**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Numbers:
DA/02442/2013

**<u>THE IMMIGRATION ACTS</u>**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 5 January 2014** | **On 9 February 2015** |

**Before**

**UPPER TRIBUNAL JUDGE LATTER**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

<u>Appellant</u>

**And**

**JEFFERSON CARLOS CASTRO**
**(Anonymity order not made)**

<u>Respondent</u>

<u>Representation:</u>

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr S Harding, instructed by Howe & Co Solicitors

**<u>DECISION AND REASONS</u>**

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing an appeal by the respondent, Jefferson Castro, under the EEA regulations and on human rights grounds against the decision made on 5 November 2013 to remove him to Italy following his conviction and imprisonment for an offence of making/supplying articles for use in fraud. In this decision I will refer to the parties as they were before the First-tier Tribunal, Mr Castro as the appellant and the Secretary of State as the respondent.

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## Background

2. The appellant is a citizen of both Brazil and Italy born on 5 April 1983. The background to this appeal can briefly be summarised as follows. The appellant lived in Brazil with his family until he was 14 when he went to live with his uncle. When he was 16 he met his wife and they moved in together and a son was born on 2 July 2000. In 2006 his family (himself, his wife, son and mother) travelled to Italy. His mother is Italian by birth, hence the appellant's entitlement to Italian nationality. He started to work in Italy and duly obtained an Italian passport. He then moved to Spain and had jobs in the construction industry. His wife became pregnant but because there were complications, she needed 24 hour care. It was decided that his wife and son would return to Brazil where her mother could care for and support her whereas the appellant came to the UK because the work he had in Spain had came to an end.

3. In October 2008 his daughter was born and a month later the appellant travelled to Brazil returning to the UK in December 2008. He was able to work and save money to bring his family over and they joined him in December 2009. In January 2010 his wife fell pregnant again. An application was made for residence permits under the EEA regulations and they were granted 5 year permits in October 2010. Subsequently, the appellant lost his job and because of the financial pressures on him he became involved in the criminal activities which were to lead to his conviction.

4. On 28 March 2011 he was arrested with others involved in the manufacture and supply of false documents including passports and identity cards. In August 2011 he was convicted at Harrow Crown Court of making/supplying articles for use in fraud and on 16 September 2011 he received a sentence of 5 years 4 months. The seriousness of the offence is apparent not only from the length of the sentence but also from the judge's sentencing remarks which included the following:

> "Getting involved in the commercial production on a significant scale of false identity documents is very serious. It is serious because it leads to a widespread abuse of the immigration and employment laws, and upsets the balance of society it is a serious crime. In the case of all of you, you knew exactly what you were doing. In the case of all of you, it was motivated by the prospects of, in my judgement, high level commercial gain. It was, I think it's been described by the prosecution as a medium sized, significant operation. But it was very significant, and it was fairly sophisticated. You were using equipment especially produced for the purpose, and you had set up a head quarters for your operation. There isn't evidence that there was anybody in this country who was masterminding the operation for you….. In my judgement, it is not a decision that I, the judge, makes, but I want to put it on record that if there is an ability to deport you, you should be, because your presence is not conducive to the public good in this country, quite the

> contrary, because what you have done, as I said, which undermines society in the way I have described."

5. At the hearing of the appeal against the respondent's decision the First-tier Tribunal heard oral evidence from the appellant, his son and his wife. It found that all the witnesses gave evidence in straightforward and helpful manner and the panel had no reason to believe they had not been told the truth [56]. The appellant had been a man of good character who had worked in Brazil, Italy and Spain before coming to the UK in 2008 where he had worked until "the unfortunate commission of his offence." They accepted that financial pressure had built up and that the appellant had decided to take "the criminal route, hence finding himself where he does" [57].

6. The panel referred to the OASYs assessment dated 27 November 2013 which recorded that the appellant accepted full responsibility for the commission of his offence and that it was his first offence. He had been employed full time whilst in custody and in particular had worked for DHL at HMP The Verne for about 6 months and received an excellent work report. The probability of the appellant re-offending was regarded as low and it was recorded that he was motivated to address his offending and had the capacity to change and reduce it. There were numerous good case notes entries on the C-NOMIS system.

