



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2024-000459
First-tier Tribunal No:
EA/01733/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 15 August 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AUDRIUS SIMKUS
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr N Wain, Senior Home Office Presenting Officer

For the Respondent: No appearance

Heard at Field House on 25 July 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal Judge Craft promulgated on 6 December 2023 allowing Mr Simkus' appeal against the decision of the Secretary of State to refuse him leave to remain EU Settlement ("EUSS") on 21 March 2023.
2. The Secretary of State refused the application as she was not satisfied that the appellant had provided sufficient evidence of his residency for the years prior to 31 March 2021 and thus, did not qualify for settled status and for the same reasons was not granted pre-settled status. The judge

heard evidence from the appellant, noting [5] that the appellant had been in custody between 21 December 2019 and 5 March 2021 “for an extradition offence, for which he was sentenced to thirty months’ imprisonment and was released after serving fifteen months of that prison sentence”. He observed that there was documentation from solicitors representing an appeal proceeding before the Administrative Court. It was agreed by the Secretary of State and the respondent’s Counsel that the issue as to the respondent’s imprisonment was critical and decisive when considering the appeal, given the definition of “continuous qualifying period” (“CQP”) requiring that the relevant period must have commenced before the specified date, 31 December 2020.

3. The judge found:

7. Mr Singh and Mr Alan agreed that the issue as to the Appellant's imprisonment was critical and decisive in considering this appeal. They both referred me to the definition of Continuous Qualifying Period in the relevant period. This states that the relevant period must have commenced before the specified date (31 December 2020). They agreed that if during that period the person served or is serving a sentence of imprisonment of any length in the UK that will not count towards the qualifying period unless the conviction which led to it has been overturned which it has not in this case. They also agreed that the period in prison will break the continuity of the qualifying period of residence but will not cancel eligibility. Mr Alam accepted that he Tribunal concludes that the Appellant was in custody in that period then that will mean that he will qualify for pre-settled status under EU14.

Conclusions

8. On the evidence placed before me by the Appellant he falls far short of persuading me that he was resident in the UK from an unspecified date in 2016 onwards. However, there is conclusive evidence that he was resident and working in the UK from 25 July 2019. I attach weight to the letter to the Appellant from National Legal Service in June 2020 and that, together with evidence from the Appellant, particularly the answers which he gave to Mr Alam when questioned about his imprisonment, have persuaded me that he was in prison as he claims. This period in custody would have broken the continuity of his required residence. This means that he cannot succeed on his appeal against the refusal of his application under EU11. However, on the evidence before me, I am satisfied that he was present in the UK on 31 December 2020 and that he is currently completing a continuous qualifying period of residence in the UK which means that his appeal against the refusal of his application under EU 14 is allowed.

4. The Secretary of State sought permission to appeal on the grounds that the judge had erred in that he had misdirected himself as to law as the respondent was in no position to have started a new sub five-year continuous qualifying period before 31 December 2020 once his initial one broke and did not meet any definition of eligible time before the 31 December 2020 due to his being in prison. It is also averred that any concession to the contrary was not properly made.

5. On 4 March 2024, Upper Tribunal Judge Pickup granted permission to appeal stating

“It is arguable that the appellant could not have started a new CQP before 31.12.20 once his previous period had been broken. There was no qualifying period before 31.12.20, as the appellant was in prison”.

6. This matter came before me initially on 24 April 2024. The respondent attended that hearing, and it became clear during that hearing that he was not serving a sentence of imprisonment in the United Kingdom between 24 December 2019 and 5 March 2021, this had in part at least been because he was on remand pending an extradition request. I issued directions requiring the Secretary of State to make enquiries as to the position of the Appellant’s imprisonment.
7. In the meantime, the UTIAC lawyers were able to obtain an order from the Administrative Court, which provides as follows:

The NCA [National Crime Agency] have confirmed in the witness statement of Aimee Bellas dated 16 March 2021 that the EAW [European Arrest Warrant] relating to the applicant with reference ES1-28-813/2019 has been withdrawn. The NCA have also confirmed that EAW ref ES1-28-813/2019 is the only warrant in respect of the applicant.

I direct that the order for the extradition of the applicant in respect of ES1-28-813/2019, made by District Judge Snow at Westminster Magistrates' Court on 3 June 2020 be quashed.

I order the discharge of AUDRIUS SIMKUS pursuant to section 42 of the Extradition Act 2003 in respect of ES1-28-813/2019 only.

AUDRIUS SIMKUS is to be released for this matter only. If the applicant is detained in custody in respect of any other matters, then this order does not affect the position in relation to those.

8. This appears to confirm much of what the respondent said., at least as regards the period between 24 December 2019 and 5 March 2021.
9. On 24 July 2024, the Secretary of State responded to directions seeking to adduce further evidence pursuant to Rule 15(2A) of the Tribunal Procedure Rules. This consisted of a Police National Computer (“PNC”) report, which showed the appellant had been imprisoned for three months from 21 February 2020.
10. The Secretary of State also has sought to withdraw the concession made at the hearing before Judge Craft.

The Hearing

11. The respondent did not attend the hearing. No explanation was given for his failure to attend. I was satisfied from the court file that he had been given due notice of time, date and venue of the hearing and in the

circumstances, I was satisfied that it was in the interests of justice to proceed.

