Neutral Citation Number: [2019] EWCA Civ 1052

Case No: C9/2018/1952

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**
**DA/00511/2017**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2019

**Before:**

**LORD JUSTICE UNDERHILL**
**(VICE PRESIDENT OF THE COURT OF APPEAL CIVIL DIVISION)**
**LORD JUSTICE LEWISON**
and
**LORD JUSTICE FLAUX**

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**Between:**

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| **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Appellant** |
| **- and -** | |
| **DENIS VISCU** | **Respondent** |

**ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE) CENTRE**
**Intervener**

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**Ben Lask and Harry Gillow** (instructed by **Government Legal Department**) for the **Appellant**
**Allan Briddock and Benjamin Bundock** (instructed by **Turpin Miller LLP**) for the **Respondent**
**Laura Dubinsky and Zoe Harper** (instructed by **Allen & Overy LLP**) for the **Intervener**

Hearing date: 11 June 2019

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# Approved Judgment

## Lord Justice Flaux:

Introduction

1. The Secretary of State appeals with the permission of the Upper Tribunal against the Decision of Upper Tribunal Judge Lindsley dated 15 March 2018 upholding the Decision of the First-tier Tribunal of 16 November 2017, allowing the appeal of the respondent against the decision of the Secretary of State to take deportation action against the respondent under the Immigration (EEA) Regulations 2016 ("the 2016 Regulations").

2. The appeal raises a single issue of law: whether detention in a young offenders' institution ("YOI") counts as imprisonment for the purposes of regulation 3(3) of the 2016 Regulations so that, in principle, it breaks the continuity of the period of residence required in order for an offender to benefit from enhanced protection against expulsion under the 2016 Regulations.

Factual background

3. The respondent is a citizen of Romania born in June 1999. He came to the United Kingdom with his parents and brother in June 2007. Between July 2014 (when he was 15) and March 2017 (when he was 17) he received 14 convictions for 20 offences. In terms of custodial sentences, he was sentenced on three occasions to a detention and training order ("DTO") which he served in a YOI: 4 months DTO in June 2015 for robbery and attempted robbery, 4 months DTO in March 2016 for possession of a knife in a public place and 12 months DTO in March 2017 for robbery, theft and resisting arrest.

4. In September 2017, the appellant decided to take action to deport the respondent under the 2016 Regulations. In the Decision Letter it was accepted that the respondent had a right of permanent residence under regulation 15 as he had been resident in the United Kingdom for a continuous period of five years as the family member of his father. However, the appellant contended that his deportation was justified under regulation 27(3) because he was a persistent offender and on serious grounds of public policy. It was contended that although the respondent had lived in the United Kingdom since 2007, he was not entitled to enhanced protection under regulation 27(4), because the time he had spent in custody broke the continuity of lawful residence.

5. The respondent appealed to the First-tier Tribunal under regulation 36 against the decision to deport him. The principal issue before the First-tier Tribunal was whether the sentences of DTOs in a YOI were a "sentence of imprisonment" within regulation 3(3)(a), breaking continuity of residence so that regulation 27(3) rather than regulation 27(4) applied to the respondent. The First-tier Tribunal judge held that, since a juvenile could not be sentenced to imprisonment his residence in the United Kingdom had been continuous and uninterrupted. Accordingly it was for the appellant to show that there were imperative grounds of public security for deportation within regulation 27(4). This could not be shown so the appeal was allowed.

6. The appellant appealed to the Upper Tribunal. The Upper Tribunal judge upheld the decision of the First-tier Tribunal, holding that since the respondent was under 21 he

had not served a sentence of imprisonment since young offenders could only be sentenced to youth custody or a DTO and not to imprisonment, with the policy objective of reintegrating young offenders into society. The provisions of sections 117C and 117D of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), which provide in relation to foreign criminals who are not EEA nationals that detention in an institution other than prison is in effect deemed to be imprisonment, could not be relied upon by the appellant as they were not the provisions under which it was sought to deport the respondent. The Upper Tribunal judge gave the appellant permission to appeal to this Court.

