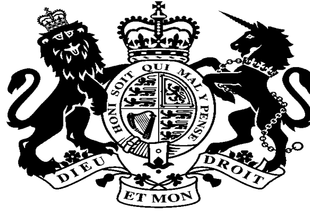

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/14404/2016

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice
On 15 July 2019

Decision & Reasons Promulgated
On 30 July 2019

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MANTAS ANTULIS

Respondent

Representation:
For the appellant: Mr S. Kotas, Senior Home Office Presenting Officer
For the respondent: No appearance

DECISION AND REASONS

1. For the sake of continuity, we shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. There was no appearance by or on behalf of Mr Antulis. We were satisfied that a production order was made for him attend the hearing from the prison where he was

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last known to be held on remand. On the morning of the hearing, the Upper Tribunal was notified by the prison authorities that Mr Antulis refused to attend. We were satisfied that he had notice of the hearing and an opportunity to attend. There was no evidence to indicate any other reason as to why he did not attend. In the circumstances we were satisfied that we could proceed to determine the Secretary of State's appeal in his absence.

The removal decision

3. In a decision dated 21 December 2016 the Secretary of State decided to remove Mr Antulis from the United Kingdom with reference to regulations 19(3)(a) and 24(2) of The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006"). The relevant parts of regulation 19 were as follows:

> 19. …..
> (3) Subject to paragraph (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if-
> **(a) that person does not have or ceases to have a right to reside under these Regulations;**
> (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21;
> (c) the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with regulation 21B(2).
> (4) A person must not be removed under paragraph (3) as the automatic consequence of having recourse to the social assistance system of the United Kingdom.
> (5) A person must not be removed under paragraph (3) if he has a right to remain in the United Kingdom by virtue of leave granted under the 1971 Act unless his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21. **[emphasis added]**

4. Regulation 24 of the EEA Regulations 2006 stated:

> 24. …..
> **(2) Where a decision is taken to remove a person under regulation 19(3)(a) or (c) the person is to be treated as if he were a person to whom section 10(1)(a) of the 1999 Act applied, and section 10 of that Act (removal of certain persons unlawfully in the United Kingdom) is to apply accordingly.**
> (3) Where a decision is taken to remove a person under regulation 19(3)(b), the person is to be treated as if he were a person to whom section 3(5)(a) of the 1971 Act (liability to deportation) applied and section 5 of that Act (procedure for deportation) and Schedule 3 to that Act (supplementary provision as to deportation) are to apply accordingly. **[emphasis added]**

5. The effect of these provisions is that removal of EEA nationals because they cease to have a right to reside under EU law is treated as a form of administrative removal. A decision to remove on grounds of public policy is treated as a deportation decision. They are different forms of decision distinct from one another.

6. The decision made by the Secretary of State on 21 December 2016 was not a "relevant decision" to remove the appellant on grounds of public policy under regulations 21 and 24(3). It was issued by way of an IS.151A immigration notice, which makes clear that the decision was made with reference to regulations 19(3)(a) and 24(2). The reasons given for removing the appellant were as follows.

> "A decision has been taken under regulation 19(3)(a) of the EEA regulations. Even assuming that you had been exercising treaty rights before your incarceration, and having regard to the absence of any evidence that you have acquired a permanent right of residence or had any other right of residence under the Citizens or Free Movement Directive, your 10 month imprisonment cannot constitute lawful residence for he purposes of EU law (see the judgments of the Court of Justice of the European Union in *Onuekwere* [2014] EUECJ C-378/12, [2014] INLR 613 and *Secretary of State for the Home Department v MG* [2014] EUECJ C-400/12. [2014] Imm AR 561, [2014] WLR 2441) and you have therefore ceased to have a right to reside and, in all the circumstances, it would be proportionate to remove you."

