Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00113/2015

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 19 January 2016	**On : 22 January 2016**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ZAHID SHEIKH MASOOD
(NO ANONYMITY ORDER)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Mahmud, instructed by Mellor & Jackson Solicitors
For the Respondent: Mr K Norton, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals against the decision of the First-tier Tribunal dismissing his appeal against the decision to deport him from the United Kingdom pursuant to Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). Permission to appeal was granted on 4 November 2015.

2. The appellant is a citizen of Pakistan, born on 19 September 1965. As is recorded in the decision of the First-tier Tribunal, the appellant first entered the United Kingdom in 1998 using a passport in a different name. He obtained a

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provisional driving licence in that name and resided in the United Kingdom using that identity.

3. On 3 November 2003 the appellant collided with a car which had broken down on the motorway, at a time when he was using his mobile telephone and when he had no proper driving licence in his own name, had not taken a driving test in the United Kingdom and had no insurance, which resulted in the death of the driver of the car. He was not arrested at the time and before a formal interview took place he fled the country in December 2003 and was placed on the Police National Computer as a wanted person. He travelled to Pakistan and then went to Romania after two months. He had already met his wife, a Romanian national, in the United Kingdom in 2002 and in February 2004 he married her in Romania.

4. In August 2004 the appellant came to the United Kingdom as a visitor, in his real name, returning to Romania in June 2005 and then coming back to the United Kingdom in November 2007 on an EEA family permit issued in September 2007, since when he claims to have remained here. On 12 May 2008 he was issued with an EEA residence card valid until 12 May 2013. He did not surrender himself to the police, but was eventually arrested in 2012 when caught by the police.

5. On 3 May 2013 the appellant was convicted of causing death by dangerous driving and committing an act with intent to pervert the course of justice. He was sentenced to 4 years' imprisonment for the first offence and 9 months for the second, to run consecutively, and was disqualified from driving for 7 years and until an extended retest had been passed.

6. On 8 July 2013 the appellant was served with a notice of liability to deportation and he returned the enclosed questionnaire and provided details of his wife, their two children and his wife's daughter from a previous marriage, all of whom were Romanian nationals.

7. On 26 March 2015 a deportation order was signed and the respondent made a decision to deport the appellant under the EEA Regulations. In making her decision, the respondent did not accept that the appellant had acquired a permanent right of residence in the United Kingdom and considered that he posed a genuine, present and sufficiently serious threat to the interests of public policy pursuant to Regulation 21(5). It was considered further that his deportation would not breach his Article 8 rights under the ECHR.

8. The appellant appealed against that decision and his appeal was heard on 17 August 2015 by First-tier Tribunal Walters.

9. Judge Walters heard from the appellant and his wife and gave consideration to the documentary evidence produced to the respondent and at the hearing in relation to his claim to have acquired permanent residence following the period 7 November 2007 to 7 November 2012. The judge accepted that the appellant had been present in the United Kingdom between those dates. However he found there to be insufficient evidence that the

appellant's wife had been exercising Treaty rights in the United Kingdom for a five year period and thus insufficient evidence that the appellant had been living in the United Kingdom in accordance with the Regulations for a continuous period of five years. He therefore did not accept that the appellant was entitled to a permanent right of residence and he found that the correct test was therefore under Regulation 21(1) and went on to consider Regulation 21(5). With regard to Regulation 21(5)(c) he found that there was a real risk of the appellant re-offending. He concluded that the respondent's decision was justified on grounds of public security. The judge went on to consider Regulation 21(6) and Article 8 of the ECHR. He considered that it would be unreasonable to expect the appellant's wife and children to live in Pakistan but that they could reasonably relocate or remain in the United Kingdom without the appellant and that the decision to deport the appellant was proportionate. The judge accordingly dismissed the appeal under the EEA Regulations and on human rights grounds.

10. The appellant sought permission to appeal to the Upper Tribunal on the grounds that the judge had erred in law in finding that he and his wife had not acquired a permanent right of residence in the United Kingdom, that the judge had failed in his assessment under Regulations 21(1), 21(5) and 21(6) and that he had erred in his assessment under Article 8 and had failed to consider the best interests of the children under section 55 of the Borders, Citizenship and Immigration Act 2009.

