**Asylum and Immigration Tribunal**

LG and CC (EEA Regs: residence; imprisonment; removal) Italy [2009] UKAIT 00024

**THE IMMIGRATION ACTS**

**Heard at Taylor House**
**On 22 and 23 April 2009**

**Before**

**LORD JUSTICE CARNWATH, SENIOR PRESIDENT**
**SENIOR IMMIGRATION JUDGE ALLEN**
**SENIOR IMMIGRATION JUDGE P R LANE**

**Between**

**LG**
**CC**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Secretary of State

**Representation:**

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|---|---|
| For Appellant LG: | Ms C. Hulse, Counsel, instructed by Messrs Duncan Moghal |
| For Appellant CC: | Mr M. Karnik, Counsel, instructed by Messrs Paragon Law |
| For the Secretary of State: | Mr T. Eicke, Counsel, instructed by the Treasury Solicitor |

*Time spent in prison does not count towards the acquisition of the level of protection afforded to an EEA national by regulation 21(4) of the Immigration (European Economic Area) Regulations 2006, even for a person who has a right of permanent residence in the United Kingdom.*

*A clear distinction is required to be drawn between the three levels of protection against removal introduced in the 2006 Regulations, each level being intended to be more stringent and narrower than the immediately lower test.*

## DETERMINATION AND REASONS

### *Introduction*

1. LG and CC are EEA nationals who the Secretary of State has decided should be deported from the United Kingdom. Their cases come before this Tribunal on the reconsideration of earlier determinations to dismiss their respective appeals against the Secretary of State's decisions.

2. Both of the appeals raise issues concerning the interpretation and application of Directive 2004/38/EC of 29 April 2004 ("the Directive") and the Immigration (European Economic Area) Regulations 2006 ("the Regulations"): specifically, what constitutes residence for the purpose of establishing a right of permanent residence in a host Member State (here, the United Kingdom); what constitutes residence for the purpose of being able to invoke the protection against expulsion provided by regulation 21(4)(a); and generally as to the correct means of undertaking the procedures laid down in regulation 21 in the case of the expulsion of EEA nationals. We have set out the relevant parts of the Directive and the Regulations in the Appendix to this determination. To avoid duplication, we have found it convenient to refer generally to the provisions and terminology of the Regulations, except where the nature of the discussion focuses attention on the Directive.

3. The appeal in the case of LG was remitted to this Tribunal by the Court of Appeal in LG (Italy) v Secretary of State [2008] EWCA Civ 190. The issues before the Court of Appeal were first, whether, on the basis that, as found by the AIT, LG satisfied the ten year residence criterion under the 2006 Regulations, the AIT had been entitled in law to hold that there were 'imperative grounds' of public security for removing him; and secondly under a respondent's notice, whether the AIT erred in law in holding that LG satisfied the ten year residence criterion in view of the fact that for the preceding seven years he had been in prison.

4. At paragraph 14 Carnwath LJ noted the following:

> "14. As appears from the emphasised words above in Regulation 21(1)-(4), the 2006 Regulations have introduced a new hierarchy of levels of protection, based on criteria of increasing stringency:
>
> (1) A general criterion that removal may be justified 'on the grounds of public policy, public 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 criterion, 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 security'.

> The Regulations provide no further guidance on the meaning of these expressions."

5. At paragraph 31, Carnwath LJ stated that on the basis of the relatively limited arguments that had been heard he would not feel confident in attempting to lay down any definitive guidance and would not in any event wish to do so until the Secretary of State had reached a more settled view both of the legal interpretation of the relevant provisions and the policy considerations governing their application in practice. The case was remitted to enable that to happen. CC's case has been listed at the same hearing, since it raises issues which overlap.

6. Some further insight into the legislative history of Article 28 of the Directive is to be found in the Common Position (EC) No 6/2004 adopted by the Council on 5 December 2003. There was a difference of view between the Council and the Commission as to the level of protection that was appropriate, as appears from the following comment:-

> "**Article 8:** The Council is almost unanimously against the absolute protection against expulsion, although it has accepted an increased protection for Union citizens who have been residing for a long period in the host Member State. After the acquisition of the right of permanent residence, Union citizens may be expelled only on serious grounds of public policy or public security."

7. The background was explained by the Commission in its communication to the European Parliament of 30 December 2003:-

> "**Article 28(2):** The Member States were almost unanimously opposed to absolute protection against expulsion for Union citizens and the members of their families who have acquired the right of permanent residence in the host Member State. However, they did agree to increased protection for Union citizens who have lived for a number of years in the host Member State. Consequently the compromise included in the common position takes the form of increased protection depending on the length of residence in the territory of the host Member State.
>
> Once they have acquired the right of permanent residence, citizens of the Union and the members of their families may be expelled only for particularly serious reasons of public policy or public security.
>
> After ten years of residence in the host Member State, Union citizens can be expelled only for overriding public security reasons...."

8. The fact that the final text represented a compromise may help to explain some of the difficulties in the drafting, but provides little help in resolving them.

9. We have been referred to the Commission's 2008 report to the Council and Parliament on the working of the Directive, to which we will return below (paragraph 53). At this stage, we note the following comment:-

> "Member States remain competent to define and modify the notions of public policy and public security. However, implementation may not trivialise the difference between

the scope of Article 28(2) and Article 28(3), or extend the concept of public security to measures which should be covered by public policy."

## *Facts and appeal histories*

*LG*

10. LG is a citizen of Italy who was born on 18 October 1969. He has lived in the United Kingdom since at least 1987. On 9 October 2001 LG was convicted at Leicester Crown Court of robbery and grievous bodily harm with intent. He was sentenced to twelve years' imprisonment, reduced on appeal to a term of nine years. On 10 November 2005 the Secretary of State decided that, in view of this conviction, it was conducive to the public good to make a deportation order in respect of LG. The basic facts of these offences were that, in the early hours of Saturday 29 January 2000, LG had followed a 66 year old retired man and attacked him from behind, inflicting serious head and facial injuries, including a fracture of the skull. LG robbed the victim of his wallet, leaving him lying in the road.

11. The sentencing judge described LG's offences as "a brutal, senseless, cowardly attack upon an elderly gentleman" and told the appellant that "you are a thoroughly dangerous man…I don't think for offences of robbery of this type it gets much worse".

12. LG's criminal history had begun in August 1996, when he was convicted of obtaining property by deception and ordered to pay compensation. The following month, he was convicted on two counts of obtaining services by deception and ordered to pay a fine, compensation and costs. A month after this, he was convicted of two counts of obtaining property by deception, for which he was ordered to pay a fine and compensation. In August 1997, LG was convicted on two counts of theft and one count of robbery, receiving a sentence of three years and 28 days' imprisonment.

13. LG appealed against the decision to make a deportation order. His appeal was heard at Newport on 15 December 2005 by the Tribunal ("the first Tribunal"). His appeal was dismissed. Reconsideration of the first Tribunal's decision was ordered under section 103A of the Nationality, Immigration and Asylum Act 2002 and, on 8 December 2006, it was found that the first Tribunal had materially erred in law. The reconsideration hearing was adjourned in order for findings of fact to be made and a fresh decision taken, whether to allow or dismiss the appeal.

14. The adjourned hearing took place at Newport on 5 January 2007 before an Immigration Judge and a non-legal member ("the second Tribunal"). In the determination which followed that hearing, the second Tribunal accepted "on the balance of the evidence" that LG had had ten years' continuous residence in the United Kingdom for the purposes of the appeal (paragraph 56). Accordingly, pursuant to regulation 21(4)(a), the decision that the appellant should be deported could not be taken "except on imperative grounds of public security".

15. At paragraph 67, the second Tribunal found that LG:

> "... has been convicted of grave offences and we find that the appellant has not shown that he does not pose a risk of further harm to the public by way of further offending and, moreover, that the evidence before us suggests that this appellant does pose a continuing risk particularly when he does not appear to accept that he committed the grave offence of grievous bodily harm with intent on this 66 year old man in the circumstances which were proved at the Crown Court".

16. The Tribunal concluded, at paragraph 69:

> "... that the Secretary of State has met the evidential burden of showing that there are imperative grounds of public security for removing this appellant from the United Kingdom to Italy".

17. On appeal to the Court of Appeal (see above), the Court held that the second Tribunal had erred in law in relation to its approach to the issue of whether, if the "ten year test" applied, the decision to remove LG could properly be said to be on imperative grounds of public security. The Court accordingly remitted the appeal to the Tribunal. In doing so, however, it expressly left open the question, raised by the Secretary of State for the first time before the Court of Appeal, whether the second Tribunal had been right to conclude that the level of protection based on ten years' residence applied at all in this case.

18. We will need to return in more detail to the evidence in LG's case when we have considered the legal issues.

*CC*

19. CC is a citizen of Portugal born on 15 November 2004. All that is known about his arrival in the United Kingdom is that he is said to have come here at some time in 2002. He was said to be seeking work. According to the Secretary of State's letter of 20 September 2007 to CC, the latter claimed that he had mostly been in full-time factory work since arriving in the United Kingdom. However, documentary evidence of CC's employment in the United Kingdom, in the form of payslips and P45 forms, commences only on 6 May 2004 and ends on 1 September 2006. National insurance records for 2006/2007 record CC as being unemployed from 11 September 2006. According to a Probation Service report filed on 15 February 2007, CC had appeared in the criminal courts on a total of eleven occasions since 2003, for a variety of offences including theft, possession of Class A drugs, damaging property, breach of a community order, being drunk and disorderly, being in possession of an offensive weapon and using a false instrument. This offending had been dealt with by means including conditional discharge, probation and three days' imprisonment. On 26 July 2006 CC was convicted at Grantham Magistrates' Court of exposure, sexual assault on a female and common assault. He was sentenced at Lincoln Crown Court to 22 months' imprisonment. The order for CC's imprisonment is dated 16 February 2007, although Mr Karnik's skeleton argument states that CC had been detained since January 2007. He was released on 17 October 2007.

