(b) are a minor, except if the 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.'

United Kingdom law

10 The Immigration (European Economic Area) Regulations 2006 [('the Immigration Regulations')] transpose Directive 2004/38 into national law.

11 Regulation 21 of the Immigration Regulations, entitled 'Decisions taken on public policy, public security and public health grounds', transposes Articles 27 and 28 of Directive 2004/38 into national law.

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 Ms G. is a Portuguese national. On 12 April 1998, she entered the United Kingdom with her husband, who is also a Portuguese national. Ms G. was employed from May 1998 to March 1999. In March 1999, she gave up work to have her first child, who was born in June 1999. Ms G. and her husband had two further children between 2001 and 2004. Ms G. was supported financially by her husband during that period of inactivity and up until the couple's separation in December 2006. Despite that separation, Ms G. and her husband are still married.

13 In April 2008, Ms G.'s children were placed in foster care following a report by hospital staff that injuries to one of the children were non-accidental. On 21 November 2008, a family court judge determined that Ms G. had been responsible for injuries caused to one of her children. On 27 August

2009, having been convicted on one count of cruelty and three counts of assault by beating a person under 16 years, Ms G. was sentenced to 21 months' imprisonment.

14 Following Ms G.'s conviction, her husband was awarded custody of the children. While she was in prison, Ms G. was granted the right to have supervised contact with her children in public. In April 2010, however, the local authorities stopped that contact and, in August 2010, made an application for contact to be suspended. On 5 July 2011, a family court judge decided to maintain the supervision order, to restrict contact to indirect contact and also to make a prohibited steps order, stating that Ms G. had yet to demonstrate that she could maintain a stable, drug-free lifestyle.

15 On 11 May 2010, while she was still in prison, Ms G. applied to the Secretary of State for a certificate of permanent residence in the United Kingdom. On 8 July 2010, the Secretary of State refused the application and ordered that Ms G. be deported on grounds of public policy and public security pursuant to Regulation 21 of the Immigration Regulations.

16 On 11 July 2010, Ms G. remained in custody despite having served her sentence, owing to the Secretary of State's decision ordering her deportation. In that decision, the Secretary of State took the view, first, that the enhanced protection against expulsion provided for in Article 28(3)(a) of Directive 2004/38 is dependent on the integration of the Union citizen into the host Member State and that such integration cannot take place while that citizen is in prison. Secondly, the Secretary of State found that Ms G. was not entitled to the intermediate level of protection against expulsion because she had not shown that she had acquired a right of permanent residence and, in any event, there were serious grounds of public policy and public security for expelling her. Thirdly, the Secretary of State found that, a fortiori, Ms G. was not entitled to the basic level of protection against expulsion.

17 Ms G. appealed to the First-tier Tribunal (Immigration and Asylum Chamber) ('the First-tier Tribunal'), which allowed the appeal on 10 January 2011, holding that Ms G. had resided in the United Kingdom for a period of over 10 years prior to the deportation order and that the Secretary of State had failed to demonstrate the existence of imperative grounds of public security. However, the First-tier Tribunal also found that, in the absence of evidence to show that her husband had been employed or that he had otherwise exercised rights conferred by the FEU Treaty, Ms G. had not proved that she had acquired a right of permanent residence for the purposes of Directive 2004/38.

18 The Secretary of State brought an appeal before the Upper Tribunal (Immigration and Asylum Chamber) ('the referring court') against the decision of the First-tier Tribunal. By decision notified on 13 August 2011, the referring court set aside the decision of the First-tier Tribunal on the ground that it was contrary to precedent.

19 In the proceedings before the referring court, the Secretary of State accepted that, in May 2003, Ms G. had acquired a right of permanent residence for the purposes of Directive 2004/38 and that she had not subsequently lost that right. However, the parties to the main proceedings continue to take different positions both as regards the method of calculating the 10-year period referred to in Article 28(3)(a) of Directive 2004/38 and as regards the assessment, in the circumstances of the case, of serious grounds of public policy or public security as referred to in Article 28(1) and (2) of that directive.

20 In September 2011, while the proceedings before the First-tier Tribunal and the referring court were still under way, the family court proceedings came to a close after Ms G.'s husband moved to Manchester (United Kingdom). Ms G. remained in custody until 20 March 2012.

21 In those circumstances, the Upper Tribunal (Immigration and Asylum Chamber), London, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does a period in prison following sentence for commission of a criminal offence by a Union citizen break the residence period in the host Member State required for that person to benefit from the highest level of protection against expulsion under Article 28(3)(a) of Directive 2004/38 … or otherwise preclude the person relying on this level of protection?

2. Does reference to “previous ten years” in Article 28(3)(a) [of Directive 2004/38] mean that the residence has to be continuous in order for a Union citizen to be able to benefit from the highest level of protection against expulsion?

3. For the purposes of Article 28(3)(a), is the requisite period of 10 years during which a Union citizen must have resided in the host Member State calculated

(a) by counting back from the expulsion decision; or

(b) by counting forward from the commencement of that citizen’s residence in the host Member State?

4. If the answer to Question 3(a) is that the 10-year period is calculated by counting backwards, does it make a difference if the person has accrued 10 years’ residence prior to such imprisonment?’

Consideration of the questions referred

Questions 2 and 3

22 By its second and third questions, which it is appropriate to examine first, the referring court asks, in essence: (i) whether the 10-year period of residence referred to in Article 28(3)(a) of Directive 2004/38 must be calculated by counting backwards (from the decision ordering the expulsion of the person concerned) or forwards (from the commencement of that person’s residence) and (ii) whether that period must be continuous.