The First-tier Tribunal decision

7. Designated Judge of the First-tier Tribunal Shaerf ("the judge") allowed the appeal in a decision promulgated on 27 June 2018. At [3-4] of the decision he noted that the respondent made a decision to remove the appellant because it was said that he ceased to have a right to reside in the United Kingdom. The judge went on to note the evidence given by the appellant and his partner and the points put forward by both parties. He went on to make the following findings:

> "27. I have identified a number of apparent inconsistencies and discrepancies as well as lack of evidence of certain elements of the Appellant's claim. The Appellant's academic record shows limited achievements and I have to take account of this when assessing his evidence and credibility. His partner appeared reluctant to divulge information unless pressed. Consequently, I conclude that between the Appellant and his partner I have not been given a complete and full picture of their circumstances. I can attach little weight to his claim to be at risk from Lithuanian gangs here and in Lithuania because of the alleged incident at a party in Lithuania.
>
> 28. The Appellant started his education in the United Kingdom on 25 September 2006 at Mayfield School. A start at schools some two or three weeks after commencement of the academic year would indicate that his family did not arrive in the United Kingdom until August or September 2006. He was remanded in custody and remained in custody to serve his prison sentence from 12 July 2016. Consequently, before his imprisonment he had not completed 10 years' residence. I find that he had completed five years' residence by then and that such residence was lawful in accordance with the 2006 Regs. because he was in education between 25 September 2006 and July 2010. Thereafter the Appellant states he had a variety of jobs but there is no documentary evidence of any of them or of any period of job seeking until a period before the registration with an employment agency leading to the offer of employment said to start on the Monday after the hearing. Looking at the Appellant's history, I am satisfied that he was entitled to a right of permanent residence before 12 July 2016."

8. Even though he summarised the decision was to remove on grounds that the appellant ceased to have a right to reside under EU law earlier in his decision, the judge went on to consider the case with reference to the provisions contained in

regulation 21, which related to removal on public policy grounds [29-35]. The judge considered whether the appellant could benefit from the highest level of protection from removal on public policy grounds under regulation 21(4) where a 'relevant decision' could only be taken on imperative grounds of public security in respect of an EEA national who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision. The judge had regard to the opinion of the Advocate General in the matter of the referral made by the Supreme Court in *SSHD v Vomero* [2016] UKSC 49. In fact, by the date of the First-tier Tribunal hearing on 10 May 2018 the Court of Justice of the European Union (CJEU) had recently given judgment in *B v Land Baden-Württemberg and SSHD v Vomero* [2018] EUECJ C-316/16. It made no material difference to the judge's findings because the Grand Chamber came to the same conclusion as the Advocate General regarding the need to demonstrate the acquisition of a right of permanent residence as a pre-requisite to highest protection from expulsion on grounds of 10 years' continuous residence prior to the relevant decision.

9. The judge concluded that the appellant's period of imprisonment did not break the integrative links that he had with the UK and that he qualified for enhanced protection [32]. He went on to consider the appellant's personal circumstances and concluded that removal was not proportionate with reference either to the criteria for removal of a person with a permanent right of residence or under the enhanced 10-year level of protection from removal [35]. Finally, the judge went on to conclude that the appellant's removal would amount to a disproportionate breach of his rights under Article 8 of the European Convention [36].

The Secretary of State's appeal

10. The Secretary of State appeals the First-tier Tribunal decision on the following grounds:

    (i) The judge failed to give adequate reasons to explain how and why he concluded that the appellant had acquired a right of permanent residence.

        (a) The judge considered the fact that the appellant was in education from September 2006 to July 2010 (a period of less than four years). In finding that this was a lawful period of residence under the EEA Regulations 2006 he failed to take into account the fact that an EEA national residing as a student needed to show that they were enrolled at an accredited education establishment, had comprehensive sickness insurance and must have sufficient resources not to become a burden on the social assistance system of the host Member State.

        (b) The judge failed to give adequate reasons for apparently accepting the appellant's evidence that, for the remaining part of his initial five-year period of residence in the UK, he was exercising rights as a worker. In view of the doubts expressed at [27] about the reliability of the

appellant as a witness, it was necessary for the judge to give reasons to explain why he accepted the appellant's evidence given that he noted that there was no documentary evidence to support the appellant's claim.

(ii) In determining the appeal with reference to the provisions relating to removal on grounds of public policy under regulation 21 the judge applied the wrong legal provisions. He conflated the issues relating to ceasing to exercise rights of residence (administrative removal) with removal on public policy grounds (deportation) under the EEA Regulations 2006. The case should have been considered with reference to regulation 19(3)(a).

(iii) The First-tier Tribunal erred in allowing the appeal on human rights grounds.

11. The appellant is unrepresented. Perhaps unsurprisingly, he did not lodge a written response to the Secretary of State's appeal (see rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008).

Decision and reasons

12. After having considered the First-tier Tribunal decision and the grounds of appeal we are satisfied that the decision involved the making of errors of law and must be set aside.

