



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00041/2016

THE IMMIGRATION ACTS

Heard at Glasgow
On 10 August 2018

Decision & Reasons Promulgated
On 23 August 2018

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RICARDO FERREIRA SOBRAL MESQUITA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr A Govan, Senior Presenting Officer

For the Respondent: Mr S Winter instructed by Bruce Short Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Designated Judge of the First-tier Tribunal J G Macdonald who allowed the appeal by Mr Mesquita (the claimant) against the decision dated 13 January 2016 to deport him pursuant to the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). The claimant is a national of Portugal where he was born on 24 October 1979.
2. The First-tier Tribunal (FtT) concluded that the claimant was entitled to permanent right of residence which was established between 2006 and 2011. The decision to

deport the appellant arose out of some thirteen convictions over 21 offences together with a final conviction dated November 2015. The FtT considered that the offences fell well below the guidance given in chapter 69 of the Secretary of State's Operation Enforcement Manual and that there was no evidence to suggest that the claimant would commit the type of offences set out in the manual. The evidence was that the claimant did not have the propensity to commit serious crimes in the future nor had he in the past. The Tribunal concluded that the Secretary of State had failed to discharge the burden of proof to show that the appellant was a genuine, present and serious threat to society.

3. The grounds of challenge argue error by the FtT in failing to give proper consideration to the requirements of reg. 6 of the 2016 Regulations. For the periods during which the claimant was a jobseeker, it was necessary to be actively seeking employment and to have a genuine chance of being engaged. There did not appear to be any documentation to demonstrate this. There was a period between 2008 and 2010 when the claimant did not work at all and that simply claiming jobseeker's allowance was not sufficient to demonstrate that he was a qualified person. Thus, the finding that the claimant had acquired a permanent right of residence was inadequately reasoned and accordingly the claimant could not benefit from the heightened protection available to him under the EEA Regulations.
4. Mr Govan clarified that in the event that no error of law was found in the FtT decision, the heightened protection available to the claimant as a permanent resident under the 2006 Regulations 2006 would mean exclusion would not be justified. He further confirmed that the Secretary of State was not making a rationality challenge but instead it was based on inadequate reasoning.
5. The background to this case is that the claimant has been in the United Kingdom since 1999 and has been here since then, but the range of activity including employment, periods of ill-health, periods of study and a history of criminal offending including such a history from Portugal. He also has a history of relationships in the United Kingdom, the most recent being with [AN], however by the time the matter came before the First-tier Tribunal Judge, they were "just close friends", although he was spending time looking after [AN]'s children, of whom he is not the biological father. He currently lives with that family.
6. The judge noted two preliminary matters at [14] and [15] of his decision:
 - "14. It was accepted by Mr Winter, Counsel for the appellant, that the convictions against the appellant were accurately recorded in the refusal letter - it is not necessary to record them here. Mr McCallum lodged a printout of convictions which disclosed 13 convictions over 21 offences but that did not include the final conviction dated November 2015.
 15. To conform to directions issued by Upper Tribunal Judge Macleman, Mr Winter had produced a chronology in respect of employment and unemployment taken from Annex P of the appellant's first bundle. For the Home Office it was accepted that the details given there were accurate but it was also said that the information given was so incomplete it had little value."

7. The oral evidence noted by the judge at [16] and [17] is as follows:

“16. The appellant gave evidence as noted in my Record of Proceedings. He adopted his witness statements as part of his evidence. In cross-examination he gave details of his employment from his arrival here on 16 December 1999. He was paid in cash for four years and in 2004/2005 went to Aberdeen College to study nursing. He did an English language course first. After that he worked in numerous bars. He gave details of when he met his wife and [AN]. He explained that he came out of immigration detention in January 2017. As to how [AN] had coped without him he said it was very hard for her. He was very glad that he had come back. She had no help from her family. He had no one (sic) in Portugal; his siblings had moved to Spain and Sierra Leone and his mother was in Angola. He had visited her there. While he was away he had kept in touch with [AN] and the children through FaceTime. If he was in the house he could get the children to do things. [AN] needed help. There was no re-examination of the witness.

17. The remaining witness was [AN] who adopted her three statements as part of her evidence. The children viewed him as their father. In cross examination she said that they were a strong unit together. She received no help from her family. She had cut all ties with them. She had tried to get support but it was very difficult. She had been to the social work people. She had help at school but outside the school she had to do everything herself. In re-examination she said that she had been self-negligent in not doing (sic) back to see her GP for her difficulties. She had so much else going on.”

8. By way of submissions, the judge records the Presenting Officer’s points that the chronology was not good or clear enough to give the claimant the benefit of five years’ permanent residence in the light of incomplete periods of employment. As a student, he was required to have and did not have comprehensive sickness insurance. The case should be looked at at the lowest level of protection in the light of the claimant being a persistent offender. He was no more than a close friend of [AN] who helped her out with the children.

