Upper Tribunal
(Immigration and Asylum Chamber)

Vassallo (Qualifying residence; pre-UK accession) [2014] UKUT 00313 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **On 28 February 2014**	**Determination Promulgated** ……

Before

UPPER TRIBUNAL JUDGE MCGEACHY
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BENEDETTO VASSALLO

Respondent

Representation:

For the Appellant: Mr T. Melvin, Home Office Presenting Officer
For the Respondent: Mr R. Halim, Counsel instructed by Turpin & Miller Solicitors

(1) A person may acquire qualifying residence for the purposes of exercising Treaty rights in respect of periods of residence arising before the UK became part of the European Community on 1 January 1973.

(2) Similarly, a person may acquire qualifying residence in respect of periods of residence arising before the implementation of the Immigration (European Economic Area) Regulations 2000.

(3) However, in each case the residence in question must be in accordance with the conditions laid down in Article 7(1) of Directive 2004/38/EC (the Citizens Directive) or in accordance with Schedule 4, paragraph 6 of the Immigration (European Economic Area) Regulations 2006.

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience we refer to the parties as they were before the First-tier Tribunal. Thus, the appellant, Benedetto Vassallo, is a citizen of Italy, born on 1 January 1948. He is said to have arrived in the UK in 1952.

2. The appellant has been convicted of numerous and varied criminal offences. They are summarised in the refusal letter as having commenced in 1963, involving 68 offences in the UK, Switzerland and Sweden, and consisting mostly of offences of dishonesty including numerous offences of burglary. He has received many sentences of imprisonment.

3. His offending culminated in a conviction in the Crown Court at Canterbury on 21 May 2012 for an offence of (residential) burglary, resulting in a sentence of 29 months' imprisonment. That offence involved the burglary of the home of an elderly couple in their 90's who had been watched leaving the premises. The appellant and his accomplice were apprehended after leaving the property, in possession of jewellery, ornaments and cash.

4. On 19 August 2013 a decision was made to make a deportation order pursuant to the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). The appellant's appeal against the decision was allowed under the EEA Regulations by a panel ("the Panel") of the First-tier Tribunal consisting of First-tier Tribunal Judge Nightingale and non-legal member Sir Jeffrey James, after a hearing on 21 November 2012.

5. Permission to appeal was granted on the basis that it was arguable that the First-tier Tribunal had erred in law in concluding that the appellant had acquired a permanent right of residence and could only be deported on imperative grounds of public security.

The findings of the First-tier Tribunal

6. The Panel of the First-tier Tribunal found that the appellant had established that he had been resident in the UK since 1952 as had been claimed and that his parents were in employment here from the time that the appellant arrived.

7. The Panel also found that he had been continuously resident for a period of 10 years prior to his first sentence of imprisonment in 1963, and in that time he had been in education. He had thus acquired protection against removal at the highest

level, namely imperative grounds of public security under regulation 21(4) of the EEA Regulations. The periods of time that he spent in Sweden and Switzerland did not break the continuity of residence. The Panel found in the alternative that the appellant had acquired permanent residence on the basis of five years continuous residence.

8. He had been to Italy only once since the age of 5 for a family holiday of about three weeks and he has not remained in contact with relatives there. It was found that he neither reads nor writes Italian and that his spoken Italian is limited. He was, to all intents and purposes, raised as a British child, married a British woman and is the father of two British national children to whom he is "reasonably" close emotionally.

9. The Panel found that the appellant had committed a large number of criminal offences but represented a low risk of reoffending.

Submissions

10. Mr Melvin submitted that the Panel was wrong to take into account the period from 1953 to 1963 as demonstrating that the appellant had acquired permanent residence in the UK, thus entitling him to the highest level of protection against removal, namely only on imperative grounds of public security. This is because the UK did not become part of the European Community ("EC") until 1973.

11. In addition, the Panel had been wrong to conclude that the appellant had integrated into the community in the UK, he having committed offences over a 47 year period. The decision in Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC) was relied on. He is a serial offender who could not be said to have become fully integrated. There is very little evidence of the exercise of Treaty rights whilst he has not been in prison.