20. On 20 September 2007 the Secretary of State decided to make a deportation order in respect of CC. He appealed against that decision and his appeal was heard at Nottingham by the Tribunal ("the original Tribunal") on 22 November 2007. The

original Tribunal dismissed CC's appeal. In its determination, the original Tribunal addressed Mr Karnik's submission that CC could be deported only on serious grounds of public policy or public security (regulation 21(3)) because CC had acquired a right of permanent residence under regulation 15(1)(a); that is to say, by residing in the United Kingdom for a continuous period of five years. Even leaving aside the problem of when CC arrived in the United Kingdom, it can immediately be seen that Mr Karnik's submission to the original Tribunal (and to us) stands or falls on whether the period of imprisonment spent by CC, following his convictions in July 2006, is to be taken into account in calculating the period of five years mentioned in regulation 15(1)(a).

21. It is relevant to observe that, before the original Tribunal, the argument appears to have been advanced that CC was a "worker or self-employed person who has ceased activity", so as to fall within regulation 15(1)(c). The original Tribunal rejected that submission, which was not advanced before us; rightly so, since it is plain that CC could not fall within the definition of "worker or self-employed person who has ceased activity", as defined in regulation 5.

22. The original Tribunal rejected the submission that CC had acquired a right of permanent residence in the United Kingdom. The original Tribunal found that "at best, the appellant has an extended right of residence in terms of Regulation 14 which like Regulation 15 is subject to Regulation 19(3)(b) which provides that the appellant can only be removed if justified on the grounds (as opposed to serious grounds) under Regulation 21(3) of public policy, public security or public health" (paragraph 28 of the determination). It was on that basis that the original Tribunal assessed the position of CC. Notwithstanding the fact that CC had entered what the original Tribunal considered to be an apparently stable relationship with a female British citizen, and had not committed any further offence since his release from prison, the original Tribunal was troubled by CC's failure to accept responsibility for the offences that had caused his imprisonment for 22 months. The original Tribunal did not accept that he had given up drugs and drinking to excess (paragraph 35). It did not consider that CC's relationship with his present partner had removed or reduced his propensity to re-offend, particularly bearing in mind that the offences were committed when CC was already in that relationship (paragraph 32). The original Tribunal concluded that CC represented a genuine and sufficiently serious threat such as to justify his deportation under regulation 21. CC's "past and escalating behaviour does in these particular circumstances establish a future risk to society such as to justify his deportation which is proportionate given the circumstances".

23. So far as Article 8 of the ECHR was concerned, the original Tribunal accepted at paragraph 40 that CC enjoyed family life with his partner but took into account the fact that the partner had told the original Tribunal "that if necessary, she would go to Portugal to join the appellant there, following her surgery for removal of an ovarian cyst. [The partner] is epileptic, however there was no suggestion that whatever medication and treatment she requires will not be available in Portugal." The original Tribunal concluded that CC's removal would not be disproportionate, either by reference to regulation 21(5) or, if different, by reference to Article 8.

24. The Tribunal refused to order reconsideration of the original Tribunal's decision but on 4 February 2008 such reconsideration was ordered by Wyn Williams J. Unfortunately, the judge did not explain his reasons for finding a material error of law. This is the basis upon which CC's appeal comes before us.

***The issues***

25. We now summarise the issues which arise under the Regulations. Ms Hulse, on behalf of LG, submitted that the second Tribunal was right to find that he could be deported only on "imperative grounds of public security" (regulation 21(4)), but that the second Tribunal materially erred in law in the way it approached that test. On behalf of CC, Mr Karnik submitted that the original Tribunal erred in law in concluding that CC had not acquired a right of permanent residence and therefore failed to consider whether there were "serious grounds of public policy or public security", which required his deportation (regulation 21(3)). For the Secretary of State, Mr Eicke submitted that neither LG nor CC had acquired a right of permanent residence and that LG had also failed to show ten years' residence for the purposes of regulation 21(4).

26. The following questions are therefore posed:-

    (a) What constitutes residence for the purposes of regulation 15(1)(a) – right of permanent residence after five years' "legal" residence in the United Kingdom?

    (b) What constitutes residence for the purposes of regulation 21(4) – protection from expulsion where there is ten years' residence?

    (c) What is the correct meaning and application of the test of serious grounds of public policy and public security under regulation 21(3)?

    (d) What is the correct meaning and application of the test of imperative grounds of public security under regulation 21(4)(a)?

    The word "legal" in question (a) is taken from Article 16. We will need to discuss further below (paragraphs 46ff) the precise content of that term.

27. Questions (a) and (b) both have what might be described as a *qualitative* and a *temporal* aspect. The qualitative aspect relates to the nature of the residence needed to be shown. In particular, the question arises as to whether time spent in prison in the United Kingdom following conviction for an offence can count towards the five year and ten year periods.

28. The temporal aspect raises two issues: first, in relation to the right of residence, the question of *commencement*, and secondly, in relation to the 10-year period, the *end-date.* The first relates to whether and to what extent regard is to be had to any period before 30 April 2006, when the Regulations came into force, or to any period before 2 October 2000, when the Immigration (European Economic Area) Regulations 2000

came into force. The significance of the 2000 Regulations arises from paragraph 6 of Schedule 4 to the 2006 Regulations (see Appendix A).

29. However, even if regard can be had to periods before those dates, the further question arises as to whether the right of permanent residence created by the Directive is one that can arise only on or after 30 April 2006. In OP (EEA; permanent rights of residence) Colombia [2008] UKAIT 00074, the Tribunal decided that question in the affirmative.

30. Before returning to the four questions, it is convenient to deal with two very recent authorities, which have narrowed the issues which we have to decide.

***Two recent Court of Appeal authorities***

*Lassal – commencement date*

31. The commencement issue has in the event been resolved for the purposes of this appeal by a concession by the Secretary of State, following a recent Court of Appeal judgment, Secretary of State for Work and Pensions v Lassal [2009] EWCA Civ 157.

32. Mr Eicke's initial stance was that the five year period for establishing a right of permanent residence could not begin to run until the coming into force of the 2000 Regulations. This itself was by reason of what he categorised as a domestic "concession", by which activity or residence in the United Kingdom in accordance with the 2000 Regulations fell to be counted for the purposes of the 2006 Regulations. (2006 Regulations Schedule 4, paragraph 6). Applying a similar approach to the ten year period, he would have submitted that it was necessary to show residence in the United Kingdom for ten years starting with the coming into force of the 2000 Regulations on 2 October 2000, and that therefore that provision could have no relevance until at earliest October 2010.

33. So far as concerns the five year period, Mr Eicke's initial approach was consistent with the decision of the Tribunal in OP (EEA; permanent right of residence) Colombia [2008] UKAIT 00074. There the Tribunal held that, since the right of permanent residence is a specific creature of the Directive, that right can crystallise only on or after 30 April 2006, even though the effect of paragraph 6 of Schedule 4 to the 2006 Regulations is to enable residence in the United Kingdom in accordance with the 2000 Regulations to count as residence in accordance with the 2006 Regulations.

34. On the second day of the hearings, Mr Eicke informed the Tribunal that the Secretary of State could not sustain these positions, in the light of the judgment of the Court of Appeal in Lassal. Although the decision in that case was to refer certain issues to the European Court of Justice, the Court made clear its view on the issue of commencement.

35. The case concerned a French national, Miss Lassal, who had resided in the United Kingdom as a worker since September 1999, save for ten months commencing February 2005 when she had returned to France for personal reasons. The question was whether she had acquired a permanent right to reside in the United Kingdom,

having regard to the fact that she had not completed five years' continuous residence on or after 30 April 2006. Arden LJ gave the judgment of the Court explaining the reasons for making the reference. In so doing she gave the Court's view of the Secretary of State's submissions as to commencement:-

> "3. The SSWP argues that the new right of permanent residence which art 16 confers applies only where a person has completed five years' continuous residence on or after the implementation date. The SSWP fears that, if a person can qualify under art 16 through residence wholly before the implementation date, art 16(4) would not apply. If art 16(4) does not apply, she could acquire permanent residence even if, subsequent to completion of five years' continuous residence, she had been outside the United Kingdom for two years or more.
>
> We would reject the SSWP's interpretation of art 16. The object of the Citizenship Directive is to facilitate the integration into the host member state of workers and others having strong links through residence with it. *To achieve that aim, it is necessary to interpret art 16 so that the right of permanent residence can be acquired on the implementation date in reliance on residence before that date.* This does not make art 16 impermissibly retrospective. Moreover, if the five years' residence has to be completed after that date, workers who may have built up many years' residence before the implementation date will be unable to take advantage of art 16 until (in the case of United Kingdom) 30 April 2011. The SSWP's interpretation would weaken rather than strengthen the right of residence of Union citizens, as the Citizenship Directive intends. As to art 16(4), we consider that this must apply consistently whether a person completes her qualifying period of continuous residence before, on or after the implementation date. Accordingly, in our judgment, art 16(4) must be interpreted so that it applies to both groups of persons." (emphasis added)

36. She went on to explain that the Court felt it right to make a reference, because some of the issues related to those considered by the House of Lords in McCarthy v SSHD [2008] EWCA Civ 641, in which a reference had been made and which was currently before the European Court (see paragraph 52 below), and because the Court of Appeal "does not consider the question of the temporal scope of the right of permanent residence to be *acte claire"* (paragraph 4 of the Reason for Making a Reference). Mr Eicke submitted that the judgment in Lassal should be treated as binding this Tribunal on the commencement issue. He accordingly conceded that, consistently with that judgment, regard could be had to periods before the coming into force of the 2000 Regulations.

37. Whether this Tribunal is formally bound by the judgment in Lassal is, perhaps, a moot point, given that the Court of Appeal in that case stayed the proceedings until the European Court of Justice has given a preliminary ruling on the question referred to it by the Court of Appeal. However, at the very least such a formal expression of view by the Court of Appeal is of great persuasive force. We are content therefore to accept the Secretary of State's concession. This means, by implication, that for the purposes of the present appeals, the Secretary of State has effectively conceded that, on this issue, OP is wrong. We proceed on that basis.

*HR (Portugal) v SSHD [2009] EWCA Civ 371*

38. After the hearings on 22 and 23 April, the Court of Appeal delivered its judgments in HR (Portugal) [2009] EWCA Civ 371. We invited the parties to make written

submissions as to the significance of this case for LG and CC. Mr Karnik and Mr Eicke have each supplied us with their submissions. Ms Hulse did not consider it necessary for her to do so. We have taken the submissions into account and will address them in due course. At this point it is unnecessary to do more than set out the essential facts and the conclusion of the Court.

