Trinity Term
[2016] UKSC 49
On appeal from: [2012] EWCA Civ 1199

JUDGMENT

Secretary of State for the Home Department (Appellant) *v* Franco Vomero (Italy) (Respondent)

before

Lady Hale, Deputy President
Lord Mance
Lord Wilson
Lord Reed
Lord Hughes

JUDGMENT GIVEN ON

27 July 2016

Heard on 21 June 2016

Appellant	*Respondent*
Robert Palmer Ben Lask (Instructed by The Government Legal Department)	Raza Husain QC Professor Takis Tridimas Nick Armstrong (Instructed by Luqmani Thompson & Partners)

LORD MANCE: (with whom Lady Hale, Lord Wilson, Lord Reed and Lord Hughes agree)

1. The respondent, Franco Vomero, is an Italian national born on 18 December 1957. He met his future wife, a UK citizen, in Nice in 1983, they came to the United Kingdom on 3 March 1985, and they married on 3 August 1985. They had five children for whom he cared (as well as undertaking some casual work) while his wife worked as a teacher. He had convictions in Italy and further convictions in the UK between 1987 and 1999. In 1998 the marriage broke down and he left the family home. He moved into accommodation with Mr Edward Mitchell, with whom he had a turbulent relationship.

2. On 1 March 2001, the respondent killed Mr Mitchell. Both men had been drinking, a fight ensued and the respondent struck Mr Mitchell at least 20 times on the head with weapons including a hammer, and then strangled him with electrical flex from an iron. The respondent was arrested on 2 March 2001. The jury reduced the charge of murder to manslaughter by reason of provocation. The respondent was on 2 May 2002 sentenced to eight years' imprisonment, being released in early July 2006.

3. By decision made on 23 March 2007 and maintained on 17 May 2007, the appellant, the Secretary of State, determined to deport the respondent under regulations 19(3)(b) and 21 of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). Regulation 21 gives effect to articles 27 and 28 of Directive 2004/38/EC of 29 April 2004 (OJ 2004 L158, p 77). The issues on this appeal depend on the proper interpretation of the Directive.

4. The respondent was detained with a view to deportation until December 2007. On appeal the case was reheard and twice adjourned pending the determination of other cases, including latterly the references in *Onuekwere v Secretary of State for the Home Department* (Case C-378/12) [2014] 2 CMLR 46 and *MG v Secretary of State for the Home Department* (Case C-400/12) [2014] 2 CMLR 40, on which the Court of Justice delivered judgments on 16 January 2014. In the meantime, the respondent committed and was convicted of further offences. One conviction (in January 2012) for having a bladed article, battery and committing an offence while subject to a suspended sentence led to him being sentenced to 16 weeks' imprisonment. Another (in July 2012) for burglary and theft led to a further 12 weeks' sentence.

5. In summary, therefore:

i) From 1985 to 2001 the Respondent lived in the UK, albeit with convictions from time to time which did not result in imprisonment.

ii) From March 2001 to July 2006 he was in prison for manslaughter.

iii) The decision to deport him was made in March 2007, less than nine months after his release from prison.

iv) Subsequently he has been convicted again and has served further short sentences of 16 and 12 weeks.

6. The following provisions of the Directive are of particular relevance and are appended for ease of reference: recitals (17), (18), (23) and (24) and articles 6, 7, 13, 16 and 28. The issues on this appeal are, in outline: (i) whether enhanced protection is available under article 28(3)(a) to a Union citizen who does not enjoy a right of permanent residence under article 16 or therefore enjoy the lesser protection available under article 28(2); and (ii) so far as relevant, what are the principles on which protection is available under articles 28(2) and 28(3)(a).

7. The Secretary of State's case is that the respondent has never acquired a right of permanent residence, and that enhanced protection cannot in consequence be available under article 28(3)(a). As put before the Supreme Court, it does not involve investigating events prior to 2001, it being accepted that the respondent had by 2001 some 16 years' established residence in the United Kingdom (see para 1 above). The case rests on the indisputable fact of the respondent's imprisonment for manslaughter from 2001 to 2006 and on Court of Justice authority, including judgments in *Onuekwere* and *MG* post-dating the Court of Appeal's judgment.