13. In light of the legal framework set out above it becomes apparent that the First-tier Tribunal determined the appeal with reference to the wrong framework. Unusually, in a decision involving the conviction of an EEA national for a criminal offence, the Secretary of State did not make a 'relevant decision' on public policy grounds. Instead, he decided to administratively remove the appellant because it was said that he ceased to exercise his rights under EU law during his period of imprisonment. However, the Secretary of State's reliance on *Onuekwere* and *MG* in the decision notice was equally erroneous. Those cases relate to the assessment of 10-year period giving rise to an enhanced level of protection from expulsion on public policy grounds, which had little to do with the assessment of whether a person ceased to exercise Treaty rights for the purpose of administrative removal.

14. We are also satisfied that the First-tier Tribunal failed to give adequate reasons for concluding that the appellant had acquired a right of permanent residence for the reasons outlined in the Secretary of State's grounds.

15. There are several ways in which the appellant might have been able to show that he had acquired a permanent right of residence. When he was a child the most obvious route might have been through his dependency on his parents if they were exercising rights of free movement in the UK. If the appellant was able to show a continuous period of dependency upon his parents up until the age of 21 years old, and could produce evidence to show that one of them was working or otherwise exercising

rights of free movement for a continuous period of five years, it is likely that he could show that he acquired a right of permanent residence. However, this issue does not appear to have been explored at the First-tier Tribunal hearing.

16. Instead, the judge considered a period of nearly four-years in which the appellant was in education. In order to find this period was lawful residence under EU law the judge needed to consider whether the appellant met the requirements contained in Article 7(1)(c) of the Citizens Directive (2004/38/EC), which was reflected in regulation 4(d) of the EEA Regulations 2006. This essential part of the legal assessment was missing from the judge's findings.

17. At [28] the judge apparently took into account the possibility that the appellant was working and exercising Treaty rights to complete the five-year period of continuous residence after he finished school. The judge noted that there was no documentary evidence to support the appellant's claim. It was open to the judge, having heard oral evidence from the appellant, to accept his claim that he undertook periods of work. However, given that he had expressed some doubts about the reliability of the appellant as a witness at [27] adequate reasons needed to be given for accepting the unsupported evidence given by the appellant at the hearing. This element is also missing from the judge's reasoning at [28]. For these reasons we conclude that the judge's conclusions relating to the acquisition of permanent residence also involved the making of errors of law.

18. It is not necessary to go into much detail about the final ground of appeal relating to human rights. There was no evidence to suggest that the appellant was asked to complete a notice under section 120 of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002"): see *Amirteymour and others (EEA appeals; human rights)* [2015] UKUT 00466 and *TY (Sri Lanka) v SSHD* [2015] EWCA Civ 1233. The appellant was not appealing a decision to refuse a human rights claim. The only ground of appeal against a decision taken under EEA Regulations is whether the decision breaches the person's rights under the EU Treaties in respect of entry to or residence in the United Kingdom: see paragraph 1, Schedule 1 of the EEA Regulations 2006. For these reasons the First-tier Tribunal also erred in determining the appeal on human rights grounds.

19. When the public policy considerations are taken out of the equation, the question of whether the appellant ceased to have a right to reside under EU law because of a short period of incarceration of less than six months gave rise to a completely different assessment under regulation 19(3)(a).

20. We note that the decision of the CJEU in *Orfanopoulos and Oliveri v Land Baden-Württemberg* [2004] EUECJ C-482/01 stated that the fact that a person who was previously employed was not available on the employment market during a period of imprisonment does not mean, as a general rule, that he did not continue to be part of the labour force of the host Member State during that period, provided that he finds another job within a reasonable time after release [50].

21. We are conscious of the fact that the appellant succeeded before the First-tier Tribunal, was unrepresented and did not attend the Upper Tribunal hearing. We have considered whether the errors we have identified would have made any material difference to the outcome of the appeal such that, despite those errors, the appeal would inevitably have been allowed.

22. A sustainable finding that the appellant had acquired a right of permanent residence is likely to be a complete answer to an administrative removal decision under regulation 19(3)(a) of the EEA Regulations 2006. Once a person has acquired a right of permanent residence it matters not if there are breaks in the exercise of Treaty rights. The person is settled in the UK. On the limited evidence that appears to have been before the First-tier Tribunal at the date of the hearing in May 2018 it could not be said that it was obvious that the appellant would have succeeded in showing that he had acquired a right of permanent residence.

