Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Onuekwere (imprisonment – residence) [2012] UKUT 00269(IAC)

Heard at Field House	**Determination Promulgated**
On 1 November 2011	.....

Before
LORD BANNATYNE
UPPER TRIBUNAL JUDGE JORDAN

Between

Mr Nnamdi Onuekwere

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mark Henderson, Counsel, instructed by Birnberg Peirce & Partners, Solicitors
For the Respondent: Mr Richard Hopkin, Home Office Presenting Officer

This decision refers to the Court of Justice of the European Union the questions set out at the end of it.

ORDER FOR REFERENCE
TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

1. The appellant is a citizen of Nigeria who claims to have arrived in the United Kingdom in 1999 as a visitor. On 2 December 1999, he married an Irish national. They have 2 children. It was at this moment that time commences to run in relation to the entitlements upon which the appellant now seeks to rely. On 5 September 2000, he was granted a residence permit permitting him to remain in the United Kingdom as the spouse of an EEA citizen exercising Treaty rights in the United Kingdom. The residence permit was expressed to expire on 5 September 2005.

2. On 26 June 2000, upon his conviction of having intercourse with a mental patient whilst a member of the hospital staff, the appellant was sentenced to 9 months imprisonment suspended for 2 years. He completed the period of suspension without imprisonment.

3. On 30 September 2003, whilst passing through United Kingdom border controls from France, the appellant was arrested for assisting the illegal entry of a passenger in the car in which he was travelling. He was bailed to appear at court but absconded. He was convicted of the offence on 18 August 2004. On 16 September 2004, he was sentenced to 2 years and 6 months imprisonment. Between the period 2 December 1999 (his marriage to a Union citizen/EEA national) and 16 September 2004, a period of about 4 years 10 months elapsed, a period just short of five years' residence before imprisonment.

4. The appellant was released on 16 November 2005. On 18 November 2005, the Secretary of State made a decision to make a deportation order. On 1 November 2006, the appeal against deportation was allowed on the basis that the appellant was the husband of an EEA national exercising Treaty rights.

5. On 26 December 2007 when the appellant's motorcar was stopped, he was found to be unlawfully in possession of false documentation for which offence he was convicted on 14 April 2008. On 8 May 2008 he was sentenced to 2 years 3 months imprisonment. The sentencing judge described the offence as undermining the integrity of identity in the context of undermining the application process for jobs. It was noted that, by that time, he had already spent 109 days in custody suggesting that he had been in detention since sometime in January 2008. The period between his release on 16 November 2005 and his next imprisonment amounted to about 2 years

and 2 months. He was released on 6 February 2009, about 2 years and 9 months before the hearing before us.

6. The Secretary of State made the second decision to deport him on 6 February 2009. By a decision made on 29 June 2010, the Upper Tribunal allowed the appellant's appeal, the Judge finding that although the appellant's wife had exercised Treaty rights between April 1998 and May 2004 and had therefore acquired a permanent right of residence, the appellant had not because his imprisonment in 2004 prevented its being acquired. Nevertheless, even on the basis of the baseline level of protection afforded to EEA nationals and their family members, the Judge found the appellant's circumstances outweighed the public interest in removing on public policy grounds, notwithstanding the offending. Following the decision, the appellant sought a permanent residence card.

7. On 24 September 2010, the Secretary of State refused his application for a permanent residence card under the Immigration (European Economic Area) Regulations 2006 (2006 No 1003) which implemented Directive 2004/38/EC. That decision gave rise to a right of appeal which the appellant exercised. The appeal was heard on 20 June 2011. The Judge found the appellant was entitled to a residence card but not a right of permanent residence based on 5 years continuous residence. The Secretary of State did not, however, appeal the Judge's finding that the appellant was entitled to a residence card.

8. The appellant appealed to the Upper Tribunal asserting that the Judge had made an error of law in refusing him the permanent residence card by reason of the breaks in continuity of residence resulting from the periods he had spent in prison. He submitted that the decision of the Grand Chamber in Case C-145/07 Tsakouridis stated that imprisonment did not break continuity but was merely a factor to be taken into account. Whilst Tsakouridis was a case dealing with the highest level of protection afforded to those with a 10-year period of residence, by parity of reasoning, the case also determined the correct approach to those entitled to a permanent right of residence. The case came before us to decide whether the Judge's approach was legally flawed.