39. HR was a citizen of Portugal who claimed to have come to the United Kingdom in 1992. Although in possession of a national insurance number, there was no evidence that he had worked in this country. By contrast, his criminal record was both long and serious. It was contended on his behalf that, because he had been in the United Kingdom for ten years (albeit much of the time in prison), HR could be deported only on imperative grounds of public security, as required by Article 28.3(a). The Court of Appeal rejected that submission. HR's time in prison could not count for that purpose. We shall return to his case in due course.

40. It is important for present purposes to note the relatively narrow basis on which the case 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 life to crime" (paragraph 44; Sedley LJ). Further, Counsel for HR accepted that his time in prison would not count for the purpose of establishing a right of permanent residence, which had to be "legal", that is "for the purposes of availing themselves of the rights and freedoms conferred by the Treaty". Indeed, he accepted the AIT's finding that HR never did satisfy that condition, even when not in prison (paragraph 31, Elias LJ). The case advanced on behalf of HR was that the 10-year period was different, since Article 28.3(a) was not expressly subject to a similar requirement of lawfulness; accordingly, for that purpose residence in Article 28.3(a) meant no more than ten years' physical presence, even if a significant part of that time had been spent in prison.

41. This interpretation was rejected by the Court. In the leading judgment, which held that the same requirement of "legality" governed both periods. Stanley Burnton LJ said:

> "21. Recital 23 is implemented in Articles 16 and 28.2; recital 24 is implemented in Article 28.3. What is significant in recital 24 is, first, the linkage with recital 23, signalled by "Accordingly" and the comparative adjective "greater" applied to "integration". "Integration" itself is explained in recital 23. It relates to "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". 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. In my view it follows that the Member States did not intend the restriction on expulsion envisaged in recital 24 to be applicable to someone who does not qualify for the protection envisaged by recital 23. It is clear from recital 24 that the reason for the restriction on the right of the state to expel someone who has been in this country for many years is his integration into this country. Recital 24 does not envisage that the restriction on expulsion to which it refers should be applicable to a person who has not availed himself of the rights and freedoms conferred on him by the Treaty, but has been compulsorily detained in this country.
>
> 22. If I read Article 28.3 literally, and assume that" resided" means no more than "been present in", there is no qualification to the period of his presence in this country, and no link with the requirements of Article 16 that he should have resided in this country

> "legally". It is clear from recital 23 that "legally" in Article 16 means "in the exercise of the rights and freedoms conferred on them by the Treaty, as was held by the Tribunal in *GN (EEA Regulations: Five years' residence) Hungary* [2007] UKAIT 00073. If the appellant's submission is well-founded, a person who has been in this country for 11 years, of which 8 were spent in prison, is not entitled to the right of permanent residence, and is therefore not protected by Article [28.2], but is protected by Article [28.3], and cannot be removed except on imperative grounds of public security. The consequence is manifestly inconsistent with recitals 23 and 24. So is the fact that it is impossible to consider the Appellant to have been integrated into this country as envisaged by recitals 23 and 24."

42. Thus the ratio of the decision is that, in respect of the quality of residence, no distinction is to be drawn between the five year and ten year periods, notwithstanding the absence from the latter of an express reference to the need for it to be "legal". That accords with the view we had reached before seeing the judgments.

43. As to whether time spent in prison can *ever* count towards the period of residence for either purpose, the judgments are more equivocal. In view of the concession made by counsel for HR, this question did not need to be decided. Elias LJ placed particular weight on that concession (paragraph 31), although he agreed generally with Stanley Burnton LJ. Sedley LJ expressed more doubt as to the question of interpretation but commented that:

> "... the facts of the present case can fall only on one side of the line, wherever it is drawn, since HR has never worked here and has evidently devoted his life to crime." (paragraph 44)

44. Therefore, we think that the case must be read as to some extent turning on its own facts and the submissions made. Furthermore, as will be seen, the Court was not referred to a line of European case-law which is potentially relevant, a least in relation to a claimant who (unlike HR) had qualified as a worker before his period of imprisonment. Accordingly, while acknowledging the guidance to be gained from the Court of Appeal judgments, we cannot avoid the need to reconsider the issues for ourselves.

45. We now turn to the four questions summarised above, to be addressed as questions of principle, before applying the answers to the facts of the two cases before us.

***Question (a) – What constitutes residence for the purposes of regulation 15(1)(a) – right of permanent residence after five years' legal residence in the United Kingdom?***

*"Legal" residence*

46. As already noted, we have used the expression "legal residence" in question (a) because Article 16.1 accords the right of permanent residence to "Union citizens who have resided legally for a continuous period of five years in the host Member State". Regulation 15(1)(a) does not use that or any equivalent term, but requires the five years' residence in the United Kingdom to be "in accordance with these Regulations".

It is necessary to consider whether there is any material difference between the two expressions.

47. The Secretary of State's position is that there is no difference**.** In order to acquire a right of permanent residence, a person must demonstrate that, during any period upon which it is sought to rely for the purpose of establishing the requisite five years' residence, he or she was in the United Kingdom, exercising a Treaty right; that is to say as a "qualified person" within the meaning of regulation 6 (e.g. a job seeker, worker or student) or as a relevant family member of such a person (within the scope of the Regulations). The expression used by the Regulations is consistent with recital 17 of the Preamble to the Directive which speaks in the same context of five years residence "in compliance with the conditions laid down in this Directive".

48. Ms Hulse and Mr Karnik, on the other hand, contended that this interpretation is too narrow. Although neither submitted expressly that mere physical presence in this country was sufficient, both contended that rights of residence in host Member States, deriving from the Treaty, were wider in nature and that, even if a person could not at any particular point in time be described as a "qualified person" etc., he or she might nevertheless be lawfully in the United Kingdom for the purposes of the Directive and the Regulations.

49. This issue in our view must now be regarded as settled, at least up to the Court of Appeal. We have already noted Stanley Burnton LJ's statement in HR (Portugal) that:

> "it is clear from recital 23 that 'legally' in Article 16 means 'in the exercise of the rights and freedoms conferred on them by the Treaty', as was held by the Tribunal in *GN (EEA Regulations: five years' residence) Hungary* [2007] UKAIT 00073" (paragraph 22).

50. The quotation from recital 23 is taken from the passage dealing generally with integration, and is arguably wider than the formula in recital 16, which relates to the right of permanent residence. That refers specifically to compliance with the conditions of *the Directive* rather than to rights under the Treaty. However, since the point had been conceded, and nothing turned on the different wording, there was no need for the Court to discuss it in any detail.

51. The same point was also addressed by the Court of Appeal in McCarthy v SSHD [2008] EWCA Civ 641. The appellant was a citizen of the Republic of Ireland and a British citizen. Whilst accepting that she was not a "qualified person" within the meaning of the Regulations, the appellant asserted that she had acquired a right of permanent residence under regulation 15 as an EEA national who had resided lawfully in the United Kingdom for a continuous period of five years. The Secretary of State refused her application for a residence permit and she appealed to the Asylum and Immigration Tribunal. Her appeal was dismissed on reconsideration. At paragraph 31 of the judgment, Pill LJ held:-

> "I agree with the conclusions of the Tribunal. The Directive creates and regulates rights of movement and residence for Union citizens. The lawful residence contemplated in article 16 is residence which complies with community law requirements specified in the Directive and does not cover residence lawful under domestic law by reason of United Kingdom nationality. Article 3 provides in terms

> that the Directive applies to Union citizens who reside in a Member State 'other than that of which they are a national'. The expression 'resided legally' in article 16 should, in my view, be read consistently with, and in the sense, of preamble 17 of the Directive, that is residence 'in compliance with the conditions laid down in this Directive'. The repeated use in the Directive of the expression 'host Member State' supports that conclusion. It indicates rights to be enjoyed in Member States other than that of nationality; the word 'host' suggests that the Union citizen is a 'guest', an inappropriate expression for persons in the state of their own nationality."

52. That passage confirms the position taken by the Secretary of State before us. It is necessary to observe that, on appeal to the House of Lords, a reference was made to the European Court of Justice ("ECJ") under Article 234 of the Treaty. The nature of the reference, however, makes it plain that the position of Mrs McCarthy, as a dual Irish and United Kingdom national, was considered to be of particular significance. The first question referred relates to whether such a person who has resided in the United Kingdom for her entire life can be said to be "a beneficiary" within the meaning of Article 3 of the Directive. The second question is whether "such a person" has resided legally within the United Kingdom for the purpose of Article 16 of the Directive. However, those points do not detract in our view from the authority of McCarthy, on the construction of the term "legally" for our purposes.

53. We should add for completeness that in the 2008 Report of the Commission, to which we have already referred, the only criticism levelled at the United Kingdom in respect of the implementation of the right of permanent residence (paragraph 3.7) relates to whether the government should have taken account of periods of residence acquired by EU citizens before the UK acceded to the EU. Immediately before that passage we find that "Hungary makes [the right of permanent residence] incorrectly conditional upon conditions related to the right of residence". Exactly what Hungary has done in this regard is unclear; but it would appear to involve making the retention of the right of permanent residence, once acquired, dependent upon continued compliance with the conditions that relate to the enjoyment of an EEA right of residence under Article 6 or Article 7 of the Directive (ie. precisely the rights contained in regulations 13 and 14). Article 16.4 expressly provides that, 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 16.4 is exactly transposed by regulation 15(2).

54. In the circumstances, had the Commission been in any way concerned with the wording of regulation 15(1)(a), one would have expected them to have said so in their Report. The fact that they have not done so provides some reassurance for the Secretary of State's interpretation.

*Imprisonment following period of work*

55. It is necessary now to deal with a number of authorities of the ECJ, which are relied upon by LG and CC in support of the proposition that imprisonment following criminal conviction may constitute residence for present purposes, at least in relation to a person who, prior to imprisonment, was a worker within the meaning of Article 39 of the Treaty. As already noted, these authorities were not cited to the Court in HR (Portugal), and were not relevant on the facts of that case.

56. The first material case, Nazli [2000] ECR I-957, was concerned with a particular context, that of Turkish nationals under the special rules (under the EEC Turkey Association Agreement) providing for their access to employment in Member States. However, as will be seen, it was treated in later cases as of general application under Article 39. The relevant provision was Article 6(1) of Decision No 1/80 of the EC-Turkey Association Council, which provides:

> "Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of the Member State:
>
> - shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;
>
> - shall be entitled in that Member State after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered under the employment services of that State, for the same occupation;
>
> - shall enjoy free access in that State to any paid employment of his choice, after four years of legal employment" [the "third indent"].

