**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA000412016

**THE IMMIGRATION ACTS**

| **Heard at Glasgow** | **Determination issued** |
|---|---|
| **on 18 May 2017** | **on 22 May 2017** |

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**RICARDO FERREIRA SOBRAL MESQUITA**

Appellant

**and**

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

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Bruce Short, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The respondent made a deportation order against the appellant under the Immigration (EEA) Regulations 2006 for reasons explained in a notice dated 15 January 2016.

2. FtT Judge D H Clapham dismissed the appellant's appeal for reasons explained in her decision promulgated on 2 November 2016.

3. The appellant sought permission to appeal to the UT on rather lengthy grounds which, lightly edited and shorn of most citations, are as follows:

> **Ground 1: failing to act in a fair manner**. The judge erred in law at paragraph 5 in refusing an adjournment:
>
> (a) as where an adjournment is sought to enable an appellant to produce corroborating evidence (a psychologist's report on the effect deportation would have on the stepchildren whom he still saw) it

is wrong for the tribunal to refuse on the ground that the appellant's witness is capable of giving evidence on that issue, given that the very purpose of obtaining evidence is to support the appellant's position and in particular that it was not proportionate to deport him;

(b) when refusing the adjournment to allow the appellant to obtain a psychologist's report, which would have commented on the psychological impact of his deportation stepchildren, and thereafter the same time rejected the appellant's witness evidence.

**Ground 2: errors when assessing the appellant's residence in the UK**. The judge erred at paragraph 88 for the following reasons:

(a) the judge appears to reject the qualification for residency on the basis that the appellant was a student for 2 years between 2004 - 2006. The judge says she cannot see that the appellant was a jobseeker within that period since he requires to show that he was seeking employment and had a genuine chance of being employed. This finding is not supported by the evidence; or the judge has failed anxious scrutiny; as HMRC records demonstrate that he was a jobseeker and was working and was a qualified person (see P6, 7, 18, 20, 22, 28, 30, 40, 84, 91, 92, 96) … *Yusuf* (EEA – ceasing to be a jobseeker; effect) [2015] UKUT 00433;

(b) the judge appears to have placed reliance on the fact that HMRC records document very short periods of employment. The fact that periods of employment are very short does not disqualify the appellant from being a qualified person; *Yusuf;*

(c) the judge erred in finding that the periods do not amount to a continuous period of 5 years as that finding is not supported by the evidence. At least from 2002 – 2007 HMRC records show that the appellant was a qualified person. His first conviction was not until 3 November 2008. The judge ought to have found that the appellant had permanent residency. That has a material bearing as it could not be said that there were serious grounds for deporting the appellant. The offences of which he was convicted are insufficient to merit such a finding. They did not fall into the category of offences that would establish serious grounds and did not carry a maximum penalty of 10 years imprisonment;

(d) the judge erred in light of the foregoing grounds as having accrued 10 years residency in light of the evidence … the appellant benefited from the highest form of protection and it could not be said that there were imperative grounds for deporting him.

**Ground 3: error by failing to make any assessment of whether the appellant is a genuine, present and sufficiently serious threat**. The judge made no findings on the foregoing but simply went on to assess proportionality. It could not be said the appellant was a genuine, present and sufficiently serious threat. The most serious conviction was a period of 4 months' imprisonment (2011). His convictions were over a sporadic period of time and were for lesser minor offences. It could not be said that he was a present, genuine and sufficiently serious threat.

**Ground 4: errors when assessing the evidence of the witnesses**. The judge erred for the following reasons:

(a) the judge finds that the evidence of the appellant's previous partner was not particularly compelling. An explanation is given at paragraph 92 but no specific reasons. This is material as the witness spoke to the serious medical difficulties of her children, one of whom would relate only to the appellant. She spoke to the traumatic effect it would have on her and the children were the appellant to be deported

(b) the findings that the couple have had an on-off relationship and the appellant has dotted in and out of their lives is not supported by the evidence [under reference to witness statements];

(c) the judge finds the appellant's evidence self-serving in relation to his peak previous partner and stepchildren at paragraph 93. To the extent that evidence may be regarded as "self-serving" cannot in any sense be said to be a reason for marginalising it;

(d) the judge finds scant evidence of any ongoing relationship between the appellant and his children. However, the judge had the evidence of the appellant, his previous partner and another witness. Such a finding is not supported by the evidence;

(e) the judge failed to resolve a contradictory finding material to the outcome. At paragraph 92 the judge found scant evidence of an ongoing relationship between the appellant and his children. However, at paragraph 95 the judge found no doubt the appellant had a bond with his children.

**Ground 5: error assessing proportionality**. The judge erred for the following reasons:

(a) the judge failed to assess all relevant factors or failed to exercise anxious scrutiny. Namely the appellant's previous partner's evidence that she made plans for him to stay with her the children, she looked into him getting into charity work, she would ensure that he continues to get help for his depression for which he was now receiving medication;

(b) the judge failed to assess whether the appellant has rehabilitated himself and if so whether it is still proportionate to return him;

(c) If it is said that the judge did find the appellant to be a genuine, present and sufficiently serious threat, the judge failed to assess whether prospects for rehabilitation are better than UK as opposed to Portugal. The judge is under a duty to undertake such an assessment whether or not raised by the appellant. On the evidence, prospects were better in the UK where the appellant's former partner and stepchildren are living, the appellant can live with them, he has undertaken courses, he has been in employment, and has not committed any further offences since his release.

