From: **European Operational Policy Team**

Subject: **ECJ cases of *MG* and *NO***

Date: **18th September 2014**

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Purpose of notice

1. This notice provides guidance to decision-makers on how to consider periods of imprisonment following the Court of Justice of the European Union ('ECJ') judgments in *NO (C378/12) ('Onuekwere')* and *MG (C400/12)* for the purposes of acquiring permanent residence and benefitting from the enhanced protection from deportation. This notice should be read in conjunction with EOPN 02/12 which provides guidance on assessing imperative public security grounds following the ECJ judgment in *Tsakouridis (C145/09).*

Background to *Onuekwere (C-378/12)*

2. In the ECJ case of *Onuekwere*, the ECJ was asked to consider whether:

    - time in prison is to be regarded as legal residence for the purposes of acquiring a right of permanent residence in line with Article 16(1) of Directive 2004/38/EC ('the Directive'); and

    - if a period of imprisonment does not qualify as legal residence, can periods of residence on either side of the person's imprisonment, be added together and count towards the period of five years needed to establish a permanent right of residence under the Directive.

Applying *Onuekwere* to decisions on the acquisition of permanent residence

3. In *Onuekwere*, the ECJ clarified that the acquisition of permanent residence is dependent upon a person residing legally and continuously for the duration of the five year qualifying period. This was considered in the context of a third country national family member, but the principle applies to anyone claiming EU treaty rights. Any prison sentence imposed by the national courts upon the EEA national/ family member demonstrates non-compliance with the values expressed by the society of the host Member State in its criminal law and, as a result, any such periods of imprisonment **do not** equate to legal residence under the Directive. It therefore follows that such

periods of imprisonment cannot be taken into account for the purposes of calculating permanent residence.

4. On the second question, the ECJ confirmed that imprisonment, in addition to being considered non-legal residence, would also break continuity of residence. This means that a person cannot use residence before and after imprisonment to count towards permanent residence. For example, a person who resided in the UK for three years, spent one year in prison and then a further two years following their release from prison, cannot aggregate the periods before and after prison to count towards the five year qualifying period for permanent residence. Any qualifying period would, therefore, effectively re-start at the point they were released from prison and started residing in accordance with the Immigration (European Economic Area) Regulations 2006 ('the Regulations').

Background to *MG (C-400/12)*

5. In the ECJ case of *MG,* the ECJ was asked to interpret Article 28(3) of the Directive and the point at which a person is assessed as benefitting from the highest level of protection against deportation (that being a decision taken on 'imperative grounds' of public security). Article 28(3) of the Directive has been transposed into domestic legislation via regulation 21(4) of the Regulations.

6. Regulation 21(4) states that *"a relevant decision may not be taken against an EEA national except on imperative grounds of public security, where that EEA national has resided in the UK for a continuous period of at least ten years prior to the relevant decision being made"*. It is our position, that any such residence must have been completed under the terms of the Directive. This means that in order for a person to have reached the relevant imperative public security threshold a person must have acquired permanent residence in accordance with the Regulations and then completed a further five years lawful residence in the UK to reach the ten year point.

Applying *MG* to deportation decisions

7. In *MG* the ECJ confirmed that, for the purposes of regulation 21(4), the ten year period of residence must, in principle, be continuous and calculated backwards from the deportation decision.

8. The ECJ also confirmed the position taken in the case of *Onuekwere*, that continuity of residence is broken by any period of imprisonment and would therefore also, in principle, affect the decision regarding the grant of imperative public security protection. This means, that *in principle*, any time spent in prison prior to the decision to deport, would break the continuity of the ten years residence required to provide the higher imperative public security protection for an EEA national.

9. However, it was further noted that decision-makers must still decide on the basis of all the circumstances of the case at the time the question of deportation arises whether the person concerned deserves the imperative public security protection after all. (As the ECJ explained, "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..." (paragraph 30).)

Assessing whether a person should benefit from imperative threshold

10. In *MG*, the ECJ reaffirmed the position taken by the ECJ in the case of *Tsakouridis (C145-09)* that an overall assessment must be made of the person's situation on each occasion at the precise time when the question of deportation arises. So the fact that a person has served a term of imprisonment in the preceding ten years may, together with all other factors, be taken into account as part of the overall assessment required for determining whether the integrating links previously forged with the UK have been broken.

11. The following factors will be relevant in determining whether the integrating links previously forged with the UK have been broken:

    - Nature of offences and imprisonment. For example, a single offence of a small duration is less likely to break integrating links than conduct which persisted over a period of time and resulted in a lengthy sentence.
    - The degree of that person's integration with the UK. This could include links to family/friends, length of residence, properties/business interests in UK.
    - Any absences from the UK during the preceding ten years, including:
        - the duration of each absence
        - the frequency of those absences
        - the reasons for those absences

12. If, in assessing these factors, it is considered that the person's personal, family or occupational interests had transferred to another country, then the EEA national cannot benefit from the enhanced public security threshold. For example, if a person had spent considerable periods outside the UK and had maintained business and personal interests in another country, and had spent several years in prison then this would weigh against the EEA national having the necessary continuous residence so as to rely on the imperative public security threshold.

Ten years residence completed before imprisonment

13. Where the ten year period was completed before the person started their prison sentence, the enhanced protection that that ten year period provides is not automatically lost by the fact that the relevant EEA national has spent time in prison where that person remains integrated within the UK. Rather, the time spent in prison must be taken into account, along with all other relevant factors in determining whether a person should be deported. However the fact that the ten year period was completed before imprisonment would be a significant factor to take into account when considering the position overall.

Enquiries

14. If you have any queries about this notice, please contact [REDACTED] or [REDACTED], or email the European Operational Policy Mailbox at EuropeanOperational@UKBA.gsi.gov.uk

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