# ASYLUM AND IMMIGRATION TRIBUNAL

**THE IMMIGRATION ACTS**

Heard at: Field House

Date of Hearing: 26 June 2007
Determination delivered orally at hearing

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Pinkerton

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: In person
For the Respondent: Mr S Ouseley, Home Office Presenting Officer

*(1) The word "legally" in Article 16 of the Citizens Directive is to be construed as a reference to requirements of European law: it does not mean "in accordance with national law". (2) The requirement in reg 15(1)(a) of five years' residence in the UK "in accordance with these Regulations" is not contrary to any rights given by the Directive and means what it says (as supplemented by the Transitional Provisions in Schedule 4). Thus, a period of residence by a person not exercising a right under the 2000 or 2006 Regulations at that time cannot count towards the five years.*

## DETERMINATION AND REASONS

1. The appellant is a citizen of Hungary. He appealed to an Immigration Judge against the decision of the Secretary of State on 9 February 2007 refusing his application for permanent residence as an EU national residing here. The

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Immigration Judge allowed his appeal. The Secretary of State sought and obtained an order for reconsideration. Thus the matter comes before us.

2. The appellant was born in 1979. He first came to the United Kingdom on 31 August 1997 as a student. He completed his studies here and obtained a work permit under the Worker Registration Scheme. Hungary, the country of which he is a national, became a Member of the European Union on 1 May 2004. On 26 January 2006 the appellant applied for a residence permit as a qualified person. That was granted and expires on 25 February 2011. On 16 August 2006 he sought permanent residence and that resulted in the decision against which he now appeals.

3. The basis of the Immigration Judge's decision was that the appellant has been in the United Kingdom for more than five years. The ground upon which reconsideration was sought and obtained, and which Mr Ouseley has argued before us today, is that the matter is not as simple as that.

4. The relevant regulations are the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). The regulation relating to permanent residence is reg 15; and reg 15(1)(a) is as follows:

> "15. — (1) The following persons shall acquire the right to reside in the United Kingdom permanently—
> (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years."

5. There is no doubt that the appellant is, and is for the purposes of these regulations, an EEA national. The fact that he has not been an EEA national for the whole of the period of time during which he has resided in the United Kingdom is not relevant to that part of the regulation. The question, however, as Mr Ouseley puts it is whether his residence in the United Kingdom has been for five years "in accordance with these regulations". "These regulations" came into force on 30 April 2006 and it follows that nobody has been in the United Kingdom in accordance with these regulations for over five years yet. But there are transitional provisions and in paragraph 6 of Schedule 4 to the regulations we find this:

> "**Periods of residence under the 2000 Regulations**
>
> 6(1) Any period during which a person carried out an activity or was resident in the United Kingdom in accordance with the 2000 Regulations shall 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 under these Regulations."

The reference to the 2000 Regulations is a reference to the predecessor regulations, the Immigration (European Economic Area) Regulations 2000. There are no other

elements of the 2006 Regulations which enable residence before the coming into force of those regulations to be counted for the purposes of the regulations.

6. On the basis of those provisions Mr Ouseley argues that as the appellant, although lawfully present here, was not present under the 2000 Regulations until Hungary became a member of the EU on 1 May 2004, his period of residence for the purposes of reg 15(1)(a) of the 2006 Regulations can only have commenced on that date. He therefore had a period of two years' residence under the 2000 Regulations to which is to be added the period of residence under the 2006 Regulations from the coming into force of those regulations until the present, which is a period of just over three years in total. Therefore, says Mr Ouseley, the appellant has not resided in the United Kingdom under the regulations for a period of more than five years and it follows that the Immigration Judge was wrong to allow his appeal.

7. The position under the regulations, we think, is clear and it is fair to say that the appellant, who has represented himself, does not dispute that interpretation of the regulations themselves. Instead he points us to a number of provisions deriving directly from the Directive itself and another interpretation of it. He points first to the general provisions relating to non-discrimination, and in particular non-discrimination on grounds of nationality that pervade European law and are the subject of specific reference in paragraph 31 of the preamble to the Citizens Directive 2004/38/EC. He then reminds us that Article 37 of the same Directive allows Member States to make provisions that are more generous than those set out in the Directive, but does not enable Member States to make provisions which are narrower than those set out in the Directive. He then refers to a letter, apparently written on behalf of a member of the European Commission, giving a view which is specifically stated as not to be authoritative or binding that "since the Directive does not provide for the condition that the five year residence has to be ' on the basis of the Directive' this notion should cover also those persons who have recently become Union citizens and have legally resided in the UK for five years, otherwise such persons would have to wait for five years from the acquisition of citizenship of the Union, which would be an additional condition not foreseen in the text."

8. The appellant refers to Article 16 of the Directive which is, so far as relevant, in these terms:

> "16. …
>
> (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."

He also refers to paragraph 17 of the preamble to the Directive, which is as follows:

> "17. Enjoyment of permanent residence by Union citizens who have chosen to settle long-term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of

> the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure."

9. On the basis of those points of European law, the appellant submits that his residence in the United Kingdom, lawful as it was before Hungary became a member of the European Union, should count towards residence for the purposes of Article 16 of the Directive and for that reason should count for the purpose of enabling him to have permanent residence in the United Kingdom, whatever the United Kingdom's regulations may say.

10. We are unpersuaded by the appellant's submissions. Looking first at Article 16 of the Directive we find there, as we have indicated, the word "legally". The appellant's submission incorporates an implication that that word means "lawfully in accordance with national law". We see no basis for reading that meaning into the word "legally" in Article 16 of the Directive. When one sees a word of that sort in any legal instrument, one interprets it normally within the instrument's own legal context. The context of the Directive is European law: and for that reason we read "legally" in Article 16(1) as meaning in accordance with European law. If there were any doubt about that it would in our view be resolved by paragraph 17 of the preamble, to which the appellant has referred us, which indicates that the intention is to give a right of permanent residence to those "who have resided in the host Member State in compliance with the conditions laid down in this Directive" for five years. That, it seems to us, is sufficient to show that the provisions of the Directive are properly reflected in the regulations, which indicate that the period of five years in question is a period during which the applicant was exercising Treaty rights or was a spouse or family member of someone doing so. In the appellant's case he was not exercising any direct Treaty rights before Hungary, the country of which he is a national, became a member of the European Union.

11. So far as concerns the other matters to which the appellant referred, we note the interpretation posited by a member of the Commission on the words of Article 16, but note also that it did not purport to be authoritative, and makes no reference to the preamble, which we regard as a valuable aid to interpretation.

12. We also reject the appellant's submission that the application of the Directive and the regulation in this way amounts to discrimination on grounds of nationality. The position simply is, as Mr Ouseley put it, that the decision is made on the facts of the case. Of course from time to time there will be groups of people, the facts of whose cases are similar; but the position is that, like any other Union citizen, the appellant will be able to apply for a right of permanent residence when he has resided in a Member State in accordance with the provisions of the UK Regulations or in accordance with the terms of the Directive for five years.

13. The parties told us that there were no additional facts for us to take into account if we were substituting our own determination. For the reasons we have given we find that the Immigration Judge materially erred in law in making her determination. On the facts, which are that the appellant has been residing in the United Kingdom as a Union citizen or as a national of EEA state for a period of less than five years, we substitute a determination dismissing his appeal.

C M G OCKELTON
DEPUTY PRESIDENT
Date: