Capparrelli (EEA Nationals – British Nationality) [2017] UKUT 00162 (IAC)

Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision Promulgated**
On 02 November 2016	**On 20 January 2017**

Before

THE HON. MR JUSTICE MCCLOSKEY, PRESIDENT

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GUISEPPE CAPPARELLI

Respondent

Representation

For the Appellant: Mr J Harrison, Senior Home Office Presenting Officer
For the Respondent: Mr M Schwenk, of counsel, instructed by Parkview Solicitors

(i) An EEA national exercising Treaty rights in the United Kingdom is not "settled" within the compass of section 1(1) of the British Nationality Act 1981 since such person's lawful residence is conditional upon remaining economically active: Gal affirmed.

(ii) The statutory phrase "the immigration laws" does not encompass the EU rules on free movement: Gal modified.

(iii) Being ordinarily resident in the United Kingdom does not confer the status of British nationality.

(iv) The dichotomy of persons lawfully present in the United Kingdom under (a) the EEA Regulations 2006 and (b) the Immigration Rules is reflected in paragraph 5 of the latter.

(v) The question of whether a person is ordinarily resident in the United Kingdom is one of fact and degree.

DECISION

Introduction

1. For convenience I shall employ the appellations "Appellant" and "Respondent" as at first instance.

2. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department ("the Secretary of State") dated 20 August 2015, to make a deportation order in respect of the Appellant. The central question of law which arises is whether the Appellant is a British citizen. If the answer is affirmative, the decision must be adjudged unlawful as it was not made in accordance with the provisions of the Immigration (European Economic Area) Regulations 2006 (the "EEA Regulations") whereunder the Appellant enjoys certain protections against deportation.

The EEA Regulations

3. In the context of this appeal, the following are the material provisions of the EEA Regulations:

Regulation 19(1B):

> *"If the Secretary of State considers that the exclusion of an EEA national or the family member of an EEA national is justified on the grounds of public policy, public security or public health in accordance with Regulation 21 the Secretary of State may make an order for the purpose of these Regulations prohibiting that person from entering the United Kingdom."*

Regulation 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–*
>
> *…*
>
> *(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; …"*

Regulation 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

(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."

The British Nationality Act 1981

4. Section 1 of the British Nationality Act 1981 (the "1981 Act"), the subject matter whereof is "Acquisition by birth or adoption", provides:

> "*(1) A person born in the United Kingdom after commencement, or in a qualifying territory on or after the appointed day, shall be a British citizen if at the time of the birth his father or mother is –*
>
> *(a) a British citizen; or*
>
> *(b) settled in the United Kingdom or that territory."*

Section 1 came into operation on 01 January 1983. In section 50 "settlement" is defined as follows:

> "*(1) In this Act, unless the context otherwise requires –*
>
> *…*
>
> *"settled" shall be construed in accordance with subsections (2) to (4) …*
>
> *(2) Subject to subsection (3), references in this Act to a person being settled in the United Kingdom or in a British overseas territory are references to his being ordinarily resident in the United Kingdom or, as the case may be, in that territory without being subject under the immigration laws to any restriction on the period for which he may remain."*

The Secretary of State's Decision

5. The Appellant is aged 30 years. He was born in the United Kingdom on 18 March 1986. The impugned decision recites that between 2004 and 2012 he was convicted of a series of criminal offences, mainly offences against the person and breaches of community orders. It suffices to focus on his two most recent convictions. On 01 March 2011 he was sentenced to two years imprisonment having been convicted of assault occasioning actual bodily harm, criminal damage and harassment. The index conviction – of rape – was made on 29 February 2012 generating a punishment of 6 ½ years' imprisonment and a three year licence period.

6. The decision maker, in giving consideration to the question of how the 2006 Regulations applied to the Appellant, stated:

> "*It is not accepted that you have been resident in the United Kingdom in accordance with the 2006 Regulations for a continuous period of five years.*"

The reason proffered for this conclusion was the absence of documentary evidence demonstrating that at the time of the Appellant's birth, his parents were settled and exercising Treaty rights in the United Kingdom. The decision continues:

"*It is understood at aged 2 or 3, in 1989, you and your family relocated to Germany for approximately 7 years, not returning until September 1997. Although evidence submitted in the form of school and medical documents indicates your presence in the United Kingdom from 1997 to 1999, there follows a gap of approximately 12 years until your employment time sheet dated August 2009 and weekly pay slip dated 24 June 2010 ….*
It is asserted [that] *during this period you were in the United Kingdom in constant employment but no evidence has been submitted or received to substantiate these claims …*

Furthermore, prior to your indicated conviction of 29 February 2012, you were convicted on 01 March 2011 and received a custodial sentence of 2 years … thus breaking any continuous residence accrued from August 2009 and 24 June 2010."