8. In this connection, it is, now at least, clear that no right of permanent residence could in law be acquired before 30 April 2006: see article 40 of the Directive, *Secretary of State for Work and Pensions v Lassal* (Case C-162/09) [2001] 1 CMLR 31, para 38 and *Secretary of State for Work and Pensions v Dias* (Case C-325/09) [2011] 3 CMLR 40, paras 40 and 57. To acquire such a right, the respondent therefore required, as at 30 April 2006 or at some later date, to "have resided legally for a continuous period of five years" in the UK. As at 30 April 2006, the respondent had been in prison for over five years, and he remained so for a further two months. By the time of the decision to deport, he had been out of prison for less than nine months.

9. Second, in *Onuekwere* the Court of Justice held on 16 January 2014 that under the terms of article 16(2) of the Directive "periods of imprisonment cannot be

taken into consideration for the purposes of the acquisition of a right of permanent residence for the purposes of that provision" (para 22) and further that articles 16(2) and (3) "must be interpreted as meaning that continuity of residence is interrupted by periods of imprisonment in the host member state" (para 32). The same must necessarily apply in respect of a Union citizen under article 16(1).

10. Under article 16(4) a right of permanent residence acquired in the past may be lost "through absence from the host member state for a period exceeding two consecutive years". The thinking behind article 16(4), as explained in *Lassal* (Case C-162/09) paras 53-58, is that a two-year absence affects "the link of integration" with the host member state of the Union citizen concerned. In *Dias* (Case C-235/09) this thinking was developed in a more complex situation. A Union citizen had resided legally in the UK for a five-year period from January 1998 until 17 April 2003 (not yet therefore acquiring any permanent right of residence since this five-year period ended prior to 30 April 2006). She had remained thereafter in the UK for a period from April 2003 to April 2004 during which she did not work or satisfy any other condition entitling her to reside in the UK under European Union law. From April 2004 to March 2007 (when she asserted that she had a permanent right of residence) she again worked. The Court of Justice held that the rule laid down in article 16(4) regarding absences must be applied by analogy in relation to the period when she had not been working. Since this was for less than two years, it did not affect her acquisition of a permanent right of residence as from 30 April 2006. The Supreme Court considers it clear (and understood Mr Raza Husain QC for the respondent to accept) that the Court of Justice was here identifying a bright line rule relating to the acquisition of a permanent right of residence.

11. Even a period out of work exceeding two years cannot affect a right of permanent residence acquired from or after 30 April 2006. The point of a permanent right of residence is that it is no longer necessary to work or to fulfil any of the other residence qualifications applicable under article 7 to Union citizens who have not acquired a permanent right of residence. By analogy with absence, it might, however, seem logical if a period exceeding two years spent in prison were to lead to the loss of any right of permanent residence acquired on or after 30 April 2006. The parties were not however agreed on this, and it is not necessary to consider it further on this appeal.

12. It follows from paras 8 and 9 above that, as the Secretary of State rightly submits, the respondent had not acquired any right of permanent residence before the date of the decision to deport him. The respondent's case on this basis has to be that this is irrelevant, and that a Union citizen with no right of permanent residence may nevertheless acquire a right to enhanced protection under article 28(3)(a).

13. As to the test for acquiring enhanced protection, Mr Husain submits, on the basis of Court of Justice decisions in *Land Baden-Württemberg v Tsakouridis* (Case C-145/09) [2013] All ER (EC) 183 and *MG* (Case C-400/12), that the requirement in article 28(3)(a) that the Union citizen "have resided in the host member state for the previous ten years" involves an overall assessment of the degree of integration at the date of the decision to deport; that there must "in principle" have been ten continuous years of residence, and that a period of imprisonment will not normally count towards integration; but that a period of imprisonment immediately preceding the decision to deport will not necessarily mean that prior integration is lost to a degree depriving the Union citizen of enhanced protection under article 28(3)(a); otherwise, Mr Husain submits, a delayed decision to deport could unfairly prejudice a Union citizen.