57. Mr Nazli, a Turkish national, had been in continuous paid employment in Germany since 1979, and from May 1989 he had held a work permit unlimited in duration and entirely unconditional. In 1992 he was implicated in a case of drug trafficking in Germany and detained pending trial from December 1992 to January 1994. In April 1994, he was sentenced to a term of imprisonment of 21 months, which was suspended in full because the offence had been an isolated one and Mr Nazli was well-integrated socially and had found work again immediately after his release. However, his application for an extension of his residence permit was later rejected by the department responsible for the control of aliens, which also simultaneously ordered his expulsion from Germany.

58. Amongst the questions referred to the ECJ was whether, having achieved the legal status conferred by the third indent of Article 6(1), a Turkish worker should forfeit that status subsequently if he is detained on suspicion of having committed a crime for which he is ultimately convicted and given a suspended prison sentence. The Court answered that question in the negative, holding that he did not lose his status as a worker during his imprisonment, provided he found a new job within a reasonable period after his release. The essential reasoning appears from the following passage of the judgment:

> "38. …Article 6 of Decision No 1/80 relates not only to the situation where a Turkish worker is in active employment but also to the situation where he is incapacitated for work, provided that his incapacity is only temporary, that is to say it does not affect his fitness to continue exercising his right to employment granted by that decision, albeit after a temporary break in his employment relationship…
>
> 39. Thus, while the right of residence as a corollary of a right to join the labour force and to be actually employed is not unlimited, the rights granted by Article 6(1) of

Decision No 1/80 are necessarily lost only if the worker's inactive status is permanent.

40. In particular, while legal employment for an uninterrupted period of one, three, or four years respectively is in principle required in order for the rights provided for in the three indents of Article 6(1) to be established, the third indent of that provision implies the right for the worker concerned, who is already duly integrated into the labour force of the host Member State, to take a temporary break from work. Such a worker thus continues to be duly registered as belonging to the labour force of that State providing that he actually finds another job within a reasonable period, and therefore enjoys a right to reside there during that period.

41. It follows from the foregoing considerations that the temporary break in the period of active employment of a Turkish worker such as Mr Nazli while he is detained pending trial is not in itself capable of causing him to forfeit the rights which he derived directly from the third indent of Article 6(1) of Decision No 1/80 provided he finds a new job within a reasonable period after his release.

42. A person's temporary absence as a result of detention of that kind does not in any way call into question his subsequent participation in working life, as is moreover demonstrated by the main proceedings, where Mr Nazli looked for work and indeed found a steady job after his release..."

59. In Orfanopoulos and Oliveri [2004] ECR I-5257, the same line of reasoning was applied to the question of deportation of nationals of Member States. The Court was concerned with the cases of a Greek national and an Italian national, both of whom lived in Germany. Mr Orfanopoulos had been in that country for almost 30 years, having arrived as a teenager. Mr Oliveri had been born there. Mr Orfanopoulos had been refused an extension of his residence permit. His employment in Germany had been interrupted by periods of prolonged unemployment, including periods of imprisonment and hospitalisation as a result of drug addiction. In 2001 his expulsion from Germany was ordered and he was informed that he would be deported at the end of his latest sentence of imprisonment. Mr Oliveri also had been a drug addict and had committed numerous offences, in respect of some of which he had been imprisoned. In 2000 his expulsion from Germany was ordered.

60. A number of questions were posed to the ECJ by the German courts, in respect of both cases. Much of the ECJ's judgment is taken up with the issue of whether deportation of a national of a Member State can properly be based on reasons of a general preventative nature and, in particular, whether automatic deportation following a criminal conviction is compatible with Community law. The Court found that general prevention could not be relied upon, particularly where deportation was, under national law, an automatic consequence of conviction (paragraph 68, citing Nazli).

61. However, the Court also addressed the effect of their periods of imprisonment on their status as workers, in the context of the rights derived from Articles 18 and 39 of the Treaty. In the following passage Nazli was treated as applicable:-

"49. So far as concerns migrant workers who are nationals of a Member State, their right of residence is subject to the condition that the person remains a worker or, where relevant, a person seeking employment (see to that effect, KC-292/89

*Antonissen* [1991] ECR I-745, paragraph 22), unless they derive that right from other provisions of Community law…

50. Moreover, in respect more particularly of prisoners who were employed before their imprisonment, the fact that the person concerned was not available on the employment market during such imprisonment does not mean, as a general rule, that he did not continue to be duly registered as belonging to the labour force of the host Member State during that period, provided that he actually finds another job within a reasonable time after his release (see, to that effect, KC-340/97 *Nazli* [2000] ECR I-957, paragraph 40).

51. It is clear that Mr Orfanopoulos has made use of the right to freedom of movement for workers and has pursued several activities as an employed person in Germany. In those circumstances, it must be held that Article 39 EC and Directive 64/221 apply in circumstances such as those of the main proceedings in KC-482/01..."

62. In the case of Mr Oliveri there was insufficient information for the Court to determine the issue.

63. Dogan [2005] ECR I-6237 was another case relating to a Turkish national who, after four years of legal employment in Austria, had acquired the right of free access to any paid employment of his choice under the third indent of Article 6(1). It was held that he did not forfeit that right solely because of a period of imprisonment, even for several years. It was a strong case, because he had lived in Austria for some 27 years and had been legally employed there "for many years" (paragraph 7 of the judgment). His family had been authorised to join him in Austria in 1975 or 1976. The case arose from the fact that, in March 1999, he was sentenced to three years' imprisonment. The judgment is significant because it was confirmed both that the *Nazli* principle was of general effect, and that it applied following even relatively lengthy terms of imprisonment. The court said:-

"22. As is clear from joined cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 50, the reasoning in *Nazli* cannot therefore be understood as being limited to the particular circumstances of that case, depending on the fact that the worker in question had been detained pending trial for more than a year and then given a suspended sentence. On the contrary, the same reasoning is applicable in its entirety, for the same reasons, to a temporary absence from the labour force due to the completion of a prison sentence. More particularly, the fact that the imprisonment prevents the person concerned from working, even for a long period, is irrelevant if it does not preclude his subsequent return to working life...."

64. We accept that this line of authorities is of potential importance in the present context. It shows that in certain circumstances a person who has acquired rights of free movement under Article 39 in his capacity as a "worker" will not lose that status merely because of a period during which he is forcibly deprived by imprisonment of the ability to work. The same approach should arguably be applicable to the definition of a "worker" under the instant Directive. Imprisonment in itself would not mean that residence ceases to be "legal", and thus falls to be disregarded for the purposes of deciding whether the necessary periods of residence have been achieved.

65. However, none of the cases was, or could be, directly concerned with the means of establishing a right of permanent residence under the 2004 Directive, which was not in force at the time. Nazli and Dogan were concerned with the Turkey Association Agreement, under which a worker who satisfies the four year requirement acquires an accrued right. That seems closely analogous to the right of permanent residence which can now be acquired by EEA nationals under Article 16 of the Directive. One can readily understand why a Turkish worker who has such an accrued right should not have that right automatically extinguished by any period of imprisonment. Indeed, such a failure to differentiate between accrued and conditional rights appears to be precisely the criticism made by the Commission of Hungary's implementation of the Directive (see paragraph 53 above).

66. In Orfanopoulos and Oliveri, the same reasoning was applied in the context of the Treaty to EEA nationals who had been imprisoned following conviction. Although the right of permanent residence did not then exist, Mr Orfanopoulos had been living and working in Germany for a far longer period than would have been necessary to satisfy that test. It is not surprising that the Court in effect decided that his status was sufficiently settled not to be disrupted by three years imprisonment. However, as Mr Eicke says, the case was concerned with whether the individuals were at the relevant time wholly outside the remit of EU law, and the protection against removal on grounds of public policy, public security or public health, and not whether they had acquired some enhanced status by reason of past residence.

67. It does not in our view follow that the same approach is to be applied to the acquisition of the new right of residence under the Directive. For that purpose it becomes particularly important that the quality of residence required during the five years is such as to meet the objective of the Directive to recognise genuine integration and enables the test to be applied with certainty. The criterion adopted in Orfanopoulos would be difficult to apply as a test for deciding whether a period of imprisonment counts towards the five year period in Article 16 of the Directive. The deciding authority would in each case have to wait until "a reasonable time" after the release of the person concerned (whatever that might be), before establishing whether the period of imprisonment counted towards the five years. The effect would be to impede the ability of Member States to take expulsion decisions in the cases of persons whose crimes resulted in imprisonment - precisely the category of persons in respect of whom expulsion may be most necessary.

68. There is a further consideration which argues against treating this line of cases as relevant to the test for the right of permanent residence. The approach of the Directive is to review and codify the existing Community legislation on the rights of movement and residence. That is plain from its Preamble. Article 7.1 defines those having a right of residence for more than three months. Article 7.3 contains a list of circumstances in which a person who is "no longer a worker" is to retain the status of worker (implemented in the United Kingdom by regulations 5 and 15(1)(c)). They include, for example, (a) the case of a person "temporarily unable to work as the result of an illness or accident", and (b) that of a person in "involuntary unemployment" after having been employed for more than a year who is registered as a job-seeker". They do not include a person who is prevented from work by imprisonment. These specific definitions and protections make it potentially misleading to rely on more general concepts of "worker" used in other contexts.

Conversely, as Mr Eicke submits, if it had been intended that a person who had previously been a worker, but was then imprisoned, should nevertheless retain the status of a worker during his imprisonment, one would expect to see express provision to that effect in Article 7.3.

69. For these reasons, we conclude that there is nothing in this line of cases which would justify us 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.

***Alternative arguments for CC***

*Council of Europe Convention on the Transfer of Convicted Persons*

70. It is convenient at this point to note, in order to dismiss, two alternative arguments of Mr Karnik. The first relied upon the Council of Europe's Convention on the Transfer of Sentenced Persons (21 March 1983) in support of the proposition that an EEA national serving a sentence of imprisonment in the United Kingdom is lawfully resident within the scope of Article 16.1 of the Directive. We do not see how any rights under this Convention can be relevant to legal residence under Article 16.1, which as already made clear, means residence in accordance with a right described in the Directive.

