Upper Tribunal
(Immigration and Asylum Chamber)

Ogunyemi (imprisonment breaks continuity of residence) Nigeria [2011] UKUT 00164 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 24 March 2011

Determination Promulgated

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Before

THE HON. MR JUSTICE SILBER
SENIOR IMMIGRATION JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SUNDAY ADEOLA OGUNYEMI

Respondent

Representation:

For the Appellant: Mr A Alabt of Peniel Solicitors
For the Respondent: Mr K Kyriacou, Home Office Presenting Officer

Time spent in prison however short is to be disregarded in the calculation of the period required to obtain a permanent right of residence with the consequence that that period has to start again on release.

DETERMINATION AND REASONS

1. The Secretary of State for the Home Department appeals against the decision of Immigration Judge Neuberger promulgated on 15 December 2010 by which he allowed an appeal by Mr Sunday Adeola Ognyemi ("the respondent") against the decision of the Secretary of State issued on 22 September 2010. By that decision, the Secretary of State had refused to grant the respondent a residence card as confirmation of a permanent right to live in the United Kingdom under the requirements of Regulation 15(1)(f) of the Immigration (European Economic Area) Regulations 2006 ("the Regulations"). The issue raised on this appeal is whether the time spent by the respondent in prison for a criminal offence breaks "a continuous period of five years" which is the qualifying period for obtaining the right to reside in the United Kingdom permanently under Regulation 15(1)(f) of the Regulations. We should also add that we are not concerned with any other issue such as whether the respondent can be or should be deported because that is not a matter which is before us.

2. Before considering submissions it is necessary to set out the statutory provisions. Regulation 15 which is the significant one has the heading "Permanent right of residence". The relevant part of it states that:

> "(1) The following persons shall acquire the right to reside in the United Kingdom permanently.
>
> (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years
>
> …
>
> (f) a person who
>
> (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
>
> (ii) was, at the end of that period, a family member who has retained his right of residence."

The Immigration Judge explained that the respondent was born in Nigeria and had entered the United Kingdom without leave in the year 2000. He married a Dutch EEA national in September 2002 and he was granted permission to stay as a family member. The marriage lasted for seven and a half years and the respondent and his wife were divorced in January 2010.

3. On April 2006, the respondent had been sentenced to twenty months' imprisonment for using a false instrument. On 5 March 2010 an application had been made on behalf of the respondent for a residence card as confirmation of his right to reside in the United Kingdom. He

applied as a non-European Economic Area national former family member of his Dutch wife. He sought a retained right of residence on the basis of having completed five years' residency in the United Kingdom in accordance with the Regulations. The application was refused on the basis that the Secretary of State stated that the respondent had not completed five years' residence in the United Kingdom. The Immigration Judge recorded that he had heard evidence from the respondent who had stated that he had started a prison sentence on 30 August 2006 and he was released on 3 January 2007 having spent a period of four months and three days in prison. He also had received credit for thirty days remand time and police custody time. It is accepted on behalf of the respondent that if the period of time which the respondent spent in custody is ignored, he would not qualify for the residence card under Regulation 15(1) (f). Thus the issue is whether any time spent by the respondent in custody does not count towards the five-year period of residence required for the acquisition of a permanent right.

4. Mr Alabt, the solicitor for the respondent, submitted to the Immigration Judge that while the Secretary of State relied on the Court of Appeal judgment in HR (Portugal) v the Secretary of State [2009] EWCA Civ 371 the Court of Appeal in that case had ruled that it was only a European Economic Area national who having been convicted of a crime and who was detained for a significant period of imprisonment who would be deemed not to be a resident in the United Kingdom for the purposes of Regulation 21(4)(a). The Immigration Judge explained that the respondent's case before him stressed the importance of the time in prison being "a significant period". This was then developed by Mr Alabt when he appeared in front of the Immigration Judge when he submitted that the respondent had only been in prison for four months which could hardly be described as "a significant period". It was said that the similar reasoning applied under Regulation 15(1)(f) with the consequence that the fact that the respondent had been in prison for four months did not break his continuous period of residence in the United Kingdom which was required under the Regulations.