14. The Court of Appeal accepted this submission. The respondent had resided in the UK from March 1985 to March 2001 when he was imprisoned, and the Court of Appeal saw his integrative link with the UK as remaining intact in March 2007 when he was ordered to be deported. The Court of Appeal had before it the judgment in *Tsakouridis*, but not the later judgment in *MG*, delivered on 16 January 2014. The judgment in *MG* was delivered without the benefit of an Advocate General's opinion and the case was, presumably, viewed as capable of resolution without deciding any new point of law. Both *Tsakouridis* and *MG* repay study nonetheless.

15. In *Tsakouridis*, Mr Tsakouridis, a Greek national, was born in Germany in 1978, left Germany to run a pancake stall in Rhodes from March to mid-October 2004 and left again in mid-October 2005 to resume running his stall in Rhodes. He was arrested there on 19 November 2006 and returned to Germany in March 2007 pursuant to an international arrest warrant issued against him on 22 November 2005 by a German court for drug dealing. He was on 28 August 2007 sentenced to six years and six months' imprisonment.

16. The Court of Justice emphasised that, according to recital 23, the Directive protects from expulsion those who, having availed themselves of the Treaty rights and freedoms, have become genuinely integrated into the host member state, and that the system of protection afforded under articles 28(1), 28(2) and 28(3) increases with the degree of integration (paras 24-28). In para 30 the court indicated that it was "starting from the premise that, like the right of permanent residence, enhanced protection is acquired after a certain length of residence in the host member state and can subsequently be lost", and in para 37 it noted that "if it were concluded that a person in Mr Tsakouridis's situation who has acquired a right of permanent residence in the host member state does not satisfy the residence condition laid down in article 28(3) … an expulsion measure could in an appropriate case be justified on 'serious grounds of public policy or public security' as laid down in article 28(2) …".

17. These statements suggest a progression in the level of protection, with the possibility of the highest (enhanced) protection only being earned after ten years by those already benefitting from the next highest level through having a right of permanent residence. With regard to article 28(3)(a), the court in *Tsakouridis* said "the decisive criterion is whether the Union citizen has lived in that member state for the ten years preceding the expulsion decision" (para 31). As regards any absences from the host member state during that period, it said that "an overall assessment must be made of the person's situation on each occasion at the precise time when the question of expulsion arises" (para 32), continuing:

> "33. The national authorities responsible for applying article 28(3) of Directive 2004/38 are required to take all the relevant factors into consideration in each individual case, in particular the duration of each period of absence from the host member state, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host member state. It must be ascertained whether those absences involve the transfer to another state of the centre of the personal, family or occupational interests of the person concerned.
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> 34. The fact that the person in question has been the subject of a forced return to the host member state in order to serve a term of imprisonment there and the time spent in prison may, together with the factors listed in the preceding paragraph, be taken into account as part of the overall assessment required for determining whether the integrating links previously forged with the host member state have been broken.
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> 35. It is for the national court to assess whether that is the case in the main proceedings. …"

18. In *MG*, MG, a Portugese national, had come to the UK on 12 April 1998, and was treated as having acquired a right of permanent residence (as she must have done at any rate as from 30 April 2006). On 27 August 2009 (having resided in the UK for over 11 years) she was sentenced to 21 months' imprisonment, and while in prison a decision was made to deport her. She claimed the benefit of enhanced protection, and questions were referred to the Court of Justice regarding the nature and operation of the ten-year period in these circumstances. In answering them, the court stressed that the ten-year period for enhanced protection must be calculated by counting back from the date of the decision ordering expulsion: see paras 24, 28 and 37. It also stressed "that periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in article 28(3)(a)":

see para 33. The phrase "in principle" seems here to be used more in the sense of "in general" than of "as a matter of principle", because the court went on (see para 35) to make clear that the period of residence during the ten years preceding the decision to expel might be "non-continuous", citing *Tsakouridis*, para 32.