9. The appellant has never spent a continuous period of 5 years in the United Kingdom since 2 December 1999 if the periods of his imprisonment are excluded from the calculation. It goes without saying that if they are included, the period that has elapsed since his marriage on 2 December 1999 is now in excess of 12 years. We should add that there has never been a suggestion in

this case that either the appellant or his spouse has been absent from the United Kingdom so as to break their continuity of residence.

10. If the periods of imprisonment are excluded from calculation but the periods of physical freedom are aggregated (albeit non-continuous), the period is in excess of 5 years.

Case law and Discussion

11. In order to understand the significance of the relevant case law, it is important to note that the impact of imprisonment upon the calculation of the period of 5 years residence not only affects the entitlement to a permanent right of residence and the documentation that recognises it but also affects the level of protection against removal that is afforded to Union citizens/EEA nationals or their family members under Article 28 of Directive 2004/38/EC, as transposed into United Kingdom law by reg. 21 of the Immigration (European Economic Area) Regulations 2006 (2006 No 1003). It is in this context that the issue has usually been considered both in national and European level. Reg. 21 is as follows:

> Decisions taken on public policy, public security and public health grounds
> 21.—(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.

12. The 2006 Regulations set out three levels of protection; (1) the basic level of protection for anyone who is the subject of an EEA decision taken on public policy, public security or public health grounds; (2) a higher of protection for a person who has acquired a permanent right of residence; for such a person '*serious grounds*' have to be shown; and (3) the highest level of protection for a person with 10 years' residence prior to the relevant decision; for such a person '*imperative grounds*' have to be shown. In respect of all three (but clearly crucial to a person with only the basic protection) any decision must comply with the principles set out at paragraphs (5) and (6) above.

13. It is to be noted that persons with a permanent right of residence may include family members of a Union citizen as well as Union citizens themselves, see reg. 15(1)(b). In contrast, the category of those entitled to the exception of *imperative grounds of public security* is not stated to include family members of EEA nationals. This distinction also appears in the Directive, Article 16, paragraph 2 and Article 28, paragraphs 2 and 3:

Article 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.
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

twelve 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.

Article 28
1. Before taking an expulsion decision on the 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 ten years…

14. In refusing the appellant's application for a permanent residence card, the Secretary of State accepted he was a family member of an EEA national. However, on the basis of decisions made in the national courts that periods spent in prison do not count for the purposes of periods of residency, the Secretary of State decided in her letter of 24 September 2010 that the appellant had not resided in the United Kingdom for a continuous period of 5 years.

15. It is common ground between the parties that the consistent authority of the Court of Appeal (by whose decisions we are bound in the absence of supervening CJEU authority) and the Tribunal is that periods spent in custody do not count towards periods of residence for the purposes of the Directive or the 2006 domestic Regulations made in pursuit of it. In Carvalho and Omar [2010] EWCA Civ 1406, Maurice Kay LJ, with whom the other members of the Court agreed, stated:

7. Nevertheless, in HR (Portugal) v SSHD [2009] EWCA Civ 371, [2010] 1 WLR 158, it was held that the same requirement of lawfulness governs both the 5 year and the 10 year qualifying periods. This assimilation is based on the recitals to the Citizens' Directive which emphasise that the protection applies to persons who have "availed themselves

> of the rights and freedoms conferred on them by the Treaty" and "have become genuinely integrated into the host Member State" (recital 23); and "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" (recital 24). Stanley Burnton LJ said (at paragraph 21):
>
> "... These recitals show that what was intended was a progression in the restrictions on expulsion, depending on the degree of integration of a person in the country in which he is present as demonstrated by the duration of his residence in the exercise of Treaty rights."

8. Thus, "legally" means "in the exercise of the rights and freedoms conferred by the Treaty".

16. The Upper Tribunal (Immigration and Asylum Chamber) applied these principles in Ogunyemi (Imprisonment breaks continuity of residence) [2010] UKUT 164 (IAC).

17. Whilst the appellant accepts the authority of the decisions in the Court of Appeal, he submits that these authorities have been undermined by the decision of the Court of Justice in Tsakouridis [2010] EUECJ Case C-145/09; [2011] Imm AR 276 given on 23 November 2010. Carvalho and Omar was heard in the Court of Appeal on 16 November 2010 but judgment was not given until 14 December 2010, that is after Tsakouridis had been published. However, neither Carvalho and Omar nor Ogunyemi in 2011 makes reference to Tsakouridis.

