Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00073/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 June 2017	**On 28 June 2017**

Before

UPPER TRIBUNAL JUDGE SOUTHERN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOAO CARLOS SERODID SOARES

Respondent

Representation:

For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the Respondent: In Person

DECISION

1. The Secretary of State for the Home Department has been granted permission to appeal against the decision of First-tier Tribunal Judge Mayall who, by a determination promulgated on 2 May 2017, allowed Mr Soares' appeal against a decision that he should be deported from the United Kingdom. Mr Soares is a citizen of Portugal and the decision that he was to be removed was taken pursuant to Regulation 19(3)(B) of the Immigration (EEA) Regulations 2006 ("the 2006 Regs").

2. Although this means that it is the Secretary of State who is the appellant before the Upper Tribunal, as it will be necessary to reproduce extracts from the decision of the First-tier Tribunal Judge, it is convenient to refer to the parties as they were before the First-tier Tribunal.

3. Mr Soares arrived in the United Kingdom in June 2001. It was not long after that, in June 2003, that he began accumulating a criminal record. On that occasion, he was cautioned for possession a controlled drug of Class B. His first conviction, for attempted theft, followed in November 2003. Since then, he has accumulated a long list of 57 criminal offences, resulting in convictions on 34 occasions. Those offences include for possessing Class A drugs, assault, going equipped for theft, criminal damage and burglary of a dwelling house. He also has been convicted on a number of occasions of failing to appear at court after having been granted bail and has breached community orders and has offended while being subject to both community orders and suspended sentences of imprisonment. He has been sentenced to terms of imprisonment, either suspended or immediate, on no fewer than thirteen occasions. It is evident that these offences, mostly of an acquisitive nature, have generally been committed to enable Mr Soares to fund his drug habit.

4. The respondent concluded that the appellant's conduct, taken together with his record of prolific offending and the nature of that offending, meant that he was likely to reoffend in the future so that he posed a genuine, present and sufficiently serious threat so that his deportation was justified under regulation 21 of the 2006 Regs. The respondent concluded also that the decision to deport the appellant was proportionate, in terms of Reg 21(5).

5. The appellant gave oral evidence before the First-tier Tribunal. The judge recorded that:

> "He said that he was now off drugs. He had been on a methadone prescription in detention but he was now off that as well. He would not commit any further offences. He said that in 2016 he had lost his job and had gone back to drugs."

   The judge heard evidence from the appellant's mother who also said that the appellant's convictions "were because of drugs".

6. Next, the judge set out a summary of the appellant's record of convictions and made clear that he had regard to the OASyS report:

> "This is a detailed report. It sets out his personal history and his list of convictions. The overall assessment was that he was of medium risk in the community to the general public and to known adult. The known adult was his partner and any future partners due to domestic violence offences. However his record suggested a low likelihood of violent reconviction. His scores represented a very high likelihood of general offending within a 24 month period. This was likely to be in the context of acquisitive crime."

7. In order to make his assessment of risk in the context of the 2006 Regs, the judge considered the evidence before him to reach a conclusion as to whether or not the appellant had established a right to permanent residence by residing for a continuous period of five years in accordance

with the 2006 Regs. The judge found that the appellant had indeed achieved that, so that he enjoyed an enhanced level of protection against removal in that he could be removed only if there were serious grounds of public policy or public security. The respondent has been granted permission to appeal on the basis that the judge fell into legal error in making that finding of fact because, on the evidence and on the basis of the position as the judge found it to be, the appellant had not in fact established that he had resided in the United Kingdom in accordance with the 2006 Regs for any continuous period of five years.

8. Alternatively, even if, which the respondent does not accept, the judge was entitled to find that the serious grounds test was the applicable one, on the facts of this case the respondent asserts that it was not reasonably open to the judge to conclude otherwise than that the appellant represented a very high risk of committing further offences. There was, according to the respondent, no evidence before the judge to support the bare assertion of the appellant that he had successfully addressed his drug problem or done anything to address his other offending behaviour. His evidence, recorded by the judge, that "he never hurt anyone" shows no insight into his offending behaviour, given that he has been convicted of offences of assault and burglary. The respondent submits also that the judge was wrong to rely upon the appellant's evidence to be in a relationship with his child, since the OASyS report records the appellant's confirmation that he has not had any contact with his child since 2007.