19. The court dealt with the significance of long residence in the host member state prior to imprisonment as follows:

> "37. Lastly, as regards the implications of the fact that the person concerned has resided in the host member state during the ten years prior to imprisonment, it should be borne in mind that, even though - as has been stated in paras 24 and 25 above - the ten-year period of residence necessary for the grant of the enhanced protection provided for in article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of the decision ordering that person's expulsion, the fact that the calculation carried out under that provision is different from the calculation for the purposes of the grant of a right of permanent residence means that the fact that the person concerned resided in the host member state during the ten years prior to imprisonment may be taken into consideration as part of the overall assessment referred to in para 36 above.
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> 38. In the light of the foregoing, the answer to Questions 1 and 4 is that article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host member state for the ten years prior to imprisonment. However, the fact that that person resided in the host member state for the ten years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host member state have been broken."

20. In summary, the continuous period of five years' legal residence to which article 16(1) refers may have occurred at some time in the past. Once acquired from or after 30 April 2006, a right of permanent residence continues, unless lost under, or by analogy with, article 16(4). The residence referred to in article 28(3)(a) must, in contrast, have been "for the previous ten years", previous that is to (here) the

decision to deport. The calculations under articles 16(1) and 28(3)(a) are different: see *MG* para 37 and Advocate General Bot's opinion, para 28 in *Onuekwere*. But how different is not clear. The five-year period is expressly required to be continuous, and is (it seems) broken by any period of imprisonment, but will, once acquired, only be lost by absence (or, it may be, imprisonment) lasting two years. The ten-year previous period is, in contrast, only "in principle" continuous, and may be non-continuous, where, for example, interrupted by a period of absence or imprisonment. Whether the ten years is to be counted by including or excluding any such period of interruption is however unclear.

21. The requirement of an overall assessment to identify whether or not a sufficient integrative link exists is also open in its meaning and effect. An overall assessment of integration appears on its face a different test from residence "for the previous ten years". *MG* indicates that, in considering whether ten years' previous residence exists in a sufficiently integrative sense when the person ordered to be deported is or has recently been in prison at the date of the deportation order, account can and should be taken of the length of residence prior to such imprisonment. In *MG* itself, the Court of Justice said that, in assessing whether MG had ten years' residence previous to the deportation order, it was relevant to have regard to the period (which the court, somewhat confusingly, also described as a ten-year period - in fact it was well over 11 years) which she had spent at liberty before imprisonment.

22. On the other hand, in considering whether the necessary integrative link still existed in *Tsakouridis*, Advocate General Yves Bot was inclined to discount Mr Tsakouridis's seasonal absence from March to October 2004 (AG127), but took a very different view of the period of a little over 16 months' absence from mid-October 2005 until March 2007 when Mr Tsakouridis's enforced return to Germany occurred. As to this he said:

> "AG124 … I consider that an absence of more than 16 months, such as that in the present case, may cause the loss of the enhanced protection granted under article 28(3)(a) of Directive 2004/38 and that, therefore, it is not possible to apply mutatis mutandis article 16(4) of the directive.
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> …
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> AG128 In contrast, Mr Tsakouridis's second absence, from the middle of October 2005 until March 2007, which was interrupted not of his own accord but because he was subject to an enforced return to the host member state following a legal

> decision, interrupted the ten-year period. I consider that such an absence shows, in actual fact, that the Union citizen established himself in another member state and that, therefore, the link between him and the host member state is no longer as strong and may even be totally broken."

23. The Court of Justice did not say anything to exclude this possibility. Indeed, it extended it by focusing not merely on the single, second period of absence, but by referring to the need to examine all absences: see paras 33-35 cited in para 17 above. This was against a background where Mr Tsakouridis had been born in Germany in 1978 and had lived there continuously for at least 26 years, prior to 2004. In contrast, the present respondent was born and for his first 28 years lived abroad (until 1985), he then came to and lived for some 16 years in the UK (until 2001), during which time he developed but then lost a family life, which it appears no longer exists even in the form of contact with his children, then from March 2001 until July 2006 (some five years four months) he was in prison and finally for some eight months he was at liberty before the decision to deport in March 2007. He had a number of convictions during the 16-year period (and, if material, has had further more recent convictions).