12. Mr Halim relied on the decision of the Court of Appeal in Taous Lassal [2009] EWCA Civ 157 in relation to the objects of the Citizens Directive and the need to facilitate free movement. Notwithstanding that the appellant's life in Europe took place before formal union, he has been here since the age of 5 which is a matter that should attract weight.

13. Between 1953 and 1963 the appellant was a student. Paragraph 6 of Schedule 4 to the EEA Regulations meant that that period as a student could be taken into account. Even if he had not qualified by reason of his studies, he was a family member of persons exercising Treaty rights. It was not argued, however, that the appellant qualified as a worker in his own right.

14. Furthermore, it had not been established that the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The Secretary of State was not entitled to go behind the OASys report which referred to his risk of reoffending as low. The appellant had spent many

years in the UK, had no ties to Italy, could not speak the language and could be said to be a 'home grown' criminal.

15. The appeal would otherwise have been allowed under Article 8 of the ECHR if not under the EEA Regulations, the Panel having referred to the decision in Maslov [2008] ECHR 546.

16. In reply, Mr Melvin submitted that if the appellant were not able to succeed on the basis of his studies between 1953 and 1963, equally he could not rely on his being a dependant of his parents because the same principle applies: he could not benefit from membership of the EC at that time.

Our assessment

17. It is as well to set out at this stage the relevant elements of Directive 2004/38/EC ("the Directive" or "Citizens Directive") as transposed into UK domestic law by the EEA Regulations. The Regulations are as follows:

> "**Exclusion and removal from the United Kingdom**
>
> **19.-** …
>
> (3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if-
>
> (a) that person does not have or ceases to have a right to reside under these Regulations; or
>
> (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21.
>
> (4) A person must not be removed under paragraph (3) as the automatic consequence of having recourse to the social assistance system of the United Kingdom.
>
> (5) A person must not be removed under paragraph (3) if he has a right to remain in the United Kingdom by virtue of leave granted under the 1971 Act unless his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.
>
> …
>
> **Decisions taken on public policy, public security and public health grounds**
>
> **21**.—(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 permanent right of residence under regulation 15 except on serious grounds of public policy or 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 necessary in his best interests, 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(11).

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(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.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

18. The Citizens Directive sets out a hierarchy of levels of protection from removal in the case of EEA nationals, of which the appellant is one, being a citizen of Italy. The First-tier Tribunal concluded that the appellant was entitled to the highest level of protection, namely in terms of imperative grounds of public security; alternatively, although it was not actually spelt out in terms, the lower level namely serious grounds of public policy or public security.

19. At the outset we can dispose of one matter raised in the Secretary of State's grounds of appeal. That is the contention that the First-tier Tribunal concluded that because the appellant had acquired five years residence he could only be

removed on "imperative grounds of public security". That is however, a misunderstanding of what the Panel said. At [62] the Panel said this:

> "By 1963 the appellant had been in the United Kingdom as, we accept, the child, that is to say the relative in the descending line, of EEA nationals working here. We accept that he had, consequently, been here for five continous years on that basis and, indeed for ten years residence at the time he was first sent to prison."

20. At [63] the Panel went on to state that:

> "We accept on balance that the appellant had, by 1963, residence for ten years continuously in the United Kingdom. We also accept on balance that after five years in the United Kingdom he had acquired permanent residence. It follows that we find that he has established that he is entitled to the highest level of protection against removal, that is to say imperative grounds of public security, under Regulation 21(4)."

21. Reading those paragraphs together, it is clear the Panel did not equate five years residence with a removal that could only be based on imperative grounds of public security. Rather, it concluded that in addition to the five years which entitled him to permanent residence, he had acquired a further five years qualifying residence.

22. The central question in this appeal is whether the appellant has acquired EU rights such as would enable him to resist removal except as provided for in the Directive.

23. That question arises in the following way: the appellant arrived in the UK in 1952, so the First-tier Tribunal found. The period of residence prior to his committing criminal offences and being subject to imprisonment or its young persons' equivalent was before the Citizens Directive came into force, which was 29 April 2004. More to the point, it accrued at a time before the UK was even part of the European Communities (subsequently the EU) which did not happen until the coming into force of the European Communities Act 1972 on 1 January 1973.

