



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

Appeal Number: EA/00250/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 16th May 2017**

**Determination Promulgated
On 17th May 2017**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**DANIEL ADRIAN VLADISLAV
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Respondent: No Representative or attendance

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Romania born on 23rd March 1988. He says he has been lawfully working in the UK on a casual basis in the building trade from the start of 2016. The Secretary of State made a decision to remove him on 12th December 2016 on the basis of s.10 of the Immigration and Asylum Act 1999 applied by virtue of Regulations 19(3)

(a) and 19(3)(c) pursuant to Regulation 21B(2) and 24(2) of the Immigration EEA Regulations 2006. His appeal against the decision was allowed by First-tier Tribunal Judge Kainth in a determination promulgated on the 6th March 2017.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Keane on 31st March 2017 on the basis that it was arguable that the First-tier judge had erred in law in firstly referring to deportation under s.5(1) of the Immigration Act 1971 when this was a removal decision; and secondly by irrationally finding that the claimant was a qualified person under Regulation 6 of the Immigration EEA Regulations 2006 in the context of evidence of work which was all from or prior to September 2016.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law. The claimant did not attend but I was satisfied that he had been notified of the hearing and that it was fair and in the interests of justice to proceed with the hearing.

Submissions – Error of Law

4. In the grounds of appeal the Secretary of State firstly argues that the First-tier Tribunal wrongly records at paragraph 1 of the decision the basis of the appeal as being deportation when this was a removal decision that the claimant had ceased to have an EEA right to reside under Regulation 19(3)(c) of the Immigration EEA Regulations 2006 (the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with Regulation 21B(2)).
5. Secondly the decision is irrational as there was no evidence that the claimant was exercising Treaty rights at the date of determination of the appeal as the most recent evidence of work was payslips from September 2016, and the other evidence only showed that he had only sporadically worked throughout 2016.
6. The claimant did not attend hearing or put forward any written submissions on the issue of the argued for errors of law.

Conclusions – Error of Law

7. There clearly is a legal error at paragraph 1 of the decision of the First-tier Tribunal as it states that the basis of the decision is a deportation one under s.5(1) of the Immigration Act rather than a removal under s.10 of the Immigration and Asylum Act 1999 in accordance with Regulation 19(3)(c) of the Immigration EEA Regulations 2006 (the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with Regulation 21B(2)). However, there is no evidence that this was a material error or that any deportation test was applied when deciding the appeal, rather than the

correct basis of whether the claimant could be removed from the UK on the test of whether he was abusing his rights as an EEA worker.

8. The Secretary of State's decision is based on the concept of abuse of rights under Regulation 21B(2) of the Immigration EEA Regulations 2006, and this is said to be the case because the claimant had been in the UK for a year at the date of decision in December 2016 and was rough sleeping in a park, and had not shown he was able or intended to exercise his free movement rights, and as such a decision to remove him was proportionate.
9. The First-tier Tribunal found the claimant was not removable in this way because he had registered with HMRC and the Construction Industry Scheme in March 2016 and had evidence of being paid for such work in June, August and September 2016, and had evidenced receiving a support payment from his mother in December 2016, and that he had shown the Secretary of State his Mastercard which she had failed to check, although he said he had also done agency work paid into this card. The documentary evidence of a history of exercising Treaty rights together with the claimant's oral evidence was found to suffice to show there was no abuse of rights justifying his removal as contended for by the Secretary of State in her decision.
10. I find there is no material error of law as there is no evidence of an abuse of rights as defined in Community law by the Court of Justice of the European Union in Emsland - Staerke as this is not a situation where objectively there is formal observance of Community Rules but a failure to achieve the purpose of the Rules, and further there is no evidence of a subjective element of an intention to obtain an advantage from Community rules by creating artificially the conditions laid down for obtaining it.
11. Further the claimant was found by the First-tier Tribunal genuinely to have done casual building work since arriving in the UK, and to have been homeless/ rough sleeping for one night due to falling out with his girl-friend. There was no evidence that this was a persistent state of affairs or that he was not taking steps to exercise Treaty rights or that there were any aggravating factors so he would appear not even to meet the Secretary of State's definition of a rough sleeper for whom removal is justified on the basis of an abuse of rights as set out at page 25 of the Secretary of State's own guidance dated 1st February 2017 on EEA administrative removal.
12. This was not a decision that the claimant was entitled to a residence card as a worker so evidence of the exercise of Treaty Rights at the date of decision is not the central material issue for this appeal. The appeal was a challenge to a decision regarding the proposed administrative removal of the claimant on the basis of an abuse of EEA rights which I find was dealt with in a lawful fashion with adequate reasoning and without legal error by the First-tier Tribunal.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
2. I uphold the decision of the First-tier Tribunal allowing the appeal.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 16th May 2017