



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

Case : UI-2022-001642
First tier number DA/00090/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 27th November 2023**

Decision & Reasons Promulgated

On 10th of May 2024

Before

**UPPER TRIBUNAL CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE KELLY**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ABDISALAN BASHE SAID
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr Claire, Counsel instructed by Veja and Co, Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State from the decision of the First-tier Tribunal, promulgated on the 10th February 2022, to allow the appellant's appeal against the decision to deport him to Denmark. The Secretary of State's decision was made pursuant to regulations 23 and 27 of the Immigration (European Economic Area) Regulations, 2016 (hereafter, 'the EEA Regulations 2016') on the 14th January 2021 (both representatives agreed that the decision is incorrectly dated the 14th January 2020).

2. The Upper Tribunal raised a preliminary issue relating to the jurisdiction to hear an appeal in circumstances where the respondent's decision to remove on public policy grounds was dated after EU exit (31 December 2020) but the respondent did not accept that the appellant was residing in the UK under EU law or had acquired a permanent right of residence before EU exit. The Upper Tribunal made directions to the respondent to address the issue in writing after the hearing before deciding the question of error of law.
3. In further submissions dated 15 December 2023, the respondent accepted that, on his findings, the appellant was not a 'relevant person' as defined by The Citizens Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ('the Grace Period Regulations 2020'). However, the First-tier Tribunal found that the appellant had acquired a right of permanent residence before EU exit, which was a factual finding that, if it did not disclose an error of law, would "'legalise" the original basis of the decision.' If there was no error of law in the findings relating to permanent residence then the appellant would have fallen within the scope of the Grace Period Regulations 2020, which preserved various aspects of the EEA Regulations 2016. In those circumstances, it was submitted that the Upper Tribunal was likely to have jurisdiction to hear the appeal.
4. In light of our finding that the First-tier Tribunal decision did not involve the making of material errors of law (see below), we conclude that the Upper Tribunal does have jurisdiction to hear an appeal brought under the EEA Regulations 2016 (as saved) for the reasons outlined by the Secretary of State.
5. The First-tier Tribunal did not direct anonymity and we cannot see that any purpose would be served by directing it now.
6. For the sake of continuity and convenience, we shall refer to the parties according to their status before the First-tier Tribunal.

The Legal Framework

7. A removal decision taken under the Regulations on grounds of public policy are governed by Regulation 27, the pertinent parts of which read as follows –

Decisions taken on grounds of public policy, public security and public health

27.—(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(17).

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

(7) ...

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

8. Schedule 1 of the Regulations, as referred to in regulation 27 (8) above, reads as follows:

SCHEDULE 1 CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

Considerations of public policy and public security

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

Application of paragraph 1 to the United Kingdom

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

- (a) the commission of a criminal offence;
- (b) an act otherwise affecting the fundamental interests of society;
- (c) the EEA national or family member of an EEA national was in custody.

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including—

- (a) entering, attempting to enter or assisting another person to enter or to attempt to enter, a marriage, civil partnership or durable partnership of convenience; or
- (b) fraudulently obtaining or attempting to obtain, or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

The fundamental interests of society

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

- (a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;
- (b) maintaining public order;
- (c) preventing social harm;
- (d) preventing the evasion of taxes and duties;
- (e) protecting public services;
- (f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;
- (g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);
- (h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);
- (i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;
- (j) protecting the public;

(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);

(l) countering terrorism and extremism and protecting shared values.

9. A right of permanent residence under Regulation 15 is acquired where an EU citizen has been ‘a qualified person’, as defined by Regulation 6, for a continuous period of five years.

Background to the appeal

10. The appellant claims to have arrived in the United Kingdom with his parents in 2002, when he was 5 years old. That claim was not challenged by the Secretary of State, either in the First-tier Tribunal or before us.
11. The appellant was made the subject of a Referral Order by the Juvenile Court on the 27th March 2014 in respect of an offence of criminal damage. He thereafter received a number of further non-custodial sentences for relative minor offences, before receiving his first custodial sentence on the 11th March 2015, namely, a sentence of 4 months Detention and Training Order for offering to supply a class A controlled drug. He made four further court appearances for criminal offences until, on the 3rd May 2019, he was sentenced to a total of 54 months’ imprisonment in respect of offences of possessing controlled drugs with intent to supply. That sentence post-dates the First-tier Tribunal’s decision, which is the subject of this appeal.

The decision of the First-tier Tribunal

12. In summary, the First-tier Tribunal judge concluded as follows.
13. On the basis of his father’s earnings from employment from 2009 onwards, the appellant had acquired a permanent right of residence in the United Kingdom by the time the Detention and Training Order was imposed on him in March 2015. The appellant thus qualified for the ‘medium’ level of protection from deportation under Regulation 27(3) (serious grounds of public policy and public security) [26]. He did not however qualify for the highest level of protection under Regulation 27(4) (imperative grounds of public security) because his integrative links to the UK had been disrupted by his period of criminal detention between May 2019 and April 2021 [27, 28]. Based upon his criminal history, together with the contents of an OASys report, [34, 37, 38], there is a risk that the appellant will re-offend. He thus poses “the necessary threat” to the fundamental interests of society under Regulation 27(5)(c) [40]. However, given the appellant’s age and length of residence in the UK [45, 47], his criminal convictions, and consequential threat posed to the fundamental interests of society [44], his linguistic and familial links to the UK [46, 47, 48], his apparently reasonable state of health [49], and the relatively good prospects of his societal rehabilitation in the UK compared to those following forced return to Denmark [52, 53, 54], the proportionality balance falls, “just in favour of the appellant, despite his offending”.