24. Our reference above to the "period of residence" prior to his committing offences requires further refinement in terms of the findings made by the First-tier Tribunal because, as can be seen from the authorities we refer to below, mere 'residence' without connection to a relevant activity, by the individual or in relation to another person's activity, does not give rise to the *acquisition* of any EU rights, whenever that residence occurred.

25. The First-tier Tribunal accepted at [61] that the appellant had arrived in the UK in 1952. It concluded that by 1963 he had been resident continuously in the UK for 10 years. At [62] it was found that he had lived here since 1952 as the child "of EEA nationals working here", that is his parents. At [61] it was concluded that the appellant was educated until the age of 14, a period of 10 years.

26. It is as well to state at this point that it is not suggested on behalf of the appellant that he is able to rely on any period of employment or self employment that he was himself engaged in, or indeed any other qualifying status or activity. All that is relied on in terms of qualifying residence is his having been a student, alternatively his status as a child of parents who were in employment.

27. Mr Halim principally relied on the provisions of the EEA Regulations in support of the contention that the appellant had acquired EU rights of residence. Although in one sense it is logical to consider the relevant domestic legislative provisions first, it is useful before turning to the relevant provisions of Schedule 4, paragraph 6 of the EEA Regulations, to consider the authorities to which we were referred.

28. Case C-162/09 Taous Lassal [2011] 1 CMLR 31 was a case concerning a claim for income support by a French national whose period(s) of residence preceded the transposition into domestic law of the Citizens Directive.[1] The European Court of Justice ("ECJ") said as follows from [29]:

> "29 As a preliminary point, it must be observed that citizenship of the Union confers on each citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaty on the functioning of the European Union and the measures adopted for their implementation, freedom of movement for persons being, moreover, one of the fundamental freedoms of the internal market, which was also reaffirmed in Article 45 of the Charter of Fundamental Rights of the European Union.
>
> 30 With regard to Directive 2004/38, the Court has already had occasion to point out that that directive aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right, so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals (see Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 82 and 59).
>
> 31 The Court has also observed that, having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (see *Metock and Others*, paragraph 84).
>
> 32 As recital 17 in the preamble to Directive 2004/38 states, the right of permanent residence is a key element in promoting social cohesion and was provided for by that directive in order to strengthen the feeling of Union citizenship.
>
> 33 It is true that it is common ground that the acquisition of the right of permanent residence on the ground of legal residence for a continuous period of

[1] See also the decision of the Court of Justice in Dias [2011] 3 CMLR 40

five years in the host Member State, provided for in Article 16(1) of Directive 2004/38, did not appear in the EU law instruments adopted for the application of Article 18 EC prior to that directive.

34 However, such a finding cannot lead to the conclusion that only continuous periods of five years' legal residence either ending on 30 April 2006 or thereafter, or commencing after 30 April 2006 are to be taken into account for the purposes of acquisition of the right of permanent residence provided for in Article 16 of Directive 2004/38."

29. In relation to the question of retrospectivity, the Court stated that:

> "38 Furthermore, it should be noted that, in so far as the right of permanent residence provided for in Article 16 of Directive 2004/38 may only be acquired from 30 April 2006, the taking into account of periods of residence completed before that date does not give retroactive effect to Article 16 of Directive 2004/38, but simply gives present effect to situations which arose before the date of transposition of that directive.
>
> 39 It should be borne in mind in that regard that the provisions on citizenship of the Union are applicable as soon as they enter into force and therefore they must be applied to the present effects of situations arising previously (see Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 25 and the case-law cited)."

30. At [40], the conclusion expressed by the Court was that:

> "…for the purposes of the acquisition of the right of permanent residence provided for in Article 16 of Directive 2004/38, continuous periods of five years' residence completed before the date of transposition of that directive, namely 30 April 2006, in accordance with the earlier EU law instruments, must be taken into account."

31. It is to be noted that the conclusion at [40] included the qualifying phrase "in accordance with the earlier EU law instruments". That has potential relevance for the appellant before us if there were no earlier EU law instruments in force because the UK was not, at the time of the appellant's potentially relevant residence, part of the EC.