71. In any event, it is not possible to infer from this Convention anything that can be properly categorised as a right of residence by reason of imprisonment. The Convention provides a mechanism whereby a person sentenced in the territory of a party to the Convention may be transferred to the territory of another party, if the States in question agree and the sentenced person consents. Mr Karnik submitted that the requirement of the prisoner's consent indicated a right of the prisoner to reside in the State that had imprisoned him. We do not agree. A person who has no right to be in the United Kingdom, but who is serving a sentence of imprisonment here, remains in the United Kingdom not because of any right that he has but, rather, as a result of the right of the host State to punish him for his crime. The fact that such a prisoner may not be regarded as being in the United Kingdom unlawfully in no sense means that his presence in prison is to be regarded as lawful for other purposes (see Abdirahman [2007] EWCA Civ 657).

*Regulation 19(3)*

72. Secondly, Mr Karnik argued that the logic of the Secretary of State's submissions regarding the position of serving prisoners was that such persons should be removable under regulation 19(3)(a), since they had no right to reside under the Regulations once they began their sentences. However, in both of the present cases the decision to make the deportation order was specifically taken under regulation 19(3)(b), which applies where the person concerned:-

> "would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21".

73. It is true that the deportation decisions in both of the present cases were made at a time when each of the appellants was still serving his sentence and when, on the basis of the Secretary of State's stance, neither was exercising a right of residence under the Directive or the Regulations. We do not, however, consider that the Secretary of State's decision to proceed under regulation 19(3)(b) shows her interpretation of regulation 15(1)(a) to be incorrect. We have already seen how, in the case of a person who was, for example, a worker prior to imprisonment, the use of regulation 19(3)(b) produces a result which is in accordance with ECJ case law, by ensuring that the deportation decision is subject to the relevant general principles in Article 27 of the Directive. The Tribunal is also aware that the Secretary of State regularly resorts to deportation, where a person is in theory subject to administrative removal under section 10 of the Immigration and Asylum Act 1999. In short, the fact that the Secretary of State has used regulation 19(3)(b) does not compel the conclusion Mr Karnik urged us to draw.

***Question (b) – What constitutes residence for the purposes of regulation 21(4)(a): protection from expulsion where there has been ten years' residence?***

*The effect of imprisonment*

74. As has been seen, at least part of the answer to this question has been provided by the decision of the Court of Appeal in HR (Portugal). That establishes that, at least in relation to a person who has not worked in this country and who has not acquired a right to permanent residence, time spent in prison does not count towards the ten year period required. That is not, however, because during that time he is not "resident" in the UK, but because it is not "*relevant* residence": that is, residence in exercise of the rights and freedoms conferred in the Treaty (paragraph 23 Stanley Burnton LJ, paragraphs 35-7 Elias LJ).

75. However, we have found it less easy to apply the reasoning to a case, in which a person has already lived and worked in this country for five years before his imprisonment, so as to acquire here a right of permanent residence. Once that right has been acquired, it could be argued, there is no reason to regard time spent in prison as ceasing to be residence in pursuance of that right. It is therefore residence "in accordance with the rights of residence as set out in the Directive", and should in principle count for the purposes of establishing ten years' residence. As Recital (18) says:

> "(18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions."

76. On the other hand, even if time in prison is accepted as continuing to be pursuant to the right of residence, it can hardly be said to be an exercise of "the rights and freedoms" conferred by the Treaty, or as contributing in any way to the objective of integration. The argument would also have surprising results. A person who, one month after acquiring the permanent right, is then imprisoned for five years, would become automatically entitled to the higher level of protection at the end of his

sentence, without his level of integration having in any way improved since he acquired the permanent right. Accordingly, although there are arguable grounds for distinguishing such a case from the facts of HR (Portugal), we think they are insufficient to justify us adopting a different approach, with the result that time in prison does not count towards the acquisition of the higher level of protection, even for someone who has a right of permanent residence.

*The correct "end date" for the ten year period in regulation 21(4)(a)*

77. The question whether prison counts also has relevance to the last aspect of this question which we have to consider, relating to the end date for the 10 year period. Article 28 of the Directive concerns an expulsion decision. Article 28.3(a) applies the most stringent test, of imperative grounds of public security, in the case of those (adults) who "have resided in the host Member State *for the previous ten years"*. Regulation 21(4)(a) implements this by referring to the EEA national as having "resided in the United Kingdom for a continuous period of at least ten years *prior to the relevant decision"* (our emphases).

78. Thus it is clear that the period of residence that gives rise to the test of imperative grounds runs backwards in time from the date of the expulsion decision. This temporal requirement does not apply to the five year test. It is not clear from the contemporary materials or the Preamble why this difference was made between the two tests. The Commission's report treats the two tests as differing only in length of time. The Preamble to the Directive refers simply to "Union citizens who have resided for many years in the territory of the host Member State", without mentioning an end-date.

79. One can understand the reason for having some link between the ten year period and the date of decision. Otherwise, for example, a person who had been lawfully resident for ten years in the United Kingdom and then absent for 20 years, before returning here for a brief period and committing a serious criminal offence, for which he is imprisoned, would be able to enjoy the highest degree of protection from expulsion, even though his degree of integration in the United Kingdom was (in the light of his long absence) very limited.

80. On the other hand the end-date requirement may also have anomalous and harsh results. Since most expulsion decisions of this kind will be taken in respect of persons who have been imprisoned for criminal offences, the consequence of not treating time in prison as residence for the purposes of Article 28.3, even for those who have a right of permanent residence, may mean that its practical value is much reduced. It would mean that such a person would be unable to demonstrate the requisite ten years' residence, however long and blameless his previous residence in the United Kingdom, and however short his time in prison.

81. However, these potentially harsh results may be mitigated if the specific temporal rules are seen in context. Once a permanent right of residence has been acquired it is not lost as a result of imprisonment. Expulsion must be justified by "serious grounds" of public security or public policy. Furthermore the decision must be consistent with the principle of proportionality and have regard to:

> "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."

82. Thus, even if the highest level of protection is not available as a matter of right, a person's period of residence is still relevant in deciding whether his expulsion would be disproportionate on the facts of his case. Where a person has become fully integrated into this country by more than ten years residence, particularly if he has severed any links with his country of origin, it would be consistent with the purpose of the Directive (as stated in the Preamble) to apply a stringent test, which may be equivalent in practice to the "imperative grounds" test.

83. There is also the following point. Article 33 prevents expulsion orders being issued as a penalty or legal consequence of a custodial penalty, unless they conform to Articles 27 to 29. If such an expulsion order is enforced more than two years after it is issued, the Member State must check that the individual "is currently and genuinely a threat to public policy or public security" and must assess "whether there has been a material change in the circumstances since the expulsion order was issued". The existence of this provision in the Directive suggests that, at least where the decision to deport arises as a result of a recommendation from the sentencing court, the Secretary of State should make that decision as close as possible to the beginning of any custodial sentence for the offence. In the case of a person who has 10 years or more relevant residence before committing an offence which causes a decision to deport, such an approach should enable the person to invoke the protection of regulation 21(4)(a).

***The application of our conclusions to the facts of LG and CC***

84. Before turning to questions (c) and (d), we must first consider how our conclusions as to the interpretation of the residence requirements apply in the two cases before us, in order to determine on what criteria the decision to deport either of them should be based.

*LG*

85. It is clear that LG has lived in the United Kingdom since at least 1987. In fact, LG's evidence to the first Tribunal and the second Tribunal was that he had been in the United Kingdom since 1985. LG's account, which has not been challenged by the Secretary of State, is that his parents died whilst he was a child and that, following a period when he was looked after by a relative in Italy, he came to the United Kingdom to be looked after by his aunt. The second Tribunal recorded at paragraph 32 of its determination that LG had been granted a residence permit in 1990, valid until 1995, and that he "did not obtain another document after this because he was told that it was not necessary once five years had expired". The second Tribunal's reference to national insurance records relates to the material sent under cover of a fax of 4 January 2007 from HM Revenue and Customs. These records extend back to the tax year 1985-1986. They demonstrate that LG was in paid employment in each of the tax years beginning with 1987-1988 and ending 1993-1994. There was further economic activity in 1996-1997, 1998-1999 and 1999-2000. The first Tribunal found at paragraph 15(6) of its determination that:-

> "The appellant claims to have been a postman from 1990 to 1991; he was employed by Next plc from 1991 to 1993; owned his own restaurant from 1994 to 1996; and worked for a marketing company, FDS Ltd from 1997 to 1998. No evidence has been adduced to contradict that employment record and so I (sic) find on balance that the appellant was so employed."

86. At some point LG married in the United Kingdom but was divorced in 1996. Although there was a child of the marriage, LG has not seen his son since 1999. LG asserts that his criminality began at a time when both his business and his marriage were in difficulties. He was released from prison in the summer of 2007.

87. The circumstances of LG's arrival as a minor orphan in the United Kingdom, the issue to him of a residence permit, and his pre-imprisonment employment record, not challenged before the first Tribunal and the second Tribunal, show on the balance of probabilities that (given the retrospective reach of the Regulations as conceded by the Secretary of State) LG had acquired what the Regulations require us to recognise as a right of permanent residence before he was imprisoned. We find further that he had been resident here for more than ten years before his first imprisonment.

88. Although, during his term of imprisonment, LG did not enjoy, and was not exercising, any of what can be called the conditional rights of residence, he did not lose his right of permanent residence. However, for the reasons we have given, his time in prison did not count for the purpose of establishing ten years' residence prior to the expulsion decision. Accordingly he was not entitled as of right to the highest level of protection, represented by the "imperative grounds" test. For that reason we do not agree with the conclusion of the second Tribunal on this issue.

89. However, he retained his right to the second level of protection, which required "serious grounds of public policy or security". Further, the decision to remove had to be proportionate, having regard to the extent of his ties with this country and his lack of ties with Italy. We shall return to that issue.

*CC*

90. The decision to deport CC was made on 20 September 2007. CC asserts that he arrived in the United Kingdom in 2002. He has not put forward any evidence as to when in that year he might have arrived. CC has failed on balance to show that, as at the date of decision, he had been physically present in the United Kingdom for a period of five years. For that reason alone, CC cannot show he acquired a right of permanent residence in the United Kingdom.

