Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00588/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 June 2017	**On 07 July 2017**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANGELO LUCA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant:	Mr P Armstrong, Senior Home Office Presenting Officer
For the Respondent:	The respondent appeared in person and was not represented
Interpreter:	Ms Giulia Castagno attended to interpret the Italian and English languages

DECISION AND REASONS

1. I see no need for and do not make any order restricting application of the details of this appeal.

2. This is a case brought by the appellant, hereinafter "the Secretary of State", with the permission of the First-tier Tribunal challenging the decision of the First-tier Tribunal (First-tier Tribunal Judge Rodger) allowing an appeal by the respondent, hereinafter "the claimant", against the decision of the Secretary of State to make him the subject of a deportation order in accordance with Regulation 19(3)(b) and Regulation 21 of the Immigration (EEA) Regulations 2006.

3. The claimant is a convicted criminal. At the Crown Court sitting at Kingston-upon-Thames on 3 February 2016 he was sent to prison having pleaded guilty to seven

counts on an indictment representing his part in a scheme to defraud Her Majesty's Revenue and Customs.

4. The details of his criminal acts are understandably vague but the essence seems to be that he abused his position as an account's clerk to gather information that enabled him to raise false documents with the intention of obtaining money from the Revenue dishonestly by way of payments from VAT or income tax. If everything had gone according to plan he would have realised something in the order of £86,000. As it was he realised something in the order of £31,084.40.

5. He was sentenced to a total of twenty months' imprisonment.

6. The claimant is also an EEA national and therefore questions concerning his deportation are regulated not by the ordinary Immigration Rules but by the Immigration (European Economic Area) Regulations 2006. These were brought into British law under the provisions of the European Communities Act 1972.

7. I begin by considering the structure and content of the First-tier Tribunal's decision.

8. The judge gave the history of events leading up to the appeal and noted in summary the claimant's case. The claimant said that he was remorseful and had already paid £11,486.54 and had agreed with the Crown Court to repay a further sum of £16,458.73 within the next three years.

9. He said that he had lived in the United Kingdom for over ten years and had acquired a permanent right of residence in the United Kingdom. He claimed that he had exercised treaty rights in the United Kingdom for over ten years and relied on his national insurance contributions record to confirm that claim. He said that he wanted to settle in the United Kingdom and supported that claim with reference to a mortgage agreement and said that he had successfully passed the British citizenship test. He was a man of previous good character who had committed the offences to support his elderly mother who was unwell and had financial problems. There were no security questions arising from his criminal behaviour and the presentence report showed a 14% risk of reoffending within one and two years.

10. This summary does not set out all the points he made but is a summary of the ones that I consider important.

11. It was the Secretary of State's case before the First-tier Tribunal that the Secretary of State did not accept that the claimant had been resident in the United Kingdom in accordance with the EEA Regulations for a continuous period of five years. The Secretary of State said the claimant had not served any pay slips showing that he had been exercising continuous treaty rights in the United Kingdom for five years and, obscurely, did not accept that he was a British citizen which is clearly was not. Neither did the Secretary of State accept that the claimant had been continuously resident in the United Kingdom for ten years.

12. The Secretary of State noted that the claimant had not produced evidence, such as attending an "Enhanced Thinking Skills" course that would confirm his resolve about his future behaviour.

13. The Secretary of State also maintained that even if the claimant had resided in the United Kingdom for ten years there were serious grounds of public policy that

justified his being deported and the deportation was proportionate including in the context of an Article 8 balancing exercise.

14. The First-tier Tribunal Judge considered the evidence before her including the oral evidence of the claimant and, although the First-tier Tribunal Judge was clearly aware of the nature of the claimant's criminality, found him to be "a credible and honest witness".

15. The judge was particularly impressed with the evidence in the form of a schedule of national insurance contributions from HMRC. This showed that there was no break in his contributions between the tax years 2001 to 2002 through to the tax year 2011 to 2012. The claimant said he had started his own business in 2011 and not kept any of his P45 or P60 documents relating to previous employment.

16. The judge was satisfied that the claimant genuinely thought that his national insurance record was sufficient to prove his period of residence. At paragraph 39(c) of her decision the judge said:

> "I have had sight of the HMRC letter dated 05/07/16. It sets out [the claimant's] national insurance contributions paid between 2011 and 2015. The [claimant] explained the absence of payments from 2012 to 2013 onwards was due to him working exclusively as a self-employed person from that date and not paying himself enough to make national insurance deductions. This is consistent with the contents of the first page of the aforesaid letter which states that the HMRC records show that he currently had fourteen qualifying years up to 5 April 2016. If he was simply absent and not resident in the UK from 2012 onwards, hence the nil NI contributions, then the qualifying period it is unlikely to amount to fourteen years and is credibly explained by his continued presence in the UK and registration as a self-employed person. This is also consistent with the screenshots of the first page of his tax returns for the years 06/04/12 to 05/04/16, which shows that he was self-employed during the latter period."

17. At paragraph 39(b) of her decision the judge sets out a summary of the evidence from the tax authorities. At paragraph 39(d) she found that the appellant's evidence had satisfied her that he was present and resident in the United Kingdom from 2001 onwards, that he had been resident for a continuous period save for short visits for the purpose of seeing his family and one visit of six weeks' duration in 2004 when his mother was ill. The judge had seen national insurance records which showed payments which she found to be wholly consistent with his claim to have been in work.