32. This brings us to the next decision of significance, Case C-424/10 [2011] EUECJ Ziolkowski. This was a case involving nationals of Poland living in Germany who sought confirmation of rights of residence where the periods of residence included a period before Poland's accession to the European Union.

33. The ECJ considered the aims and purposes of the Citizens Directive including, at [36] of the decision, "to facilitate and strengthen the exercise of the primary and individual right to reside and move freely within the territory of the Member States". It also noted the following at [37]

> "It is apparent from recitals 3 and 4 in the preamble to Directive 2004/38 that the aim of the directive is to remedy the sector-by-sector piecemeal approach to the

right of freedom of movement and residence in order to facilitate the exercise of this right by providing a single legislative act codifying and revising the instruments of European Union law which preceded the directive."

34. After considering other decisions and EU instruments the Court concluded as follows:

> "60 Consequently, the provisions of Article 16(1) of Directive 2004/38 can be relied (sic) by Union citizens and be applied to the present and future effects of situations arising before the accession of the Republic of Poland to the European Union.
>
> 61 It is, admittedly, true that the periods of residence completed in the territory of the host Member State by a national of another State before the accession of the latter State to the European Union fell not within the scope of European Union law but solely within the law of the host Member State.
>
> 62 However, provided the person concerned can demonstrate that such periods were completed in compliance with the conditions laid down in Article 7(1) of Directive 2004/38, the taking into account of such periods from the date of accession of the Member State concerned to the European Union does not give retroactive effect to Article 16 of Directive 2004/38, but simply gives present effect to situations which arose before the date of transposition of that directive (see *Lassal*, paragraph 38).
>
> 63 In the light of the foregoing considerations, the answer to Question 2 is that periods of residence completed by a national of a non-Member State in the territory of a Member State before the accession of the non-Member State to the European Union must, in the absence of specific provisions in the Act of Accession, be taken into account for the purpose of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38, provided those periods were completed in compliance with the conditions laid down in Article 7(1) of the directive. "

35. In order to put that decision into context, we set out the provisions of Articles 7 and 16 of the Citizens Directive. Article 16 provides as follows:

> "1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.
>
> 2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.
>
> 3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness,

study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.'"

Article 7 states that:

"1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) - are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
- have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c)."

36. It is evident that the situations in the cases of Lassal and Ziolkowski differ from that of the appellant before us in that in the case of the former both France and the UK were members of the EU at the relevant time. In the case of the latter, Poland was not a member of the EU at the time of the period of residence in question but Germany was. In the case of this appellant, the UK was not a member of the (now) EU but Italy was.

37. In our view that distinction is not one of substance when one considers that regard must be had to the purposes and aims of the Citizens Directive as elaborated in Ziolkowski and which we do not need to repeat. We are satisfied that the principles to be derived from those two decisions, and those referred to in them, apply *mutatis mutandis* to the case of the appellant before us.

38. However, even accepting that the appellant is able to count periods of residence prior to the UK's accession to the EEC for the purpose of assessing his periods of residence, we consider that the First-tier Tribunal was wrong to conclude that the appellant acquired rights of residence whilst he was a student, because on the basis of the decisions of the ECJ to which we have referred, in particular Ziolkowski, the appellant would have to establish that as well as being a student

he had comprehensive sickness insurance and provided an assurance of sufficient resources not to become a burden on the State, in accordance with Article 7(1)(c) of the Citizens Directive. This follows from [63] of Ziolkowski. For reasons given below, we do not consider that an assessment of that issue under the EEA Regulations yields a different result.

39. We also consider that the First-tier Tribunal erred in law in relation to the question of whether the appellant had acquired protection against removal on the basis of 10 years residence. Although we were not referred to it, we have taken into account the decision of the ECJ in Case C-400/12 MG. That was a judgment which post-dated the hearing before the First-tier Tribunal and so of course the Panel could not be criticised for not taking it into account. Rulings of the ECJ have legally binding effect and hence must be applied immediately. In relation to periods of imprisonment the Court stated as follows:

> "31 …when interpreting Article 16(2) of Directive 2004/38,…the fact that a national court has imposed a custodial sentence is an indication that the person concerned has not respected the values of the society of the host Member State, as reflected in its criminal law, and that, in consequence, the taking into consideration of periods of imprisonment for the purposes of the acquisition, by members of the family of a Union citizen who are not nationals of a Member State, of the right of permanent residence as referred to in Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence (Case C-378/12 *Onuekwere* [2014] ECR I-0000, paragraph 26).
>
> 32 Since the degree of integration of the persons concerned is a vital consideration underpinning both the right of permanent residence and the system of protection against expulsion measures established by Directive 2004/38, the reasons making it justifiable for periods of imprisonment not to be taken into consideration for the purposes of granting a right of permanent residence or for such periods to be regarded as interrupting the continuity of the period of residence needed to acquire that right must also be borne in mind when interpreting Article 28(3)(a) of that directive.
>
> 33 It follows that periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 and that, in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision."

40. Earlier, the Court concluded at [28] that the 10 year period of residence must be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned.

41. In this case the decision to deport the appellant was made on 19 August 2013. Counting back 10 years brings the commencement of the period of residence relevant for the purposes of 10 years residence to 2003. In 2006 he was sentenced to 15 months' imprisonment for burglary and theft. In 2010 he was sentenced to 29 months' imprisonment for like offences. We do not consider in these

circumstances that the appellant could be said to have acquired the necessary continuous 10 years residence; the periods of imprisonment broke the continuity of that residence.

42. But we must now return to the EEA Regulations to consider the question of whether, under those Regulations, the appellant could be said to have acquired qualifying residence of five years. In this context it is clear that (unlike the position in respect of the 10 years condition governing protection against deportation) we must count forward from the time the qualifying period of residence began.

43. Schedule 4, paragraph 6 of the EEA Regulations provides as follows:

> "**6. Periods of residence prior to the entry into force of these Regulations**
>
> (1) Any period during which a person ("P"), who is an EEA national, carried out an activity or was resident in the United Kingdom in accordance with the conditions in subparagraph (2) or (3) is to be treated as a period during which the person carried out that activity or was resident in the United Kingdom in accordance with these Regulations for the purpose of calculating periods of activity and residence there under.
>
> (2) P carried out an activity, or was resident, in the United Kingdom in accordance with this subparagraph where such activity or residence was at that time in accordance with—
> (a) the 2000 Regulations;
> (b) the Immigration (European Economic Area) Order 1994(**a**) ("the 1994 Order"); or
> (c) where such activity or residence preceded the entry into force of the 1994 Order, any of the following Directives which was at the relevant time in force in respect of the United Kingdom—
> (i) Council Directive 64/221/EEC;
> (ii) Council Directive 68/360/EEC;
> (iii) Council Directive 72/194/EEC;
> (iv) Council Directive 73/148/EEC;
> (v) Council Directive 75/34/EEC;
> (vi) Council Directive 75/35/EEC;
> (vii) Council Directive 90/364/EEC;
> (viii) Council Directive 90/365/EEC; and
> (ix) Council Directive 93/96/EEC.
>
> (3) P carried out an activity or was resident in the United Kingdom in accordance with this subparagraph where P—
> (a) had leave to enter or remain in the United Kingdom; and
> (b) would have been carrying out that activity or residing in the United Kingdom in accordance with these Regulations had the relevant state been an EEA State at that time and had these Regulations at that time been in force.
>
> (4) Any period during which P carried out an activity or was resident in the United Kingdom in accordance with subparagraph (2) or (3) will not be regarded

as a period during which P carried out that activity or was resident in the United Kingdom in accordance with these Regulations where it was followed by a period—
(a) which exceeded two consecutive years and for the duration of which P was absent from the United Kingdom; or
(b) which exceeded two consecutive years and for the duration of which P's residence in the United Kingdom—
(i) was not in accordance with subparagraph (2) or (3); or
(ii) was not otherwise in accordance with these Regulations.

(5) The relevant state for the purpose of subparagraph (3) is the state of which P is, and was at the relevant time, a national."

44. The explanatory note to the amendments to the EEA Regulations, which for the most part came into force on 16 July 2012, expressly states that paragraph 6 of Schedule 4 is to reflect the principles in Lassal, Dias, and Ziolkowski. We shall have to consider, however, whether the EEA Regulations do reflect the principles in those cases in so far as is relevant to this appellant.

