Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **DA 00935-13**

THE IMMIGRATION ACTS

At **Royal Courts of Justice** Decision signed: **03.12.2013**
on **02.12.2013** sent out: **16.12.2013**

Before:

Upper Tribunal Judge **John FREEMAN**
Deputy Upper Tribunal Judge **Andrew WILSON**

Between:

Dzulian Krzystian ZEMLA

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Anawar Babul Miah* (counsel instructed by Patterson & Co)
For the respondent: Mr Steve Walker

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Peter Ievins and a lay member), sitting at Taylor House on 25 September, to allow a deportation appeal by a Roma citizen of Poland, born 17 December 1993, against a decision made on 30 April 2013. The panel allowed the appeal solely on the basis that the appellant was entitled to the protection of reg. 21(4)(a) of the Immigration (European Economic Area) Regulations 2006 [the 2006 Regulations]. On their, literally correct, reading of the regulation, someone who is now an EEA citizen, and " … has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision", in whatever capacity, could not be removed "…except on imperative grounds of public security".

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ISSUES

2. It was accepted by the presenting officer before the panel that the appellant had been in this country since 1997; however, Poland only joined the European Union, and so the EEA, on 1 May 2004. Mr Walker accepted before us that the appellant's period of residence from then till the coming into force of the 2006 Regulations fell to be taken into account for the purposes of reg. 21(4)(a); but the issue for us is whether the appellant's stay here before Polish accession can count in that way.

3. Before we discuss that question, it is worth making clear that

a. the panel dismissed the appellant's appeal on both the other grounds on which he relied (as someone entitled to permanent residence under reg. 21(3), and under article 8), and

b. there has been no cross-appeal against those parts of their decision; however

c. there has been no challenge by the Home Office to the panel's assessment that this appellant's record did *not* make it imperative to remove him on public security grounds; so

d. our answer to the question before us will settle the result of this appeal one way or the other.

HISTORY

4. The appellant, then only 3½, arrived here in May 1997 with his parents, who claimed asylum for themselves, him and his siblings. That was refused, and their appeals were finally dismissed on 23 January 2001, following which they all left this country. Then on 10 March 2002 they all came back here, and a further asylum claim was made, refused on 24 July because the appellant's father had failed to complete their SEF. This time too their appeals were dismissed, the decision becoming final on 5 January 2004; however they stayed on till Poland joined the European Union on 1 May, and the appellant's parents registered themselves later that year under the Accession State Worker scheme.

5. In April 2010 the appellant, by then 16, committed an offence of attempted robbery; but it was on 14 June that year that he was involved in the crime which led to the decision to make a deportation order against him. This was charged as 'engaging in sexual activity in the presence of a child'. What happened, as described by the sentencing judge, was that he and two other young men, one of whom was his elder brother Denis, and the other called Daniel Stephenson, all took a 13-year old girl down into a basement room with a mattress, apparently used for sexual congress by all and sundry. They used a degree of force to get her in there, and then partly stripped her; two of them, apparently Denis and Daniel, forced her to commit sexual acts with them, and, as the judge said "there was a degree of masturbation going on … as an additional act of humiliation". They took pictures of what they were doing on their mobiles, and threatened the girl with wider publication if she dared to complain to anyone.

6. The judge described the conditions in that little room as "desperately unpleasant": he noted that the girl had suffered profound emotional damage, to the extent that, even by the time sentence was passed two years later, she was staying much of the time in her room, withdrawn from life and beset by nightmares. On 11 May 2012 he sentenced Denis and Daniel, both convicted of rape, to seven years' detention, while the appellant received a sentence of two years for the part he played. Shortly before the custodial part of that was due to expire, the Home Office began the proceedings leading to the decision under appeal. At the date of the appellant's offence, his British girl-friend Shannon had been only just over a week from giving birth to his daughter.

DISCUSSION

7. The panel took the appellant as someone who had resided here for ten years on the literal meaning of the expression: as they noted, the appellant, with his family, had lived and had his home here since 1997, only going back to Poland for weddings and holidays. Permission to appeal was given on the basis of grounds, not settled by Mr Walker, which he accepted were misleading and off the point, so far as they referred to authority (without any attempt at proper citation) at all. So far as the parties and we are aware, there is no direct authority on the point before us. We shall turn later to authorities which may be helpful.

8. Mr Miah drew our attention to reg. 15 of the 2006 Regulations, beginning like this:

> (1) The following persons shall acquire the right to reside in the United Kingdom permanently—
> (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

As he pointed out, the words "in accordance with these Regulations" are conspicuous by their absence from reg. 21(4); so, he argued, this must be treated as a deliberate omission, and the expression 'resided' there given its ordinary natural meaning, as the panel had done.