18. In short, the judge found that the claimant had been in the United Kingdom exercising treaty rights since 2001. This evidence was reinforced by evidence from the Italian authorities showing that for the purposes of passport renewal he had identified himself as a person resident in the United Kingdom.

19. On this evidence the judge was satisfied that the appellant had accrued ten years' lawful residence and could only be removed if there were "imperative grounds of public security". Consistent with this finding the judge said at paragraph 43 of her decision that she was "satisfied that the [claimant] has also proved that he has acquired the right of permanent residency under Regulation 15".

20. The judge was satisfied that the claimant's deportation could not be justified on serious grounds of public policy. Perhaps most significantly the judge was not

persuaded that the claimant "represents a present threat affecting one of the fundamental interests of society".

21. It is a requirement of Regulation 21(5)(c) that where a decision is taken on grounds of public policy or public security "the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".

22. These words mean what they say and in particular there must be a "present" threat. The judge was not satisfied that there was a present threat. She gave considerable weight to the report from the Probation Service that there was a risk of reoffending at "14%" which she regarded as a low figure. She was satisfied that the claimant was remorseful and had evidenced that by paying back at least some of the money that he had defrauded and she was "satisfied that the [claimant] is an intelligent young man who is keen to turn his life around and start contributing positively to UK society".

23. Cynicism comes easily and any person who has been convicted of a criminal offence can express a desire to behave properly in the future but the claimant was entitled to a fair assessment of his evidence. Unlike those who may be quick to criticise, the judge heard the claimant and formed a view. The judge's view was consistent with the offending being an isolated outburst of criminality by a man of previous good character rather than something that had been shown to have gone on throughout his life and with the opinion of the probation officer who made the prediction about the risk of future offending.

24. In cases involving the deportation of people who are not EEA nationals their protestations about future behaviour are rarely of more than peripheral relevance. Deportation of foreign criminals who are not EEA nationals invokes different considerations. It is beyond argument that an EEA national cannot be deported unless there is a present sufficiently serious threat. The judge was clearly of the view that there was no such threat in this case and I find no basis whatsoever for going behind that decision.

25. Neither the Secretary of State's grounds nor the submissions before me engaged adequately with this finding. The grounds pontificate that the view was inconsistent with the sophistication of the offences that led to the claimant's imprisonment. They fail to explain why the finding that he was not a present threat was inconsistent with that. It is almost always the case that it is impossible to make unquestionable findings about the possibility of future events. There is no way of knowing whether the claimant will offend again. The judge has mixed her own observations with the opinion of the probation officer and has concluded that there is no sufficiently serious present threat. That is not an error. That is the judge doing her job. Neither the grounds nor the submissions show a proper basis for going behind that decision.

26. Neither is there any basis for challenging the finding that the claimant had established a right to reside in the United Kingdom. The evidence that he had worked for at least five years was, I find, completely unimpeachable.

27. This is sufficient to dispose of the appeal.

28. However there is a point of importance that needs to be considered.

29. The initial challenge in the grounds was to the judge's finding that the claimant had accrued ten years' relevant residence.

30. It must be remembered that the decision challenged is the decision made on 24 November 2016 and the claimant was sent to prison on 3 February 2016. The claimant clearly had not accrued ten years' continuous residence immediately before the decision complained of because the period had been interrupted by a prison sentence. The interpretation of this Regulation was the subject of a decision of the European Court of Justice in a decision of **SSHD v MG [2014] EUECJ C-400/12**. Paragraph 38 was in particularly clear terms. The court said:

> "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 10 years prior to imprisonment. However, the fact that that person resided in the host Member State for the 10 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."

31. The judge's starting point should have been to have recognised that the claimant had not established a continuous period of at least ten years prior to the relevant decision.

32. However the judge should then have gone on to decide if the claimant was sufficiently integrated to be worthy of that high degree of protection. The fact that the claimant had been involved in criminal activity in the United Kingdom is telling evidence that he is not integrated there or at least not integrated into the parts of society that need to be encouraged. The judge did not grapple with this.

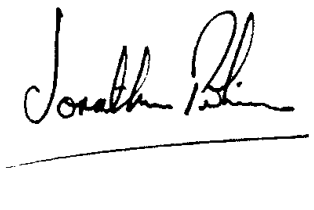
33. Notwithstanding that the claimant has established a significant private and family life in the United Kingdom, the only points referred to in the evidence were the kind of links that could be expected in the case of a person who had established himself in the United Kingdom. There are no particularly compelling personal relationships such as with a life partner or a minor child and no indication of a special contribution to the community that would indicate he had established himself in the United Kingdom in a way that outweighs the harm done by his criminality.

34. In my judgment the First-tier Tribunal Judge did not approach the question properly and if she had approached the question properly on the evidence she would have decided that the claimant was not entitled to the enhanced protection that comes with ten years' continuous residence.

35. However this is not a material error. Neither the criminal offence nor the period of imprisonment undoes the five years' lawful residence that has been established when the claimant was exercising treaty rights and therefore the claimant's right to permanent residence in the United Kingdom.

36. Importantly, the error does not in any way undermine the judge's finding that the claimant is not a present risk.

37. It follows therefore that there is no material error of law in the decision and I dismiss the Secretary of State's appeal.



Signed
Jonathan Perkins
Judge of the Upper Tribunal Dated 6 July 2017