



27 July 2016

## PRESS SUMMARY

**Secretary of State for the Home Department (Appellant) v Franco Vomero (Italy)**  
**(Respondent) [2016] UKSC 49**  
*On appeal from [2012] EWCA Civ 1199*

**JUSTICES:** Lady Hale (Deputy President), Lord Mance, Lord Wilson, Lord Reed, Lord Hughes

### BACKGROUND TO THE APPEAL

The Respondent, Mr Vomero, is an Italian national. He met a UK citizen in France in 1985 and they came to England and married in 1987. They had five children for whom he cared in England. 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. In March 2001, he killed Mr Edward Mitchell. He was found guilty of manslaughter, by reason of provocation, sentenced to eight years' imprisonment and released in July 2006.

In a decision made on 23 March and maintained on 17 May 2007 the Appellant Secretary of State decided to deport Mr Vomero under regulations 19(3)(b) and 21 of the Immigration (European Economic Area) Regulations 2006. Regulation 21 gives effect to articles 27 and 28 of Directive 2004/38/EC (the "Directive").

In October 2007 the Immigration and Asylum Tribunal ("IAT") dismissed Mr Vomero's appeal against the Secretary of State's deportation decision. A Senior Immigration Judge ordered that the IAT's 2007 determination be reconsidered. The reconsideration was heard by a second, differently-constituted IAT in April 2008, which allowed Mr Vomero's appeal.

The Court of Appeal the Court dismissed the Secretary of State's appeal against the second IAT determination. The Secretary of State appealed to the Supreme Court. The Supreme Court granted permission to appeal but stayed the matter pending the outcomes of two related cases before the Court of Justice of the EU (the "Court of Justice"): *Onuekwere* (Case C-378/12) and *MG* (Case C-400/12).

The decision in *Onuekwere* confirmed that a period of imprisonment cannot be taken into account in calculating the five years of continuous residence necessary for a permanent right of residence under article 16 of the Directive. Therefore Mr Vomero had not acquired any right of permanent residence before the date of the decision to deport him. Mr Vomero submits that this is irrelevant and that an EU citizen with no right of permanent residence may nevertheless acquire a right to enhanced protection from expulsion under article 28 of the Directive.

### JUDGMENT

The Supreme Court refers several questions to the Court of Justice for determination. Lord Mance, with whom the other Justices agree, gives the lead judgment.

## REASONS FOR THE JUDGMENT

Statements by the European Court of Justice (Grand Chamber) in *Tsakouridis* (Case C-145/09) suggest the protection afforded under articles 28(2) and 28(3) of the Directive is intended to be progressive, 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 [15-17].

Following the judgment of the Court of Justice (Second Chamber) in *MG* [18-19], it is apparent that the calculations of the time needed to qualify for certain rights under articles 16 and 28(3)(a) of the Directive are different. The five-year period under article 16 must be continuous but will, once acquired, only be lost by absence or imprisonment lasting two years. The ten-year previous period under article 28(3)(a) may be non-continuous, where 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 unclear [20].

A majority of the Supreme 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) of the Directive on the basis that neither that article nor the existing case law identifies any need for a right of permanent residence in order for an EU citizen to invoke enhanced protection [26-27].

However, there are indications in the Directive 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. It is open to suggestion that the right in question refers most naturally the right of permanent residence referred to in article 28(2). A minority of the Court therefore regards the position as unclear and so as requiring a reference to the Court of Justice. The Supreme Court therefore refers to the Court of Justice the following 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) of the Directive. [27]

In the event that this question is answered negatively, the Supreme Court refers two further questions:

(2) whether the period of residence for the previous ten years, to which article 28(3)(a) 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 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. [28]

*References in square brackets are to paragraphs in the judgment*

### **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

<http://supremecourt.uk/decided-cases/index.html>