7. It is to be noted that since the decision of the Upper Tribunal, the respondent has been convicted of four further offences: possession of a knife in a public place, possession of a Class A drug with intent to supply, failure to comply with a DTO and burglary, for which he was sentenced to a total of 4 ½ years detention in a YOI.

8. Before considering the submissions of the parties and on behalf of the AIRE Centre which we allowed to intervene, I propose to set out the relevant EU and domestic legal framework.

The legal framework

9. The 2016 Regulations superseded the earlier Immigration (EEA) Regulations 2006. As is common ground and as is made clear by paragraph 2.1 of the Explanatory Memorandum to the 2016 Regulations, both sets of Regulations transpose into domestic law Council Directive 2004/38/EC on the rights of citizens of the Union and their family members to reside and move freely between member states (the so-called "Citizens' Directive").

10. Chapter IV of the Citizens' Directive is headed "Right of permanent residence" and, within that, Article 16 headed "General rule for Union citizens and their family members" provides, inter alia:

> "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 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."

11. Chapter VI is headed: "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health". Article 27 is then headed "General principles" and provides, inter alia:

> "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."

12. Article 28 is headed: "Protection against expulsion" and provides:

> "1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
>
> 2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
>
> 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
>
> (a) have resided in the host Member State for the previous 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."

13. Article 16 of the Directive was considered by the Court of Justice of the European Union ("CJEU") in *Onuekwere v Secretary of State for the Home Department* (Case C-378/12) [2014] 1 WLR 2420. The applicant was a third-country national who obtained a temporary residence permit in 2000 allowing him to reside in the United Kingdom as the spouse of a Union national. He was subsequently convicted of a

number of offences and served two sentences of imprisonment. His application for permanent residence was refused by the Secretary of State in 2010. The Upper Tribunal referred to the CJEU questions as to (i) whether under Article 16(2) a period of imprisonment could constitute legal residence for the purposes of acquisition of a right of permanent residence and, (ii) if not, whether periods of residence before and after imprisonment could be aggregated for the purposes of calculating the period of five years under the Article.

14. In his Opinion Advocate-General Bot considered that the questions should be answered in the negative on the grounds that the right of permanent residence in the Directive is based on genuine integration of the individual concerned, whereas the commission of the offence which led to the sentence of imprisonment was indicative of a lack of integration. At [54]-[56] he said:

> "54. It is clear that every sentence must, in accordance with the fundamental principles of the law on sanctions, comprise a rehabilitative element to be achieved by appropriate means of implementation. Nevertheless, if a sentence has been imposed, it is precisely because societal values as expressed in the criminal law have been disregarded by the offender. And while rehabilitation must take its proper place, that is exactly because either there was no integration in society, thus explaining the commission of the offence, or because such integration was expunged by commission of the offence.
>
> 55. Besides rehabilitation, the sentence also serves the essential purpose of retribution, which aims to make the offender pay for his crime and is proportionate to the gravity of the offence, expressed here by the penalty of imprisonment. These functions cannot operate to negate each other. The rehabilitative function cannot result in a situation where a period spent atoning for the crime committed confers on the convicted person a right the acquisition of which requires recognition and acceptance of social values which he specifically disregarded by committing his criminal act.
>
> 56. That is the reason for which, in addition, I am of the opinion that, even in the context of reduced sentencing which may find expression, for example, in house arrest or in a part-release scheme obliging the prisoner to return to prison in the evening, it is not possible to consider that the person concerned is residing legally within the meaning of Article 16(2) of Directive 2004/38."