12. Mr Wain submitted that the test set out in Ladd v Marshall was satisfied with respect to the PNC computer record as there had not been any opportunity nor any need to make the checks regarding the respondent prior to the hearing and thus the due diligence test was met. He submitted further that the other two limbs of the test were met.
13. Mr Wain submitted further that even if being held on remand pending an extradition did not qualify as imprisonment for the purposes of EUSS, the respondent's continuous period of qualifying period was broken and that once it had been broken, it could not be restarted. On that basis, the imposition of the three-month term of imprisonment operated so as to deprive the respondent from being able to have a qualifying period as at the specified date.
14. Mr Wain was not, however, able to direct me to any authority for the proposition that once broken by imprisonment, a new CQP, cannot be started.

The Law

15. EU14 provides, so far as is relevant, as follows:

EU14. The applicant meets the eligibility requirements for limited leave to enter or remain where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application, condition 1 or 2 set out in the following table is met:

- | | |
|---|--|
| 1 | (a) The applicant is: |
| . | (i) a relevant EEA citizen; |
| | ... |
| | (b) The applicant is not eligible for indefinite leave to enter or remain under paragraph EU11 of this Appendix solely because they have completed a continuous qualifying period of less than five years; and |
| | ... |

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16. "Continuous qualifying period" is defined as follows.

a period of residence in the UK and Islands...

- (a) which, ..., began before the specified date; and
- (b) during which none of the following occurred:

...

(ii) any period of absence due directly to an order or decision to which sub-paragraph (b)(iii) below refers, where that order or decision has been set aside or
or
revoked; or

(ii) the person served or is serving a sentence of imprisonment of any length in the UK and Islands, unless the conviction which led to it has been overturned; or

(iii) any of the following in respect of the person, unless it has been set aside or revoked:

...

17. The respondent's guidance entitled "EU Settlement Scheme EU and other EEA Swiss citizens and family members version 23.0" provides as follows at page 165:

Where the applicant served or is serving a sentence of imprisonment of any length in the UK and Islands, and where prior to that they have completed a continuous qualifying period of residence in the UK and Islands of less than 5 years (and the person has not acquired the right of permanent residence in the UK under regulation 15 of the EEA Regulations, or the right of permanent residence in the Islands through the application there of section 7(1) of the Immigration Act 1988 (as it had effect before it was repealed) or under the Immigration (European Economic Area) Regulations of the Isle of Man), that continuous qualifying period is broken, and restarts from scratch on release (where release is before the specified date, where a continuous qualifying period which started before that date is required).

Where the continuous qualifying period of a relevant EEA citizen is broken and restarted in this way, this also breaks and restarts any continuous qualifying period of residence of less than 5 years on which their family member relies (where they have not acquired the right of permanent residence in the UK under regulation 15 of the EEA Regulations, or the right of permanent residence in the Islands) as being a family member of a relevant EEA citizen.

18. I consider that on the particular facts of this case, it would be in the interests of justice to admit the PNC printout even at the error of law stage, as it is necessary to a proper analysis of the situation. And, for the reasons set out below, it makes little difference to the outcome.
19. Mr Wain submitted that once a CQP is broken by imprisonment, an applicant cannot start a new CQP. I am not satisfied that the Immigration Rules can be interpreted as having that effect. Were they to do so, then no one who had been imprisoned at any point would be able to qualify for status under Appendix EU after that. Such a result would plainly be contrary to the provisions of the Withdrawal Agreement. Further, it would render almost redundant the provisions whereby only a deportation order compliant with the test under EU law has the effect of making an individual ineligible for status. The corollary of that is that a deportation order which did not meet that requirement does not prevent the person subject to it being granted status.

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20. While the definition of CQP means that it is broken by the imposition of a sentence of imprisonment, hence “served” and it cannot be started while in prison, hence “is serving”, it does not mean that a person cannot start a new CQP once a period of imprisonment has been completed. That is consistent with the Secretary of State’s policy as set out above at [16].
21. Whilst there was no release in this case, because the respondent was held on remand, he was in effect released from of imprisonment was concerned, at the latest on the 20 May 2020, 3 months after the sentence was imposed. That is because, pursuant to section 384 (1) of the Sentencing Act 2020, a sentence begins on the day it is imposed, absent any direction to the contrary. There is no evidence of any such unusual direction.
22. Accordingly, there is no merit in the Secretary of State’s contention that CQP could be completed. Whilst the parties appeared to have thought otherwise and indeed the Judge Pickup thought otherwise, that appears to be on the assumption, that the respondent was serving a term of imprisonment up and until March 2021 whereas, as it now turns out, after 20 May 2020 he was held only on remand pending an extradition request which was later quashed.
23. In the light of the evidence of the respondent being on remand, there is no doubt as to his whereabouts during period of 20 May 2020 until 31 December 2020.
24. The question then arises whether he was able to start a fresh CQP. I conclude that he was. He was resident as defined after 20 May 2020, albeit on remand, but that is not one of the incidences which prevents or breaks a period of residence.
25. In the circumstances, I find that the decision did not involve the making of a material error of law as it is sufficiently clear from the above that the respondent met the relevant criteria to be granted pre-settled status.
26. In the circumstances, it is not appropriate nor in the interests of justice to permit the Secretary of State to withdraw the concessions, given that in light of the above observations, they are not material and make no difference to the outcome.
27. Accordingly, for these reasons, I consider that the Secretary of State has failed to satisfy me that the decision of the First-tier Tribunal involved the making of an error of law capable of affecting the outcome and I uphold it.

Notice of decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed
Jeremy K H Rintoul

Date: 5 August 2024

Judge of the Upper Tribunal