24. It is true that Mr Tsakouridis had, so far as appears, shown no intention to return to Germany when he was arrested, whereas the present respondent on release from prison remained in the UK. Nonetheless, the factors outlined above appear well capable of constituting grounds for a close review of the question whether, as at the date of the decision to deport in 2007, the respondent's integrative links with the UK were such as to entitle him to enhanced protection on the basis of residence in the UK for the previous ten years. This review was not conducted at all at the Tribunal level, since it was assumed that the ten-year period was established. The Court of Appeal examined it, but I do not consider that the Court of Appeal's examination can stand. It was conducted on the basis (which can now be seen to have been erroneous) that the respondent had a permanent right of residence, which, even if not a pre-requisite to enhanced protection, must be relevant to its acquisition or retention. On any remission the Tribunal will also need to consider whether, if the Secretary of State would otherwise be entitled to deport, this would be proportionate: see article 28(1).

25. The primary question before the Supreme Court is whether enhanced protection under article 28(3)(a) depends upon the possession of a right of permanent residence under article 16 and article 28(2). The case in favour of this is that the protection afforded under articles 28(2) and 28(3) is intended to be progressive (see para 17 above). Further, article 28, headed "Protection against expulsion" appears in Chapter VI of the Directive, headed "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health". The implication is that the article 28(2) and 28(3) protections benefit

those enjoying rights of residence; and that article 28(3) is predicated upon the enjoyment of such a right. This (it can be suggested) means, most naturally, the right of permanent residence referred to in article 28(2).

26. The case against is that neither article 28(3) nor the existing case law identifies any need for a right of permanent residence in order for a Union citizen to invoke enhanced protection, and that, if any right of residence at all is required in this context, a simple right to reside under, for example, articles 6, 7, 12 or 13(1) should suffice (if it could be established to exist). The respondent (although he may not have been a worker at any material time) may enjoy a simple right of residence under article 13(2)(a), as a divorcee who was married to a UK citizen here for over three years.

27. A majority of the Court favours the view that possession of a right of permanent residence is not needed in order to enjoy enhanced protection under article 28(3)(a). But a minority regards the position as at the least unclear and so as requiring a reference to the Court of Justice. The Supreme Court accordingly refers to the Court of Justice the question:

> "(1) whether enhanced protection under article 28(3)(a) depends upon the possession of a right of permanent residence within article 16 and article 28(2)."

28. In case the answer to this question is in the negative, the Supreme Court also considers it necessary or appropriate to refer to the Court of Justice the further questions:

> "(2) whether the period of residence for the previous ten years, to which article 28(3)(a) refers, is
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> (a) a simple calendar period looking back from the relevant date (here that of the decision to deport), *including* in it any periods of absence or imprisonment,
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> (b) a potentially non-continuous period, derived by looking back from the relevant date and adding together period(s) when the relevant person was not absent or in prison, to arrive, if possible, at a total of ten years' previous residence,

(3) what the true relationship is between the ten year residence test to which article 28(3)(a) refers and the overall assessment of an integrative link."

Annex
Relevant provisions of Directive 2004/38/EC

"**Recitals:**

(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 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. …"

Provisions:

CHAPTER III - Right of residence

Article 6 - Right of residence for up to three months

1. Union citizens shall have the right of residence on the territory of another member state for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of para 1 shall also apply to family members in possession of a valid passport who are not nationals of a member state, accompanying or joining the Union citizen.

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 of longer than three months if they:

(a) are workers or self-employed persons in the host member state; or

(b) …

Article 13 - Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership.

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of article 2 shall not affect the right of residence of his/her family members who are nationals of a member state.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of article 7(1).

…

CHAPTER IV - Right of permanent residence

Section I - Eligibility

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.

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

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

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

…

CHAPTER VI - Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health.

…

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 ten 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."