15. The CJEU adopted the same approach in concluding that periods of imprisonment could not be taken into consideration for the purposes of acquisition of a right of permanent residence, noting at [24] of its judgment that the acquisition of that right was subject to the integration of the citizen in the member state. The principal reasoning of the Court is at [25]-[26]:

> "25 Such integration, which is a precondition of the acquisition of the right of permanent residence laid down in Article 16(1) of Directive 2004/38 is based not only on territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host Member State (see Case C-325/09 *Dias* [2011] ECR I-6387, paragraph 64), to such an extent that the undermining of the link of integration between the person concerned and the host Member State justifies the loss of the right of permanent residence even outside the circumstances mentioned in Article 16(4) of Directive 2004/38 (see, to that effect, *Dias*, paragraphs 59, 63 and 65).
>
> 26 The imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition by family members of a Union citizen who are not nationals of a Member State of the right of permanent residence for the purposes of Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence."

16. The CJEU went on at [28]-[32] to conclude for the same reason that the answer to the second question was that Article 16 was to be interpreted as meaning that continuity of residence is interrupted by periods of imprisonment.

17. The judgment of the CJEU in *Secretary of State for the Home Department v MG (Portugal)* (Case C-400/12) [2014] 1 WLR 2441 was delivered on the same day as its judgment in *Onuekwere*, having been heard by the same constitution. In *MG*, the applicant was a Portuguese national who had resided in the United Kingdom for more than ten years when convicted of offences of child cruelty and assault by beating and sentenced to 21 months imprisonment. Whilst serving that sentence she applied for a certificate of permanent residence. This was refused by the Secretary of State who ordered her deportation on the grounds that the enhanced protection provided by Article 28(3)(a) of the Directive was dependent on integration into the member state, which could not take place when she was in prison.

18. The Upper Tribunal referred a number of questions to the CJEU. The first series of questions concerned whether the ten year period of residence referred to in the Article had to be calculated by counting backwards from the date of the decision ordering expulsion or forwards from the commencement of the person's residence and also asked whether that period had to be continuous. The CJEU decided that on a proper construction of Article 28(3)(a) the ten year period of residence had to be continuous and must be calculated counting back from the date of the decision ordering expulsion.

19. The second series of questions, of particular relevance to the present appeal, asked whether Article 28(3)(a) must be interpreted as meaning that a period of imprisonment is capable of interrupting the continuity of the period of residence under

that provision and may consequently affect the decision as to whether to grant enhanced protection even where the individual concerned resided in the member state for the ten years prior to imprisonment. It can be seen immediately that the questions were very much tied to the particular facts of that case and did not deal with the position of someone who had not resided in the member state for ten years prior to imprisonment.

20. The CJEU emphasised the importance of the degree of integration in relation both to the right of permanent residence and protection against expulsion. At [32]-[33] it held:

> "32 Since the degree of integration of the persons concerned is a vital consideration underpinning both the right of permanent residence and the system of protection against expulsion measures established by Directive 2004/38, the reasons making it justifiable for periods of imprisonment not to be taken into consideration for the purposes of granting a right of permanent residence or for such periods to be regarded as interrupting the continuity of the period of residence needed to acquire that right must also be borne in mind when interpreting Article 28(3)(a) of that directive.
>
> 33 It follows that periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 and that, in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision."

21. The CJEU then went on to consider the extent to which the non-continuous nature of the period of residence in the ten years prior to the expulsion decision prevented someone from enjoying enhanced protection, holding that an overall assessment of the person's position had to be made at the time of the expulsion decision. At [36] the Court said:

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

22. The 2016 Regulations came into force on 25 November 2016. Regulation 3 is headed "Continuity of residence" and provides, inter alia:

> "(3) Continuity of residence is broken when—

> (a) a person serves a sentence of imprisonment;
>
> …
>
> (4) Paragraph (3)(a) applies, in principle, to an EEA national who has resided in the United Kingdom for at least ten years, but it does not apply where the Secretary of State considers that—
>
> (a) prior to serving a sentence of imprisonment, the EEA national had forged integrating links with the United Kingdom;
>
> (b) the effect of the sentence of imprisonment was not such as to break those integrating links; and
>
> (c) taking into account an overall assessment of the EEA national's situation, it would not be appropriate to apply paragraph (3)(a) to the assessment of that EEA national's continuity of residence."