91. However, even if that were otherwise, on the view we have taken of the relevant provisions, CC's period of imprisonment, in respect of offences for which he was convicted, cannot count towards the relevant five year period.

92. On any view, therefore, CC had no entitlement to invoke the second level of protection against expulsion ("serious grounds of public policy or public security") contained in regulation 21(3).

93. The Secretary of State was, accordingly, justified in deporting CC by reference to the ordinary test, that is, if she could show simply that there were grounds of public policy, public security or public health (regulation 21(1), (2), (5) and (6)). That is the basis upon which the original Tribunal proceeded to consider CC's appeal. We consider below whether the original Tribunal erred in law in approaching this issue.

***Questions (c) and (d) – the meaning of the "serious grounds" and "imperative grounds" tests.***

94. We now turn to the content of the tests at the second and third level, and the difference between them.

95. The starting-point for our consideration of that issue is the judgment of the Court of Appeal, by which the case was remitted to this Tribunal. In the leading judgment, at paragraph 31, Carnwath LJ stated that on the basis of the relatively limited arguments that had been heard he would not feel confident in attempting to lay down any definitive guidance and would not in any event wish to do so until the Secretary of State had reached a more settled view both of the legal interpretation of the relevant provisions and the policy considerations governing their application in practice. However, he set out some relevant considerations, including comments on the guidance give in the then current version of the Department's manual:

> "32. The following points should be taken into account:
>
> 1) Weight must be given to different tests within the new hierarchy. The words 'imperative grounds of public security' at the third level are clearly intended to embody a test which is both more stringent and narrower in scope than 'serious grounds of public policy or public security' at the second level.
>
> 2) 'Public security' is a familiar expression, but it does not appear to have been subject of judicial definition. I see no reason to equate it with 'national security'. That expression was discussed in Secretary of State v Rehman [2001] UKHL 47, where Lord Slynn said:
>
> > 'There must be some possibility of risk or danger to the security or well-being of the nation which the Secretary of State considers makes it desirable for the public good that the individual should be deported…' (paragraph 15)
>
> 'Public security' to my mind is a broader concept. The earlier version of the manual referred in this connection to –
>
> > '… national security matters, or crimes that pose a particularly serious risk to the safety of the public or a section of the public'.
>
> The words 'risk to the safety of the public or a section of the public' seem to me reasonably consistent with the ordinary understanding of 'public security'. In the latest version of the manual, the utility of that description is reduced, because it is used for the second level, 'public policy or public security', without distinction between the two parts.

3) The word ‘imperative’, as a distinguishing feature of the third level, seems to me to connote a very high threshold. The earlier version of the manual treats it as equivalent to ‘particularly serious’. In the latest version, the expression ‘particularly serious risk’ is used for the second level. The difference between the two levels, that is, between ‘serious’ and ‘imperative’, is said to be ‘one of severity’, but there is no indication why the severity of the offence in itself is enough to make removal ‘imperative’.

4) The same thinking is reflected in the examples of offences given in the manual. Both levels require a serious offence linked to a propensity to re-offend. The second ‘serious’ level encompasses ‘a violent offence carrying a maximum penalty of 10 years’; the third ‘imperative’ level requires not only a maximum penalty of 10 years but also an actual sentence of at least five years. It is not clear why the mere fact that a five year sentence has been imposed should make removal ‘imperative’.

5) Neither version of the Manual seems to me to give adequate weight to the distinction between levels two and three, or to the force of the word ‘imperative’. To my mind there is not simply a difference of degree, but a qualitative difference: in other words, level three requires, not simply a serious matter of public policy, but an actual risk to public security, so compelling that it justifies the exceptional course of removing someone who (in the language of the Preamble to the Directive) has become ‘integrated’ by ‘many years’ residence in the host state.”

96. At paragraph 40 of the judgment, he said that it would be difficult for the Tribunal or the Court to give clearer guidance until the Secretary of State, who has primary responsibility under the Directive for determining issues of public policy and public security, had herself reached “a coherent and settled view”.

97. Steps have since been taken by those acting on behalf of the Secretary of State, to address the concerns of the Court of Appeal and enable the Secretary of State to reach an informed view on the relevant issues. These steps and the resulting conclusions are described in a witness statement made by Seonaid Webb of the UK Border Agency, dated 15 August 2008. (We understand that this statement was also made available to the Court of Appeal in HR (Portugal).)

98. The Secretary of State caused to be sent out a detailed questionnaire about the legislation and practice of other Member States in order to see whether there was any consensus about the construction and permissible limits of the relevant provisions of the Directive. We have been provided with a copy of the questionnaire. As at the date of the witness statement, some 12 of the 27 Member States had responded to the questionnaire. Ms Webb states at paragraph 15 that in considering the responses it had become clear that there was no commonly accepted understanding as to the issues in the case either as regards the residence requirement, which we deal with elsewhere, or the construction of the terms “serious grounds of public policy or public security” and “imperative grounds of public security”.

99. It seems that only three of the Member States who responded to the questionnaire have defined any of these terms in legislation or policy instructions:

- In Austria, a “long term resident – EU” may only be expelled if continued residence would constitute a “serious threat to public order or security”, which is “deemed to exist” following conviction for certain defined crimes. “Imperative grounds of public security” arise where the individual’s continued residence “constitutes a sustainable and serious threat to public order or security of the Republic of Austria.”

- Finland has not defined “serious grounds of public policy or public security” but has defined “imperative grounds of public security” in its forthcoming Aliens Act (due to enter into force in the spring of 2009) at section 168(5) thus:

  > “Imperative grounds as laid down in sub-Sections 3 and 4 are considered to exist when an EU citizen is guilty of an act which is punishable by no less than one year of imprisonment, and where he or she, on grounds of the seriousness of the crime or of continued criminal activity, is considered a danger to public security, or where there are grounds for suspecting that he or she is seriously endangering the national security of Finland or another state.”

- Germany also has no definition of “serious grounds of public policy or public security” but “imperative grounds of public security” are equated with “compelling grounds of public safety”, subject to the following definition:

  > “Compelling grounds of public safety can only apply if the person concerned has been unappealably sentenced to a prison term or a term of youth custody of at least five years for one or more intentionally committed offences or preventive detention has been ordered in connection with the most recent and appealable conviction, the security of the Federal Republic of Germany is affected or the person concerned poses a terrorist threat [Section 6(5) of the Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Act on the general freedom of movement for EU citizens)].”

100. Ms Webb comments that these definitions are thought to be consistent with the approach adopted by the Secretary of State in her policy, and that generally the thresholds adopted, at least in the context of imperative grounds of public security, are significantly lower than those adopted by the Secretary of State. It does not appear that any of this legislation has been interpreted in any of the national courts of the three countries in question, or that elsewhere in the national courts of those or other Member States there have been judicial decisions which provide any guidance on the meaning of the relevant terms.

101. Ms Webb confirms that the Secretary of State’s “coherent and settled view” on the issues in the appeal is as currently formulated in the UK Border Agency’s Criminal Casework Directorate Case Owner Process Instructions (the Instructions) at 2.2.2 under the heading “Stage One”. The relevant parts of this are set out at Appendix B to this determination. Ms Webb explains that this has been revised taking account of the Court of Appeal’s guidance in LG (Italy), which the Secretary of State accepts. In particular, there is agreement with the conclusion of Carnwath LJ that the word “imperative” denotes a “very high threshold”, being limited to EC nationals “who have taken advantage of the freedom of movement under the Treaty to become fully integrated into the host country”.

102. We are grateful to Ms Webb and her colleagues for undertaking the researches set out above and for providing us with the conclusions which the Secretary of State reached following her further consideration. This material is of some assistance, even if only as showing that there appears to be no consistent approach to interpretation of these provisions in other Member States. The Secretary of State has a margin of appreciation in the interpretation of the relevant provisions, but at the end of the day we have to interpret them in light of our understanding of Community Law, taking account of her views.

103. We return to the hierarchy of levels of protection summarised by the Court of Appeal (as quoted at the outset of this determination). It has been clear, at least since the decision of the Court of Appeal in Bouchereau [1981] 2 All ER 924 that the notion of public policy presupposes the existence of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society. In Orfanopoulos and Oliveri, the Court of Justice emphasised (at paragraph 67) that:

> "The existence of a previous criminal conviction can justify an expulsion only insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy."

104. This, then is the test in what might be called the lowest level of case (level 1). We are clear that, as it was put at paragraph 32(1) in LG, "weight must be given to different tests within the new hierarchy", and that each level is intended to be more stringent and narrower in scope than the immediately lower test. The Secretary of State was not asked to provide her view of level one, though it can be seen from the Instructions that it is defined in terms requiring the Case Owner's satisfaction that the person's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, echoing the wording of Article 27 of the Directive, and that any offence meeting the criteria for consideration for deportation might constitute a crime within the scope of public policy or public security.

105. Even at this lowest level of the hierarchy it is necessary to bear in mind the requirement set out at Article 27(2) of the Directive that measures taken on grounds of public policy or public security must comply with the principle of proportionality and be based on the personal conduct of the individual concerned. Regard must also be had to the considerations referred to in Article 28(1), including the length of time the individual has resided in the territory of the Member State, 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.

106. The threat in the "serious grounds" category (level 2) requires to be differentiated from that posed in a level 1 case, bearing in mind that a level 2 person has acquired a permanent right of residence in the United Kingdom. We can see from the section of the Instructions concerning level 2 that a conviction for any of a number of listed offences might constitute "serious grounds". We see merit to the list of offences as a means of differentiating between level 1 and level 2, but it must be emphasised that it is the present risk arising from conviction for the offence in question that must be established. As the Instructions recognise, the list of offences represents guidance rather than prescription, but properly represents a higher level of seriousness. One can imagine, for example, a serial shoplifter being properly removable under level 1,

but being unlikely to represent the level of risk that is required to be posed in the case of a person with a right of permanent residence.

107. Turning to the third level ("imperative grounds"), the relevant part of the guidance (see Appendix B) reads as follows:

> "If an EEA national with permanent residence has resided in the UK for a continuous period of at least ten years prior to a decision to deport (not including time spent in custody), he may only be deported on imperative grounds of public security...
>
> Imperative grounds of public security will involve national security matters, or crimes that pose a particularly serious risk to the safety of the public or a section of the public. Imperative grounds in this respect might be where the person has been convicted of murder, a terrorism offence..., a drug trafficking offence..., a serious immigration offence..., or a serious sexual or violent offence carrying a maximum penalty of ten years or more... and been sentenced to five years or more..."

