Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00618/2018

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre
On1st July 2019

Decision & Reasons Promulgated
On 1st August 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

The Secretary of State for the Home Department

Appellant

And

Sheroze [K]
(no anonymity direction made)

Respondent

For the Appellant: Mr Bates, Senior Home Office Presenting Officer
For the Respondent: Mr McIndoe, Latitude Law

DECISION AND REASONS

1. The Respondent is a national of France born in 1994. On the 29th March 2019 the First-tier Tribunal (Judge AJ Parker) allowed his appeal with reference to Regulation 27 of the Immigration (European Economic Area) Regulations 2016 ('the Regulations'). The Secretary of State now has permission to appeal against that decision.

Background and Matters in Issue

2. The Respondent has committed a series of criminal offences in this country. To date he has been to court on five occasions, being convicted of 14 offences including drug offences, breaching conditions and dangerous driving. He was sentenced to 58 weeks in prison on the 21st February 2018 for driving dangerously, without insurance and without a licence.

3. It was the Secretary of State's case, set out in his letter of the 18th September 2018, that these convictions, and this persistent criminality, exposed the Respondent to deportation action under the Regulations. It was not accepted that the Respondent had ever accrued a permanent right of residence in the United Kingdom and so received no enhanced protection from expulsion. The relevant tests were therefore those set out at Regulation 27(5).

4. On appeal the First-tier Tribunal found as fact that the Respondent has lived in this country since 2007, having arrived when he was 13 years old. The entire family were issued with registration documents in 2007 that were valid for five years. The Respondent's father was working as a taxi driver at that time. The Tribunal was accordingly satisfied that the Respondent had lived in this country in accordance with the Regulations between 2007 and 2012 and that he therefore accrued a right of permanent residence. Having had regard to the fact that the Respondent was educated in this country, and that he has lived here continuously since his arrival, the Tribunal was satisfied that the Respondent has further accrued ten years continuous residence such that he attracted the maximum protection from expulsion under the Regulations. In making that finding the Tribunal had specific regard to the fact that the Respondent had been sent to prison during that period, but was not satisfied that the ties of integration had been broken by that incarceration.

5. The Tribunal was not satisfied, in light of its own findings, that the Secretary of State could justify expulsion and the appeal was allowed.

The Secretary of State's Appeal and the Response

6. The Secretary of State was granted permission to appeal on the 7th May 2019 by First-tier Tribunal Judge Haria. Although commenting that the decision was well-reasoned and that consideration had been given to the pre-sentence report, Judge Haria granted permission on all of the following grounds:

    i) Making findings without evidential foundation. The Tribunal accepts without reasons, or reference to the evidence, the assertion that the Respondent's father was working as a taxi driver between 2007-2012. Without

that finding the Respondent could not show that he qualified for permanent residence. This in turn meant that he could not rely on his ten years continuous residence to attract a higher level of protection from removal: Vomero[1];

ii) In its assessment of whether the Respondent presented a genuine or present threat the First-tier Tribunal failed to have regard to, or make adequate findings on, the evidence. The pre-sentence report assesses the risk of re-offending as 67% within 2 years, and the sentencing judge said that the offences came "somewhere close to one of the worst cases" he had seen. This evidence is not adequately reflected in the determination.

7. For the Respondent Mr Mcindoe accepted, in respect of ground (i) that there was no independent corroboration of the claim that the Respondent's father had been a self-employed taxi driver. There were, for instance, no HMRC records because he had never earned above the personal allowance and so had not been liable to pay any tax. Mr McIndoe did however submit that the Tribunal was rationally entitled to accept such evidence as there was: a series of self-prepared accounts, stamped by an accountant, and the oral evidence of the man in question, his wife, the Respondent and the Respondent's sister. Mr McIndoe further pointed out that the Secretary of State had recognised that this gentleman was exercising treaty rights in June 2007 when a residence card was issued to him and his family. As to ground (ii) Mr McIndoe points out that the figures cited by the Secretary of State do feature in the Tribunal's reasoning, albeit that they were derived from the OASys and not the pre-sentence report.

