Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/08368/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral Judgment given at hearing	
On 21 September 2018	**On 29 October 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

YORAN ELIAS BENJAMIN HENZIER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Papasotiriou, Counsel
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of France born in 1999. He made an application on 26 June 2016 for a residence card as confirmation of a right of permanent residence pursuant to regulation 15 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). That application was refused by the respondent in a decision dated 21 September 2017.

2. The application was refused on the basis that the appellant had not provided adequate evidence to show that he has been a qualified person as a worker, a self-employed person, a student, a jobseeker or a self-sufficient person for a continuous five year period.

3. The appellant's appeal against that decision came before First-tier Tribunal Judge Row on 9 December 2017. There was no oral hearing because that was the basis upon which the appellant asked for the appeal to be decided. Judge Row dismissed the appeal. Permission to appeal having been granted the appeal came before me.

4. Judge Row correctly identified that the appellant had to establish that he had exercised Treaty rights for a continuous period of five years as a qualified person. He identified the evidence that he had before him and gave an appropriate self-direction on the burden and standard of proof. There was evidence before him which was, amongst other things, to the effect that the appellant had been a student in the UK for a period of time. Judge Row concluded however, that that evidence did not show that the appellant had been a student for the required five year period.

5. The appellant's claim was that he had been a student studying at Bradfield College between September 2013 and June 2017 and he had produced a letter from Bradfield College confirming that that was the case.

6. At para 7 Judge Row referred to two other letters. Those were from the Lycee Français Charles de Gaulle, dated 10 September 2011 and 14 September 2012. The first of the letters recorded that the appellant had been a full-time pupil there from 7 September 2011, the second that he had been a pupil there from 5 September 2012. Judge Row also referred to a letter from the appellant's GP dated 1 October 2012. There were also some bank statements from 2016 and 2017.

7. At paragraph 8 Judge Row said this:

> "It was not clear whether the French school was in the United Kingdom or not. The letter from the school dated 14 September 2017 did not confirm when the appellant had left that establishment. It was therefore still uncertain whether the appellant had been in the United Kingdom studying since 2011. In any event there was a gap between 14 September 2012 and when the appellant began to study at Bradfield College in September 2013."

8. It was on the basis of those conclusions that he dismissed the appeal, i.e. it was not clear whether the French school, the Lycee Français, was in the United Kingdom. In addition, on the basis that the second of the letters from that school did not confirm when the appellant left, there was thus a gap between September 2012 and when he began to study at Bradfield College in September 2013.

Submissions

9. In submissions on behalf of the appellant before me today Mr Papasotiriou referred to the documentary evidence, submitting that Judge Row had misapprehended the information contained in the letters from the Lycee Français. Firstly, in that there

was information on those documents that indicated that that was a school based in London and secondly in terms of the date of the second letter as being 14 September 2017 whereas it was in fact dated 14 September 2012.

10. Mr Papasotiriou also relied on the GP's letter dated 1 October 2012 which it was said is some indication that the appellant was still in the UK at that time and supported the contention that he was a student. That evidence helped to bridge the gap between September 2012 and the September 2013 start date at Bradfield College. He submitted that but for those errors the judge would have found in favour of the appellant.

11. Ms Fijiwala on behalf of the respondent submitted that Judge Row had come to conclusions to which he was entitled based on the evidence that was before him. She pointed out that the letter from the Lycee Français dated 14 September 2012 was dated but a few days after the appellant's start date of 5 September 2012. The point made on behalf of the respondent is that it was not clear, and the evidence does not show, that the appellant actually continued the academic year there. Thus there was still the gap between that and the start date at Bradfield College. It was submitted that the GP's letter does not show the exercise of Treaty rights to September 2013.

12. In his reply Mr Papasotiriou submitted that even if the letter dated 14 September 2012 did not confirm completion of the academic year, had Judge Row considered the evidence properly and applied the appropriate standard of proof of a balance of probabilities and taking into account the GP's letter dated 1 October 2012 evidencing his residence in the UK, he would have concluded that the appellant had met the relevant requirements. He further submitted that it was less likely than not or (putting it a little more clearly) more likely than not that he would have stayed in the UK as a student rather than study somewhere else. The point was also made that there was continuity between his studies in the UK in year nine and then moving on to GCSEs.

