



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000234
First-tier Tribunal No:
DA/00017/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
12th October 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BRUNO MIGUEL TE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the appellant: Mr T Lindsay, Senior Presenting Officer

For the respondent: Mr J Dhanji, Counsel, instructed by Vestra Lawyers

Heard at Field House on 3 October 2023

DECISION AND REASONS

Introduction

1. For the sake of continuity I shall refer to the parties as they were before the First-tier Tribunal: therefore, the Secretary of State is once again “the respondent” and Mr Te is “the appellant”.
2. The respondent appeals with permission against the decision of First-tier Tribunal Judge Cartin (“the judge”), promulgated on 25 January 2023. By that decision, the judge allowed the appellant’s appeal against the

respondent's decision of 5 January 2022 to make a deportation order, pursuant to regulations 23 and 27 of the Immigration (European Economic Area) Regulations 2016 ("the Regulations").

3. The appellant, a citizen of Portugal, had been convicted in December 2020 for the offences of supplying Class A drugs and money laundering, for which he was sentenced to 4 ½ years' imprisonment.

The judge's decision

4. In a conscientious and well-structured decision, the judge set out the relevant background to the appeal, summarised the parties' respective submissions, and reached the following core findings and conclusions, which I will only summarise here:

(a) the appellant enjoyed the highest level of protection under the Regulations as he had acquired a permanent right of residence and had been resident in the United Kingdom for 10 years: [28]-[29];

(b) the acquisition of permanent residence was based in the first instance on the appellant's completion of compulsory education in this country between 2006 and 2013: [28];

(c) the appellant had also worked for a period of five years: [29];

(d) the integrative links established by the appellant in this country had not been broken by his imprisonment: [30]-[33];

(e) the respondent had ultimately failed to show that the threat posed by the appellant reached the imperative grounds threshold: [34]-[45].

5. The appeal was accordingly allowed.

The grounds of appeal

6. The respondent's grounds of appeal can be summarised as follows. Firstly, it is said that the judge failed to have regard to the decision of the

CJEU in Vomero Case C/424/2016. Secondly, it is said that the judge was wrong to have found that the appellant could rely on compulsory education in order to acquire permanent residence in the United Kingdom. Thirdly, the evidence before the judge did not support the conclusion that the appellant had exercised Treaty rights for five years between 2013 and 2018. Fourthly, the judge had failed to have regard to the principles of schedule 1 to the Regulations when considering the question of integrative links, had made a perverse finding in respect of the appellant's alleged links to a gang, and had failed to consider the seriousness of the consequences of re-offending.

7. Permission to appeal was granted on all grounds.

Rule 24 response

8. Following the grant of permission, the appellant provided a detailed rule 24 response, rebutting each of the points put forward in the respondent's grounds of appeal.

The hearing

9. I was assisted by concise submissions from both representatives, which are a matter of record and which need not be set out here in full.

10. In support of grounds 1 and 2 and the meaning of "student" in regulation 4 of the Regulations, Mr Lindsay relied on the respondent's guidance entitled "European Economic Area nationals: qualified persons", version 10.0, published on 2 August 2023. He did, however, accept that this document was "not crystal clear" as to what was meant by "student" in regulation 4. He submitted that even if the judge had been entitled to find that the appellant had been a student, there was no finding on whether he had also had sufficient resources of his own. The judge had failed to make a finding as to whether the appellant had actually worked for five years continuously. There was also an issue as to the judge's calculation of the relevant 10 year period. In respect of grounds 3 and 4,

Mr Lindsay submitted that the judge had failed to undertake a balancing of the positives and negatives in the case.

11. Mr Dhanji relied on his rule 24 response. In essence, he submitted that the judge had been entitled to make all of the findings he did. On the question of whether the appellant had been a student for the purposes of regulation 4, the respondent had failed to provide any meaningful authority or other materials in support of her case. The question of sufficient resources had not been raised previously. Any mistake by the judge in respect of the 10 year period was immaterial. The judge had clearly been entitled to find that the integrative links had not been broken by the term of imprisonment.
12. Mr Lindsay made no reply.
13. At the end of the hearing, I reserved my decision.

Conclusions

14. Before turning to my analysis of the judge's decision in the context of the challenge put forward by the respondent, I remind myself of the need to exercise appropriate restraint before interfering with a decision of the First-tier Tribunal: see, for example, UT (Sri Lanka) [2019] EWCA Civ 1095, at [19].
15. I conclude that there are no material errors of law in respect of the judge's findings and conclusions on the level of protection available to the appellant in this case. My reasons for this are as follows.
16. Firstly, it is clear from reading the judge's decision sensibly and holistically that he was well-aware of the need for the appellant to establish both a right of permanent residence and a 10-year residence in the United Kingdom in order to be able to rely on the imperative grounds level of protection: [8]-[9], [20], [22]-[23], and [24]. The fact that the judge did not specifically refer to Vomero does not establish an error of law.

17. Secondly, before the judge and now before the Upper Tribunal, it has been the respondent's case that compulsory education does not count for the purposes of deciding whether an EEA national was a qualified person by virtue of being a "student" under regulation 4(1)(d)(i) of the Regulations. That regulation read as follows:

" 'student' means a person who-

(i) is enrolled, for the principal purpose of following a course of study (including vocational training), at a public or private establishment which is-

(aa) financed from public funds; or

(bb) otherwise recognised by the Secretary of State as an establishment which has been accredited for the purposes of providing such courses or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located..."