7. The decision maker next posed the question of whether the deportation of the Appellant would be justified on the grounds of public policy or public security. In the lengthy recitation of the evidence of risk of reoffending and commentary which follow, one finds these salient passages:

"*In completing your OASYS assessment the Offender Manager found that you pose a medium risk of harm … to the community, but high risk of harm to non - adults, any partners due to the pattern of serious domestic abuse ….*

In assessing you as high risk, it has been considered that there are identifiable indicators of a risk of serious harm which could happen at any time and cause a serious impact ….

The Offender Manager has assessed [that] *your risk of harm is greatest when you are in a relationship with a partner (given your history of domestic abuse) failure to address your offending behaviour, increased use of alcohol, the perception of being disrespected or humiliated and failure to comply with the indefinite Restraining Order with regards to your current victim….*

There is no evidence that you have addressed the issues which caused you to behave in this appalling manner … you pose a significant and unacceptable risk of harm to women in the United Kingdom. Furthermore, there is clearly an escalation in seriousness of the offences you have committed."

This assessment culminates in the omnibus conclusion:

"*All the available evidence indicates that you have a propensity to reoffend and that you represent a genuine, present and sufficiently serious threat to the public to justify your deportation on the grounds of public policy.*"

The decision continues:

> "*Given the nature of the offence you have committed and the threat that you pose to society, it is considered that, even if you had permanent residence as a result of 5 years continuous residence in the United Kingdom or for a continuous period of at least 10 years, the requirement for serious grounds of security or imperative grounds of public security respectively would be satisfied.*"

Finally, the decision maker pronounced himself satisfied about the proportionality of deportation and concluded that this would not infringe Article 8 ECHR.

Decision of the First-Tier Tribunal

8. The First-tier Tribunal ("FtT"), having considered the testimony of the Appellant and both of his parents made the following specific findings:

   (a) When the Appellant was born (in 1986), his mother and father had lived in the United Kingdom, having emigrated from Italy, for periods of 7 and 4 years respectively. They were married following the birth.

   (b) At the time of the Appellant's birth, his mother was on a Youth Training Scheme and his father was actively employed.

   (c) The family lived in Germany from 1989 to 1997.

   (d) The Appellant had lived continuously in the United Kingdom from 1997, beginning work in 2003 (having left school) and holding down some seven or eight short lived, cash paid, jobs between 2003 and 2006.

   (e) The Appellant was again in employment from mid-2007 to mid-2008 and he made national insurance contributions of varying amounts between 2003 and 2011.

   (f) "*The totality of the evidence ….. supports the Appellant's* [assertion] *that he was essentially working at short term or temporary jobs within the period after he left school*".

   (g) The Appellant "*…. was continuously resident in the UK from his return from Germany in 1997 without any unlawful break until 2010*".

   Finally, the Judge found that both the Appellant's parents were "ordinarily resident" in the United Kingdom at the time of his birth.

9. In a key passage the Judge continues:

> "*I find the evidence discloses on balance that the Appellant was continuously resident in the UK from his return from Germany in 1997 without any unlawful break until 2010. During that time he was a student at school until 2002* [then aged 16] *and thereafter on balance I find from the totality of the evidence he was engaged, albeit perhaps sporadically, in employment. He would also have been a family member under Regulation 7 of the 2006 Regulations until the age of 21 years in 2007. I find therefore that he appears to have acquired 10 years continuous residence from 1997 until 2011. Thereafter his continuous time in the UK has been broken by periods spent in prison which does* [sic] *not as lawful residence.*"

The Tribunal then raised the question of whether the Appellant had 10 years continuous residence during the period preceding August 2005, when the impugned decision was made. The Judge did not, however, answer this question. Rather, the determination states:

> "*As noted above the Appellant on balance appears to have acquired such residence from 1997 until 01 March 2011 …*"

This is followed by:

> "*It follows* ***therefore*** *that any removal of the Appellant can only be in accordance with Regulation 21(4) namely on imperative grounds of public security.*"
>
> [My emphasis.]