7. The Tribunal also referred to a letter from the National Offender Management Service at the London Probation Trust written by the appellant's probation officer who had reduced his reporting requirements and felt that the risk of re-offending was low and that he could safely be managed in the community. On visits to the family home the probation officer commented that the children were well behaved, polite and clearly happy to have their father home. The family lived in a three bedroom flat which was well maintained with no obvious signs of wealth to suggest that the appellant may be living a lavish lifestyle following the offence.

8. The panel commented and found, in confirmation of the fact that the custodial sentence had afforded the appellant the opportunity to reflect and understand that should he commit offences he risked going back to prison, that he had wasted no time in obtaining employment and was not afraid of hard work as he not only worked during the day but had also taken on evening and weekend work to help improve his finances. So far as the appellant's thinking and behaviour at the time of the offence, he had clearly involved himself with a group of people that believed that committing offences of fraud was justified but the probation officer said that in her assessment the appellant's term in custody was a very harsh lesson for him and she believed that his thinking had changed considerably. He now believed that the only way to live was by legitimate means. It was her assessment that the appellant had made positive strides to reintegrate into society.

9. The panel summarised its findings in [65] as follows:

> "Whilst in no way minimising the appellant's offence, against the background of all the evidence, we find that the appellant does not represent a genuine, present and sufficiently serious threat to the public to justify his deportation. He utilised his time in prison in a positive manner, before which time he was a man of good character. The report from the probation officer is to the effect that the appellant is making every effort and appears to be succeeding in leading his life in the exemplary manner he has done, before his unfortunate error of judgement."

10. The panel went on to consider article 8 and found that in the appellant's circumstances removal would be disproportionate to the legitimate aim pursued.

Grounds of Appeal and Submissions

11. Permission to appeal was sought and in the application to the First-tier Tribunal it was argued that the Tribunal had failed to consider the EEA regulations fully, that deportation was justified under grounds of public policy or public security and that the Tribunal had also failed to make any findings on why the appellant did not meet the lowest threshold. It was further argued that the finding that he did not represent a genuine, present and sufficiently serious threat was flawed in that all relevant matters had not been taken into account and, in particular, the seriousness of the offence and the comments of the sentencing judge. It was further argued that the appellant denied using aliases which suggested he was not fully rehabilitated or taking full responsibility for his actions, that the Tribunal had failed to consider the appellant's rehabilitation prospects in Brazil or Italy and that he had clearly not integrated into the UK way of life, otherwise he would know that his conduct was unacceptable.

12. Permission was refused on the basis that the application amounted to no more than a disagreement with findings which were properly open to the panel having assessed and compared all the evidence. The application for permission to appeal was renewed to the Upper Tribunal and in these grounds it was argued that the essential contention made by the respondent in her explanatory letter was that the appellant had not discharged the burden in establishing that he was entitled to permanent residence and there was no clear finding on this important issue. There was also a challenge to the finding that the appellant had worked in the UK prior to his imprisonment and that it was not clear what evidence had been assessed in coming to this conclusion. The article 8 assessment was challenged on the basis that there had not been a proper consideration of the seriousness of the offence.

13. Permission to appeal was granted by the Upper Tribunal for the following reasons:

> "It is arguable that the First-tier Tribunal has failed to make a finding on whether the appellant had permanent residence and if so on what basis and thus has failed to identify the level of protection afforded to the appellant in determining his appeal against deportation as an EU national."

14. At the hearing before me Mr Tarlow relied on the grounds repeating the argument that no finding had been made on the level of protection the appellant fell under. He further submitted that the evidence of the appellant's employment was unclear and insufficient to justify the Tribunal's findings. The evidence had been set out but when analysed there was very little of substance available to the Tribunal. The appellant had committed a very serious offence and been sentenced to a period of 5 years 4 months imprisonment. The public interest arguments had not been properly assessed but minimised by the Tribunal using such phrases as "an unfortunate error of judgement [65]." This did not indicate that the necessary balancing of the competing interests had been properly taken into account.