18. It is clear from the judge's decision that the respondent provided no meaningful assistance to him on the question of who was a "student": [25]. Similarly, and with respect to Mr Lindsay, I have received no such assistance either. The only extrinsic source to which I have been referred is the respondent's guidance. At page 34 of the document, under the heading "Student", one finds the following:

"This page tells you how to assess if a European Economic Area (EEA) national qualified as a student under the EEA Regulations. They must show that they:

- were enrolled for the main purpose of following a course of study (including vocational training) at a public or private establishment which was:
 - o financed from public funds
 - o recognised by the Secretary of State as an establishment accredited to provide such courses or training within the law or administrative practice of the part of UK in which it is located..."

19. Mr Lindsay acknowledged that this passage was less than "crystal clear". With respect, that is something of an understatement. In my judgment, it adds nothing of substance to the respondent's argument. Mr

Lindsay suggested that the word “student” implied persons undertaking higher education. I acknowledge that there may be some merit in that, although it is once again clearly less than “clear-cut” and, in my judgment, does not get the respondent’s case over the line.

20. If indeed the respondent has taken a firm position on the limited meaning of “student” within regulation 4, one would have expected her guidance to have made this much clearer than it does. The absence of any clear statement in any materials that I am aware of is a relevant consideration.
21. Again without criticising Mr Lindsay, I have not been provided with any arguments from the respondent as to why the term “student” should be limited to further and/or higher education. This failure is more apparent given that the respondent’s contention would seem to run against the need to give effect to the purpose behind the Citizens’ Directive.
22. I would add that I have been unable through my own pre-reading researches to find any authority or other learning on this point.
23. In all the circumstances, the respondent is unable to persuade me that the judge erred in law in his interpretation of the term “student” in regulation 4. The judge’s finding at [25] of his decision was open to him.
24. Thirdly, Mr Lindsay’s attempted reliance on the “sufficient resources” point under regulation 4(1)(d)(iii) of the Regulations does not assist the respondent’s case. I am satisfied that this issue was not raised in the respondent’s original decision letter, nor in any review. I am satisfied that it was not raised before the judge either. It is to be remembered that an appeal before the First-tier Tribunal is not a dress rehearsal. Having regard to those considerations and the reported decision of Lata (FtT: principal controversial issues) [2023] UKUT 163 (IAC), I conclude that the judge has not made any errors of law particular issue.

25. Fourthly, I am satisfied that at [29] the judge did in fact make a finding that the appellant had worked continuously in the United Kingdom between 2013 and 2018. The judge made reference to the HMRC records which were in evidence before him and stated that they confirmed that the appellant “was working in the UK in the tax years 2013-14 up until 2017-2018.” On a fair and sensible reading, I conclude that the judge was stating his finding that the appellant had worked throughout and that the period ran until the end of the 2017-2018 tax year. In reaching that finding, there is no clear indication that the judge in some way unaware of the OASys report, or the appellant’s status in this country.
26. Fifthly, as discussed during the hearing, it does seem as though at one point the judge potentially went wrong in respect of the calculation of the 10-year period. At [9] and [24], the judge was plainly correct in stating that the period involved counting back from the respondent’s decision to make the deportation order. However, at [29] he then wrongly referred to counting back from the date of the hearing. It is difficult to discern whether this was simply a slip, or whether it represents a significant error. In the first instance, I conclude that it was simply a slip and nothing more. Even if I were wrong about that, any error is immaterial because the 10-year period counting back from the respondent’s 2022 decision leads one to 2012, at which point the appellant had already (on the judge’s sustainable finding) acquired permanent residence through his status as a student (relating to the period 2006-2011). Thus, the appellant had already acquired a permanent right of residence by the time the 10-year clock began ticking, as it were.
27. I turn to the issue of integrative links and other related issues. I conclude that there are no errors of law here either. My reasons for this are as follows.
28. Firstly, the judge made specific reference to Binbuga v SSHD [2019] EWCA Civ 551 when noting the respondent’s submissions: [20]. That case does not stand for the proposition that any period of imprisonment will

automatically break any integrative links in the host country, contrary to what the respondent appears to suggest in her grounds of appeal.

29. Secondly, the judge specifically referred to schedule 1 to the Regulations at [10] and [12] when summarising the relevant legal framework. I am not prepared to find that the judge then simply ignored these considerations later on when setting out his findings and conclusions. In saying this, I refer back to what I said about the need for appropriate judicial restraint when considering decisions of the First-tier Tribunal.
30. Thirdly, the judge undertook a careful analysis of the question of whether integrative links had been broken: [31]-[33]. There is nothing irrational or otherwise erroneous in respect of that analysis and the conclusions reached thereon.
31. Fourthly, the judge undertook an appropriately detailed assessment of the relevant factors relating to threat/risk. Whilst the judge's analysis at [43] and [44] are referred to in the grounds of appeal, I read the decision more widely, having specific regard to what had already been said at [34]-[42]. It is clear that the judge weighed in the balance considerations which were adverse to the appellant. The respondent is simply wrong to assert that the judge deemed the low risk of re-offending to be in some way determinative of the issue. The judge's conclusion was very far from being perverse.
32. Fifthly, the respondent's assertion that the judge failed to consider the seriousness of the consequences of re-offending is misconceived: see, for example, the analysis at [38] and [39].
33. It follows from the above that there are no material errors in the judge's decision and that the respondent's appeal to the Upper Tribunal must be dismissed.

Anonymity

34. No anonymity direction has been made thus far and I see no reason to make one at this stage.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. That decision shall stand.

The Secretary of State's appeal to the Upper Tribunal is dismissed.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 10 October 2023