Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01787/2013

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Determination Promulgated**
On 7 July 2014	**On 15th Aug 2014**
Judgment given orally at hearing	

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOSE ALBERTO OLIVEIRA DE ALMEIDA

Respondent

Representation:

For the Appellant: Mr K Norton, Home Office Presenting Officer
For the Respondent: Not represented

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal. Thus, the appellant is a citizen of Portugal who was born on 7 October 1971.

2. The appeal before the First-tier Tribunal arose in the following circumstances. In April 2013 in the Crown Court sitting at Maidstone the appellant was convicted of an offence of assault occasioning actual bodily harm whereby he was sentenced to a term of imprisonment for fifteen months. In consequence of that conviction the Secretary of State decided on 13 August 2013 to make a deportation order under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

3. The appellant appealed against that decision and his appeal came before a panel of the First-tier Tribunal consisting of First-tier Tribunal Judge McMahon and Ms C. St. Clair, a non-legal member. The panel allowed the appeal under the EEA Regulations. One of the issues for the First-tier Tribunal to determine was the extent to which the appellant was able to resist removal to Portugal as an EEA national in terms of the level of protection against removal that the EEA Regulations afford him. That in part depended on the extent to which he was resident in the UK exercising Treaty rights and for what period.

4. The First-tier Tribunal found that the appellant has been in employment in the UK. Unequivocally it found at [13] of the determination that he had lived in the UK continuously since 1995, from the age of 24 years. Mr Norton on behalf of the Secretary of State does not challenge that conclusion. What is however challenged is the further conclusion in terms of his having been in employment since that time. In relation to employment the First-tier Tribunal stated as follows at [13]:

> "He has supported that account [of the period of residence] with detail as to the nature of his employment since 1995. There is nothing implausible about the account. Although the respondent has doubt as to that aspect of the claim there is nothing from the respondent which goes to show the claim in that respect is unreliable."

5. One of the arguments on behalf of the Secretary of State is that in that respect the First-tier Tribunal appeared to reverse the burden of proof, given that the burden of proof was on the appellant to establish the extent to which he was exercising Treaty rights. Of course, that the appellant bears the burden of proof is uncontentious. The matter of the appellant's employment since he has been in the UK has always been in issue, ever since the decision to remove him.

6. I am satisfied that the First-tier Tribunal erred in apparently concluding that it was for the respondent to rebut the appellant's assertions in relation to employment or, put another way, bearing the burden of proving that the appellant was not in employment. It was for the appellant to establish those facts. I also note in this regard that directions were issued on 3 October 2013 in relation to what further evidence might be expected from the appellant as regards his employment.

7. The notice of decision refers to the lack of documentary evidence of his employment. The only evidence that he has been in employment, which is the basis on which he suggests that he has been exercising Treaty rights,

was his own evidence, unsupported by any documentary evidence. I am not satisfied that the First-tier Tribunal's conclusion in terms of the appellant's exercise of Treaty rights is sustainable in these circumstances bearing in mind it was *for the appellant* to establish the fact of his exercise of Treaty rights. Although the panel referred at [29] to what was said to be the significance of his receiving incapacity benefit and employment and support allowance, those benefits do not establish that the appellant has actually ever worked.

8. Subsequent to the hearing before the First-tier Tribunal some records have been provided in terms of the appellant having received jobseekers' allowance. At the hearing before the Upper Tribunal, the appellant stated that at the time of the hearing before the First-tier Tribunal he did not have his "tax" records. He then referred to the records in respect of jobseekers' allowance. It would appear that having been in receipt of jobseekers' allowance he therefore was entitled to credits for national insurance purposes but that record, apart from not assisting in terms of establishing any error of law on the part of the First-tier Tribunal given that it was not evidence before the First-tier Tribunal, says very little about whether the appellant has in fact been working.

9. In these circumstances, I am satisfied that the First-tier Tribunal erred in law in its assessment of the extent to which the appellant has been exercising Treaty rights in the UK. That, it seems to me, is a sufficient basis from which to conclude that the decision should be set aside because it has a fundamental impact on the assessment of the appellant's 'removability' in terms of the level of "protection" he is afforded by the EEA Regulations.

10. I am also satisfied that there were errors of law in other respects. Firstly, in terms of whether the appellant had established that he was entitled to resist removal on imperative grounds of public security. That conclusion failed to take into account the decision of the European Court of Justice in Case C-400/12 MG which establishes that the ten year qualifying period is to be calculated by counting back from the date of the decision. Periods of imprisonment break the continuity of residence which again affects the extent to which the appellant would be entitled to claim that he is able to resist removal on imperative grounds.

11. I am further satisfied that the assessment by the First-tier Tribunal of the risk of re-offending was vitiated by legal error. Although the panel referred to the fact that the appellant had received a number of criminal convictions and referred, to some degree, to the seriousness of those offences, and considered evidence of rehabilitation, I am not satisfied that the panel took full account of the numerous and repeated offences that the appellant has been convicted of and which are set out in detail in the PNC printout.

12. It is also evident that the appellant has on many previous occasions failed to respond to non-custodial sentences. Again, that is a matter that ought

to have been taken into account by the First-tier Tribunal. The National Offender Management Service report or 'NOMS' report, assessed the appellant's risk of offending as high. The panel concluded that his risk of reoffending was 'medium'. A Tribunal is perfectly entitled to disagree with an assessment of the risk of re-offending provided legally sustainable reasons are given for that conclusion. I am not satisfied that in this case, bearing in mind the extent of the appellant's offending, sustainable reasons on that issue were given by the First-tier Tribunal. Although there is criticism of the NOMS report and its conclusions, there is no recognition on the part of the First-tier Tribunal, in its reasons, of the fact that the risk of reoffending is said in the report to be high (see page 8 of the report). Paragraph 2 of the determination does refer to that assessment in the NOMS report but that paragraph only rehearses the Secretary of State's reasons for the decision to remove the appellant.

13. Furthermore, I am not satisfied that even if the panel was entitled on the evidence to conclude that he represents a medium risk of re-offending, it was then entitled to find that he does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, as it did at [40]. The panel appears to have concluded that because the risk of reoffending was medium, that did not represent a "genuine" and "present" threat. Although it concluded that his past offending has been at the level of 'medium' seriousness, that does not take into account the seriousness of the most recent offence of assault occasioning actual bodily harm, as indicated in the sentencing remarks which are quoted at [17] of the determination.

14. Having concluded that the First-tier Tribunal erred in law in the respects to which I have referred, I am satisfied that the decision of the First-tier Tribunal must be set aside. Having heard submissions from Mr Norton in terms of whether it was appropriate for the appeal to be remitted to the First-tier Tribunal for a fresh hearing, I am satisfied that that is the appropriate course, having regard to the Practice Statement at paragraph 7.2.

DIRECTIONS

1. The appeal is remitted to the First-tier Tribunal for a hearing *de novo* with none of the contested findings preserved.

2. The appeal is to be heard by a differently constituted Tribunal from that which heard the original appeal.

3. Further directions as to listing are left to the discretion of the First-tier Tribunal.

Upper Tribunal Judge Kopieczek 15/08/14