10. In the penultimate paragraph of its decision the FtT concludes and reasons as follows:

(i) The Appellant is a British citizen under section 1(1)(b) under the 1981 Act.

(ii) Accordingly, he cannot be deported under the 2006 Regulations.

(iii) If conclusions (i) and (ii) are incorrect, the Appellant is an EEA national who, by virtue of 10 years continuous residence in the United Kingdom, can be deported only on grounds of "imperative public security", under Regulation 21(4) of the 2006 Regulations.

(iv) While the Appellant has undoubtedly engaged in "serious criminality", the threshold of "imperative public security" is not overcome.

The FtT allowed the appeal accordingly.

Permission to Appeal

11. Permission to appeal to this Tribunal was granted on the basis that there is arguable merit in the contention that the FtT erred in law in the following respects:

    (i) In holding that the Appellant's mother had, at the time of his birth, acquired a permanent right of residence, and hence the status of settlement, in the United Kingdom.

    (ii) In failing to consider whether the Appellant's integration links with the United Kingdom had been severed.

    So much is clear from the grant of permission to appeal.

12. The reference in the grant of permission to appeal to the Secretary of State's "third ground" is opaque, having regard to the terms in which the application for permission to appeal is couched. In one section of the grounds there appears to be an indirect challenge to the correctness of the decision in MG and VC [2006] UKAIT 00053. In another part there is a contention, based on the decision in LG (Italy) v SSHD [2008] EWCA Civ 190, that the FtT failed to take account of "*an evolution in the SSHD's policy*". Two observations are appropriate:

    (a) The suggestion that MG and VC was wrongly decided is bare and unparticularised.

    (b) There is no attempt to explain how the FtT's asserted failure to take into account the "*evolution in the SSHD's policy*" constitutes an error of law.

    To this I would add that, in any event, government policies relating to how legislation is to be implemented or operated, a paradigm example being how discretionary statutory powers will normally be exercised and the criteria which will dictate their exercise, have no bearing on the construction of the legislation concerned. The construction of legislation is a pure question of law.

13. The conclusion that the Secretary of State's application for permission to appeal is non-compliant with the decision of this Tribunal in Nixon (permission to appeal: grounds) [2014] UKUT 368 (IAC) follows inexorably. It should never be necessary for the Upper Tribunal to invest its limited resources in protracted attempts to construe applications for permission to appeal or grants of permission to appeal. This is manifestly inimical to the overriding objective. Applications for permission to appeal should be crisp, succinct and clear. The application in the present case takes the form of a diffuse and unparticularised essay. Having conducted this unwelcome exercise, I conclude that the scope of this appeal is confined to the two issues set forth in [11] above.

The British Citizenship Issue

14. The first limb of the Appellant's case is that he is a British Citizen by birth. The submission developed by Mr Schenk on behalf of the Appellant was that section 50(2) of the 1981 Act applies to any person exercising Treaty rights by virtue of Home Office policy. The policy in question took the form of a Home Office Nationality Instruction entitled "European Economic Area and Swiss Nationals". Paragraph 8.1 of this policy stated that as regards the period prior to 02 October 2000 –

> "*Evidence that the person concerned was exercising any description of EEA free movement right in the UK on the relevant date should be accepted as evidence that he or she was not, then, 'subject under the immigration laws to any restriction on the period for which* [they] *might remain in the United Kingdom'.*"

In Fransman's British Nationality Law (3rd Edition) it is stated at paragraph 13.2.2 (page 337):

> "*To be settled in the UK or an overseas territory, a person must be 'ordinarily resident' and, simultaneously, not 'subject under the immigration laws to any restriction on the period for which he may remain' (i.e. he must be without time restrictions).*"

15. Fransman also addresses the phrase "*without time restrictions*". He suggests, at paragraph 13.2.5:

> "*'Without being subject to time restrictions' is mainly a matter of fact, whether or not the status involves a time restriction.*"

With regard to the first element of this proposition, I confine myself to the observation that, in the abstract at least, a time restriction could arise by operation of law, via legislation whether primary or secondary and could also arise by virtue of Government policy, whether through the medium of the Immigration Rules or otherwise. Thus there is scope for debate about whether "*being subject to time restrictions*" is, as Fransman advocates, mainly a matter of fact. Having said that, the terms in which a residence authorisation are couched would be primarily a matter of fact, though construction of the document would be a matter of law. The second element of the proposition is probably not designed to add in substance to the first and does not in my view do so.