11. Permission to appeal was granted on 4 November 2015 on the grounds raised.

Appeal hearing and submissions

12. Mr Mahmud requested an adjournment of the proceedings on the basis that clarification needed to be sought from counsel who represented the appellant at the hearing before the First-tier Tribunal as to which documents were before the First-tier Tribunal. The judge's decision at [3] referred to three appellant's bundles, but he did not have any instructions on three bundles having been produced or what they contained. He only had one bundle (which had been named by Judge Walters as bundle A1). Furthermore, the appellant claimed to have produced documents before the judge which had not been considered or referred to in his decision. Mr Mahmud produced a further 8 documents which the appellant claimed had been produced to the First-tier Tribunal but which did not appear on the court file. Clarification was also required to address paragraph 17 of the grounds, whereby it was asserted that both the judge and the presenting officer had accepted, at the hearing, that additional documents produced at that time by the appellant were sufficient to support the acquisition of permanent residence, but which had then been contradicted by the judge's adverse finding at paragraph 48 of his decision.

13. At this point I took both parties through the documents and bundles I had on file, which Judge Walters had identified as bundles A1, A2 and A3. Mr Norton helpfully produced the presenting officer's record of the proceedings which he said clarified matters. It was noted that the record listed the documents

produced at the hearing before the First-tier Tribunal and that those documents corresponded exactly to those in bundle A2.

14. I rose for some time for Mr Mahmud to take further instructions from the appellant and for myself to consult Judge Walters' record of proceedings. Having done so, I advised Mr Mahmud that I did not consider an adjournment would take matters any further forward and I considered there to be no need to obtain a typed copy of Judge Walkers' record of proceedings, as he suggested, since the respondent's record was very clear and comprehensive and Judge Walters' record was sufficiently legible to ascertain the submissions made and the absence of any concession on the part of the presenting officer. I considered that there had been plenty of time for the appellant's previous counsel to be approached for clarification of the matters and it was not appropriate that this was being raised at this late stage. I indicated that the matters could in any event be raised in submissions and that I would consider everything as part of my error of law decision. It was agreed that the bundle of documents which the appellant claimed had been before the First-tier Tribunal but which were not on the court file would be referred to as "bundle A4".

15. Mr Mahmud submitted that it had been accepted at the hearing that the appellant had resided in the United Kingdom for five continuous years. He sought to amend the grounds to include the fact that there were documents before the judge that had not been considered (bundle A4) and that the judge had misguided himself by considering facts he was not supposed to. With regard to the latter the judge had erred by taking into account at [37], when considering the risk of reoffending, the fact that the appellant had a Romanian driving licence and had speculated about him attempting to drive on that licence. He had also failed to take account of the fact that the appellant had never been offered an opportunity to participate in a victim awareness programme. With regard to the former, the documentary evidence demonstrated that the appellant's wife had been exercising Treaty rights for the five year period. Mr Mahmud submitted further that the judge had failed to consider proportionality and had erred in his consideration of Regulation 21(5) and (6). The judge had wrongly made an adverse credibility finding against the appellant with respect to being interviewed for the OASys report. The judge had erred by having regard to the Regulations rather than the Directive. He had failed to engage with section 55 of the Borders, Citizenship and Immigration Act 2009, he had not considered the effects on the children of the family breaking up and he had failed to consider section 117B of the Nationality, Immigration and Asylum Act 2002.

16. Mr Norton submitted that the presenting officer's record made it very clear which documents had been produced before the First-tier Tribunal and that bundle A4 had not been part of those documents. The judge made clear at [44] which documents he had before him. However he had no objection to the documents in A4 being included, since they did not assist the appellant in meeting the requirements of Regulation 15 in any event. The documents showed no more than that the appellant's wife had had some employment in 2013/2014 but had also received six times her earnings in state benefits and that she had had some employment in 2015. They did not show that she had

been exercising Treaty rights for a continuous period of five years and there was a gap between 2009 and 2103. The judge was therefore correct in concluding that the appellant had not acquired a permanent right of residence. The judge properly considered proportionality under Regulation 21(5) and the relevant factors in Regulation 21(6), he was entitled to rely on the OASys report, and he was entitled to conclude as he did on the risk of reoffending. With regard to Article 8, the judge considered section 117 in substance, applying the lower test in section 117C(5), and considering whether it would be unduly harsh for the children to go to Romania or be separated from the appellant. His findings were sustainable.

17. Mr Mahmud reiterated the submissions he had made previously.

Consideration and findings.

18. I turn first of all to the assertion made at [17] of the grounds, that the judge had indicated that there was sufficient evidence, in the documents submitted at the hearing, to show that the appellant had acquired permanent residence and that the presenting officer had conceded that that was the case. I can find nothing in the papers and records before me to support that assertion. Other than the bare assertion made in the grounds there is nothing from the appellant, such as his representative's record of the proceedings or a statement from his representative, to support the claim. However, and on the contrary, there is evidence from the respondent which directly contradicts that assertion. Mr Norton was able to produce the very clear record made by the presenting officer at the hearing before the First-tier Tribunal, specifically stating that no concessions were made.

