



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00244/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 30<sup>th</sup> May 2018

Decision & Reasons Promulgated  
On 15<sup>th</sup> August 2018

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

HUSSEIN DUALEH

Respondent

**Representation:**

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer  
For the Respondent: Mr R Arkhurst instructed by Caulker & Co, solicitors

**DECISION AND REASONS**

1. In a decision promulgated on 4<sup>th</sup> December 2017, First-tier Judge PS Aujla allowed the appeal by Mr Dualeh against the deportation order made against him under the Immigration (European Economic Area) Regulations 2006. He found that Mr Dualeh had resided in the UK continuously since 4 August 1999, having arrived in the UK as a 6-year-old. He found that there was no suggestion by the secretary of State that Mr Dualeh and/or his family had utilised NHS services and that this suggested there was comprehensive health insurance in place. The First-tier Tribunal Judge found

“... [Mr Dualeh] had acquired settled status in August 2004 or the latest by September 2005 ... after having completed 5 years residence in the United Kingdom as a qualified person, a minor of compulsory schooling age, engaged in education ...

Having carried out a balancing exercise, I find that [Mr Dualeh's] period in prison subsequent to his nearly 16 years continuous residence in the United Kingdom did not adversely affect his entitlement to the enhanced level of protection on the basis that he had continuously resided in the United Kingdom for longer than 10 years. I therefore find that [Mr Dualeh] could only be deported from the United Kingdom on imperative grounds of public security ...”

2. The Secretary of State sought and was granted permission on the grounds that the First-tier Tribunal Judge had speculated on the existence of comprehensive medical insurance.
3. The reasons for the decision dated 9<sup>th</sup> April 2016 states
  11. On 29<sup>th</sup> August 2015 you were served with a letter of request to provide evidence that you have been exercising your treaty rights and evidence of your residence. In response you submitted on 21<sup>st</sup> September 2015, representations as to why you should not be deported from the United Kingdom. You have failed to provide any evidence that you have been exercising treaty rights in the United Kingdom for a continuous period of five years. It is not accepted that you have been resident in the United Kingdom in accordance with the 2006 regulations for a continuous period of five years.
  12. As you have not acquired a permanent right of residence under the 2006 regulations, consideration has not been given to whether your deportation is justified on serious grounds of public policy or public security.”

#### Error of Law

4. Mr Arkhurst acknowledged that a failure to utilise NHS services was not necessarily an indication that there was comprehensive medical insurance. He submitted that the burden lay with the Secretary of State to establish that there was no such insurance, that such information was within the knowledge of the Secretary of State and furthermore that the Secretary of State had not relied upon the absence of such insurance in support of the decision to deport Mr Dualeh.
5. The burden of proving that an individual is a qualified person exercising treaty Rights lies with the individual so asserting. The Secretary of State sought evidence from Mr Dualeh, which he did not provide. Whether Mr Dualeh has or had comprehensive medical insurance is a matter of fact that can only be provided by Mr Dualeh disclosing such evidence as he has. It is not possible for the Secretary of State to obtain medical records without consent and nor is it possible for her to obtain evidence of a private contract between Mr Dualeh and/or his family regarding insurance. Mr Dualeh did not provide evidence of comprehensive medical insurance at the hearing before the First-tier Tribunal; he has not provided evidence as required that he has been exercising treaty rights in accordance with the regulations. He has not provided evidence to support the claim that he has acquired a permanent right of residence (which is presumably what the First-tier Tribunal Judge means when he refers to settled status). The First-tier Tribunal Judge materially erred in law in finding that the absence of such evidence could be, effectively, ignored. The finding by the First-tier Tribunal Judge that Mr Dualeh had acquired permanent residence and was thus entitled to enhanced protection rights is perverse and unsustainable.

6. The First-tier Tribunal Judge materially erred in law and I set aside the decision to be remade.

### **Remaking the decision**

7. The hearing before the First-tier Tribunal was the second time that this appeal had been heard. On the first occasion, First-tier Tribunal Judge Cockrill found that Mr Dualeh had been resident for more than 10 years and that was all he had to prove. He found that Mr Dualeh was entitled to enhanced protection and thus allowed the appeal. That decision was set aside by Upper Tribunal Judge Kekic on appeal by the Secretary of State that not only did Mr Dualeh have to show presence in the UK but also that he was integrated and had been exercising Treaty Rights.
8. First-tier Tribunal Judge Cockrill found:
  29. I do not need, therefore to go into the detail of [Mr Dualeh's] circumstances because, frankly, those in themselves would not be sufficient, necessarily, to prevent his removal by deportation if one of the lower levels of protection had really been appropriate...
9. At the hearing I indicated to the parties that in the absence of evidence that Mr Dualeh had been exercising Treaty Rights, he would only be entitled to the lowest level of protection and, given the decision by First-tier Tribunal Judge Cockrill, his appeal would not succeed on that ground. There was no dissent from either party to that. I was however aware that it may be that Mr Dualeh did have comprehensive health insurance, or his parents did or his parents had been exercising Treaty rights and he had acquired permanent residence through them. I therefore granted leave to Mr Arkhurst to file and serve evidence of comprehensive health insurance by 4pm on 14<sup>th</sup> June 2018, if it exists. If no such evidence was filed and served, then I would proceed to dismiss the appeal.
10. On 12<sup>th</sup> June 2018, Mr Dualeh's solicitors filed copy documents which they stated were evidence of comprehensive health insurance. They were in German. The solicitors were written to on 22<sup>nd</sup> June 2018, on my instructions, to provide a translation within 14 days. The translation duly arrived.
11. The translations provided evidence that Mr Dualeh had health insurance. The two policy schedules attached showed premiums payable of 99.95 per month from 01-01-17 until 01-01-2018 and of 103.95 from 01-07-2018 until 01-01-19. His address on those schedules is an address in Tilburg which is in the Netherlands. The policy is described as a "Self Aware" policy. There is no indication what the policy covers or whether it could be described as comprehensive.
12. In any event it is not relevant for this appeal. The issue before the Tribunal is whether Mr Dualeh has an enhanced level of protection from deportation. To do that he has to show that he had permanent residence before he acquired 10 years continuous residence. I adjourned the remaking of the appeal to enable him to produce evidence of comprehensive health care either for him personally or as a dependant of his parents such that it entitled him to permanent residence. He has not done so. He has not provided evidence that

his parents were exercising Treaty Rights during his education years. He has not shown that he had permanent residence. He cannot sustain his claim to enhanced protection.

13. It follows that his appeal is dismissed.

Date 2<sup>nd</sup> August 2018

A handwritten signature in cursive script, appearing to read "Jane Coker".

Upper Tribunal Judge Coker