108. It is to be noted that the list of offences is the same as that in respect of serious grounds of public policy or public security, the difference between them being that in the case of imperative grounds of public security the person in question will have been sentenced to a custodial sentence of five years or more. The other distinction is that "imperative grounds of public security", are said to "involve national security matters or crimes that pose a particularly serious risk to the safety of the public or a section of the public". This follows the formula used in an earlier version of the guidance, which was accepted by Carnwath LJ as "reasonably consistent with the ordinary understanding of 'public security'" (see paragraph 95 above).

109. We observe, first, that notwithstanding our conclusion on question (b), the unqualified exclusion of "time spent in custody**"** probably goes too far. As Sedley LJ indicated at paragraph 45 of HR (Portugal), "acquittals following remands in custody" will require "judge-made adjustments" to the principle that time spent in prison is not relevant residence.

110. Secondly, we cannot accept the elevation of offences to "imperative grounds" purely on the basis of a custodial sentence of five years or more being imposed. As was said by Carnwath LJ in LG (see paragraph 32(3)), there is no indication why the severity of the offence in itself is enough to make removal "imperative" in the interests of public security. Such an offence may be the starting point for consideration, but there must be something more, in scale or kind, to justify the conclusion that the individual poses "a particularly serious risk to the safety of the public or a section of the public". Terrorism offences or threats to national security are obvious examples, but not exclusive. Serial or targeted criminality of a sufficiently serious kind may also meet the test. However, there needs to be some threat to the public or a definable section of the public sufficiently serious to make expulsion "imperative" and not merely desirable as a matter of policy, in order to ensure the necessary differentiation from the second level.

111. It is instructive to compare this approach to that of the three Member States whose stated practices have been noted above:

- The Austrian legislation appears to set an even higher threshold in that it requires a threat to "public order or security *of the Republic of Austria*". As Carnwath LJ observed in LG (Italy) (paragraph 95 above) "public security" is not necessarily to be equated with "national security".

- The Finnish test links the offence to the duration of the imprisonment but also requires that the person, on grounds of the seriousness of the crime, or of continued criminal activity, is considered "a danger to public security" or that there are grounds for suspecting that he or she is "seriously endangering the national security of Finland or another state". This is consistent with our approach, in that the criminal conviction is not sufficient in itself, but the statute gives no further guidance as to the meaning of "public security".

- The German test substitutes the term "compelling grounds of public safety", which it appears to equate with *either* a conviction carrying a sentence of at least five years, *or* something affecting the security of the Federal Republic or a terrorist threat. If this is intended to have the effect that the conviction is enough in itself, that would not be consistent with our approach.

***The application of our findings to the facts in the cases of LG and CC***

*LG*

112. As noted earlier, the second Tribunal found that LG had acquired the requisite ten years' residence as at the date of the decision to deport him, and accordingly could only be deported on imperative grounds of public security. Even applying that test, it determined that that LG's expulsion was permitted by the Directive. It agreed with the trial judge that LG was a dangerous man. A probation report dated 17 August 2006 stated that:

> "in respect of controlling anger and aggression, [LG] does not seem to have made any further progress in reducing the unacceptable risk of re-offending which was identified".

113. The second Tribunal concluded that LG continued to pose a continuing risk of harm to the public (paragraph 67). It found that LG:

> "has been convicted of grave offences and we find that the appellant has not shown that he does not pose a risk of further harm to the public by way of further offending and, moreover, that the evidence before us suggests that this appellant does pose a continuing risk particularly when he does not appear to accept that he committed the grave offence of grievous bodily harm with intent on this 66 year old man in the circumstances which were proved at the Crown Court".

114. The Tribunal accordingly concluded, at paragraph 69:

> "... that the Secretary of State has met the evidential burden of showing that there are imperative grounds of public security for removing this appellant from the United Kingdom to Italy".

115. The Court of Appeal did not in terms make a positive ruling that this aspect of the Tribunal's reasoning was itself erroneous in law. The legal deficiency which justified allowing the appeal lay in the failure of the Secretary of State to provide a coherent policy foundation for considering the issue. However, it is implicit that the second Tribunal's decision was erroneous for the same reason. If necessary, we would hold that there was a material error of law in the Tribunal's failure to explain its jump from the risk of potentially serious harm from further offending, to the conclusion that there were "imperative" grounds of public security to justify removal.

116. On the view we have taken, the second Tribunal was wrong to apply the highest level of protection. However, even if one judges their reasoning by reference to the second level of protection, which arises because of LG's position as a person with a right of permanent residence (a factor the second Tribunal did not appreciate), they erred in our view in failing to consider the particular circumstances of LG's position, his long residence in this country, including more than ten years' residence before any offences were committed, and his lack of links with Italy.

117. This failure meant that the second Tribunal's assessment of proportionality was fatally flawed. In our view, even acknowledging the seriousness of the offence in 2000, and the possible risk of re-offending, we do not think that expulsion is a proportionate response for someone who came here as a child, has acquired a right of permanent residence in this country, has lived here for some 15 years before the crime was committed, and has no significant links with Italy. In such a case we think that public policy considerations should carry little weight. As to public security, in one sense, of course, any risk of further offences as brutal as that committed in 2000 represents a threat to public safety, but that threat is no different in kind than is presented, unfortunately, by many other offenders for whom expulsion is not an available response. For these reasons we do not think that the decision to deport LG was justifiable. On the facts as at the date of the hearing in January 2007, LG was entitled to succeed in his appeal.

118. Since there is no suggestion that LG currently presents any greater societal threat than he did at that date, we see no need to adjourn to make any further findings of fact. LG's appeal thus falls to be allowed.

*CC*

119. CC may not be deported unless there are grounds of public policy, public security or public health precluding his removal, he having failed to establish that he had been in the United Kingdom for five years at the date of decision in his case and since, in any event, his periods of imprisonment could not be counted as legal residence for the purposes of regulation 15(1)(a).

120. The original Tribunal was concerned by his failure to accept responsibility for the offences that had caused him to be imprisoned for 22 months, did not accept that he had given up drugs and drinking to excess and did not consider that his relationship

with his present partner had removed or reduced his propensity to re-offend. The Tribunal concluded that he represented a genuine and sufficiently serious threat such as to justify his deportation under regulation 21. Mr Karnik argued that this conclusion was flawed, given that the reference to "medium risk" in the OASys report indicates that re-offending is "unlikely unless there is a change of circumstances" as defined in National Probation Service Circular 10/2005. He also argued that the assessment of proportionality by the Tribunal was flawed, in failing to give proper weight to a published policy of the Secretary of State indicating that normally a sentence of two years would be a prerequisite for deportation proceedings to be considered. It was also contended that reliance was placed by the Tribunal upon sentencing remarks in respect of a sentence that was passed in error and subsequently rescinded as recorded at paragraph 30 of the determination.

121. We note, however, that in February 2007 CC's Probation Officer had concerns regarding his insight into his behaviour, acceptance of his behaviour and attitude towards women. Bearing that in mind, together with the Tribunal's concerns set out above, we do not consider that any of the matters raised by Mr Karnik amount to material omissions from the Tribunal's reasoning. The original Tribunal was entitled to conclude that CC's past and escalating behaviour represented a future risk to society, and a sufficiently serious threat to justify his deportation, and hence to dismiss his appeal under the Regulations. The decision in that regard is free from material legal error.

*Article 8*

122. The original Tribunal accepted that CC enjoys family life with his partner. It took into account that she said in evidence that, if necessary, she would go to Portugal to join CC there, following her surgery for removal of an ovarian cyst. The Tribunal noted that his partner is epileptic, but there was no suggestion that whatever medication and treatment she required would not be available in Portugal. In assessing the Article 8 claim, the Tribunal also bore in mind the factors it had taken into account in assessing the relevant issues under regulation 21(5).

123. In his skeleton argument, elaborated in oral submissions, Mr Karnik argued that the rights of CC's partner had not been taken into account in the Article 8 assessment. She had lived in the UK for 30 years, with family and relatives here, and there was no indication that any equivalent to the disability benefit she receives in the UK would be available in Portugal.

124. Nevertheless we consider the Tribunal was entitled to attach weight to the fact that CC's partner said that if necessary she would go to join him in Portugal, following her operation. Taking account of that factor and the other material, we consider that the assessment of the Article 8 claim at paragraphs 40 and 41 of the determination was open to the Tribunal, and that no error of law in its reasoning or conclusions has been identified. It follows that the determination of the original Tribunal, dismissing CC's appeal, does not contain a material error of law, and accordingly we order that it shall stand.

*References to the European Court of Justice*

125. We referred earlier to the references to the European Court of Justice made by the House of Lords in McCarthy and the Court of Appeal in Lassal. Although neither party has requested a reference, we have considered whether there is anything in the proceedings before us that calls for the Tribunal to make such a reference, or otherwise to delay deciding the consideration of either of the appeals, pending responses from the European Court on the references that have already been made.

126. We have concluded that it is unnecessary for us, of our own motion, to make any reference or to delay completion of the reconsideration process in either appeal. So far as the qualitative nature of questions (a) and (b) above is concerned, we have benefited from very full submissions from Counsel, together with relevant materials. Our findings are generally in accordance with the judgments in McCarthy and HR (Portugal). We also take note of the fact that in the latter case the Court of Appeal felt able to decide the matter without the need for a reference.

127. As for the reference made in Lassal, we have been able to base our decision on the concession which the Secretary of State was prepared to make without waiting for the decision of the ECJ. Accordingly it has not been necessary for us to determine that issue, or to wait for any ECJ judgment before doing so.