19. It appears from that record that a preliminary point was raised by the appellant's representative, that the evidence produced at the hearing, which the appellant was claiming had been submitted to the Secretary of State but had not been considered, clearly demonstrated that there had been five continuous years of residence in the United Kingdom between 7 November 2007 and 7 November 2012 and that the appellant's wife had been exercising Treaty rights throughout that period. It was therefore submitted on behalf of the appellant that there were two options, that the judge accepted the acquisition of permanent residence and considered the matter under the "serious grounds" test or the matter be remitted to the Secretary of State to reconsider the matter applying the "serious grounds" test. It is very clearly recorded by the presenting officer that she did not concede that the evidence showed five years of exercising Treaty rights and that the judge did not agree to remit the matter to the Secretary of State but decided to consider the whole case himself without making any concessions. That is consistent with what appears in the Tribunal's record and with the judge's comments at paragraph 4 of his decision. Accordingly I reject the assertion in the grounds that there was any concession made by the respondent or the judge. It is clear that the judge proceeded to hear the evidence before making any findings on the acquisition of permanent residence and that he reserved his decision at the end of the hearing.

20. As regards the documentation before the judge, the presenting officer's record again makes it very clear which documents were produced at the hearing. These are listed on the first page and correspond exactly with the documents in the bundle which the judge named A2. The originals of those documents were produced to the judge and appeared on the court file, but were returned to the appellant after the hearing before me. The judge's findings at [44] to [46] also clearly refer to the documents in the bundles named A2 and A3. There is nothing in the judge's record, in his findings or in the presenting officer's records to support the appellant's assertion that the documents now produced in bundle A4 (other than pages 6, 7 and 8 which appear in the respondent's bundle) were before the First-tier Tribunal. I therefore reject his claim that the documents were produced before the judge.

21. Turning, therefore, to the documents that were before the judge, it is clear from his findings at [44] to [46] that he gave careful consideration to all the evidence before him in assessing whether or not the appellant's wife had been exercising Treaty rights for a continuous period of five years such as to entitle the appellant to permanent residence in the United Kingdom. He noted at [44] the evidence of earnings from employment in her P60 for 2014/2015 and her payslip for 22 June 2015. He referred to a payslip dated 29 August 2008, but that was in fact the appellant's payslip. He noted that the appellant's wife had never asserted in her oral or written evidence that she had been exercising Treaty rights for five years. Whilst there were also the three HMRC documents at pages D44 to D46 of the respondent's bundle, for the years 2009/10, 2010/11 and 2011/12 which were not specifically mentioned, they all confirmed that no tax was payable. Mr Mahmud argued that that was because the appellant's wife's earnings were below the tax threshold but still demonstrated that she had earnings. However I do not agree, since the documents, without the accompanying tax returns or other evidence of income, do not demonstrate that there were any earnings during those periods. Accordingly, on the basis of the very limited evidence before him, the judge could have reached no other conclusion than that there was no evidence of the appellant's wife having exercised Treaty rights for a continuous period of five years.

22. Mr Norton submitted that even if the documents in A4 were taken into account, they also failed to demonstrate five years of exercising Treaty rights and I would agree with that submission. There is nothing in those documents to show that the appellant's wife was in receipt of earnings from employment or self-employment or was exercising Treaty rights in any other way, for a continuous period of five years. Indeed, as Mr Norton submitted, it is relevant to note that the document at page 4 of that bundle shows that she was in receipt of state benefits in the year 2013 to 2014, which amounted to six times her earnings in that year. In any event, those documents were not before the First-tier Tribunal Judge.

23. Mr Mahmud also took issue with the judge's findings on the appellant's own continuous residence in the United Kingdom which he submitted had been conceded but which the judge appeared to dispute in his decision. It is clear from [41] that there was a concession made as to the appellant's presence in the United Kingdom between November 2007 and November 2012. What is not

entirely clear from [45] to [47] is whether the judge was doubting whether the appellant had shown five years of continuous residence, or whether he was doubting that there was five years of continuous residence *in accordance with the Regulations,* where, in the latter case, the appellant's own employment record and economic activities was of no relevance, the exercise of Treaty rights being relevant only with respect to the EEA national. In any event nothing material arises from that, given that, on the findings he made in regard to the appellant's wife's activities, the judge was entitled to conclude, and indeed properly concluded, that the appellant had not demonstrated that he had acquired permanent residence in the United Kingdom.

24. Mr Mahmud made a further point, relying on [10] of the grounds. He asserted that Article 16 of the Directive 2004/38/EC was wider than Regulation 15 and did not require that the acquisition of permanent residence be based upon anything other than five years residence. He submitted that the judge had erred by considering the more restrictive Regulation 15, which also required that the residence be "in accordance with these Regulations", rather than the Directive, which did not, and that the appellant succeeded on the basis that he had continuously resided in the UK for five years. However that is plainly wrong, as such an assertion ignores the reference to the word "legally" in Article 16 and the requirements of Article 7, that a right of residence of more than three months, in order to be lawful, must be based upon the exercise of Treaty rights.

25. Accordingly, the judge properly concluded that the appellant had not acquired permanent residence in the United Kingdom and proceeded to consider the matter on the basis of the lower threshold at Regulation 21(1) and (5).

26. Contrary to the assertion in the grounds and to Mr Mahmud's submissions, it seems to me that the judge plainly gave full and careful consideration to all relevant factors in Regulations 21(5) and (6).

27. With regard to Regulation 21(5), the judge considered the personal conduct of the appellant and the relevant offences and noted at [38] that there were no previous convictions. His consideration of Regulation 21(5)(c) did not merely amount to the findings in [51] but was based upon a detailed assessment of the question of risk of re-offending, at [20] to [40]. He was entitled to rely upon the OASys report, which he considered in detail at [26] to [38], taking account of factors in favour of the appellant as well as those against. Mr Mahmud submitted that the appellant stood by his claim not to have been interviewed for the OASys report and submitted that the judge ought not to have relied upon the report. However it is clear from the OASys report that it was an ongoing assessment based to a large extent upon the appellant's own statements and referring specifically at section 11 to the appellant having been interviewed. The judge was accordingly perfectly entitled to place the weight that he did upon the report in his consideration of the appellant's propensity to re-offend for the purposes of Regulation 21(5(c). He was, likewise, entitled to take account of the fact that the appellant had a European driving licence and draw the conclusions that he did in that regard.

The appellant complains that he was never offered a victim awareness course, but whether or not that was the case, the judge was entitled to place weight upon the fact that he had demonstrated a failure to take responsibility for his crime by fleeing the country after the incident and failing to surrender to the authorities on his return to the United Kingdom. For the reasons clearly and cogently given, the judge was entitled to reach the conclusions that he did on the appellant's propensity to re-offend.

28. Contrary to the assertion in the grounds, the judge plainly gave careful consideration to the principles of proportionality and to the relevant factors in Regulation 21(6). The fact that he did so within his findings on Article 8 does not detract from his consideration and awareness of the requirements in Regulation 21(5) and (6). The judge's conclusion, that the respondent's decision to deport the appellant was justified on ground of public policy and security, was one that was entirely open to him on the evidence.

29. The grounds challenging the judge's findings on Article 8, and Mr Mahmud's submissions in that regard, were little more than an attempt to re-argue the appellant's case and a disagreement with the judge's decision. The judge's decision on Article 8 was a detailed and careful one. Whilst he did not specifically cite section 117 of the 2002 Act, I agree with Mr Norton that he considered the substance of the relevant provisions and gave the appellant the benefit of applying the lower test, despite his sentence having been in excess of four years. He specifically considered the relevant exceptions in section 117C(5) in regard to whether the effect of deportation would be unduly harsh on the appellant's partner and children, giving careful consideration to the best interests of the children, at [67] to [70] and taking account of concerns about their education and language. Whilst the appellant's removal was to be to Pakistan, since that was his country of nationality, the judge gave cogent reasons for concluding that he could reasonably relocate to Romania, as he had done previously when fleeing the United Kingdom after committing the index offence, where his wife and children could join him. The judge also concluded, as he was entitled to do, that his wife and children could remain in the United Kingdom without him. There is no merit in the assertions made on behalf of the appellant that the judge failed to take account of all relevant matters, when he clearly did.

30. The judge's decision is a careful and thorough one, taking account of all relevant matters and all the evidence, both oral and documentary. He gave full and cogent reasons for making the findings that he did and the conclusions that he reached were entirely open to him on the evidence.

31. For all of these reasons I conclude that the grounds of appeal do not disclose any errors of law in the First-tier Tribunal's decision requiring the decision to be set aside.

DECISION

32. The appellant's appeal is accordingly dismissed. The making of the decision of the First-tier Tribunal did not involve an error on a point of law, such

that the decision has to be set aside. I do not set aside the decision. The decision to dismiss the appellant's deportation appeal therefore stands.

Signed Date
Upper Tribunal Judge Kebede