9. We accepted that the panel had done just this, and took the view that they would have been well entitled to do so in the case of an ordinary piece of domestic legislation, which had to be read in accordance with conventional 'black-letter' principles. However, that is not necessarily the case with the 2006 Regulations, passed into law in line with this country's obligations to give effect to European Union legislation which is binding on us, and in particular Directive 2004/38/EC of 29 April 2004, known as the 'Citizens' Directive'. Mr Miah had not considered the possible implications of this, and so we drew his attention in some detail to the terms of the Citizens' Directive.

10. We went on to put to Mr Miah some of the consequences of the construction of 'residing' for which he was arguing. It was implicit in his own argument that an accession state citizen (a Pole for example) who had been living here for however long, and on whatever basis, at the date of accession, could not, because of the words "in accordance with these Regulations" in reg. 15, acquire a permanent right of residence till five years had passed

from the accession date. So he could not acquire the right, under reg. 21 (3), not to be removed "… except on serious grounds of public policy or public security" until that time.

11. However, on Mr Miah's construction of reg. 21 (4), a Pole who at the accession date happened to have been in this country on whatever basis, either as a dependent asylum-seeker or overstayer like this appellant, or even as an entirely clandestine illegal entrant, for the necessary ten years would immediately on that day acquire the much more extensive protection against removal "…except on imperative grounds of public security". This seemed to us a result so absurd that it should not be adopted on nothing more than a literal reading of the 2006 Regulations, without looking further into their history and purpose.

12. As already mentioned, the 2006 Regulations were passed to give effect to the Citizens' Directive. Both the provisions with which we have been concerned have been more or less directly transposed from it: the requirement in paragraph 15 from article 16 (1) –

> Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there.

and the one in reg. 21(4)(a) from article 28 (3):

> An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
>
> (a) have resided in the host Member State for the previous ten years

13. There are, for present purposes, no significant differences in the language used in the Directive and in the Regulations, so Parliament should in our view be taken to have enacted the Regulations for the purpose of giving effect to the Regulations, without independent consideration of the point in question. While it is well known that the long title of a British statute is not to be resorted to for interpretation purposes, under the 'mischief rule', unless there is some real apparent ambiguity in the body of the legislation itself, that rule does not apply by analogy in the interpretation of European legislation.

14. In this case, the preamble is an integral part of the legislation itself, and the recitals in it are to be given effect in finding out the purpose of that. Without going through all those of potential relevance, we shall concentrate on those directly relating to the purposes behind articles 16 and 28. They are as follows:

> (17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.
>
> …
>
> (24) Accordingly [*with the requirement for proportionality set out at (23)*], 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. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion

measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life.

15. It is clear from (17) that the right of permanent residence after five years is laid down to "… strengthen the feeling of Union citizenship and [promote] social cohesion, which is one of the fundamental objectives of the Union". That is why it is to be extended only to those "… who have resided in the host Member State in compliance with the conditions laid down in this Directive". Can any different purpose be seen behind (24)?

16. We invited Mr Miah to deal with the obvious question as to how, in the terms of (24), someone who for his first seven years in this country, before Polish accession, had been here, either as a dependent asylum-seeker, or an overstayer, could be said to have acquired, during that time, any degree whatever of integration as a Union citizen himself, or the family member of parents who were nothing of the kind till the accession date.

17. Mr Miah was not able to shed any significant light on that problem, nor to refer us to any authorities which might guide our interpretation of the Citizens' Directive; so we were driven to look into it further for ourselves.

AUTHORITIES

18. Most of those which deal with quality of residence concern the different question of whether a Union citizen can count periods spent in prison towards the 5-year qualifying period for permanent residence. However there are two decisions of the Court of Justice of the European Communities which specifically deal with the one about pre-accession residence before us. Both concerned pre-accession residence by Polish citizens: in *Ziolkowski* (Freedom of movement for persons) [2011] EUECJ C-424/10 it was held as follows (and followed in almost identical terms in *Czop* [2012] EUECJ C-147/11):

> 1. Article 16(1) of Directive 2004/38/EC … must be interpreted as meaning that a Union citizen who has been resident for more than five years in the territory of the host Member State on the sole basis of the national law of that Member State cannot be regarded as having acquired the right of permanent residence under that provision if, during that period of residence, he did not satisfy the conditions laid down in Article 7(1) of the directive.
>
> 2. Periods of residence completed by a national of a non-Member State in the territory of a Member State before the accession of the non-Member State to the European Union must, in the absence of specific provisions in the Act of Accession, be taken into account for the purpose of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38, provided those periods were completed in compliance with the conditions laid down in Article 7(1) of the directive.

19. So far as domestic authority goes, *HR (Portugal)* [2009] EWCA Civ 371 is an imprisonment case, and on that might now need to be read in the light of *Tsakouridis* (European citizenship) [2010] EUECJ C-145/09. However, there are interesting comments on the principles of interpretation of European legislation by both Stanley Burnton and Elias LJJ, and in particular the approach to be taken to art. 28 (3). They confirm (at paragraphs 17 – 18) that the EEA Regulations are to be interpreted in accordance with the purpose behind the Citizens' Directive, which they were passed to implement.