16. The status under the 1981 Act of EC nationals (as they then were) was addressed specifically by the Immigration Appeal Tribunal (the "*IAT*") in the case of Gal [TH/25885/92 10620]. The argument developed, in substance, was that the EU national concerned, a French citizen, was settled in the United Kingdom because, as an employee, he had a right of residence not limited by any time restriction. The Tribunal's rejection of this argument was unequivocal. It held that an EC national residing in the United Kingdom equipped with a residence permit is not "*settled*" within the compass of section 1(1) of the 1981 Act. The rationale for thus holding was simple: the period during which such a person may remain in the United

Kingdom is conditional upon remaining economically active. The operative passage of the decision is at page 10:

> *"We accept that so long as Mr. Zilberberg** qualified for a residence permit he had a right of residence but to be "settled" a person must have no restriction "for the period which he could remain". Mr. Zilberberg could remain under his European Law right only for a period during which he qualified under European Law for residence i.e. he met the terms of any particular European Law category on which he relied. So as an employee he had to remain a "worker" within the meaning of European Law. Even the residual residence category requires non-recourse to public funds.*
>
> *The period for which Mr. Zilberberg could remain was not restricted directly by time but so long as qualifications are needed the period is restricted and, more, is restricted as to its duration. The need for continued qualification is to be contrasted with indefinite leave to remain which may only be terminated by deportation. It follows that Mr. Zilberberg was never settled in this country and it was not open to Mrs. Gal to claim any right under paragraph 132."*

[** The EU national in the equation]

One of the distinctive features of the Appellant's arguments is that they do not mention, much less acknowledge, this decision. The same observation applies to the grounds of appeal and submissions of the Secretary of State.

17. It would appear that in Gal an appeal to the Court of Appeal was initiated, but not pursued. It seems surprising, at this remove, that the issue which Gal decided does not feature in other reported decisions of the Upper Tribunal (or its predecessors) and has not been authoritatively determined by the Court of Appeal. Fransman suggests that the decision generated some controversy. While the benefit of comprehensive adversarial argument would obviously have been welcome, I am satisfied that Gal was correctly decided. However, for the reasons explained below, my analysis is that while the outcome in Gal was correct the underlying reasoning was flawed.

18. Although in Gal the IAT accepted that the phrase "*immigration laws*" encompasses the EU rules on free movement, I would question the correctness of this. Since 1971, via Section 33(1) of the Immigration Act of that year, the definition of "*immigration laws*" has been:

> "'Immigration laws' *means this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom and Islands.*"

I consider that the ordinary and natural meaning of these words does not encompass the EU rules on free movement. The definition makes no mention of EU laws, primary or secondary. Furthermore, the 1971 Act pre-dated the accession of the United Kingdom to the EU and this definition was not amended subsequently. Notably, this definition was repeated when the 1981 Act was introduced: see section

50(1). In my judgement "i*mmigration laws*" are confined to laws made by the United Kingdom Parliament. If this phrase were designed to extend to any provisions of EU law, one would expect clear words to this effect: there are none. To complete this discrete analysis, paragraph 5 of the Immigration Rules makes clear that they have no application to EU citizens exercising Treaty rights:

> "*Safe where expressly indicated, these Rules do not apply to those persons who are entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations. But any person who is not entitled to rely on the provisions of those Regulations is covered by these Rules.*"

19. I consider that the FtT fell into error in its consideration and application of the definition of "*settled*" in section 50(2) of the 1981 Act. This error arose from its concentration on the phrase "*ordinarily resident*" only, at the expense of and neglecting the second part of the definition namely "*without being subject under the immigration laws to any restriction on the period for which he may remain*". For the reasons explained in [18] I consider that the reasoning in Gal was incorrect. The IAT should have held that this second part of the definition of "*settled*" cannot sensibly be applied to a EU citizen exercising Treaty rights since the "*immigration laws*", correctly defined and understood, do not apply to such persons. In other words, in the case of EU citizens, no question of a time restriction under the immigration laws can arise. It follows that EU citizens can never satisfy the second part of the definition. Approached in this way, the FtT's error was to conclude that the Appellant's parents were, at the material time, viz when he was born, British citizens simply on account of being ordinarily resident in the United Kingdom. This finding failed to address the second limb of the definition of "*settled*". If addressed correctly, the FtT would in my judgement have been bound to conclude that it was not satisfied, for the reasons explained above.