128. In the case of CC, his failure to show on balance that he was physically present in the United Kingdom for five years before the decision to deport means that he cannot in any event demonstrate that he has a right of permanent residence, entitling him to the application of the test of serious grounds of public policy or public security. This would not make this a suitable case for the ECJ to consider any of the issues which have been raised regarding the interpretation of the second or third level tests. -

*Funding*

129. The Tribunal hereby orders that the appellants' costs in respect of the applications for reconsideration, and of the resulting reconsiderations (including the preparation therefor) shall in each case be paid out of the relevant fund, within the meaning of rule 33 of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

## Appendix A

## The legislation

### *The EU Treaty*

The following Articles of the Treaty establishing the European Community are relevant:-

"**Article 18**

**1.** Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect....

**Article 39**

**1.** Freedom of movement for workers shall be secured within the Community.

**2.** Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

**3.** It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

**4.** The provisions of this article shall not apply to employment in the public service."

### *Directive 2004/38/EC*

The relevant parts of the Preamble to the Directive are the following:-

"(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect....

...

(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming to subject to an expulsion measure.

(18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.

…

(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."

The relevant provisions of the Directive itself are:-

"**Article 1**

**Subject**

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

…

**Article 7**

**Right of residence for more than three months**

**1.** All Union citizens shall have the right of residence on the territory of another Member State for a period longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

...

**3.** For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

**4.** By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

**Article 16**

**General rule for Union citizens and their family members**

**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.

...

**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.

…

CHAPTER VI
RESTRICTIONS ON THE RIGHT OF ENTRY AND THE RIGHT OF RESIDENCE ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY OR PUBLIC HEALTH

**Article 27**

**General principles**

**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.

**...**
**Article 28**

**Protection against expulsion**

**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.

**Article 33**

**Expulsion as a penalty or legal consequence**

**1.** Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.

**2.** If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member state Shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.

## *Immigration (European Economic Area) Regulations 2006*

The relevant provisions of the Regulations are as follows:-

"**General interpretation**

**2. —(1)** In these Regulations—

"EEA decision" means a decision under these Regulations that concerns a person's—

…

(c) removal from the United Kingdom;

…

"EEA national" means a national of an EEA State;

"EEA State" means—

(a) a member State, other than the United Kingdom;

(b) Norway, Iceland or Liechtenstein; or

(c) Switzerland;

…

**Continuity of residence**

**3. —(1)** This regulation applies for the purpose of calculating periods of continuous residence in the United Kingdom under regulation 5(1) and regulation 15.

**(2)** Continuity of residence is not affected by —

(a) periods of absence from the United Kingdom which do not exceed six months in total in any year;

(b) periods of absence from the United Kingdom on military service; or

(c) any one absence from the United Kingdom not exceeding twelve months for an important reason such as pregnancy and childbirth, serious illness, study or vocational training or an overseas posting.

**(3)** But continuity of residence is broken if a person is removed from the United Kingdom under regulation 19(3).

…

**'Worker or self employed person who has ceased activity'**

**5.** **—(1)** In these Regulations, "worker or self-employed person who has ceased activity" means an EEA national who satisfies the conditions in paragraph (2), (3), (4) or (5).

**(2)** A person satisfies the conditions in this paragraph if he —

(a) terminates his activity as a worker or self-employed person and —

(i) has reached the age at which he is entitled to a state pension on the date on which he terminates his activity; or

(ii) in the case of a worker, ceases working to take early retirement;

(b) pursued his activity as a worker or self-employed person in the United Kingdom for at least twelve months prior to the termination; and

(c) resided in the United Kingdom continuously for more than three years prior to the termination.

**(3)** A person satisfies the conditions in this paragraph if —

(a) he terminates his activity in the United Kingdom as a worker or self-employed person as a result of a permanent incapacity to work; and

(b) either —

(i) he resided in the United Kingdom continuously for more than two years prior to the termination; or

(iii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the United Kingdom.

**(4)** A person satisfies the conditions in this paragraph if —

(a) he is active as a worker or self-employed person in an EEA State but retains his place of residence in the United Kingdom, to which he returns as a rule at least once a week; and

(b) prior to becoming so active in that EEA State, he had been continuously resident and continuously active as a worker or self-employed person in the United Kingdom for at least three years.

**(5)** A person who satisfies the condition in paragraph (4)(a) but not the condition in paragraph (4)(b) shall, for the purposes of paragraphs (2) and (3), be treated as being active and resident in the United Kingdom during any period in which he is working or self-employed in the EEA state.

**(6)** The conditions in paragraph (2) and (3) as to length of residence and activity as a worker or self-employed person shall not apply in relation to a person whose spouse or civil partner is a United Kingdom national.

**(7)** For the purposes of this regulation —

(a) periods of inactivity for reasons not of the person's own making;

(b) periods of inactivity due to illness or accident; and

(c) in the case of a worker, periods of involuntary unemployment duly recorded by the relevant employment office,

shall be treated as periods of activity as a worker or self-employed person, as the case may be.

**'Qualified person'**

**6. —(1)** In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as—

(a) a jobseeker;

(b) a worker;

...

**(2)** A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and—

(i) he was employed for one year or more before becoming unemployed;

(ii) he has been unemployed for no more than six months; or

(iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

...

**(4)** For the purpose of paragraph (1)(a), 'jobseeker' means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged.

…

PART 2

EEA RIGHTS

**Right of admission to the United Kingdom**

**11. —(1)** An EEA national must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA State.

**...**
…

**Initial right of residence**

**13. —(1)** An EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the date on which he is admitted to the United Kingdom provided that he holds a valid national identity card or passport issued by an EEA State.

**...**

**Extended right of residence**

**14. —(1)** A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person.

...

**Permanent right of residence**

**15**.**—(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;

(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

(c) a worker or self-employed person who has ceased activity;

(d) the family member of a worker or self-employed person who has ceased activity;

(e) a person who was the family member of a worker or self-employed person where—

(i) the worker or self-employed person has died;

(ii) the family member resided with him immediately before his death; and

(iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was the result of an accident at work or an occupational disease;

(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 the right of residence.

**(2)** Once acquired, the right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.

**(3)** But this regulation is subject to regulation 19(3)(b).

…

PART 4

REFUSAL OF ADMISSION AND REMOVAL ETC

**Exclusion and removal from the United Kingdom**

**19. —(1)** A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if his exclusion is justified on grounds of public policy, public security or public health in accordance with regulation 21.

...

**(3)** Subject to paragraphs (4) and (5), a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if—

(a) he does not have or ceases to have a right to reside under these Regulations; or

(b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

…

**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.

...

…

…

SCHEDULE 4

TRANSITIONAL PROVISIONS

**Interpretation**

**1.** In this Schedule—

(a) the ‘2000 Regulations’ means the Immigration (European Economic Area) Regulations 2000…

…

**Periods of residence under the 2000 Regulations**

**6. —(1)** Any period during which a person carried out an activity or was resident in the United Kingdom in accordance with the 2000 Regulations shall be treated as a period during which the person carried out that activity or was resident in the United Kingdom in accordance with these Regulations for the purpose of calculating periods of activity and residence under these Regulations.”

## Appendix B

### UKBA Criminal Casework Directorate
### Case Owner Process Instructions

"*Stage one*.

2.2.2 In considering whether to deport a person who is an EEA national, Case Owners must consider whether deportation would be compatible with EU law (see regulation 21 of the Immigration (European Economic Area) Regulations 2006 and the associated case law. For more detailed guidance refer to the ECI on deportation of EEA nationals).

Under EU law, a decision to deport must be taken on the grounds of public policy, public security or public health.

To determine whether a person can be deported on grounds of public health Case Owners should refer to the European Casework Instructions on the deportation of EEA nationals. This can be found on the Horizon website using the following link: European Casework Instructions - IND Horizon.

To determine whether a person can be deported on grounds of public policy or public security, Case Owners must be satisfied that the person's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Any offence meeting the criteria for consideration for deportation might constitute a crime within the scope of public policy or public security. Public security will involve national security matters, but may also involve crimes that pose a wider risk to the safety of the public or a section of the public.

Case Owners should then look at whether the person has a permanent right of residence in the UK. If they have, then there must be serious grounds of public policy or public security.

A conviction for murder, a terrorism offence [footnote 3: offences committed under the Terrorism Act 2000, the Anti-Terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005 and the Terrorism Act 2006. Where any of these offences have been committed, Case Owners should check circumstances with SSCU.], a drug trafficking offence [footnote 4: as set out in Schedule 2 para 1 of the Proceeds of Crime Act 2002], a serious immigration offence [footnote 5: Section 25, Section 25A, Section 25B of the Immigration Act 1971 and Section 4 of the Asylum and Immigration (Treatment of Claimants) Act 2004], or a serious sexual or violent offence carrying a maximum penalty of ten years or more [footnote 6: offences in Schedule 15 of the Criminal Justice Act 2003 that are defined as serious in Section 224 of the same Act] might constitute serious grounds of public policy or public security.

If an EEA national with permanent residence has resided in the UK for a continuous period of at least ten years prior to a decision to deport (not including time spent in custody), he may only be deported on imperative grounds of public security.

An EEA national under the age of 18 may also only be deported on imperative grounds of public security unless [sic] in the best interests of the child (as provided for in the UN Convention on the Rights of the Child 1989).

Imperative grounds of public security will involve national security matters, or crimes that pose a particularly serious risk to the safety of the public or a section of the public. Imperative grounds in this respect might be where the person has been convicted of murder, a terrorism offence [footnote 3 as above], a drug trafficking offence [footnote 4 as above], a serious immigration offence [footnote 5 as above], or a serious sexual or violent offence carrying a maximum penalty of ten years or more [footnote 6 as above] and been sentenced to five years or more.

In all cases the person's conduct must also demonstrate a propensity to re-offend. While previous convictions and criminal history may be taken into account when considering a person's propensity to re-offend they should not be looked at in isolation [footnote 8: Although in general a finding of a present threat to public policy implies the existence in the individual concerned of a propensity to act in the same way in the future it is possible that following a particularly heinous crime past conduct alone may constitute a present threat to the requirements of public policy. Where Case Owners consider that they are faced with such a case they should consult senior caseworkers].

Evidence demonstrating a propensity to re-offend could be found in:

1. Court reports

2. Risk of harm or re-offending assessments, including Offender Assessment System.

3. Parole board reports.

4. Statements by prison, probation or police officers.

5. Medical reports.

Where the person is under the supervision of an Offender Manager in the National Offender Management Service (NOMS), then the offender manager should be consulted about evidence regarding propensity to re-offend.

Once it is established that the threat posed by a person is sufficient in principle to justify his deportation on grounds of public policy or security under EU law, then there will be a presumption that the public interest requires deportation.