23. Paragraph 7.13 of the Explanatory Memorandum states in terms that regulation 3: "gives effect to the CJEU judgments in Case C-378/12 *Onuekwere* (ECLI:EU:C:2014:13) and in case C-400/12 *MG* (ECLI:EU:C:2014:9) in UK law to clarify that continuity of residence is broken when a person serves a sentence of imprisonment."

24. Regulation 15 is headed "Right of permanent residence" and provides, inter alia:

> "15.—(1) The following persons 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 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;"

25. Regulation 27 deals with decisions to deport in line with Article 28 of the Directive providing that:

> "(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 right of permanent residence under regulation 15 except on serious grounds of public policy and 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 in the best interests of the person concerned, 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."

26. Since the Regulations came into force, the CJEU has considered Article 28 of the Directive again in the conjoined cases of *Franco Vomero v Secretary of State for the Home Department* (Case C-424/16) and *B v Land Baden-Württemberg* (Case C-316/16) [2019] QB 126. In *Vomero* the applicant was an Italian national who had resided in the United Kingdom since 1985. In 2002 he was convicted of manslaughter and sentenced to 8 years imprisonment. Following his release from prison, the Secretary of State made a decision to deport him, against which he appealed. The Supreme Court referred three questions to the CJEU for a preliminary ruling:

> "1) Whether enhanced protection under [Article 28(3)(a) of Directive 2004/38] depends upon the possession of a right of permanent residence within Article 16 and [Article 28(2) of that directive].
>
> If the answer to question one is in the negative, the following questions are also referred:
>
> (2) Whether the period of residence for the previous 10 years, to which [Article 28(3)(a) of Directive 2004/38] refers, is:
>
> (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,
>
> (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 10 years' previous residence.
>
> (3) What the true relationship is between the 10 year residence test to which [Article 28(3)(a) of Directive 2004/38] refers and the overall assessment of an integrative link."

27. In *B*, the applicant was a Greek national who had resided in Germany for twenty-five years and had a right of permanent residence within the meaning of Article 16 of the Directive. He was convicted of a serious offence and sentenced to over five years imprisonment. The German authorities ordered him to leave Germany under the national law transposing Article 28(3)(a) of the Directive. The Higher Administrative Court referred a series of questions to the CJEU. The first three sought in essence to ascertain whether the requirement of having "resided in the host member state for the previous ten years" in Article 28(3)(a) was satisfied by a Union national who lived in the member state for twenty years before receiving a custodial sentence which he is

serving at the time of the expulsion decision and, if so, under what conditions. The fourth question asked in essence at what time that condition of having "resided in the host member state for the previous ten years" must be assessed.

28. In considering the first question referred in *Vomero* the Grand Chamber of the CJEU reiterated at [44] to [48] of its judgment what it had said in earlier cases, that the Directive establishes a system of protection from expulsion gradually increasing in proportion to the degree of integration of the individual in the member state, identifying the general provision in Article 28(1), the need for "serious grounds" in Article 28(2) where the individual has a right of permanent residence pursuant to Article 16 and the need for "imperative grounds" in relation to those entitled to enhanced protection under Article 28(3).

29. At [49] the Court concluded:

> "In those circumstances, and even though it is not specified in the wording of the provisions concerned, the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 is available to a Union citizen only in so far as he first satisfies the eligibility condition for the protection referred to in Article 28(2) of that Directive, namely having a right of permanent residence under Article 16 of that Directive."

30. Accordingly, the Court answered the first question posed by the Supreme Court in the affirmative. Since the second and third questions were raised only in the event that the first question was answered in the negative, the Court considered there was no need to examine them. Mr Briddock submitted that this left those questions undecided and unclear, as the Supreme Court had thought in the judgment referring the questions to the CJEU: see [2016] UKSC 49; [2017] 1 CMLR 3 at [20] per Lord Mance. Whether that is correct or not (and it is to be noted that the Supreme Court did not consider that the second and third questions required an answer if the first question was answered in the affirmative, as it was), it does not seem to me that the matters raised by those questions are of any relevance to the issue which we have to decide in this case.