5. The case for the Secretary of State is that any period of imprisonment irrespective of its length broke the period necessary to qualify for a residence card. The Immigration Judge explained his conclusions in paragraph 10 of his decision where he said:

> "I have carefully considered the evidence of the appellant and all the documents on the file and have paid special attention to the Court of Appeal judgment in the case of HR (Portugal). Having considered all these matters carefully, I have concluded that Mr Ibitayo did indeed make a correct submission in that this appellant had not served a substantial period in prison but was there for merely four months. Accordingly, such a period spent in prison, does not break the continuity of his stay in the United Kingdom and it is quite clear that he is indeed entitled to permanent right of

residence in the United Kingdom in accordance with the provisions of Regulation 15. Accordingly, I allow the appeal."

6. The ground of appeal of the Secretary of State is that any time spent in prison breaks the continuity of the respondent's stay in the United Kingdom. It has also been said on behalf of the Secretary of State that the judge misapplied the case law of HR (Portugal) when he concluded that the mere fact that the respondent spent only four months in prison did not break the continuity of stay. It is also submitted that subsequent cases such as the case to which we will refer shortly of the Tribunal in LG & GC v Secretary of State [2009] UKAIT 00024 [2009] Imm. A.R. 691 shows that any period in custody breaks the chain for the continuity of the stay. It is common ground that the issue that has to be resolved by this Chamber is whether the time spent in custody of just over four months breaks the chain so that it cannot be said that this appellant had "resided in the United Kingdom in accordance with the Regulations for a continuous period of five years" as set out in Regulation 15(1) (f).

7. It is also necessary to deal with two points which have been made on behalf of the respondent today of which the first is the point that the time of four months is not a substantial period and therefore does not break the chain of causation. Second, that as the previous cases were deportation cases, they are not relevant to the interpretation of Regulation 15(1) (f).

8. The first case to be considered is HR (Portugal) v Secretary of State in which HR, a citizen of Portugal, claimed to have arrived in the United Kingdom in 1992. Although he was in possession of a national insurance number, there was no evidence he had worked in this country. He did, however, have a long serious criminal record and it was contended on his behalf that because he had been in the United Kingdom for ten years but much of it in prison, he could be deported only on imperative grounds of public security. The Court of Appeal rejected that submission and held that the time spent by HR in prison could not count for that purpose.

9. The case itself has limited value because of the narrow basis on which it proceeded. The Court of Appeal approached HR's case on the basis that he was a person who "has never worked here and has evidently devoted his whole life to crime" in the words of Sedley LJ at paragraph 44. Very importantly, counsel for HR accepted that his time in prison could not count for the purpose of establishing a right of permanent residence which had to be legal residence, which is "for the purpose of availing himself of the rights and freedoms conferred by the Treaty". Indeed, he accepted the Asylum and Immigration Tribunal finding that HR never did satisfy that condition even when not in prison. The case advanced on behalf of HR was the requirement of a ten year period was different since Article 28.3(a) was not expressly subject to a similar requirement of lawfulness. Therefore "residence" for the purposes of Article 28.3(a) required no more than 10 years' physical presence even if a significant part of that time had been spent in custody.

10. The next case in which this matter was considered was LG & CC which was heard by the Asylum and Immigration Tribunal presided over by the Senor President, Carnwath LJ. Early in the judgment he repeated what he had previously said when the LG (Italy) case was before the Court of Appeal (LG (Italy) v Secretary of State [2008] EWCA Civ 190) which was that:

> "14… the 2006 Regulations have introduced a new hierarchy of levels of protection, based on criteria of increasing stringency.
>
> (1) A general criteria that removal may be justified 'on the grounds of public policy, pubic security or public health';
>
> (2) A more specific criterion, applicable to those with permanent rights of residence, that they may not be removed 'except on serious grounds of public policy, or public security';
>
> (3) The most stringent condition applicable to a person 'who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision' who may not be removed except on 'imperative grounds of public policy'."

Carnwath LJ pointed out that the Regulation provided no further guidance on the meaning of those words.

11. The Tribunal proceeded to consider cases such as HR (Portugal) to which we have referred and it concluded at paragraph 69:

> "For these reasons we conclude that there is nothing in this line of cases which would justify us from departing from the principle which was conceded and formed the starting-point for the decision in HR (Portugal). We proceed on the basis therefore that time in prison does not count towards the five year period of residence required for acquisition of a permanent right."

