Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00435/2016

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31st October 2017	**On 1st November 2017**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SILVIA KAMILLA SILVA
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr M S Jaufurally of Callistes Solicitors

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Portugal born on 8th October 1979. She has thirteen convictions for a number of counts of shoplifting and theft, and one count of failing to attend for tests for a class A drug, threatening with an offensive weapon and battery. The Secretary of State made a

deportation order against her on 5th September 2016 pursuant to s.5 of the Immigration Act 1971. Her appeal against the decision was allowed under the Immigration (EEA) Regulations 2006 (henceforth the EEA Regulations) by First-tier Tribunal Judge Munonyedi in a determination promulgated on the 7th August 2017.

2. Permission to appeal was granted by Judge of the First-tier Tribunal I D Boyes on 25th August 2017 on the basis that it was arguable that the First-tier judge had erred in law in finding that the claimant had permanent residence.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. The grounds of appeal and oral submissions for the Secretary of State contend, in summary, that the First-tier Tribunal misdirected itself in law or provided inadequate reasoning for the conclusion that the claimant had permanent residence and thus a heightened level of protection against deportation.

5. It is argued for the Secretary of State that the conclusion of the First-tier Tribunal was that she had this entitlement because she had lived in the UK for more than five years, see paragraph 39 of the decision, whereas in fact what needed to be shown was that the claimant had resided in accordance with the EEA Regulations for a continuous period of five years and so inadequate reasons are given for this conclusion.

6. The claimant had shown 5 P60 documents for the period April 2011 to April 2016. Whilst it is accepted that the P60s for April 2012 to April 2016 show an amount which suggests regular employment the one for April 2011 to April 2012 is for a significantly lesser amount, and in any case during this time the claimant was imprisoned for a number of weeks and so her continuity was broken, see Onuekwere v SSHD (Directive 2004/38/EC) Case C- 378/12. As such she should not acquire the "serious grounds" level protection which would accompany permanent residence.

7. It is said that the evidence before the First-tier Tribunal did not show that the claimant had lived in the UK for more than ten years because there is only a vaccination certificate from 2004 which does not show residence, and in any case her GP records show that she came to the UK on 28th May 2005. The claimant's own evidence is vague and uncertain on the issue of her arrival in the UK, varying from 2004 to 2007. Further she could not be seen as integrated from 2013 when she started her period of offending, and also could not acquire the high level of "imperative grounds" protection against deportation unless she had first obtained permanent residence, in accordance with a recent opinion of the Advocate General.

8. It was further argued that the decision was very poorly drafted, making it uncertain what test had been applied for the claimant to satisfy that she should not be deported, and as result leading to a conclusion that these errors were material. It could not be certain the correct test had been applied because there were numerous errors, and overall the decision was not sufficiently accurately made. There was an irrelevant reference to the case of Uner at paragraph 17 of the decision; there was an irrelevant reference to Regulation 11(1) of the EEA Regulations at paragraph 21 of the decision; there were computation errors with regards to the claimant's period of stay at paragraphs 33 and 35 of the decision; and at paragraph 38 of the decision there was a reference to Regulation 6 of the EEA Regulations which clearly should have been to regulation 21(6) of the EEA Regulations.

9. In the Rule 24 notice and oral submissions Mr Jaufurally argues for the claimant that the First-tier Tribunal does not err as contended as in fact the First-tier Tribunal considered the oral evidence of the claimant and found that it had the "ring of truth about it", and found that she had been living and working in the UK in low paid work since 2004, working in restaurants, shops and as a cleaner. It was open to the First-tier Tribunal to conclude that she had a permanent right of residence as it was open to that Tribunal to decide to give weight to the oral evidence which was supported by the medical notes and other evidence. The conclusion at paragraph 23 about permanent residence should be seen in the light of the later findings at paragraph 32 and thus to include reference to the claimant's work as well as her period of residence in finding she had permanent residence. The Secretary of State makes no irrationality challenge in the grounds, and there is sufficient reasoning in the decision of the First-tier Tribunal. In the alternative, it was argued that any errors regarding the determination of the issue of permanent residence were not relevant as ultimately the test for deportation was not that of "serious grounds".

Conclusions – Error of Law

10. Mr Tufan makes some valid criticisms of the drafting of the decision of the First-tier Tribunal. There are materials which are included that are not relevant, and there are computation errors. It is my task however to make a decision as to whether the key issue of the appeal is determined lawfully.

11. Regulation 15(1)(a) of the EEA Regulations is set out correctly at paragraph 22 of the decision, recording that permanent residence is acquired by residing for 5 years in accordance with the EEA Regulations.

12. It was rationally open to the First-tier Tribunal to conclude that the claimant had been physically in the UK for a period of more than 10 years, and on the balance of probabilities for 13 years between 2004 and 2017, as is done at paragraphs 32 – 33 of the decision based on the

claimant's own evidence combined with that of her GP notes and other documentary evidence. The First-tier Tribunal does not however take this issue further to conclude that the claimant can only be deported from the UK on imperative grounds of public security on the basis of a period of ten years continuous residence prior to the deportation decision in accordance with Regulation 21(4) of the EEA Regulations, so I find that no error of law arises out of this finding.

13. At paragraph 39 of the decision it is stated that the claimant has acquired permanent residence "having lived here for five years". I find that this statement is insufficiently reasoned, and does not correctly apply the test in Regulation 15(1)(a) of the EEA Regulations. Further this paragraph cannot be seen as supplemented by what is said at paragraph 32 of the decision to remedy this defect as this also does not address whether the claimant had resided continuously for a period of five years in accordance with the EEA Regulations. Whilst she might have lived and worked in the UK over the period 2004 to 2017, and not claimed benefits, this does not necessarily mean she resided in accordance with the EEA Regulations for a continuous five year period.

14. I clarify therefore that the decision of the First-tier Tribunal may only be seen, with respect to the claimant's residence, as a decision by the First-tier Tribunal that the claimant has resided in the UK from 2004 to June 2017, and not a decision that she has permanent residence in accordance with Regulation 15 of the EEA Regulations or is entitled to either of the higher levels of protection against deportation at Regulation 21(3) or 21(4) of the EEA Regulations.

15. However, I find that no material error is made because ultimately the test for whether the claimant's deportation is lawful is simply whether she poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, see paragraph 47 of the decision. I find that this was based on a proper direction as to the relevant factors as set out in Regulation 21(6) of the EEA Regulations, as set out at paragraph 38 of the decision. There is no evidence whatsoever the higher "permanent residence" test for deportation of "serious grounds of public policy or public security" was applied. The conclusion the claimant does not pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society is supported by relevant factual findings at paragraphs 40 to 45 of the decision based particularly on a report from her "Recovery Worker" which leads to a conclusion that the claimant is free of drugs and highly motivated to remain so due to the support of her husband and the desire to be reunited with her son, and so, in the context of her criminality having been caused by drug addiction, she does not pose a genuine, present and sufficiently serious threat of reoffending. No challenge is made to the reasoning of the decision on this point, that the claimant does not represent such a threat, and so I find that there is no material error of law.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

2. I do not set aside the decision, although I have clarified some of the findings regarding her period of residence as set out above at paragraph 14.

3. The decision of the First-tier Tribunal allowing the appeal under the Immigration (EEA) Regulations 2006 is upheld.

4. If there is no onward appeal to the Court of Appeal by the Secretary of State, and this decision is the final determination of this appeal, the Claimant shall appear before an Immigration Officer to discharge her bail when and if required by the Immigration Service in writing to do so.

Signed: Fiona Lindsley Date: 31st October 2017
Upper Tribunal Judge Lindsley