20. In short, there is no merger of United Kingdom immigration laws and EU Treaty free movement rules. The view expressed in Gal that the latter are immersed within the former is, in my estimation, misconceived. These are two quite separate legal regimes in the context under scrutiny.

21. Given the definition of "settled" in section 50(2) of the 1981 Act, the separate question to be addressed is whether the FtT erred in law in its approach to the "*ordinarily resident*" rubric of section 50(2) of the 1981 Act. The concrete question for the FtT was whether either of the Appellant's parents was "*ordinarily resident*" in the United Kingdom on the date of his birth, 18 March 1986. The first requirement of "ordinary residence" is that it denotes lawful residence, per section 50(5) of the 1981 Act. This is not disputed in the present case, given the EU national status (now EU citizenship) of both parents and their exercise of Treaty rights at all material times.

22. It has long been settled that ordinary residence is a question of fact and degree. Lord Scarman addressed this topic *in extenso* in Shah v Barnet LBC [1983] 2 AC 309 at, firstly, page 343:

"Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."

Elaborating, at page 344:

"There are two, and no more than two, respects in which the mind of the "propositus" is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.

And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."

These principles fall to be applied to this appeal in the following way.

23. At [21] of its decision the FtT unambiguously found that in 1986 both of the Appellant's parents were ordinarily resident in the United Kingdom at the time of his birth. In thus finding, the Tribunal gave express consideration to the decision in Shah, directed itself correctly in law, and provided adequate and rational reasons for thus finding. This discrete aspect of its decision is, in my view, unimpeachable.

24. It is almost otiose to add that the Home Office policy noted in [14] above cannot alter or modify primary legislation. Nor can it have the effect of altering paragraph 5 of the Rules, given their status in law. Furthermore, the policy is not a legitimate aid to construction of either primary legislation or the Rules. Insofar as it purports to state the law I consider it flawed. The brusque riposte to the first element of the Appellant's case – see [14] above – is that the Home Office policy in question is incapable of conferring British citizenship on the Appellant or contributing to his ability to satisfy the relevant statutory requirements and definitions.

25. It follows that the first ground of appeal is made out. However, as appears from what follows, this does not suffice to rescue the impugned decision of the Secretary of State.

Second ground of appeal: the EEA Regulations issue

26. In my judgement, this aspect of the appeal travels nowhere by virtue of the unambiguous – and repeated – findings of the FtT relating to the Appellant's

continuous residence in the United Kingdom. These are rehearsed in [8] – [10] above. It is appropriate to observe that this is the issue which the FtT addressed most insistently. The critical finding (repeated) was that the Appellant was continuously resident in the United Kingdom from 1997 to 2010. This was a finding of fact, pure and simple. It is unassailable. Moreover, there is no suggestion that this period of 13 years was punctuated by (in the language of the FtT) any "*unlawful break*". The second of the permitted grounds of appeal dissolves and thaws to nothing accordingly. In passing, I consider it highly probable that the second ground of appeal overcame the permission threshold by reason of the multiple defects in the application for permission: see [11] – [12] above.

27. Accordingly, the Appellant qualifies for the highest level of protection against deportation under the regime of the 2006 Regulations. Thus, per Regulation 21(4), the precondition of lawful deportation action against him is "*imperative grounds of public security*". In making the impugned decision the Secretary of State failed to recognise this, as is clear from [6] – [7] above and, in consequence, erred in law. The decision of the FtT on this issue is unimpeachable. As a result, the FtT's error of law diagnosed in [19] above does not operate to redeem the Secretary of State's decision and is immaterial.

Decision

28. This appeal is dismissed accordingly.

Signed: Edward McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 31 December 2016