23. Even if the appellant had not acquired a right of permanent residence, in principle, if he continued to exercise rights of free movement by obtaining employment within a reasonable time after his release from prison, he could and should have succeeded in an appeal against a decision to remove him under regulation 19(3)(a). As long as the appellant could show that he was exercising his Treaty rights at the date of the hearing it could not be said that he ceased to have a right to reside in the UK under EU law.

24. In assessing whether the errors we have identified made any material difference to the outcome of the appeal we take into account the fact that there appears to have been no evidence, apart from the appellant's oral evidence that he was due to start temporary work as a forklift driver the following week, to show that he was likely to be working at the date of the hearing. The judge expressed some doubts about his reliability as a witness and made no clear finding whether he accepted the appellant's evidence in this respect. Because the First-tier Tribunal determined the appeal with reference to the wrong legal framework the issue did not appear to be properly ventilated at the hearing with reference to regulation 19(3)(a). Even if the appellant was not working, it is possible that the he may also have had a continuing right of residence under EU law through his relationship with his partner and child, who also appear to be European Citizens, but again, the issue did not appear to be explored at the hearing.

25. We have found errors of law in all the main findings made by the First-tier Tribunal in relation to (i) the findings relating to permanent residence; (ii) the application of the wrong legal framework; and (iii) in determining human rights issues. In the end, the evidence and findings relating to whether the appellant was exercising Treaty rights at the date of the First-tier Tribunal hearing is lacking and it could not be said that it was inevitable that the appeal would have been allowed despite the errors. Other issues, although arguably relevant, did not appear to be discussed at the hearing and were not the subject of clear findings. For these reasons we conclude that

it is not possible to say that the errors made by the First-tier Tribunal would not have made any material difference to the outcome of the appeal. Our findings relating to the errors of law mean that the decision must be set aside in its entirety.

26. Paragraph 7.2 of the Tribunal Practice Statement dated 25 September 2012 states that the normal approach to determining appeals will be for the Upper Tribunal to remake rather than remit the appeal to the First-tier Tribunal unless the Upper Tribunal is satisfied that the nature and extent of any judicial fact finding is such that, having regard to the overriding objective, it is appropriate to remit. In this case, the decision was made on a wholly erroneous basis and none of the findings can stand. In the circumstances, we conclude that it is appropriate for the appeal to be remitted to the First-tier Tribunal for a fresh hearing.

Note for the Secretary of State

27. We note that the appellant is currently imprisoned. On the last occasion this case came before the Upper Tribunal the judge who adjourned the case was told that the appellant was facing another trial in the Crown Court. At the date of the hearing before us, Mr Kotas was unable to provide any further information about the outcome of the trial. We only mention this point because of the unusual approach taken by the Secretary of State in making a decision under regulation 19(3)(a) of the EEA Regulations 2006 rather than on public policy grounds under regulation 21 (as it then was). We indicated to Mr Kotas that the Secretary of State may wish to consider his position in light of what we have said about the relevant legal framework in this particular appeal. Whether the Secretary of State decides to maintain the decision dated 21 December 2016 to administratively remove the appellant is a matter for him, but it seems to us that the hiatus between this hearing and the next provides an opportunity for reflection and review.

Note for Mr Antulis

28. We are conscious of the fact that Mr Antulis is unrepresented and is unlikely to have relevant legal expertise. If the appeal goes ahead it may assist the First-tier Tribunal if the appellant prepares the following evidence for submission (to the First-tier Tribunal and the relevant Home Office Presenting Officers Unit) **at least 14 days** before the next hearing.

    (i) A witness statement or letter giving a detailed account of his life in the UK including his personal life and his work history. In particular, the details of his early years, who he lived with, who he was dependent upon and whether the people upon whom he was dependent were working in the UK throughout the period. Where possible the appellant should try to obtain evidence to support what he says in his witness statement e.g. if he or one of his parents was working, to produce evidence of the fact.

(ii) A witness statement or letter from his partner confirming her nationality, whether she is working in the UK and giving a detailed account of the history of their relationship. Again, anything said in the witness statement should be supported by evidence where possible.

(iii) A copy of their child's birth certificate and evidence of nationality.

(iv) Any other evidence Mr Antulis wants the First-tier Tribunal to consider.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The appeal is remitted to the First-tier Tribunal for a fresh hearing

Signed Date 23 July 2019
Upper Tribunal Judge Canavan