The grounds of appeal

14. The grounds of appeal are not numbered. They are however conveniently summarised in the grant of permission to appeal by the First-tier Tribunal, namely, that the judge had failed to –
- (1) engage with or provide reasons for rejecting the respondent’s argument concerning the earnings of the appellant’s father and consequential establishment of a permanent right of residence;
 - (2) give reasons for finding that the appellant’s period of detention, commencing in March 2015 did not interrupt the appellant’s period of residence in the United Kingdom;
 - (3) undertake a proper proportionality assessment.
15. We consider those grounds in turn.

Legal analysis

16. The respondent’s original letter explaining the reasons for the decision to deport the appellant focussed upon his mother’s earnings. However, in a “supplementary decision letter” of the 22nd July 2021, it was argued that the level of the earnings of the appellant’s father between 2009 and March 2015 were lower than the threshold for benefits, and thus did not constitute genuine and effective employment. Although Mr Tufan did not concede this ground, neither did he elaborate upon it. Specifically, he did not refer us to any evidence that had been before the First-tier Tribunal to show that the level of earnings of the appellant’s father fell below what is described in the written grounds as, “the threshold for benefits”. Neither did he refer us to any authority that was to the effect it would be necessary to cross that threshold for employment to be treated as genuine and effective, as opposed to ancillary and marginal. We therefore conclude that the respondent has not made out this ground. We are in any event satisfied that it was reasonably open to the First-tier Tribunal to conclude that the appellant had acquired a permanent right of residence in the United Kingdom by the time of his incarceration in March 2015.
17. Turning to the second ground, we are satisfied that the First-tier Tribunal fell into error. It did so by adopting the Respondent’s own erroneous analysis of the appellant’s short period of incarceration in March 2015 as being relevant to the appellant’s right of permanent residence in the UK. Once established, it is only an extended period of absence from the UK that can result in the loss of a permanent right of residence. Contrary to the analysis of both the Respondent and the First-tier Tribunal, therefore, it is not ended by a subsequent period of imprisonment or other criminal detention. On the facts of this appeal, the disruption of the appellant’s integral links to the United Kingdom was thus relevant only to the question of whether the appellant had been entitled to the very highest level of protection. Given that the judge in any event found that the appellant was not entitled to this [para 29] the error in treating the period of detention imposed in March 2015 as potentially disruptive of an established right of

permanent right of residence was wholly immaterial to the outcome of the appeal.

18. It is right to say that Mr Tufan focussed his submissions upon the third ground, namely, the First-tier Tribunal's assessment of the proportionality of deportation to Denmark. He firstly submitted that, having found that the appellant posed a threat to the fundamental interests of society, the First-tier Tribunal ought to have dismissed the appeal for that reason alone, and was thus in error by going on to consider the issue of 'proportionality'. We reject that submission. The requirement for a person to constitute a threat to the fundamental interests of society is a precondition to deportation under Regulation 27. It is not however determinative of it. Secondly, Mr Tufan submitted that the judge's finding concerning the stability of the appellant's family home, and his consequent prospects for rehabilitation in the UK, had been confounded by his subsequent conviction and imprisonment for 54 months. As we pointed out at the hearing, however, we cannot find an error of law on the basis of a failure to have regard to evidence that was not before it. Thirdly, Mr Tufan submitted that there was a tension between the judge's finding that the appellant's criminal history rendered him a threat to the fundamental interests of society and his finding that there were realistic prospects for his rehabilitation in the UK. However, these concepts are by no means mutually exclusive given that the potential threat to the fundamental interests of society is expressly required to be "present", whereas the question of future rehabilitation is by definition a prospective one. Finally, Mr Tufan submitted that the First-tier Tribunal erred in failing to consider each and every one of the factors listed in Schedule 1 of the Regulations. He did not however particularise those that he claimed the First-tier Tribunal had not considered, and neither did he specify how such failure might have been material to the outcome of the appeal. We moreover accept Mr Claire's submission that the First-tier Tribunal expressly considered all relevant factors, as summarised at paragraph 9 (above), prior reaching what it clearly considered to be a finely balance decision. That decision was one that in our judgement was reasonably open to the Tribunal, albeit not one to which a differently-constituted Tribunal may have arrived.

Notice of Decision

19. The appeal is dismissed. The decision of the First-tier Tribunal therefore stands.

No anonymity direction is made.

David Kelly

Judge Kelly

Date: 7th May 2024

Deputy Judge of the Upper Tribunal