18. In order to consider this point fully, it is necessary to examine the facts upon which the decision in Tsakouridis was made. The case was classified as one involving a Union citizen who had resided in Germany for the past 10 years, thereby engaging the highest level of protection, namely whether the decision could only be made on imperative grounds of public security. Whilst it may be that different considerations might be held to apply to 10-year cases, Tsakouridis provides the Court of Justice's thinking so far on the issue of duration.

19. Mr Tsakouridis was a Greek national, born in Germany on 1 March 1978, and was aged 32 when the CJEU made its decision. In October 2001 he acquired a permanent residence permit in Germany. From March to mid-October 2004, a period of about 9 months, he ran a pancake stall on the island of Rhodes in Greece. He then returned to Germany. In mid-October 2005 he travelled to Rhodes and resumed running the pancake stall. On 22 November 2005 the Amtsgericht Stuttgart (Local Court, Stuttgart) issued an international arrest warrant against him. On 19 November 2006 he was arrested on Rhodes having spent 13 months voluntarily absent from Germany and was

transferred to Germany on 19 March 2007 in custody. His total absence amounted to some 16 months.

20. Mr Tsakouridis was subsequently convicted by the Landgericht Stuttgart (Regional Court, Stuttgart) on 28 August 2007 on 8 counts of illegal dealing in substantial quantities of narcotics as part of an organised group. He was sentenced to 6 ½ years imprisonment.

21. By decision of 19 August 2008, the Regierungspräsidium Stuttgart (Regional Administration, Stuttgart), determined that Mr Tsakouridis had lost his right of residence in Germany and was liable to expulsion to Greece on 'imperative grounds of public security'. The high threshold applied by the Regierungspräsidium reflected the fact that he had resided in Germany for in excess of 10 years and benefitted from enhanced protection. The Regierungspräsidium considered that the interference with Mr Tsakouridis' private and family life was justified in the interests of the prevention of disorder and expulsion was proportionate.

22. Mr Tsakouridis brought proceedings before the Verwaltungsgericht Stuttgart (Administrative Court, Stuttgart) against the decision of the Regierungspräsidium, relying on the fact that most of his family were living in Germany and the loss of his right of entry to, and residence in, Germany was disproportionate. The Verwaltungsgericht held that there were no 'imperative grounds of public security' to justify expulsion. However, on appeal, the Higher Administrative Court of Baden-Württemberg referred a series of questions to the Court of Justice for a preliminary ruling. They included:

> '2. Under what conditions can the right to enhanced protection against expulsion achieved following 10 years of residence in the host Member State laid down in Article 28(3)(a) of Directive 2004/38 subsequently be lost? Is the condition for the loss of the right of permanent residence laid down in Article 16(4) of the directive to be applied *mutatis mutandis* in that context?
> 3. If Question 2 is answered in the affirmative and Article 16(4) of the directive applies *mutatis mutandis*: is the enhanced protection against expulsion lost by lapse of time alone, irrespective of the reasons for the absence?
> 4. Also if Question 2 is answered in the affirmative and Article 16(4) of the directive applies *mutatis mutandis*: is an enforced return to the host Member State in the context of criminal proceedings before expiry of the two-year period capable of maintaining the right to enhanced protection against expulsion, even where following that return the fundamental freedoms cannot be exercised for a considerable time?'

23. In its judgment, the Court of Justice noted that Article 28(3)(a) of Directive 2004/38, while making the enjoyment of enhanced protection subject to the person's presence in the Member State for 10 years preceding the expulsion measure, was largely silent as to the circumstances which are capable of interrupting the period of 10 years' residence for the purposes of the acquisition of the right to enhanced protection against expulsion laid down in that provision. The Court said:

> "30 Starting from the premise that, like the right of permanent residence, enhanced protection is acquired after a certain length of residence in the host Member State and can subsequently be lost, the referring court considers that it may be possible to apply by analogy the criteria in Article 16(4) of Directive 2004/38.
>
> 31 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, in particular when they were born there and have spent all their life there, the fact remains that, in view of the wording of Article 28(3)(a) of that directive, the decisive criterion is whether the Union citizen has lived in that Member State for the 10 years preceding the expulsion 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, the 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 the 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

integrating 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."