31. In considering the first three questions posed by the German Court in *B*, the CJEU endorsed what had been said in *MG*, that the ten year period under article 28(3) was to be calculated by counting backwards from the date of the expulsion decision and that the period must, in principle (by which the CJEU clearly means "in general") be continuous (see [65]-[66] of the judgment). The Court went on to consider the effect of periods of imprisonment, saying at [70]:

> "As to whether periods of imprisonment may, by themselves and irrespective of periods of absence from the host Member State, also lead, where appropriate, to a severing of the link with that State and to the discontinuity of the period of residence in that State, the Court has held that although, in principle, such periods of imprisonment interrupt the continuity of the period of residence, for the purpose of Article 28(3)(a) of Directive 2004/38, it is nevertheless necessary — in order to determine whether those periods of imprisonment have broken the integrative links previously forged with the host Member

> State with the result that the person concerned is no longer entitled to the enhanced protection provided for in that provision — to carry out an overall assessment of the situation of that person at the precise time when the question of expulsion arises. In the context of that overall assessment, periods of imprisonment must be taken into consideration together with all the relevant factors in each individual case, including, as the case may be, the circumstance that the person concerned resided in the host Member State for the 10 years preceding his imprisonment: see *MG's* case paras 33-38."

32. At [72] to [75] the Court went on to consider what factors would be relevant in the overall assessment:

> "72 As part of the overall assessment, mentioned in paragraph 70 above, which, in this case, is for the referring court to carry out, it is necessary to take into account, as regards the integrative links forged by B with the host Member State during the period of residence before his detention, the fact that, the more those integrative links with that State are solid —including from a social, cultural and family perspective, to the point where, for example, the person concerned is genuinely rooted in the society of that State, as found by the referring court in the main proceedings —the lower the probability that a period of detention could have resulted in those links being broken and, consequently, a discontinuity of the 10-year period of residence referred to in Article 28(3)(a) of Directive 2004/38.
>
> 73 Other relevant factors in that overall assessment may include, as observed by the Advocate General in points 123 to 125 of his Opinion, first, the nature of the offence that resulted in the period of imprisonment in question and the circumstances in which that offence was committed, and, secondly, all the relevant factors as regards the behaviour of the person concerned during the period of imprisonment.
>
> 74 While the nature of the offence and the circumstances in which it was committed shed light on the extent to which the person concerned has, as the case may be, become disconnected from the society of the host Member State, the attitude of the person concerned during his detention may, in turn, reinforce that disconnection or, conversely, help to maintain or restore links previously forged with the host Member State with a view to his future social reintegration in that State.
>
> 75 On that last point, it should also be borne in mind that, as the Court has already pointed out, the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated is not only in his interest but also in that of

> the European Union in general (*Tsakouridis's* case, paragraph 50)."

33. The CJEU concluded in relation to the first three questions, at [83]:

> "Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that, in the case of a Union citizen who is serving a custodial sentence and against whom an expulsion decision is adopted, the condition of having 'resided in the host Member State for the previous ten years' laid down in that provision may be satisfied where an overall assessment of the person's situation, taking into account all the relevant aspects, leads to the conclusion that, notwithstanding that detention, the integrative links between the person concerned and the host Member State have not been broken. Those aspects include, inter alia, the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed and the conduct of the person concerned throughout the period of detention."

34. The CJEU then went on to deal with the fourth question, concluding at [88] that compliance with the condition of having "resided in the host member state for the previous ten years" is to be assessed at the date when the expulsion decision is initially adopted.