Discussion and Findings

8. The bulk of the First-tier Tribunal's reasoning appears to start at paragraph 60 of its decision. Between paragraphs 61 and 64 the Tribunal sets out its reasons for finding that the Respondent had accrued ten years' continuous residence, and that the links of integration forged during that time have not been broken by his imprisonment. That is all sustainable reasoning. Applying Vomero, however, none of it is relevant if the Respondent cannot establish that he had, during that ten years, accrued a right of permanent residence, by living "in accordance with the Regulations" for a continuous five year period.

[1] B v Land Badem-Wurtemburg and Secretary of State for the Home Department v Vomero (Directive 2004/38/EC) Joined cases C-316/16 and C-424/16

9. At paragraph 65 the Tribunal identifies the crucial five years as being between 2007 and 2012. The Respondent was aged between 13 and 18 during this period. Although payslips in the bundle indicate that he started work sometime in April 2011, prior to that he was a student. It is common ground that he did not have the comprehensive sickness insurance required to make him a 'qualified person' in that capacity, so he had to rely on the income generated by his father (no mention is made of the Respondent's mother so I assume that she was not exercising treaty rights). Of this the Tribunal refers back to a finding that it made in the course of discussion of the Secretary of State's submissions. The Secretary of State was at that hearing represented by Presenting Officer Ms Groves:

> "56. … Ms Groves rejected the accounts produced by the appellant's father which shows that from 2007 to date he has worked as a taxi driver by saying no tax documents or taxi licence certificates had been produced. I find that this is a weak argument. I find that he has lived in this country and been exercising treaty rights since 2007 based on the credible documentary and oral evidence presented to me."

10. It is the Secretary of State's contention that there was not the evidence to reach this conclusion. The only documentary evidence was a collection of self authored accounts statements. It was true that these had been stamped by an accountant as verified but there was no covering letter from the accountant, and more significantly, no corroborative evidence from HMRC. Other than that the evidence consisted of the oral evidence of the Respondent's father, who in Mr Bates' submission had obvious reasons to want to stop his son being deported.

11. Mr McIndoe pointed out that in fact the oral evidence had been of four witnesses who had all confirmed that the Respondent's father drove a taxi in that period, and that the Tribunal had found, of (at least some of) this evidence [at 57]:

> "The oral evidence of the appellant's parents relating to treaty rights was not successfully challenged and I find that the appellant did enter the country in 2007"

12. There is no specified evidence requirement to demonstrate that treaty rights were being exercised. It is a question of fact to be determined in the round, taking all available information into account. It is the Secretary of State's case that there was "*no* evidence that the Appellant's father was lawfully employed" (my emphasis) but of course that is not right. There was evidence; it is just that it came exclusively from the witnesses (I say exclusively because the accounts statements added little if anything to the evidence of the Respondent's father, given that he had prepared them himself).

Nothing in the record of proceedings before Judge Parker indicates that the Secretary of State was able to score any particular points to undermine the testimony; nor was Mr Bates able to bring any such points to my attention. There were, for instance, no inconsistencies identified, nor evidence brought to contradict it. The weight to be attached to that evidence was, classically, a matter for the judge: see for instance Manzi v Kings' College Hospital NHS Trust [2018] EWCA Civ 1882 [at 23]: "weight is a contextual evaluation for the judge who reads, hears and sees the evidence of the witnesses. It is inappropriate for this court to interfere with that evaluation unless it is perverse". There is nothing perverse in the Judge's decision to accept as credible the consistent evidence of four witnesses. It follows that ground (i) is not made out.

13. Ground (ii) is concerned with the question of risk. I do not propose to address it in light of my findings on ground (i). That is because the evidence fell far short of establishing that there were 'imperative' grounds to deport the Respondent.

Decisions

14. The determination of the First-tier Tribunal is upheld.

15. There is no order for anonymity.

Upper Tribunal Judge Bruce
6th July
2019