9. It is clear that the judge did indeed fall into error in his assessment of the appellant's evidence of having established five years' continuous residence in accordance with the 2006 Regs. The appellant asserted, and the judge found, that he had been exercising Treaty rights, and so living in the United Kingdom in accordance with the 2006 Regs, by working for a continuous period of five years. At paragraph 62 of his decision the judge said this:

> "He gave a detailed account of his employment. In particular he gave a detailed account of his employment from July 2001, when he started to work in hotels, until November 2008 when he worked at the Home Office building. He produced payslips in support of that assertion. Apart from short gaps between employments of no more than 4 or 5 months he was continuously employed. He claims that from 2008 to 2013 he worked as a labourer. He was not challenged in cross examination about this. Nor was he challenged about his later employment as a postal worker and at Sainsbury's.
>
> In the circumstances I accept his employment history as he has outlined.
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> Thus I am satisfied that by November 2008 at the latest he had been residing in the UK in accordance with the Regulations for a continuous period of 5 years. He had thus acquired the right to Permanent Residence …"

10. The difficulty with this reasoning is that the appellant had not established that he had been exercising Treaty rights by working throughout a continuous period of five years ending in November 2008. It was not necessary for the respondent to challenge his account of his pattern of work because on the appellant's own account he had not worked continuously throughout the relevant period. The fact that he was not working for a period of some five months was sufficient to punctuate the continuity of him doing so and that break in continuity cannot simply be swept aside and ignored. Of course, it may or may not be that during the period of five months or so when the appellant was not working he was exercising Treaty rights in some other way but as the judge did not explore that possibility and as the appellant himself did not make any attempt to address that issue we simply do not know that to be the case.

11. I cannot regard that error to be one that is not material because the judge went on to explain why, despite having been resident in the United Kingdom since June 2001 the appellant did not qualify for the highest level of protection against removal. Therefore, in determining the appeal on the basis that serious grounds were required, the judge applied the wrong level of protection to which the appellant was entitled. Given the nature of the respondent's case as it was advanced before the judge, as summarised above in the respondent's grounds in the alternative to the primary submission that the appellant enjoyed only the basic and lowest level of protection against removal, it simply cannot be assumed that the outcome would have been the same had the judge applied the 2006 Regulations correctly.

12. I have considered carefully what the judge said at paragraph 74 of his determination:

> "I should add this. Had I been satisfied that the risk posed by this appellant did amount to such serious grounds of public policy as would permit deportation under the Regulations I would not have been satisfied that it met the requirements of proportionality."

However, I am unable to interpret this observation as providing support for a conclusion that the error of the judge in applying the "serious grounds" level of protection was not a material one. That is because the assessment of proportionality must be informed by the level of protection from removal to which the appellant is entitled.

13. For these reasons the decision of the judge to allow this appeal cannot stand and will be set aside. Upon hearing from the appellant, who acts in person and who had not appreciated that he might have been called upon to present his case immediately so that the decision on his appeal might be remade, I had no doubt that he was not in a position to do so. It is his case that he may well be able to address the evidential gap concerning the period during which he claims to have been living in accordance with the Regulations, although he was not presently equipped to demonstrate that. He recognises also that the issue that is likely to be determinative of the outcome of this appeal is whether or not

he can demonstrate to the satisfaction of the Tribunal that he no longer uses controlled drugs and so has no reason to commit further offences to fund a drug habit. It may be that his own bare assertion of that fact will not be sufficient and that he will need to provide some form of independent evidence. Those are matters for him to consider and if he wishes to assemble such evidence he should begin to do so without delay and ensure that it is served upon the respondent before the hearing that is to follow.

14. In all the circumstances, as it is clear that the appellant's case is that his present circumstances are fundamentally different from how they were at the date of the decision under challenge, a good deal of fresh evidence will need to be received and considered as to the appellant's current circumstances, I am satisfied that this appeal should be remitted to the First-tier Tribunal to be determined afresh.

Summary of decision:

(i) The Judge of the First-tier Tribunal made a material error of law error of law and his decision shall be set aside.

(ii) The appeal to the Upper Tribunal is allowed to the extent that the appeal is remitted to the First-tier Tribunal to be determined afresh.

Signed 

Upper Tribunal Judge Southern

Date: 27 June 2017