The parties' submissions

35. On behalf of the appellant, the principal submission of Mr Lask was that, since regulation 3 was intended to give effect to Article 28 of the Directive as interpreted by the CJEU, it must be interpreted accordingly, so that a "sentence of imprisonment" should not be interpreted narrowly, simply by reference to the Powers of the Criminal Courts (Sentencing) Act 2000 ("the Sentencing Act"). He relied upon the fact that the CJEU jurisprudence, to which I have referred, establishes that, in principle, a custodial sentence interrupts the continuity of residence required by Article 28. He described this as "the interruption principle". However, as reflected in regulation 3(4), there has to be an overall assessment of the situation of the individual at the time of the expulsion decision to determine whether integrative links with the host member state have been broken so as to deprive the individual of the enhanced protection. Mr Lask accepted that the appellant had not carried out such an overall assessment in making the expulsion decision in this case. It followed that, if the appeal were allowed, the case should be remitted to the Upper Tribunal for further consideration, probably with a supplementary decision letter from the appellant making that assessment.

36. Mr Lask submitted that the rationale of the interruption principle was that the system of protection from expulsion depends upon the degree of integration of the individual in the member state. Enhanced protection is the highest level of protection, so it assumes a high level of integration. The imposition of a custodial sentence signifies rejection of the member state's societal values and thus a severing of integrative links.

He submitted that this rationale applied equally to adults and children or young offenders. Although he accepted that, in the case of child offenders, the extent to which the offending signified rejection of societal values might be weaker than in the case of adult offenders, he made the point that, because of international legal obligations to give priority to the best interests of the child, the national courts would take great care before imposing a custodial sentence on a child offender. Such a sentence was a "last resort" reserved for situations in which "the offence is so serious that no other sanction is appropriate" (Sentencing Children and Young People Definitive Guideline paragraph 1.3). As a consequence, such a sentence would only be imposed in a case where the offending was serious, which might in a particular case be a strong indication that the child or young offender had rejected the member state's values.

37. He submitted that, in consequence, the interruption principle applies to all custodial sentences whether imposed on an adult or a young offender, although it was important to note that the individual would not automatically be denied enhanced protection nor would his or her age at the time of offending be disregarded, because there would still have to be an overall assessment of the situation of the particular individual at the time of the expulsion decision. He submitted that, in contrast, the construction of "sentence of imprisonment" for which the respondent contends would mean that a custodial sentence served as a minor or a young adult between 18 and 21 (who could still only be sentenced to detention in a YOI) would be completely disregarded in determining whether, as an adult at the time of the expulsion decision, an individual was entitled to enhanced protection.

38. Accordingly, Mr Lask submitted that, to give full effect to the intention of Parliament to implement the CJEU case law in regulation 3, the term "sentence of imprisonment" must be construed as including a custodial sentence in a YOI. There was no bar to this construction as a matter of domestic law, since depending on the context "imprisonment" may include other forms of custody.

39. The principal thrust of the submissions of Mr Briddock on behalf of the respondent was that the First-tier Tribunal and Upper Tribunal had been correct to conclude that "sentence of imprisonment" in regulation 3 means only a sentence of actual imprisonment imposed on an adult offender over the age of 21. Since, under the Sentencing Act, a sentence of imprisonment could not be passed on a young offender under the age of 21, "sentence of imprisonment" in regulation 3 could not include a sentence of detention in a YOI or a DTO. There was no autonomous EU definition of "imprisonment" so that it had to be interpreted by reference to the domestic law.

40. He submitted that the provisions of section 117C and 117D of the 2002 Act did not assist the appellant; quite the contrary. Parliament had been well aware that "imprisonment" did not include detention in a YOI so it had specifically included the deeming provision in section 117D(4). There was no equivalent provision in the Regulations, so the words "sentence of imprisonment" should be limited to adult offenders.

41. Ms Dubinsky on behalf of the AIRE Centre began by identifying what she contended were six erroneous premises in the argument on behalf of the appellant, which essentially ascribed to Mr Lask a failure to distinguish between the test for "permanent residence" in Article 16 and the test under Article 28(3)(a) as interpreted

by the CJEU for interruption of continuity of residence "in principle". As Mr Lask confirmed in his submissions in reply, he was not relying on Article 16 nor was he contending for a different test in relation to what he described as the interruption principle than that set out in the CJEU case law. It seems to me that Ms Dubinsky's criticisms were misplaced.