9. By way of response, counsel for the claimant argued the case on a ten year residence base and said in the alternative that the evidence established the claimant had acquired five years of lawful residence and thus permanent residency. Specifically, Mr Winter is recorded as arguing at [26]:

“In his oral submissions Mr Winter said that the appellant might not succeed in the five year lawful residence from the period of 1999 to 2004 because he had not shown he had comprehensive sickness cover. However, he should qualify in the period from 2006 to 2011 as the first period of imprisonment was not until April 2011. In terms of ‘serious’ grounds the Secretary of State had not discharged the burden on her to show that serious grounds existed.”

10. The judge’s conclusions on the issue of residence are set out between [28] and [30]:

“28. It is important to establish which level of protection the appellant enjoys under the 2006 Regulations as amended. In terms of paragraph 21(4)(a) on whether the appellant has resided here for a continuous period of at least 10 years the matter is not straightforward – to clarify exactly what that means

the Supreme Court has referred the issue to the European Court of Justice and a ruling is awaited. I have concluded that I do not need to answer that question.

29. The appellant is entitled to permanent right of residence if he has been here in accordance with the Regulations for a continuous period of five years. As acknowledged by Mr Winter the first period from which he might claim, namely late 1999 to 2004, probably fails because in 2004 he became a student before expiry of the five year period and he did not have comprehensive sickness cover. He therefore cannot say that he has been residing here in accordance with the Regulations for a continuous period of five years in that period of time.
 30. However, he does say he has established permanent residence in the period from 2006 to 2011 and, on balance, I conclude that he has established that through the chronology produced and agreed by the Home Office and also his oral evidence that he was working and receiving Jobseekers Allowance throughout the stated period. While the evidence referred to in the chronology is not as precise as it might be I consider that this is understandable due to the passage of time. I conclude that it is a reasonable inference to draw that, on a balance of probabilities, the appellant has established that he has been here in accordance with the rules. The whole thrust of the evidence offered by the appellant is that he came to the United Kingdom to work, has had numerous jobs since then and when he does not find another job quickly or immediately then he is in receipt of Jobseekers Allowance."
11. There is a wealth of documentary evidence in this case and, as indicated by the judge, he also heard oral evidence from the claimant.
 12. In his submissions, Mr Govan invited focus insofar as the five years referred to by the judge for the establishment of a right of permanent residence on the period between 6 November 2008 and 12 May 2010 by reference to the agreed chronology before the FtT. He acknowledged the evidence established there had been a history of sporadic employment but argued it was questionable whether the judge had undertaken a proper analysis of the evidence. He referred to the chronology indicating that there had been a period of over a year during which the claimant received Jobseekers Allowance and no evidence that he was seeking work.
 13. In the course of his clarification of the evidence for that period, Mr Winter explained that there had been no cross-examination of the claimant on the issue of his employment and other activity between 2008 and 2010. His note indicated that cross-examination had begun with questions relating to the claimant's arrival in the United Kingdom, his obtaining a national insurance number, the periods of study and the payment of tax during his employment as well as his relationship. Questioning then switched to 2011. Mr Winter relied on a rule 24 response and argued that the decision of the FtT needed to be read as a whole and invited me to note that the judge had acknowledged the evidence was not as precise as it could have been but he had given adequate reasons. Even during long periods of unemployment, it was possible for the claimant to have retained qualified status.

14. As will be seen from the above extracts from the judge's decision, he clearly had the Regulations in mind when determining whether the claimant had established a right of permanent residence. The version of the Regulations in force in respect of the period at issue between 2008 and 2011 provides at reg. 6(2):

"6. ...

- (2) a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if -
- (a) he is temporarily unable to work as the result of an illness or accident;
 - (b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and -
 - (i) he was employed for one year or more before becoming unemployed;
 - (ii) he has been unemployed for no more than six months; or
 - (iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged ...".

15. It is clear from the judge's findings at [30] quoted above that, based on the chronology but also the oral testimony of the appellant on which he was not cross-examined, he was satisfied that the claimant was a qualified person during the period in question between 2006 and 2011. Perhaps more detail might have been given, however I do not consider the reasoning given by the judge is so inadequate as to amount to an error; the Secretary of State is aware from the judge's decision how the conclusion that the claimant had been a qualified person during the period under examination had been reached. It is significant that there was no cross examination of the claimant on the evidence regarding that period. The Secretary of State has not challenged the rationality of the judge's findings and it follows that it would be only because an absence of reasons, a misdirection on the law or a misunderstanding of the evidence that error could be established.
16. Accordingly, I am not persuaded that the judge erred as alleged. I have noted Mr Govan's concession that, in the event that error was not found on the finding that the claimant had established a right to permanent residence, his deportation was not justified. Accordingly, this appeal is dismissed.

Signed

UTJ Dawson
Upper Tribunal Judge Dawson

Date 16 August 2018