45. We do not consider that the appellant is able to bring himself within paragraph 6(2) of Schedule 4 in terms of his having been a student, or indeed as the family member of a person who was engaged in relevant activity as, for example, a worker, as his parents have been found to have been between 1952 and 1963. Paragraph 6(2) does not refer to periods of relevant activity that would have come within the 2000 Regulations or the other EU instruments set out there *had they been in force*. This is readily apparent from sub-paragraph (c) which refers to any of the Directives which was "at the relevant time" in force in respect of the United Kingdom. Thus, for the activity to count, it must have been at a time when the Regulations, Order or any of the Directives were in force.

46. It is sub-paragraphs (3) and (4) that are most relevant to the appellant's case. We are satisfied that on the basis of the First-tier Tribunal's findings, the appellant was resident in the United Kingdom in accordance with sub-paragraph (3). His residence was as a family member of his parents. It is at least implicit in the findings of the First-tier Tribunal that, in relation to sub-paragraph (3)(a) he had leave to enter the UK when he arrived, to join his parents who were working, that being a relevant activity for the purposes of "these" EEA Regulations (had they been in force at the time, which this sub-para expressly provides for).

47. However, it could be said that sub-paragraph (4) precludes the appellant from being able to benefit from residence when he was a dependant family member. This is because, as we have seen, it is not suggested that the appellant can rely on any relevant activity of his own, for example in terms of employment or self-employment. The acquisition of any EU rights he may have are entirely dependent on his having derived rights from his parents. We need to look again at sub-paragraph (4). To summarise, the appellant's residence that would otherwise be counted under paragraph 6 of Schedule 4 is not to be counted where it was followed by a period which exceeded two consecutive years and for the

duration of which the appellant's residence was not in accordance with sub-paras 2 or 3.

48. However long his status as a dependent family member existed, it is clearly the case that thereafter he did not undertake any activity of his own or have any period of residence that qualified. He was not working or self-employed or otherwise undertaking a qualifying activity; for much of the time he was in prison, or at least committing criminal offences, which was evidently his way of life.

49. If sub-paragraphs (2) and (3) are to be followed, the appellant is not able to succeed in establishing that he acquired qualifying EU rights as a result of the period between 1952 and 1963.

50. However, we mentioned at [44] above that we would consider the extent to which the EEA Regulations reflect the principles in the cases to which we have referred. We must also consider the extent to which the EEA Regulations in this context are in conformity with the Citizens Directive.

51. It is true to say that the cases we have referred to in relation to what we may call pre-accession rights, concern different circumstances from those of the appellant before us. Ziolkowski for example, does not deal with cases where a person has ceased any qualifying activity for a period exceeding two consecutive years, as set out in the EEA Regulations. However, in the case of Ziolkowski there is reference to Article 16(4) of the Citizens Directive which states that once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years. There is no provision in the Citizens Directive equivalent to that in paragraph 6(4)(b) of Schedule 4 to the EEA Regulations.

52. We have considered whether this provision of the EEA Regulations is in conformity with the Citizens Directive, in that it could be said, for example, to further the principle of integration. However, we have come to the view that it is inconsistent with the Citizens Directive which states expressly in Article 16(4) that permanent residence shall be lost *only* through absence from the host Member State for a period exceeding two consecutive years. That, it seems to us, is an unambiguous statement of intent in expressing exhaustively the circumstances in which permanent residence will be lost.

53. Having come to the view therefore, that the EEA Regulations in this respect do not accurately transpose the Directive, we look to the Directive for the answer to the question of whether the appellant acquired permanent residence which he has not lost. The answer to that question, having regard to the authorities to which we have referred, in particular Ziolkowski, is that he has acquired that residence which he has not lost.

54. We summarise the position up to this point. The First-tier Tribunal erred in law in concluding that the appellant was entitled to permanent residence on the basis of

having been a student. Neither a consideration of the EEA Regulations nor of the Directive leads to that conclusion. The First-tier Tribunal also erred in law in relation to whether the appellant had acquired 10 years residence, thus entitling him to protection against removal except on imperative grounds of public security.