20. Going on to recital (24) [set out at **14**], Stanley Burnton LJ says this at paragraphs 21 – 23 (echoed in more general terms by Elias LJ at 33):

> 21. … It is clear from recital 24 that the reason for the restriction on the right of the state to expel someone who has been in this country for many years is his integration into this country. Recital 24 does not envisage that the restriction on expulsion to which it refers should be applicable to a person who has not availed himself of the rights and freedoms conferred on him by the Treaty, but has been compulsorily detained in this country.
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> 22. If I read Article 28.3 literally, and assume that "resided" means no more than "been present in", there is no qualification to the period of his presence in this country, and no link with the requirements of Article 16 that he should have resided in this country "legally". It is clear from recital 23 that "legally" in Article 16 means "in the exercise of the rights and freedoms conferred on them by the Treaty", as was held by the Tribunal in *GN (EEA Regulations: Five years' residence) Hungary* [2007] UKAIT 00073. If the appellant's submission is well-founded, a person who has been in this country for 11 years, of which 8 were spent in prison, is not entitled to the right of permanent residence, and is therefore not protected by Article 23.2, but is protected by Article 23.3, and cannot be removed except on imperative grounds of public security. That consequence is manifestly inconsistent with recitals 23 and 24. So is the fact that it is impossible to consider the Appellant to have been integrated into this country as envisaged by recitals 23 and 24.
>
> 23. In my judgment, recitals 23 and 24 make clear how Article 28.3 is to be applied in a case such as the present. "Residence" is presence in this country in the exercise of the rights and freedoms conferred by the Treaty. …

CONCLUSIONS

21. While the Court of Appeal in *HR (Portugal)* were of course dealing with an imprisonment case, it seems to us that their conclusions on the quality of residence required to get the enhanced protection of article 28 (3) are of general application, and in line with those of the Court of Justice of the European Communities in *Ziolkowski* and *Czop*. To fall under article 28 (3) of the Citizens' Directive, and reg. 21(4)(a) of the 2006 Regulations, an accession country citizen must have spent the necessary ten years in the host country, not simply as a matter of fact, but "in the exercise of the rights and freedoms conferred on them by the Treaty"; or, in the words used in *Ziolkowski* , "in compliance with the conditions laid down in Article 7(1) of the directive".

22. These are the conditions in art. 7 (1):

> 1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
> (a) are workers or self-employed persons in the host Member State; or
> (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
> (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

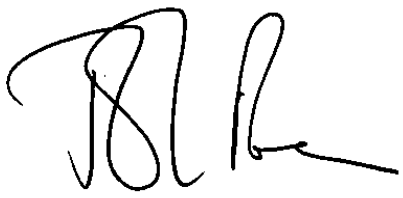
(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

23. Before Polish accession, the appellant and his family were not here as workers, or for any other purpose set out in art. 7 (1): they were asylum-seekers from their arrival in 1997 till their first appeal was finally dismissed on 23 January 2001; following that, they left this country till 10 March 2002, when they again claimed asylum, but were refused again. From the time when the dismissal of their appeal against that became final on 5 January 2004 till accession on 1 May, they were no more than overstayers. It was not till 19 August and 2 October that year that the appellant's father and mother registered under the Accession State Worker Scheme. Though the appellant himself is likely to have been going to school here from 1998 – 99, there is nothing to suggest that either he or any other member of the family was in a position to provide either the evidence of means to support themselves here before the accession date, or of any comprehensive sickness insurance they held.

24. In our judgment, both following the conclusions in *Ziolkowski* and those in *HR (Portugal)*, and as a matter of general principle on the legislative purpose behind recital (24), article 28 (3) is to be interpreted as entitling an accession country citizen to rely, for the protection given by that provision and by reg. 21(4)(a) of the EEA Regulations, only on those periods of residence here during which he or family members with him satisfied the conditions in art. 7 (1) of the Citizens' Directive.

25. On the facts set out at **23**, it is clear that neither this appellant nor any of his family with whom he was here did satisfy those conditions before Polish accession on 1 May 2004. It followed that, though by the date of his deportation crime in 2010 he had acquired a right of permanent residence here, because of his post-accession residence, neither by then nor by the date of the decision under appeal in 2013 had he acquired the greater protection given by reg. 21(4)(a) or article 28 (3), and the panel's decision is wrong in law to that extent. Since their findings against him on his case as a permanent resident and under article 8 remain unchallenged, the result is that his appeal as a whole is dismissed.

Home Office appeal allowed
Appellant's appeal against deportation dismissed



(a judge of the Upper Tribunal)