15. Mr Harding submitted that the basis of the grant of the permission was ill founded. It had never been a part of the appellant's case that he had enhanced protection under either reg 21(3) or (4). The Tribunal had made a clear finding of fact [65] that the appellant did not represent a genuine, present and sufficiently serious threat. This was a decision properly open to the Tribunal on the evidence and in the light of that finding the Tribunal had not erred in law by allowing the appeal. In so far as it was open to the respondent to rely on the other grounds, these amounted to a disagreement with findings properly open to the Tribunal. It had made it clear that it was not minimising the offence, the facts of which were clear from the OASYs report which had concluded that the risks of re-offending were low. That view was supported by the assessment of the appellant's probation officer.

<u>Assessment of whether the First-tier Tribunal erred in law</u>

16. The issue for me at this stage of the hearing is whether the First–tier Tribunal erred in law such that its decision should be set aside. The ground for granting permission by the Upper Tribunal relates solely to the issue of the failure of the First-tier Tribunal to make a finding on whether the appellant had permanent residence and so to identify the level of protection afforded to him against deportation as an EU national. It is not in dispute that a decision to remove an EEA national must be made on the grounds of public policy, public security or public health but if the decision is taken in respect of someone with a permanent right of residence, it can only be on serious grounds of public policy or public health whereas a decision may not be taken except on imperative grounds of public security in respect of an EEA national who has resided in the UK for a continuous period of at least 10 years prior to the relevant decision.

17. In the present appeal the appellant has not sought to argue that he is entitled to enhanced protection. There is nothing in the decision of the First-tier Tribunal to indicate that any such argument was made and indeed at [4] the Tribunal noted that the respondent had not accepted that the appellant had acquired permanent residence under reg 15. There is also nothing to indicate that the appellant made any such submission at the hearing and Mr Harding who represented him before the First-tier Tribunal confirmed this was the case.

18. I am therefore not satisfied that the Tribunal erred in law in this respect. There is no basis for believing that the Tribunal proceeded on any misunderstanding of the level of protection sought by the appellant. It had to consider whether he should be removed on the basis of the grounds of public policy or public security and to take into account the factors set out in reg 21(5) and (6). These provide inter alia that the decision must be based exclusively on the personal conduct of the person concerned which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interest of society and that matters isolated from the particulars of the case which relate to considerations of general prevention do not justify the decision.

19. It is clear from the Tribunal’s decision that it carefully recorded and assessed the evidence. It was entitled to find that the appellant, his wife and son had given evidence which was straight forward and truthful. Standing by themselves the use of the phrases “unfortunate error of judgement” and “unfortunate commission of the offence” might indicate that the panel had not appreciated the seriousness of the offence but they must be read in the context of the decision as a whole and are off-set by the references to the length of the period of imprisonment and to the fact that the appellant had been involved in serious criminal offending.

20. So far as the other grounds are concerned, leaving aside whether the respondent is entitled to pursue them in the light of the terms of the grant, I am not satisfied that they disclose any error of law. There is no reason to believe that the Tribunal did not take the seriousness of the offences into account. When reaching its decision the Tribunal was entitled to take account of the fact that the appellant accepted responsibility and regretted his actions and to this extent was attempting to reintegrate into society. There was little, if anything in the evidence to support an argument that he would have a better prospect of integrating or rehabilitating himself in Italy or Brazil. So far as the issue of whether the appellant had been working prior to his imprisonment that was an issue of fact where the Tribunal reached a decision properly open to it.

21. There is no substance in the grounds seeking to challenge the article 8 assessment which in the circumstance of this appeal adds little, if anything, to the decision under the EEA regulations which in any event substantially incorporate all that is required in respect of the right to respect for private and family life: it is provided by reg 21(5)(a) that the decision must comply with the principle of proportionality and all the

factors normally relevant to an assessment of proportionality are set out in reg 21(6).

22. There is no doubt that this was a very serious offence where deportation would be the likely outcome if the matter was assessed under the immigration rules but so far as EEA nationals are concerned the issue of deportation must be assessed under the separate appellate regime of the EEA regulations. This Tribunal has done and has reached a decision properly open to it.

Decision

23. The First-tier Tribunal did not err in law and accordingly its decision stands.

Signed Date 20 January 2015

Upper Tribunal Judge Latter