55. However, the First-tier Tribunal did not err in law in terms of its conclusion that the appellant has acquired a permanent right of residence on the basis of five years' qualifying residence.

56. We now deal with the remaining challenges to the First-tier Tribunal's determination.

57. The grounds at [2] identify matters that it is said the First-tier Tribunal did not have sufficient regard to in the proportionality assessment. These include matters such as the appellant's propensity to re-offend, failure to address factors that led to his offending, downplaying of involvement, escalating seriousness in offending and continuation of offending even after being warned of the risk of deportation. It is said that there is no evidence that his chances of rehabilitation are better in the UK than in Italy. What can be summarised as his connections with Italy, are matters that are also relied on in the grounds. Even if he is entitled to protection against deportation on the basis of imperative grounds, his deportation is warranted it is argued.

58. We consider that those arguments amount to no more than disagreement with the First-tier Tribunal's assessment of the evidence. The Panel took into account the length of time that the appellant has been in the UK (almost 60 years), his relative lack of connections to Italy and his family connections to the UK. The Panel manifestly did take into account the appellant's long history of offending, for example stating at [72] that his criminal offending has been reprehensible, particularly his most recent offending. At [66] it expressed some concerns that the appellant sought to downplay his knowledge of the fact that the owners of the house that was burgled in the instant offence, were elderly.

59. Crucially, the Panel found that he presented a low risk of reoffending. That is a finding that is in conformity with the very detailed OASys report. Whilst it may be that another Panel might have come to a different view of that risk, provided there was a reasoned basis for departing from the view expressed in the OASys report, Mr Melvin conceded that in the circumstances it would be difficult to contend that the Panel was not entitled to find that the appellant was at low risk of reoffending.

60. At [68] the Panel noted that the appellant's conduct must represent "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". It referred to the seriousness of offences of burglary and the OASys assessment of a medium risk of harm. However, having concluded that the appellant represented a low risk of reoffending, it was all but inevitable that the

Panel would have been bound to conclude that his personal conduct did not represent the necessary level of threat. That this is so is supported by what was said in Essa at [32] where it is stated that:

> "We observe that for any deportation of an EEA national or family member of such national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. In such a case, if there is acceptable evidence of rehabilitation, the prospects of future rehabilitation do not enter the balance, save possibly as future protective factors to ensure that the rehabilitation remains durable."

61. It is as well to observe at this point that the position in relation to the deportation of an EEA national is materially different from that in relation to a person who is not entitled to the benefit of EEA status, and who relies on Article 8 of the ECHR to resist deportation. Thus for example, in the case of EEA nationals, decision makers, including Tribunals, are simply not permitted by the Directive and the EEA Regulations to take into account questions of general deterrence of criminality when making a decision on deportation. This contrasts with the position in Article 8 cases where the proportionality of removal must take into account, amongst other things, the public interest in deterring criminality generally.

62. Mr Melvin emphasised the issue of integration, submitting that it is difficult to see how, with the appellant's history of repeated offending, it could be said that he has integrated into society in the UK. He relied on the Opinion of the Advocate General in Case C-378/12 Onuekwere. However, that Opinion, and the subsequent decision of the ECJ in the same case, was concerned with acquisition of permanent rights of residence and the issue of imprisonment in terms of continuity of residence. As noted above, the Panel in the case of this appellant concluded that he had acquired permanent residence before embarking on his criminal activities. In any event, the Panel did consider the question of integration in the light of the appellant's offending and imprisonment.

63. Evidently without any enthusiasm, the First-tier Tribunal allowed the appeal under the EEA Regulations. Although the First-tier Tribunal erred in law in the respects to which we have referred, those errors of law are not such as to require the decision to be set aside, given the alternative basis for its conclusions, namely that the appellant had acquired permanent residence on the basis of five years qualifying residence.

Decision

64. The decision of the First-tier Tribunal involved the making of an error on a point of law. However, the decision of the First-tier Tribunal is not set aside and the decision to allow the appeal under the EEA Regulations therefore stands.

Upper Tribunal Judge Kopieczek 15/05/14