Assessment and Conclusions

13. I am grateful to both parties for their submissions which clearly set out the parameters of the appeal before me. Having considered those submissions and Judge Row's decision, I am satisfied that his decision contains errors of law requiring it to be set aside.

14. There is an error of fact in that Judge Row wrongly referred to the date of the second letter from the Lycee Français as being 14 September 2017 whereas in fact it was 2012. In the same paragraph (8) he seems to have understood the date correctly (14 September 2012) but there is at the very least some confusion evident in that respect. In addition, it was conceded on behalf of the respondent before me that actually there was information before Judge Row in the letters from the Lycee Français which revealed that it was and is a school in London. That information is to be found at the foot of the letters giving the address of the school as 35 Cromwell Road, London, SW7. Furthermore as submitted on behalf of the appellant, the English translation which forms part of the letters in both cases states that the Lycee is a French public

school and belongs to the network of the AEFE (Agency for French Teaching Abroad). That is a further indication that the school is located elsewhere than in France.

15. I should also say that although Mr Papasotiriou said that because it was not translated he did not seek to rely on it, the stamps on the letters bearing the name Lycee Français Charles de Gaulle have the word "Londres", but that needs no translation.

16. All those circumstances reveal that that the school is in London. Accordingly, in that respect Judge Row was also wrong when he said at para 8 that it was not clear whether the French school was in the United Kingdom or not. Furthermore, it seems to me that the letter from the GP has more significance than Judge Row gave it. It does not establish that the appellant was exercising Treaty rights but it is evidence to some extent at least of the appellant's residence in the UK. It is not categoric evidence of residence because he could have registered and then have left the UK but that does not appear likely in the light of the other evidence.

17. In addition, it appears that the error made by Judge Row in terms of the date of the second letter and his misapprehension of the location of the Lycee Français cumulatively led him to the conclusion that the appellant was not studying in the UK and that there was a gap that was unaccounted for between 2012 and 2013.

18. The point made on behalf of the appellant in terms of the standard of proof is in my judgement a good one as regards the likelihood of continuity of studies. If Judge Row had been deciding whether he was *sure* that the appellant had been resident in the UK exercising Treaty rights for the requisite period of five years he may have come to the conclusion that he was not. However, that is not the standard. The standard is the balance of probabilities.

19. The errors of law to which I have referred, stemming in part from errors of fact, are such as to require his decision to be set aside for the decision to be re-made.

20. My analysis of the evidence in the course of this judgment indicates that in the re-making of the decision the correct outcome is to allow the appeal. That is because I am satisfied that the evidence that was before Judge Row and thus the evidence before me shows that the appellant has been exercising Treaty rights for a continuous period of five years in the United Kingdom as a qualified person, that is to say as a student. Accordingly he is entitled to confirmation of the right of permanent residence with reference to reg 15 of the EEA Regulations.

Decision

21. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside. I re-make the decision by allowing the appeal.

TO THE RESPONDENT
FEE AWARD

I was invited to make a fee award in favour of the appellant although no sum was specified. On behalf of the respondent it was pointed out that documents which supported the appeal were only provided during the course of the appeal. On behalf of the appellant it was submitted that the appellant was unrepresented at the time of the application and on appeal. The respondent, it is said, should have reviewed the decision in the light of the documentary evidence provided.

It appears to be accepted that the appellant provided some documents at the appeal stage. The FtJ's decision refers at [7] to (at least) the school letters having been provided with the notice of appeal. Those documents were not provided to the respondent at the date of the decision under appeal. It appears that other documents were also provided after the decision since the decision itself refers to very little having been provided by the appellant.

I have considered making a fee award and have decided not to make to make a fee award because the appellant could have provided relevant documents at the time of the application which may have made an appeal unnecessary.

Upper Tribunal Judge Kopieczek 23/10/18