42. She pointed out that the CJEU cases were all ones where the individual had accrued decades of residence before the last period of imprisonment. None of the cases concerned children or young offenders. The interruption principle, which she submitted was better described as the integration principle, had as its rationale that deprivation of liberty was per se disruptive of integrative ties. This principle would have to be applied differently to children. However grave the child's offending, it was less indicative of a rejection of societal values than in the case of an adult offender. Furthermore, the practice and the purpose of child detention such as in a secure children's home was less disruptive of integration than in the case of an adult offender. In the case of children and young offenders the purpose of detention was not primarily retributive but focused on avoiding further offending and the welfare and rehabilitation of the individual. This reflects the best interests and reintegration principles in the UN Convention on the Rights of the Child 1989 ("UNCRC") and Article 24.2 of the Charter of Fundamental Rights ("CFR").

43. Ms Dubinsky submitted that regulation 3(4)(a) had failed to transpose the Directive properly since it only dis-applied regulation 3(3) where, prior to the sentence of imprisonment, the individual had forged integrating links with the United Kingdom. By definition children could not have amassed long periods of residence and integrating links before a custodial sentence. She submitted that the Regulations had to be read in a manner which was consistent with the Directive and the UNCRC and CFR. By interpreting regulation 3 in the manner which the Upper Tribunal had and excluding detention in a YOI and DTOs from a "sentence of imprisonment", this consistency could be achieved.

Analysis and conclusions

44. The CJEU jurisprudence to which I have referred establishes (i) that the degree of protection against expulsion to which a Union national resident in another member state is entitled under the Directive is dependent upon the degree of integration of that individual in the member state; (ii) that, in general, a custodial sentence is indicative of a rejection of societal values and thus of a severing of integrative links with the member state but (iii) that the extent to which there is such a severing of integrative links will depend upon an overall assessment of the individual's situation at the time of the expulsion decision.

45. Although the jurisprudence refers most frequently to "imprisonment" rather than "custodial sentence" I am quite satisfied that the rationale for the principle that, in general, a custodial sentence is indicative of a rejection of societal values and a severing of integrative links so as to interrupt the required continuity of residence, is equally applicable to sentences of detention in a YOI as it is to imprisonment. This is because, on a proper analysis, it is not the sentence which indicates rejection of societal values but the offending which is sufficiently serious to warrant a custodial sentence whether of imprisonment or some other form of detention.

46. This was the point made by Advocate-General Szpunar in [75] of his Opinion in *Vomero*: "…it is the offence itself which is directed against the values expressed by the criminal law of the host member state. The imposition of a prison sentence leads only to the assumption that the convicted person committed a serious offence". Similarly, Advocate-General Bot focused on the gravity of the offence in the passage in his Opinion in *Onuekwere* at [54] to [56] which I quoted above. That is why he considered that continuity of residence might be interrupted even by house arrest or partial deprivation of liberty.

47. Given that, in regulation 3, Parliament was avowedly intending to give effect to the decisions of the CJEU in *Onuekwere* and *MG*, I agree with Mr Lask that "sentence of imprisonment" in the regulation should be widely construed to include all forms of custodial sentence, including detention in a YOI, in order to reflect the principle (whether one categorises it as an "interruption principle" or as an "integration principle") and its rationale to which I have just referred. There is nothing in domestic law which precludes that construction of "sentence of imprisonment". As Mr Lask submitted, there is no reason why imprisonment may not include other forms of detention: it all depends upon the context.