12. It is appropriate to stress at this stage that the wording of the Tribunal showed that this principle was of universal relevance and application. It did not mean that there would be a different rule where the applicant was being liable to be deported from the situation where he is seeking a residence card. The matter came before the Court of Appeal again in the case of Valentine Batista v Secretary of State for the Home Department [2010] EWCA Civ 896, in which a Portuguese national who had been convicted of various crimes for which he received lengthy sentences sought to avoid deportation on the basis he had a right of permanent residence in the United Kingdom on account of his residence. The only reasoned judgment of the Court of Appeal was given by Carnwath LJ and who said at paragraph 12 in connection with Regulation 15:

> "It is now settled law following HR (Portugal) that time spent in prison does not count towards residence for these purposes."

Again we stress two points about this. First, he is saying that this rule is a matter of universal application not limited to deportation cases and second he is not adopting or providing any support for the test put forward by the Immigration Judge that the period spent in custody only did not count towards residence if it was substantial.

13. The final case in which this matter was considered was the conjoined cases of Caesar Carvalho v Secretary of State for the Home Department and Secretary of State for the Home Department v Omar Abdullah Omar [2010] EWCA Civ 1406 in which two appeals were listed together because it appeared that they raised the same issue, namely the extent to which time spent in prison may count towards a qualifying period for permanent residence under Regulation 15(1) (a) of the Regulations. It, however, became clear during the course of the hearing that in the case of Omar Abdullah Omar, the issue that had to be determined was rather different. What is important though in connection with the Carvalho case is that there was nothing said there which indicated that its approach only related to deportation cases. Maurice Kay LJ who gave the first judgment in that case explained at paragraph 18 that the submission that had been made on behalf of Carvalho was that his right to permanent residence under Regulation 15 was not broken by his imprisonment. That submission was rejected and after considering a number of cases in the European Union as well as HR (Portugal), the conclusion of Maurice Kay LJ appears at paragraph 27 where he said that:

> "What needs to be kept in mind is that a person in the position of Mr Carvalho is not being deprived of a fundamental right as a result of his imprisonment. He simply fails to qualify for the enhanced protection which is given to those who have spent their time in the host State exercising Treaty rights."

14. Again it is worth pointing out there that what has been said by Maurice Kay LJ was expressed to be of general application and it was not limited to deportation cases, especially where he was talking about the enhanced protection that is in fact being given. The only other reasoned judgment was given by Longmore LJ who agreed and he made a number of comments about the length of time that has to be spent in prison for it not to qualify. He explained that it had been suggested on behalf of Carvalho that the court should face up to the question whether a short term of imprisonment on the part of the EEA worker during his five years means the time needed to establish the permanent right had to begin anew after his time in custody has concluded. Longmore LJ said at paragraph 47:

> "In my view HR (Portugal) does, in reality, conclude that question because, once one recognises the purpose of according to a worker a right permanently to reside in a EU state is that of encouraging the integration of such workers into the population of the host state and that such purpose is not achieved or achievable in prison, it must follow that a worker is not legally resident in the host state as an EEA worker during the period of imprisonment and that any period which includes that period of

> imprisonment cannot be part of the necessary 'continuous' period for the purpose of calculating the five years' continuous legal residence necessary to acquire the right permanently to reside here."

15. Stanley Burnton LJ agreed but this passage shows clearly that the approach of Immigration Judge Neuberger was incorrect in suggesting that the critical feature was whether or not the imprisonment was for a substantial period.

16. The position therefore is that it is quite clear from the cases that a person who is sentenced to imprisonment is not to be regarded as living continuously in this country during the period when he is in custody and that period has to be disregarded with the consequence that the five year continuous period starts afresh. We believe that if the authorities to which we have referred had been shown to Immigration Judge Neuberger, he would have reached the same conclusion as the one at which we have arrived.

17. For these reasons the challenge by the Secretary of State succeeds and we are required to remake the decision of the Immigration Judge. We reverse his decision. Accordingly the appeal is allowed.

Signed Date 1 April 2011

The Hon Mr Justice Silber
Sitting as Judge of the Upper Tribunal