Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01225/2012

THE IMMIGRATION ACTS

Heard at Field House

On 6 August 2013

Determination Promulgated
On 17 December 2013

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOSE ADAO

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Not present or represented

DETERMINATION AND REASONS

1. The respondent, Jose Adao, was born on 15 May 1991 and is a male citizen of Portugal. On 14 June 2013, I found that the First-tier Tribunal had erred in law and I set aside its determination. My reasons for reaching for that decision are as follows:

   The respondent, Jose Adao, was born on 15 May 1991 and is a male citizen of Portugal. The appellant appealed to the First-tier Tribunal against a decision of

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the respondent dated 13 November 2012 to deport him to Portugal under the provisions of Section 5(1) of the Immigration Act 1971. On 12 January 2012, the respondent had been convicted at Blackfriars Crown Court of possession with intent to supply of controlled class A drugs (cocaine; MDMA) and possession with intent to supply of a controlled drug of class C. On 16 February 2012, he had been sentenced to eighteen months' detention at the Young Offenders Institution. The First-tier Tribunal Judge (Judge McIntosh; Sir Jeffrey James CVE, CMG) allowed his appeal in a determination promulgated on 18 April 2013.

There are two grounds of appeal. First, it is asserted that the panel materially erred in law in failing to make adequate findings regarding how the appellant has obtained his permanent right of residency before he was imprisoned. Secondly, it is asserted that the panel materially erred in law in failing to have adequate consideration of the appellant's risk of re-offending and failing to note an NOMS assessment that the appellant was at medium risk of re-offending and harm.

At the initial hearing at Field House on 14 June 2013, the respondent attended in person. I have a letter from the respondent's previous representatives (Mordi & Co) informing the Tribunal that they are no longer representing him. I was careful to explain the procedures of the Tribunal to the appellant and to give him every opportunity to put his case to the Tribunal.

At [22], the Tribunal wrote:

> "It is the appellant's case that he has been present in the United Kingdom continuously since August 2004. The appellant maintains that after concluding compulsory education he has been in gainful employment or has been actively engaged in looking for employment. In those circumstances, the appellant maintains that he is eligible for the level of protection under Regulation 15 of the Immigration (European Economic Area) Regulations 2006. The appellant produced evidence from his secondary school that he had been enrolled at Eastbury Comprehensive School in January 2006. There was no independent evidence of an earlier enrolment with another secondary school. We found from the evidence before us that, at the very least, the appellant was present and resident in the United Kingdom prior to 10 January 2005. The appellant also produced a letter from New College London who confirmed the appellant's attendance at New College London from 25 February 2008 to 5 February 2008 on an English course for young adults. The more recent documents in the form of P45 dated February 2013 and recent academic awards from prison relate to recent events and do not go towards evidence of the appellant's continued presence in the United Kingdom."

Subsequently, at [25], the Tribunal wrote:

> "In the circumstances we concluded on the balance of probabilities that the appellant had established that he had been present and resident in the United Kingdom at the very least since 2005. The appellant received his notice of intention to deport him in September 2012 following his imprisonment on 16 February 2012. The appellant's total period of residence prior to sentence was calculated at six years. We concluded that the appellant has permanent residence in the United Kingdom by virtue of the fact of continuous residence of more than five years in the United

Kingdom, in accordance with Regulation 15(1)(a) of the Immigration (EEA) Regulations 2006."

Mr Hayes challenged the adequacy of the reasoning at [22].

Mr Hayes submitted that the Tribunal had failed to deal with the requirement in paragraph 15 of the 2006 Regulations (permanent right of residence) which provides a right of residence only to an EEA national who had resided in the United Kingdom in accordance with the Regulations for a continuous period of five years. The appellant had to show that he was a qualified person as defined by paragraph 6. The Tribunal had failed to consider whether or not the respondent's education at secondary school level counted towards the period of continuous residence. If it did not do so (and Mr Hayes submitted that it did not), then the Tribunal may have found that the respondent had been resident continuously in the United Kingdom for a period of less than five years. As a consequence, different considerations would have arisen as to whether it was appropriate for him to be deported to Portugal. In short, by failing to calculate the respondent's continuous residence in the United Kingdom, the First-tier Tribunal may have applied the wrong in test in determining the appeal.

It is necessary to clarify the dates in the quotations from the First-tier Tribunal's determination which I have set out above. The letter from Eastbury Comprehensive School states that, "Jose Adao was involved at Eastbury Comprehensive from 10 January 2005 to 21 July 2006. He left in year 11 when his statutory education requirement came to an end." There is a typographical error at [22] of the First-tier Tribunal's determination where it is stated that the respondent had been "enrolled at Eastbury Comprehensive School in January 2006." He had, in fact, been enrolled on 10 January 2005. The typographical error is not material to the reasoning of the Tribunal because, in the same paragraph, it goes on to find that the respondent "was present and resident in the United Kingdom prior to 10 January 2005." However, the Tribunal has not indicated in its determination (i) exactly when "prior to 10 January 2005" the respondent had commenced his period of continuous residence in the United Kingdom and (ii) whether any period of residence accrued whilst he was student in *secondary education* counted towards the period of "continuous residence" required by the Regulations. I find that the Tribunal should have addressed those matters and made findings accordingly. Its failure to do so amounts to an error of law and I set aside the determination. I consider that it would assist both parties to consider the matter further and consequently I shall remake the decision at or following a resumed hearing at Field House on a date to be fixed.