48. I see no justification for limiting "sentence of imprisonment" to adult offenders by construing it as referable only to sections 76 and 89 of the Sentencing Act. Not only would that narrow construction fail to give effect to the rationale for the interruption or integration principle in the CJEU jurisprudence, but it would mean that child and young offenders resident in the United Kingdom for a period of ten years prior to the date of an expulsion decision would always be entitled to enhanced protection when an expulsion decision was taken against them once they were adults, even if they had committed serious offences, for which they were sentenced to substantial periods of detention in a YOI, during that ten year period. Whilst it is correct that a member state is entitled in transposing a Directive into domestic law to provide for more favourable treatment than the Directive requires, I do not consider that this can have been the intention of Parliament. Had it been their intention, one would expect there to have been a specific "carve out" to that effect in regulation 3.

49. This point is particularly acute in relation to young offenders between 18 and 21 who are adults, but who under the domestic sentencing regime can only be sentenced to detention in a YOI. It is difficult to see how it can have been intended that such young offenders who had been sentenced to periods of detention would automatically be entitled to enhanced protection, despite the seriousness of their offending. Such an intention would be completely out of step with Parliament's approach to young offenders from a non-EU state as reflected in sections 117C and 117D of the 2002 Act. I agree with Mr Lask that it is no answer to say that if Parliament had intended "sentence of imprisonment" to include detention in a YOI, it could and should have included a deeming provision like section 117D(4)(c) of the 2002 Act. Unlike section 117D, the regulation was intended to give effect to EU law, and in determining whether the interruption principle applies, EU law does not draw a distinction based upon the age of the offender.

50. I accept that there is force in Ms Dubinsky's submission that, in the case of a child or young offender, it may be that the offending is less indicative of a rejection of societal values and the nature and purpose of detention is less disruptive of integration than in the case of adult offender. However those are all matters which can and should be

taken into account in the overall assessment of the situation of the offender, which of course has yet to take place in the present case. Furthermore, since in the case of a minor under the age of 18 at the time of an exclusion decision, regulation 27(4)(b) (reflecting Article 28(3)(b) of the Directive) confers enhanced protection in any event, save where the expulsion decision is in the best interests of the child concerned, it is not necessary to adopt the narrow definition of imprisonment under regulation 3 for which Mr Briddock and Ms Dubinsky contended in order to protect the best interests of the child concerned.

51. What is clear from *Vomero and B* (particularly at [70] and [72]-[75] in the passages I quoted above), is that the overall assessment will take account of all relevant factors, including the nature and circumstances of the offending (which may be of particular relevance where the offending took place when the individual was a minor) and the behaviour of the offender whilst in custody (which again in the case of a minor may be an indicator that integrating links have not been broken). Likewise one would expect the overall assessment to take into account what is in the best interests of a child in accordance with the United Kingdom's obligations under international law. It was not suggested that compliance with those obligations required the blanket availability of enhanced protection where the expulsion decision is taken when the person concerned is an adult.

52. In relation to Ms Dubinsky's submission that regulation 3(4)(a) fails to transpose properly the Directive, as Mr Lask pointed out, this issue was not fully argued and, in any event, the present case does not concern regulation 3(4) given that the overall assessment has yet to take place. What is clear is that regulation 3(4) does faithfully transpose the jurisprudence in *Onuekwere* and *MG* as the Explanatory Memorandum states. It may be that in *Vomero and B* the CJEU has taken a broader approach which might require fresh consideration of whether regulation 3(4) fully transposes the Directive. However, it is not necessary to decide that issue, which was not fully argued and does not arise, since this case does not concern regulation 3(4) but regulation 3(3). In any event, any problem with regulation 3(4) does not require the narrow interpretation of regulation 3(3) for which Mr Briddock and Ms Dubinsky contend. As I have already held, that narrow interpretation would fail to give effect to the interruption or integration principle and its rationale as it emerges from the CJEU jurisprudence.

53. Accordingly, I would allow the appeal and remit the case to the Upper Tribunal for further consideration in the light of an overall assessment to be made by the appellant.

**Lord Justice Lewison**

54. I agree.

**Lord Justice Underhill**

55. I also agree.