**Ground 6, error assessing section 117C of the 2002 Act**.

The evidence demonstrated … a genuine and subsisting *de facto* parental relationship with his stepchildren. In light of the evidence narrated above the judge ought to have held that deportation would be unduly harsh on the stepchildren.

4. Permission was granted by UT Judge Blum in these terms:

It is, at this stage, arguable that the judge did not fully consider the evidence at P of the main inventory when concluding that the appellant had not achieved permanent residence despite being a student without comprehensive health insurance. The evidence in P may indicate that the appellant was a jobseeker for short periods during 2004 and 2006 (and potentially prior to the introduction of the regulations on 30 April 2006) which may render him a qualified person even though he also studied. HMRC document may indicate that the appellant was registered as a jobseeker but also had various short-term jobs from 2002 onwards.

Albeit with some reluctance, it is also arguable that the judge failed to make a finding as to whether the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, despite reference to the appellant's offending at ¶91.

There is little merit in the remaining grounds. The judge was entitled to refuse the adjournment given the lack of a timeframe for the psychological report. I note that the appellant would have been aware of the need for a report since the refusal of his application January 2016. In light of the various sentences of imprisonment in 2011, 2012 and 2015 which in principle interrupted continuity of residence it is not arguable that the judge erred in concluding that the appellant was not entitled to the highest level of protection. The judge noted that the appellant failed to engage in any

rehabilitation programmes at ¶91. The judge was entitled to her assessment of the witnesses and of the appellant's relationship with his children and partner for the reasons given at ¶92 and 93.

5. The respondent filed a rule 24 response to the grant of permission:

> Permission is granted primarily on the basis that the tribunal may have erred in assessment of the qualifying period. The author of this reply does not have access to relevant documentation. However, the tribunal noted at ¶88 that there were significant deficiencies in the evidence adduced to corroborate employment status, some of which the appellant could not explain. The judge considers that at best the appellant was employed for a number of temporary periods. It is not clear from the grounds how the appellant would have retained worker status. The judge rejects the assertion that the appellant was a jobseeker. He did not have comprehensive medical insurance during his period of education. The respondent maintains that rejection of permanent residence was open to the tribunal.
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> With regard to paragraph of the grant of permission … it is apparent from the appellant's history set out at ¶2 that he is a recidivist criminal. The judge having heard the oral evidence and considered the documentation found at ¶91 that the appellant had not reformed and sought to minimise his offending. This is framed [within the] proportionality assessment but it is clear that such an assessment would not be relevant had the tribunal found the appellant did not pose a genuine threat.
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> The tribunal's findings at ¶91 - 95 demonstrate acceptance that the appellant has shown flagrant disregard for law and has not learnt from his mistakes … an entirely sustainable finding that the appellant continues to represent a genuine and present threat in the factual matrix of this appeal.
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> As to the remaining grounds UT Judge Blum found little merit in the application. The judge considered the adjournment request at ¶5 and provided cogent reasons for rejecting it given the lack of an of a [definable] timeframe, the availability of the children's mother at the hearing, and the appellant having had ample opportunity to acquire evidence.

6. Mr Matthews conceded that the decision makes no specific finding on whether the appellant represents "a genuine, present and sufficiently serious threat" in terms of the regulations. It was undesirable for that to be left as a matter of inference. On the grounds going to whether the appellant had established a right of permanent residence, he had sympathy with the judge, who did not appear to have been given a clear picture of the appellant's case, but there was something in the criticism of failing to consider the evidence. It was not entirely clear how far the grant of permission extended, but in any event the other grounds were of little force. However, the two main points were enough to require a remit to the FtT. A direction should be attached for the appellant to provide a chronology, a schedule of references to the evidence, and a submission on the period and legal nature of his residence in the UK.

7. Mr Winter said that the appellant was agreeable to the outcome proposed and the direction sought. He said there had been a skeleton argument outlining the case to the FtT.

8. The respondent's concession was fairly and correctly made. I also share the view that apart from two points, the grounds are only extended disagreement. In view of the concession, there was no need to delve further into the case put to the FtT.

9. I indicated that the case would be resolved as agreed, and as follows.

10. The decision of the FtT is **set aside**. None of its findings are to stand, other than as a record of what was said at the hearing.

11. The nature of the case is such that it is appropriate in terms of section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 to **remit the case to the FtT** for an entirely fresh hearing.

12. The member(s) of the FtT chosen to consider the case are not to include Judge D H Clapham.

13. The appellant is to file with the FtT and copy to the respondent not less than 14 days before the next hearing (a) a chronology of his time spent in the UK, showing periods spent in employment, as a jobseeker, as a student, in prison, or otherwise, referenced to the supporting evidence, and (b) a submission on the legal nature and effect of his residence, citing relevant regulations and case law.

14. No anonymity direction has been requested or made.

18 May 2017
Upper Tribunal Judge Macleman