24. From the above, it would appear that Tsakouridis was *not* a case about *acquiring* rights by reason of residence in the host state but *losing* rights to the 10-year imperative grounds protection thus acquired by absence *from it*. It was permissible in this context to apply the provisions in Article 16.3 and 16.4 above (which deal with the acquisition of rights derived from continuous residence) as shedding light on the circumstances where continuity of residence might be broken by absence. Importantly, although Mr Tsakouridis was sentenced to 6 ½ years imprisonment, this period did not feature in the consideration provided by the Court of Justice. This was because it had already been found he had resided in the host country for a substantial period (plainly longer than 10 years) and the Court was considering whether the periods of absence from Germany broke the continuity of residence prior to his imprisonment sufficient to engage the highest level of protection.

25. The break in the continuity of presence was predicated on a *departure* from the host country, not *remaining within it* whilst serving a prison sentence. Thus Tsakouridis does not deal with the effect of imprisonment in the host country as a means of breaking continuity in other circumstances.

26. The principal point made in Tsakouridis was that it is for the national court to determine what constitutes a break in the continuity of residence, applying the words of the Directive that short periods, such as an absence of not more than 6 months a year do not automatically break continuity and that longer breaks up to maximum of 12 months are justifiable where particularly good or important reasons are provided or even longer where the claimant is required by his national law to perform national service. These examples cover breaks in continuity for which the claimant may be excused without any misconduct on his part being raised against him - temporary absence, health, vocational training, a foreign posting or where he is required to leave (e.g., national service), but they shed little light on the impact of imprisonment.

27. Since the decision in Tsakouridis and the hearing of the appeal before us, the Court of Justice has considered the concept of lawful residence in the context of Article 16 of the Directive. In Ziolkowski (Freedom of movement for persons) [2011] EUECJ Case C-424/10 (21 December 2011), the Court concluded in paragraphs 46 and 47 that the concept of legal residence implied by the terms 'have resided legally' in Article 16(1) of Directive 2004/38 should be construed as meaning a period of residence which complies with the conditions laid down in the Directive, in particular those set out in Article 7(1). Consequently, a period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in Article 7(1) of Directive 2004/38 could not be regarded as a 'legal' period of residence within the meaning of Article 16(1).

28. This decision is consistent with the decision of the English Court of Appeal in Okafor & Ors v SSHD [2011] EWCA Civ 499 (20 April 2011) in which Thomas LJ, with whom the other Lord Justices agreed, considered the case of a wife and mother, a Union citizen, who before her death in 2007, had not fulfilled the conditions in Article 7(1) and was not therefore a "qualified person" within the meaning of reg. 6 of the UK Regulations which transposed the Directive. After the mother's death, the father and the children remained lawfully in the United Kingdom; the period of five years for which their residence permit had been granted expired, in accordance with its terms, on 26 June 2008. The appellants contended that both the father and the children could rely upon Article 16 and the fact that they had "resided legally" with Union citizens "for a continuous period of five years in the host Member State" and thereby acquired the right of permanent residence. The Court of Appeal rejected that submission, stating that it was not tenable to suggest that if a person managed to stay in a Member State beyond the period of five years, even though he has no right under the Directive to permanent residence, Article 16 provided a self-standing right. The lawful residence contemplated by Article 16 of the Directive was residence which complied with Community law requirements specified in the Directive and did not cover residence lawful under domestic law. Accordingly, the father and the children had no rights of legal residence under EU law which gave rise to rights under Article 16 to permanent residence.

29. More recently still, the Tribunal in Jarusevicius (EEA Reg 21 – effect of imprisonment) [2012] UKUT 120 (IAC) considered the case of a Lithuanian citizen who had been convicted of a highly organised scheme for the disposal of stolen vehicles. The

appellant had not spent a continuous period of 5 years in the United Kingdom prior to his imprisonment and had not acquired a right of permanent residence under the Directive. The Tribunal decided that Tsakouridis neither required nor entitled the Tribunal to reach a different conclusion. The Tribunal continued:

> "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 [2000] ECR 1-957, Dogan [2005] ECR 1-6237);
> 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 (Orfanopolous and Oliveri [2004] ECR-1 5257);
> 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) [2009] UKAIT 00024 and the Upper Tribunal of the IAC in Ogunyemi (imprisonment breaks – continuity of residence) Nigeria [2011] UKUT 00164 (IAC) (also called 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 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 Court of Appeal decision pending any reference that is made by that court."

