



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00542/2016

**THE IMMIGRATION ACTS**

Heard at Liverpool  
On 15 August 2017

Decision & Reasons Promulgated  
On 17 August 2017

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SILVERIA COSTA DA FREITAS

Respondent

**Representation:**

For the Appellant: Mr C Bates, a Senior Home Office Presenting Officer

For the Respondent: In person

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against the Secretary of State's decision to make a deportation order. The claimant is a citizen of Portugal and the Immigration (European Economic Area) Regulations 2006 therefore apply to her removal.
2. The claimant was born in 1970 and claims to have lived in the United Kingdom since 1999. On 8 October 1998, she was convicted in the Jersey Magistrates' Court of 3 counts of importing controlled drugs resulted in the claimant being bound over for 6 months to attend a drug awareness course, put on probation for a year, and

sentenced to 50 hours of community service and the confiscation of the drugs in question. All of these orders were revoked in December 1998 when the sentence was varied.

3. The Secretary of State's decision to remove the claimant was taken on 30 June 2015 on the basis of her conviction for an offence committed in Toxteth in December 2014. On 6 May 2015, the claimant was convicted at Liverpool Crown Court on charges of robbery and possession of imitation firearms with intent to cause fear of violence, and sentenced to 3 years' imprisonment, to run concurrently. The judge's sentencing remarks reflect a reduction in sentence for an early guilty plea, and the claimant's previous good character and lack of convictions. The claimant did not appeal against either conviction or sentence. For immigration purposes her conviction will never be spent.

### **First-tier Tribunal decision**

4. The appeal was heard by First-tier Tribunal Judge McCarthy who allowed the appeal. He accepted that this claimant has been in a durable relationship with a Portuguese man, also an EEA national, since at least 1999 and that her partner has been exercising Treaty rights in the United Kingdom since 2006. The couple have 3 children, born 20 August 2000, 16 October 2003, and 16 December 2009, all of whom are Portuguese citizens but have spent all of their lives in the United Kingdom. The eldest child is now 17, the middle one is 14, and the youngest is 8 years old.
5. The judge treated the claimant as a family member of her Portuguese partner, within the meaning of Regulation 21(3) of the 2006 Regulations and gave weight to her personal and family circumstances, as Regulation 21(6) requires. He found that the claimant's removal would be disproportionate, that the claimant no longer posed a medium risk to the public and known adults, and that any risk she did pose was much reduced because she had support structures in place and was no longer dependent on drugs or methadone, such that she now posed a low risk of reoffending. The judge held that the claimant's personal conduct no longer posed a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and that her deportation would be disproportionate.

### **Appeal to the Upper Tribunal**

6. The Secretary of State appealed. She argued that the claimant was not the family member of her partner since she had never held a valid EEA family permit, registration certificate or residence card, as Regulation 7(3) of the 2006 Regulations required. For that reason, she could not progress to permanent residence status after 5 years in the United Kingdom. As regards the claimant's link with her partner, the Secretary of State argued that the claimant could not rely on the relationship to give her permanent residence since she had not sought a residence card as his partner and the grant of a residence card was subject to the exercise of the Secretary of State's discretion under Regulation 17(4) of the 2006 Regulations.

7. It did not appear that the claimant had ever been a qualified person in her own right. The Secretary of State accepted that the removal of the Regulation 19(3) protection might not make a material difference to the outcome of the appeal but could do so were she to re-offend in future. There was a public interest in the correct decision being maintained.
8. Permission to appeal was granted on the basis that there was a public interest in the correct decision being maintained, despite the likelihood that Regulation 19(3) protection would not affect the outcome.
9. The claimant, who represents herself, did not file a Rule 24 Reply to the grant of permission.

**Regulation 7: EEA family members**

10. The definition of EEA family member is at Regulation 7 of the 2006 Regulations:

**“Family member**

7.–(1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –

- (a) his spouse or his civil partner; ...
- (d) a person who is to be treated as the family member of that other person under paragraph (3). ...

(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked. “

11. This claimant cannot qualify as a family member under that provision. She has never held an EEA family permit, registration certificate or residence card. The grant of a residence card is discretionary (*Sala* (EFMs: Right of Appeal : Albania) [2016] UKUT 411 (IAC)) and therefore the claimant cannot show that she has been living in the United Kingdom in accordance with the Regulations for any period.

**Regulation 19(3) and Regulation 21**

12. The removal regime under the Regulations is set out in Regulations 19(3) and 21. By Regulation 19(3):

19.–... (3) Subject to paragraphs (4) and (5), a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if –

- (a) he does not have or ceases to have a right to reside under these Regulations; or
- (b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21."

The exceptions in sub-paragraphs 19(4) and (5) are not applicable to this claimant.

13. Regulation 21 sets out the basis on which removal decisions may be made:

**"Decisions taken on public policy, public security and public health grounds**

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. ...

(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."

14. That is the statutory basis on which this application must be considered.

### **Upper Tribunal hearing**

15. At the Upper Tribunal hearing, Mr Bates for the respondent did not challenge the judge's findings of fact but argued that nevertheless, the incorrect 'serious grounds' threshold had been applied and that such a finding would be important, if the claimant were to offend again.
16. I reserved my decision, which I now give.

### **Discussion**

17. It is clear that the claimant cannot demonstrate 5 years' residence in accordance with the Regulations, as it is not her case that she has worked for 5 years or that she has ever held a document enabling her to be treated as a family member pursuant to Regulation 7(3) of the 2006 Regulations. Only the basic level of protection therefore applies to this claimant.
18. Pursuant to Regulation 21 of the Regulations, a decision to deport an EEA national is a 'relevant decision' and the Secretary of State may make such a decision only on the grounds of public policy, public security or public health. This decision was made on that basis.
19. The respondent is not entitled to rely solely on the claimant's conviction, in reaching a decision on this application. The judge's finding that the claimant now poses a low risk to the public, based on her present circumstances, is not challenged. Nor is there any challenge to his finding that her removal would be disproportionate.
20. On the basis of those findings, it is appropriate to remake the decision in this appeal in the claimant's favour.

### **Conclusions**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision. I re-make the decision in the appeal by allowing it.

Signed: *Judith A J C Gleeson*  
Upper Tribunal Judge Gleeson

Date: 16 August 2017