



IAC-AH-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00089/2019

THE IMMIGRATION ACTS

**Heard at Field House
On: 13 March 2020**

**Decision & Reasons Promulgated
On 24 March 2020**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR SALVADOR SOCORRO RODRIGUES
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant:

Mr T Lindsay, Senior Home Office Presenting Officer,

For the Respondent:

Ms N Nnamani, counsel instructed by Immigra Lex Legal Consortium

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Cohen, promulgated on 11 November 2019. Permission to appeal was granted by Resident Judge Appleyard.

Anonymity

2. No direction has been made previously, and there is no reason for one now.

Background

3. The respondent states that he arrived in the United Kingdom during September 2013. He was issued with an EEA Registration Certificate on 30 June 2016. EEA Residence Cards were issued to the respondent's non-EEA national spouse and child on 22 May 2017. On 7 November 2017, the respondent was convicted of two money laundering offences, amounting to a sum of £238,000, in connection with allowing his business to be used to launder proceeds from a fraudulent business which sold overpriced vitamins and supplements to elderly and vulnerable customers. The offences took place between 1 December 2015 and 30 September 2016. He was sentenced to 4 years imprisonment on 8 November 2017.
4. On 6 February 2019, the Secretary of State decided to deport the respondent under section 5(1) of the Immigration Act 1971. It is this decision which is under challenge. Essentially, the Secretary of State was of the view that the respondent had provided insufficient documentary evidence of continuously residing and exercising Treaty rights in the United Kingdom for 5 years. It was considered that the respondent posed a risk of re-offending and of causing harm to the public and that he represented a genuine, present and sufficiently serious threat to the public, justifying his deportation on the grounds of public policy. The respondent's Article 8 claim was also refused owing to an absence of very compelling circumstances which outweighed the public interest in his deportation.

The decision of the First-tier Tribunal

5. The First-tier Tribunal judge found that the respondent had been continuously residence in the UK, exercising Treaty rights since September 2013 and concluded that he had achieved permanent residence. The judge found that the respondent's removal was not justified on serious grounds of public policy or security and allowed the appeal on that basis as well as under Article 8 ECHR.

The grounds of appeal

6. It was argued, firstly, that the First-tier Tribunal failed to give adequate reasons for findings on a material matter. It was noted that the respondent could not have acquired a permanent right of residence, having arrived in the UK only 4 years prior to being sentenced in 2017 and therefore the Tribunal had identified the incorrect threshold. Furthermore, it was argued that the judge had failed to adequately assess the seriousness of the offending, that the judge erred in distinguishing this case from the claimant in *Tsakouridis* and that his findings as to the extent of the current threat posed by the respondent were flawed.
7. It was further argued that the judge paid inadequate scrutiny to the respondent's claimed rehabilitation and also that the judge was wrong to consider this case under

Article 8 of the ECHR, applying *Badewa (ss117A-D and EEA Regulations)* [2015] UKUT 00329.

8. On 11 December 2019, Resident Judge Appleyard considered this decision to be one which he could set aside, subject to representations, because the respondent had “manifestly” not acquired a permanent right of residence in the UK. Having seen no representations, the matter was set aside on 7 January 2020. Resident Judge Appleyard set aside his aforementioned decision on 15 January 2020 as it transpired that the respondent objected to this course of action. He also took the opportunity to grant permission to appeal for the reasons he gave previously.
9. The respondent’s Rule 24 response was provided during the hearing and in it, it was accepted that the judge misdirected himself as to the level of protection applicable. It was contended that this was not material to the outcome of the appeal because the risk criteria did not merit deportation on even general grounds because the respondent did not commit the most heinous of crimes and the judge reached his findings as to rehabilitation based on the evidence. Permission was sought to admit a bundle of additional evidence which was not previously before the Tribunal.

The hearing

10. Mr Lindsay relied on the grounds of appeal, except for paragraph 11 which referred to *Badewa*. He clarified that the Secretary of State accepted that in this case where a one-stop notice had been completed, it was open to the Tribunal to consider Article 8. Otherwise, he argued that the judge’s incorrect identification of the correct threshold would affect his proportionality findings. Mr Lindsay emphasised that the respondent received a sentence of 4 years imprisonment and he would therefore need to show that there were very compelling circumstances involved. The judge made a clear and obvious error regarding his assessment of the Regulations. It was accepted in the Rule 24 response that the respondent cannot show that he is permanently resident in the UK. Furthermore, his imprisonment broke his residency. This was a material error. While it might have been open to the Tribunal to find that the respondent posed a low risk of reoffending, he posed a real risk to the public and there was a not negligible risk of causing very real public harm. The outcome of the appeal might have been different had the judge not erred.
11. Ms Nnamani made the following points. The judge made an error of law in finding that the respondent had established permanent residence; this was not an argument advanced on the respondent’s behalf. The judge referred to reports, courses, the support network of the wife and son, low risk of reoffending and of harm and that the respondent is remorseful. The judge was entitled to note that the respondent had good prospects for continued rehabilitation and that there were protective factors as set in the reports. While the judge wrongly concluded that the respondent’s deportation was not justified in relation to serious grounds he considered that he was integrated in the UK, it was a single offence and conviction, there was a low risk of reconviction and low risk of harm. In response to my query as to how this could be considered a single offence, Ms Nnamani accepted that the offences took place over a

period of months but contended that the respondent merely had suspicions rather than knowledge of relevant matters. Ms Nnamani asked me to note that the respondent received a small payment and all the money he received was confiscated. In terms of materiality, she argued that the Secretary of State had not shown that the respondent posed a threat or that it was proportionate to deport him, and it was not justified to set aside the entire determination.

12. In response, Mr Lindsay argued that the respondent's conduct had been mischaracterised as omissions, whereas it was plain that the conviction was for positive acts on his part. It was proven by the prosecution that the respondent was suspicious that his course of conduct was contributing to a criminal enterprise. Secondly, applying *Dumliauskas* [2015] EWCA Civ 145, rehabilitation could not be a weighty factor in the absence of a permanent right of residence.
13. At the end of the hearing, I concluded that the First-tier Tribunal made a material error of law in applying the incorrect threshold and set aside the decision in its entirety.

Decision on error of law

14. It is not in contention that the respondent had not acquired permanent residence in the United Kingdom. It is clearly an error for the judge to find that he did in circumstances where it ought to have been obvious that the respondent had not even been present in the UK for 5 years prior to his imprisonment. Indeed, no such argument was ever put on the respondent's behalf. There is no support in the decision for the contention that had the judge applied the correct test, the result would have been the same. At [31] onwards, the judge made repeated, detailed, references to evidence pointing to the respondent's rehabilitation and his conclusions relied heavily on it. The following was said in *Dumliauskas* at [54]: "*I do not consider that in the case of an offender with no permanent right of residence substantial weight should be given to rehabilitation.*" In this case, the judge's findings demonstrate that substantial weight was given to this issue. Therefore, I do not accept that the outcome of the appeal would have been the same even without the error as to the correct threshold.
15. While mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010, it is the case that there has yet to be an adequate consideration of this appeal at the First-tier Tribunal and it would be unfair to deprive either party of such consideration. Furthermore, the respondent wishes to provide further evidence and rely on new material which was not previously before the First-tier Tribunal.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside, with no findings preserved.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House, with a time estimate of 4 hours by any judge except First-tier Tribunal Judge Cohen.

Signed:

Date 13 March 2020

Upper Tribunal Judge Kamara