Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00171/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decisions & Reasons Promulgated**
On 6 November 2014	**On 13 November 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DAVID GORAL
(No Anonymity Direction Made)

Respondent

Representation:
For the Appellant: Mr I Jarvis a Senior Home Office Presenting Officer
For the Respondent: the respondent appeared but was not legally represented

DECISION AND DIRECTIONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Poland who was born on 29 September 1985 ("the claimant)". The Secretary of State has been given permission to appeal the determination of a panel comprising First-Tier Tribunal Judge Herbert OBE and non-legal Member Mr C P O'Brian ("the panel")

who allowed the claimant's appeal against the Secretary of State's decision of 21 November 2013 to make a deportation order against him in accordance with Regulation 21 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") on the basis that he posed a genuine, present and sufficiently serious threat to the interests of public policy. The Secretary of State's Reasons for Deportation letter dated 11 December 2013 concluded that the claimant had not acquired a right of permanent residence in the UK. He had not shown that he had resided here and exercised his treaty rights for a continuous period of five years. After his initial conviction on 6 July 2005 for driving whilst disqualified, using a vehicle whilst uninsured and resisting or obstructing a constable he had been convicted on a further 16 occasions for 30 offences; 12 of theft and kindred offences, 10 offences relating to police/courts/prisons, 4 drug offences and 4 miscellaneous offences. He had been given both custodial and a wide range of other sentences.

2. The claimant appealed and his appeal was heard by the panel on 15 July 2014. He attended and gave oral evidence but was not legally represented. The Secretary of State was represented.

3. The panel set out the claimant's immigration history. He claimed asylum on 20 September 1997 but this was refused on 20 November 1999. It was not clear whether he then left the UK. On 22 February 2001 he applied for leave to remain on human rights grounds. On 17 February 2004 he applied for leave to remain in the UK as the dependent of Robert Huczko as part of the family ILR exercise. On 11 March 2004 he was granted indefinite leave to remain and, on 23 March 2004 he withdrew his human rights application. He became an EU citizen with the accession of Poland on 1 May 2004.

4. In paragraph 37 of the determination the panel said that the claimant appeared to have been given his first sentence of imprisonment on 9 December 2008 at Snaresbrook Crown Court. The panel stated in paragraph 38 that at that point the appellant had been lawfully resident in the UK for four years and nine months (1 May 2004 to 9 December 2008). The panel went on to say; "The respondent was then able to establish any evidence that the appellant had not been exercising his freedom of movement as a worker in the United Kingdom which the appellant claimed he had." As it stands the sentence makes no sense. Perhaps the panel meant to say; "the respondent was <u>not</u> then able to establish…." However, if this was the intention it would have been an error of law because it was not for the Secretary of State to establish that the claimant was not

exercising treaty rights during a particular period but for the claimant to establish that he was.

5. In paragraph 41 the panel said; “On our interpretation of the appellant’s antecedents and an absence of the certificate of conviction, we are satisfied on the balance of probabilities that the appellant has achieved his five-year lawful residence in the United Kingdom entitling him to a right of permanent residence in the United Kingdom”. There is no clear statement as to when it was thought that this period began or ended. The panel appears to have reached this conclusion because there was no certificate of conviction to show that the claimant’s first conviction was on 9 December 2008. Whilst I accept that there does not appear to have been a separate certificate of conviction the panel did have a full printout from the Police National Computer in which the date and details of this conviction are recorded. The claimant told me that he had never denied the date of this conviction, the offence or the sentence to the panel or anyone else.

6. In these circumstances I find that, as contended in the Secretary of State’s grounds of appeal, the panel erred in law in concluding that the claimant had provided evidence of five years continuous residence in the UK. There is no record in the determination of the claimant having provided evidence that he had been here for such a period. The burden of proof was on him to show that he had.

7. The Secretary of State’s contention was that any period of continuous residence would cease on the commencement of a period of imprisonment. The panel appeared to recognise this by reference to the relevant authority in paragraph 39. As it was not open to the panel to come to the conclusion that the claimant was not convicted, sentenced and imprisoned on 9 December 2008 it was also not open to the panel to conclude that the claimant had achieved five years continuous residence in the UK. The panel also erred in law by failing to make it clear precisely what period was thought to have led to 5 years continuous residence. The erroneous conclusion that this had been achieved led to the equally flawed conclusion that he had a right of permanent residence in the UK and to could only be deported on serious grounds of public policy or public security.

8. The panel’s conclusions in paragraphs 43 and 44 that the claimant was “a petty criminal and not somebody who commits serious criminal acts, such as serious sexual offences, terrorism violence or importation for (sic) supply of drugs” and that “there is no evidence before us that the appellant poses a continuous risk to society and the public at large…” were not open to the panel without addressing the points summarised in paragraph 2

of the grounds of appeal, that the claimant has not addressed his behaviour or his drug use, has shown a propensity to reoffend and his family do not appear to have been able to exert any sufficient influence over him so that he remains at risk of reoffending and harm to the public. These factors are set out in greater detail in paragraphs 23 to 32 of the refusal letter.

9. The panel's conclusions that the claimant was entitled to succeed on Article 8 human rights grounds are flawed by the errors of law in relation to the position under the 2006 Regulations. There is has been no proper consideration of whether the claimant's circumstances are exceptional.

10. I have not been asked to make an anonymity direction and can see no good reason to do so.

11. The errors of law are such that the decision is fundamentally flawed and must be set aside. The findings of fact are unclear and cannot be preserved. There has in effect been no proper consideration of the appeal in the First-Tier Tribunal. In the circumstances the appeal should be reheard in the First-Tier Tribunal.

Signed:..... Date: 8 November 2014

Upper Tribunal Judge Moulden