Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00147/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 7 January 2020	**On 16 January 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

THEODROS DIMITRIOS ZALAOROS
(ANONYMITY DIRECTION NOT MADE)

Claimant

Representation:
For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr A Shattock, instructed by The Aire Centre

DECISION AND REASONS

This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Foudy promulgated on 14 October 2019 dismissing the claimant's appeal against the decision of the Secretary of State dated 17 February 2018 to deport him from the UK pursuant to the Immigration (EEA) Regulations 2019 (the Regulations).

First-tier Tribunal Judge Grant granted permission to appeal on 6 November 2019.

Error of Law

For the reasons set out below I find there was no material error of law in the making of the decision of the First-tier Tribunal.

In summary, the grounds submit that the First-tier Tribunal Judge erred in law by providing inadequate reason for the finding that the claimant had acquired a permanent right of residence which was a precursor to the later finding that he was entitled to the highest level of protection under the Regulations through ten years' residence in the UK by February 2018 following his acquisition of a right of permanent residence. In the alternative, the judge found that the claimant qualified for the medium level of protection, again through the exercise of treaty rights for a continuous period of five years but it is really about the period of five years that it is in contention and as Mr McVeety has explained succinctly in his submissions, this is a reasons challenge and those reasons are essentially set out in the bullet points under paragraph 16 of the judge's decision.

In granting permission to appeal, Judge Grant considered that bearing in mind the Upper Tribunal's guidance in Begum [2011] UKUT 00275 as to what constitutes a worker and looking at the evidence placed before the judge at the hearing it was arguable that

> "the judge may have misapprehended the HMRC national insurance evidence placed before her by the appellant, page 58 of the appellant's bundle, which does not on the face of it show the exercise of treaty rights by working and the judge has arguably not adequately explained why she has found the evidence supports the appellant's claim to have exercised treaty rights for the relevant period and thus that he is entitled to enhanced protection".

The Secretary of State considered that given his significant offending record and the five years' imprisonment imposed in July 2016 for possession with intent to supply of class A controlled drugs, the claimant's conduct justified deportation. The respondent did not accept that the claimant was entitled to any heightened protection.

Judge Foudy disagreed, concluding in a relatively short decision that the claimant had already acquired a permanent right of residence by the time the 2016 Regulations came into effect, giving her reasons in paragraph 16 of the decision. At paragraph 18 of the decision the judge also concluded the claimant had established ten years' continuous residence in the UK by 17 February 2018, the date of the expulsion decision, and that this had not been broken by the sentence of imprisonment because prior to that imprisonment sentence he had forged such integrating links with the UK so that Regulation 3(3) and (4) meant that it would not be appropriate to apply Regulation 3(3)(a) to the assessment of the claimant's continuity of residence. Reasons for that latter conclusion are set out in paragraphs 19 through 20 of the decision.

As all parties accept, the crucial issue in this appeal to the Upper Tribunal is whether the judge has provided adequate reasoning for finding that the appellant had met the requirements for a right of permanent residence and whether this is sustainable on the evidence. The European Court case of Vomero establishes that a permanent right of residence is a prerequisite to entitlement to the higher imperative level of protection.

In relation to whether the claimant was exercising treaty rights over the necessary continuous five year period, the grounds accept that there is no minimum income and that earnings can be cash in hand even if that is otherwise illegal. However, it is submitted that the reasoning provided in paragraph 16 does not adequately explain whether the record relied upon by the claimant show a continuous five year period of contributions necessary to acquire a right of permanent residence.

The difficulty for the Secretary of State is that there was no representative present at the appeal hearing and the judge noted no explanation had been offered. Mr McVeety was able to tell me that it was because the assigned representative had gone ill, but that was not communicated to the Tribunal, no request for an adjournment was made, and no replacement representation was provided, even though this was a deportation case. It also appear that evidence was produced by the appellant on the day of the hearing which the Secretary of State was not aware of and would not and would not have been able to see and therefore the Secretary of State complains that the decision ought to have made clear just how the permanent right of residence was established and suggested that the extensive record of offending behaviour rather suggests he could not have been in permanent or continuous employment during the necessary period. It is suggested that the handful of documents that was available was insufficient.

Having carefully considered the decision and in particular paragraph 16, it is clear that the judge took into account both the documentary evidence and the oral evidence of the appellant. For example, the judge stated that the appellant had been consistent in his account that he was working in various casual jobs from his entry into the UK in 1990. There was support for that from HMRC records even though the earnings seemed to have been small and the appellant was said that he was working cash in hand, which may not have in fact have been disclosed to HMRC. It has been accepted that neither low wages nor cash in hand illegal working prevents a person from being a worker within the meaning of the Regulations. Even work of the very part-time and low pay type has been found to be enough to qualify a person as a worker. The judge was entitled to consider the appellant’s account that he had been in the UK since 1990, he had been working, he said, consistently in various casual jobs and that there was some support for that from the documentary evidence. It was open to the judge to conclude on that evidence that by the time the Regulations were implemented in 2006, having been in the UK since 1990, the appellant had been exercising Treaty Rights for at least a continuous period of five years notwithstanding his criminal record, which must surely have interrupted some of that working pattern.

Once the appellant acquired that right of permanent residence it would be difficult for him to lose it. There are certain instances where that can take place, such as a prolonged absence from the UK. The judge applied anxious scrutiny to the claimant's criminal record, which she found substantial and troubling, and gave consideration as to whether that meant that he was unable to meet the five year period. Ultimately, the judge concluded that he had satisfied that right of permanent residence.

It then followed from paragraphs 18 of the decision onwards, that given that he had been in the UK resident for a total period of ten years and as that ten years does not have to be exercising treaty rights once the continuous period of five years' exercising treaty rights has been acquired, the judge was, therefore, entitled to conclude that the appellant was entitled to the protection requiring imperative grounds for his removal.

Mr McVeety does not suggest that the circumstances of his conviction are sufficient to reach the high threshold of imperative grounds. In the circumstances, whilst the decision could have been clearer and more helpful for the Secretary of State to understand when the five year period was acquired, I am satisfied that the conclusion was one to which the judge was entitled to come and which has been supported by cogent reasoning.

In all the circumstances, the Secretary of State's appeal must be dismissed.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such as to require the decision to be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains allowed.

No anonymity direction is made as it is not necessary.

Signed

Upper Tribunal Judge Pickup

Dated 14 January 2020