DECISION

The determination of the First-tier Tribunal promulgated on 18 April 2013 is set aside. The Upper Tribunal will remake the decision at or following a resumed hearing at Field House on a date to be fixed.

2. At the resumed hearing at Field House on 6 August 2013, the respondent did not attend nor was he represented. Further, the respondent had failed to comply with the directions that I had issued following the June hearing which read as follows:

(1) The parties shall, within 14 days of receipt by them of these directions, confirm whether or not they agree that the Immigration (EEA) Regulations 2006 and the Directives of the European Union from which those Regulations derive exclude periods of compulsory secondary education from the calculation of periods of continuous residence in the United Kingdom. The Upper Tribunal is aware that the respondent is not currently legally represented. He should, however, seek to comply with these directions. If he does not respond in writing, it should be assumed that he expresses no view as to the issue described in this paragraph but he should make every effort to comply with direction (2) below which requires no legal knowledge or understanding.

(2) The respondent shall, within fourteen days of receipt by him of these directions, write to the Upper Tribunal and to the appellant to state when exactly he began any studies at college or school after he had left secondary school. He should send to the Upper Tribunal copies of any documents which may support such evidence.

(3) The parties shall file to the Upper Tribunal and send to the other party any documentary evidence no later than five days before the resumed hearing.

(4) A resumed hearing shall be fixed at Field House as soon as possible. The respondent should make every effort to attend that hearing.

3. Following the hearing, on 8 August 2013, I learned from the administration at Field House that the respondent had attended on that day having mistaken the date of the resumed hearing.

4. The burden of proof in the appeal is on the respondent and the standard of proof is a balance of probabilities. In the light of the failure of the respondent to provide the evidence referred to in the directions and in [8] of my error of law decision of 23 June 2013, I am unable to conclude that the respondent has discharged the burden of proving that he has been continuously resident in the United Kingdom for a period of at least five years. Consequently, I find that the respondent has not acquired a right of permanent residence in the United Kingdom. By Regulation 19 of the 2006 Regulations the respondent, not having acquired a right of permanent residence, may be removed if his removal is justified on the grounds of public policy, public security or public health. As noted previously, the respondent was convicted on 12 January 2012 at Blackfriars Crown Court of possession with intent to supply of a controlled drug of class A (cocaine): possession with intent to supply a controlled drug class A (MDMA): and possession with intent to supply a controlled drug of class C. He was sentenced, on 16 February 2012, to a period of eighteen months' detention at a young offenders' institution (YOI).

5. The removal of the respondent is to be considered according to the provisions of paragraph 21(5) and (6) of the 2006 Regulations:

(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.

6. I find that the respondent's personal conduct does represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I note from the decision letter of the Secretary of State dated 13 November 2012 that:

> In completing your NOMS1 assessment the offender manager found that you posed a medium risk of harm to the known adults, your peers, possibly your younger sister and your child and partner. In assessing you as medium risk it has been acknowledged that you have potential to do harm.

7. I have received no evidence which would contradict those observations. Further, although I acknowledge that the respondent is a young man, he is apparently in good health and I have no up-to-date evidence regarding his family circumstances. He has a child but is separated from the child and his mother and I was given no details whatsoever of any contact arrangements between the respondent and his child. I had not details of the respondent's economic situation. As regards his social and cultural integration into the United Kingdom, again I have no evidence save for the documents which were before me (as they were before the First-tier Tribunal) which indicates the efforts made by the respondent to obtain educational qualifications whilst in detention. I am aware that the respondent has taken drugs from a very early age and there was no evidence at all that he has overcome that problem. I find that this respondent is entitled only to the lowest form of protection from removal afforded to citizens of the EU who are resident in the United Kingdom and does constitute a sufficiently serious threat to public security to justify his removal by way of deportation. With so little evidence before the Tribunal, it is difficult to reach any other conclusion. Had the respondent attended the hearing it would have been possible to have heard oral evidence from

him but there was no indication at all that he intended to come to the Tribunal with any documentary evidence. Whilst I am aware that he did attend on the wrong day, I consider that the Tribunal was justified in proceeding with the hearing in his absence on 6 August 2013 as he had given no explanation for his failure to attend and further I did not see that there was any reason, after I had learned of his attendance on 8 August, to reconvene the hearing nor did he invite me to do so. Such evidence as I have throws very little light indeed on the respondent's circumstances to be considered under paragraph 21(6) of the 2006 Regulations.

8. I have also considered Article 8 ECHR. The public interest concerned with the removal of a criminal who has been sentenced for serious drug offences is a compelling one. As I have noted above, I have no evidence that the respondent continues to have any contact at all with his child. I have no evidence of any other private life or family ties which he may have within this jurisdiction. I find that the decision to remove him was proportionate both in terms of Article 8 ECHR and in the application of paragraph 21 of the 2006 Regulations.

DECISION

9. Having set aside the determination of the First-tier Tribunal promulgated on 18 April 2013, I have remade the decision. This appeal is dismissed.

Signed Date 29 September 2013

Upper Tribunal Judge Clive Lane