23 In that regard, it should first be noted that the Court has found that, while recitals 23 and 24 in the preamble to Directive 2004/38 certainly refer to special protection for persons who are genuinely integrated into the host Member State, especially if they were born there and have spent all their life there, the fact remains that, in view of the wording of Article 28(3) of that directive, the decisive criterion is whether the Union citizen lived in that Member State for the 10 years preceding the expulsion decision (see Case C-145/09 Tsakouridis [2010] ECR I-11979, paragraph 31).

24 It follows that, unlike the requisite period for acquiring a right of permanent residence, which begins when the person concerned commences lawful residence in the host Member State, the 10-year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of the decision ordering that person’s expulsion.

25 Secondly, the Court has also found that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that, in order to determine whether a Union citizen resided in the host Member State for the 10 years preceding the expulsion decision – the decisive criterion for granting enhanced protection under that provision – all relevant factors must be taken into account in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative

duration and the frequency of those absences, and the reasons why the person concerned left the host Member State, which may establish whether those absences involve the transfer to another Member State of the centre of the personal, family or occupational interests of the person concerned (Tsakouridis, paragraph 38).

26 Those findings were intended to explain to what extent absences from the host Member State during the period referred to in Article 28(3)(a) of Directive 2004/38 prevent the person concerned from enjoying the enhanced protection provided for in that provision and were based on the prior finding of fact that that provision makes no reference to any circumstances which are capable of interrupting the 10-year period of residence needed to acquire the right to that protection (see, to that effect, Tsakouridis, paragraphs 22 and 29).

27 Given that the decisive criterion for granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 is the fact that the person concerned resided in the host Member State for the 10 years preceding the expulsion decision and that absences from that State can affect whether or not such protection is granted, the period of residence referred to in that provision must, in principle, be continuous.

28 In the light of all of the foregoing, the answer to Questions 2 and 3 is that, on a proper construction of Article 28(3)(a) of Directive 2004/38, the 10-year period of residence referred to in that provision must, in principle, be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned.

Questions 1 and 4

29 By its first and fourth questions, the referring court asks, in essence, whether Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is capable of interrupting the continuity of the period of residence for the purposes of that provision and may, as a result, affect the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment.

30 In that regard, the Court has already found that the system of protection against expulsion measures established by Directive 2004/38 is based on the degree of integration of the persons concerned in the host Member State and that, accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be, in view of the fact that such expulsion can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the FEU Treaty, have become genuinely integrated into the host Member State (see, to that effect, Tsakouridis, paragraphs 24 and 25).

31 The Court has also found, when interpreting Article 16(2) of Directive 2004/38, that the fact that a national court has imposed a custodial sentence is an indication that the person concerned has not respected the values of the society of the host Member State, as reflected in its criminal law, and that, in consequence, the taking into consideration of periods of imprisonment for the purposes of the acquisition, by members of the family of a Union citizen who are not nationals of a Member State, of the right of permanent residence as referred to in Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence (Case C-378/12 Onuekwere [2014] ECR I-0000, paragraph 26).

32 Since the degree of integration of the persons concerned is a vital consideration underpinning both the right of permanent residence and the system of protection against expulsion measures established by Directive 2004/38, the reasons making it justifiable for periods of imprisonment not to be taken into consideration for the purposes of granting a right of permanent residence or for such periods to be regarded as interrupting the continuity of the period of residence needed to acquire that right must also be borne in mind when interpreting Article 28(3)(a) of that directive.

33 It follows that periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 and that, in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision.

34 As regards the continuity of the period of residence, it has been stated in paragraph 28 above that the 10-year period of residence necessary for the granting of enhanced protection as provided for in Article 28(3)(a) of Directive 2004/38 must, in principle, be continuous.

35 As for the question of the extent to which the non-continuous nature of the period of residence during the 10 years preceding the decision to expel the person concerned prevents him from enjoying enhanced protection, an overall assessment must be made of that person’s situation on each occasion at the precise time when the question of expulsion arises (see, to that effect, Tsakouridis, paragraph 32).

36 In that regard, given that, in principle, periods of imprisonment interrupt the continuity of the period of residence for the purposes of Article 28(3)(a) of Directive 2004/38, such periods may – together with the other factors going to make up the entirety of relevant considerations in each individual case – be taken into account by the national authorities responsible for applying Article 28(3) of that directive as part of the overall assessment required for determining whether the integrating links previously forged with the host Member State have been broken, and thus for determining whether the enhanced protection provided for in that provision will be granted (see, to that effect, Tsakouridis, paragraph 34).

37 Lastly, as regards the implications of the fact that the person concerned has resided in the host Member State during the 10 years prior to imprisonment, it should be borne in mind that, even though – as has been stated in paragraphs 24 and 25 above – the 10-year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of the decision ordering that person’s expulsion, the fact that the calculation carried out under that provision is different from the calculation for the purposes of the grant of a right of permanent residence means that the fact that the person concerned resided in the host Member State during the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment referred to in paragraph 36 above.

38 In the light of the foregoing, the answer to Questions 1 and 4 is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment. However, the fact that that person resided in the host Member State for the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **On a proper construction of Article 28(3)(a) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, the 10-year period of residence referred to in that provision must, in principle, be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned.**

2. **Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment. However, the fact that that person resided in the host Member State for the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken.**

[Signatures]

* Language of the case: English.

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[1] Regulation 24(5) provides that “Where such a deportation order is made against a person but he is not removed under the order during the two year period beginning on the date on which the order is made, the Secretary of State shall only take action to remove the person under the order after the end of that period if, having assessed whether there has been any material change in circumstances since the deportation order was made, he considers that the removal continues to be justified on the grounds of public policy, public security or public health”. Article 33(2) provides that “If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issue, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued”.