30. There are a number of competing arguments in relation to the impact of imprisonment on a period of residence in the host state. On the one hand, imprisonment does not result in absence from the host state but it subverts the underlying purpose of the Directive, that is, the acquisition of rights as a result of an increasing integration into the host state by developing positive social, domestic and working relationships within it. None of these aims is achieved by serving a term of imprisonment as a result of misconduct which itself runs directly contrary to the development of a positive engagement with the host country. This is the point made by Maurice Kay LJ in the extract provided in paragraph 9 of this determination with reference to recitals 23 and 24 of the Directive.

31. On the other hand, it might be thought that the touchstone of residence is being physically present in the United Kingdom and a person serving a sentence in the United Kingdom inevitably remains present here. It might seem a curious result if a person who has spent, say, 20 years in a British prison has never been resident in the United Kingdom during his period of imprisonment.

32. The facts of this appellant's appeal can be summarised in this way:

    i) The period of residence here exercising Treaty rights from 2 December 1999 (his marriage to a Union citizen/EEA national) and 16 September 2004 lasted 4 years and 10 months.

    ii) The period between his release on 16 November 2005 and his next detention in January 2008 (sentenced 14 April 2008) amounted to 2 years and 2 months.

    iii) He was next released on 6 February 2009.

    iv) The Secretary of State's decision to make a deportation order against him was made on 18 March 2009, after a further month of residence. His appeal against deportation was allowed on basic protection grounds, that is, on public policy grounds.

    v) If these periods of residence are aggregated, excluding the time in prison, they amount to a period in excess of 7 years. That period is more than the 5 years residence required for a right of permanent residence, (Article 16(2) and 28(2)).

vi) Even if the periods of residence if aggregated exceed 5 years, there is not a continuous period of 5 years.

vii) If the period of imprisonment is included as a part of the appellant's period of residence, the appellant had spent 9 years and 3 months by the time the Secretary of State made the decision under appeal.

viii) A period of more than 10 years has now elapsed since his marriage if the period of imprisonment is included.

ix) The appellant has spent a total of 3 years and 3 months in prison.

33. We consider that, as a result of the decision in Tsakouridis it is no longer clear whether imprisonment breaks continuity of residence for the purposes of *acquiring* the benefit of the higher (or highest) level of protection based upon 5 (or 10) years' residence. We conclude that a clear understanding of the EU law provisions is necessary for us to determine this appeal.

34. In deciding whether to make such a reference we have had regard to the Note on references from national courts for a preliminary ruling (2011/C 160/01, 28 May 2011).

35. We conclude:

(i) The facts of this present case have been determined by the First-tier Tribunal.

(ii) The EU law issue will be determinative of the approach to be adopted by the national courts in relation to whether the appellant has acquired a permanent right of residence but, incidentally, the level of protection to be provided to Union citizens or their family members, one of whom has been sentenced to a period of imprisonment.

(iii) The issue is a familiar one and has been the subject of a series of decisions made by the courts and tribunals in England and Wales.

(iv) Whilst the decisions of the national courts and tribunals are clear pre-Tsakouridis, the subsequent decision of the Court of Justice in Tsakouridis raises questions which the Tribunal cannot confidently resolve. In Jarusevicius, the Upper Tribunal found it difficult to reconcile the conclusion of the AIT in LG and CC with the conclusion of the CJEU in Tsakouridis and suggested that, where the issue was central to the outcome, it

might be necessary to consider making a reference to the CJEU.

(v) We sent out an earlier version of this determination and invited and received submissions on it and the questions we were minded to pose in a reference. None of the parties has opposed the making of a reference.

36. Accordingly we have decided to make an order for a reference to the CJEU on the issues of Community law on which we need assistance. The questions are annexed to this reference as a Schedule.

Signed

Andrew Jordan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date
11 July 2012

SCHEDULE OF QUESTIONS TO BE REFERRED TO THE COURT OF JUSTICE

(i) In what circumstances, if any, will a period of imprisonment constitute legal residence for the purposes of the acquisition of a permanent right of residence under Article 16 of the Citizens Directive 2004/38?

(ii) If a period of imprisonment does not qualify as legal residence, is a person who has served a period of imprisonment permitted to aggregate periods of residence before and after his imprisonment for the purposes of calculating the period of 5 years needed to establish permanent right of residence under the Directive?