Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00614/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 1 February 2018	**On 1 March 2018**

Before

UPPER TRIBUNAL JUDGE LORD BOYD
UPPER TRIBUNAL JUDGE JORDAN

Between

MR LISANDRO MANUEL BENTO DA SILVA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Ward, Counsel, instructed by Duncan Lewis Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION ON FINDING AN ERROR OF LAW

1. The appellant appeals against the determination of First-tier Tribunal Judge Devittie promulgated on 2 August 2016 in which he dealt with the claim as to whether an EEA national should be removed as a result of criminal misconduct. The issue before him was the application of Regulation 21 of the Immigration (European Economic Area) Regulations 2006 (2006 No 1003). Unfortunately, that Regulation was not contained in the determination and, had it been, it may have been that the judge would

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have been reminded of the various stages that required consideration. Regulation 21 provides:-

> (1) In this Regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> …
>
> (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.
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—
>
> (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision."

2. The relevant decision was made on 3 December 2015 and the enquiry therefore required the judge to consider first of all whether the appellant had acquired a permanent right of residence. That is determined by Regulation 15 of the 2006 Regulations. Secondly, whether he had resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision. The First-tier Tribunal Judge considered the question of whether he had permanent right of residence and decided in paragraph 16 of his determination as follows:-

> "I consider therefore that I am bound to accept that the appellant has lived in the UK in accordance with the EEA regulations (as a student) for a period beyond 5 years and has therefore acquired the right to permanent residence. In accordance with the EEA regulations therefore his deportation must be justified on serious grounds of public policy"

3. Unfortunately that was a misreading of the student provisions. A student is defined in Regulation 4 as a person who is not simply enrolled at a course of study but also has comprehensive sickness insurance cover in the United Kingdom. It is highly unlikely that this appellant had such insurance and there was no evidence one way or the other to that effect.

4. Instead the consideration ought to have been directed towards whether he was the dependant of his mother and whether the mother was exercising Treaty rights during the relevant period such as to give him a permanent right of residence.

5. Thereafter the judge had to consider the somewhat nuanced consideration of the impact of criminal misconduct on the ten years of residence in the United Kingdom. It has to be pointed out that, once he has acquired a permanent right of residence, he only then needs to establish a further five years presence in the United Kingdom to qualify for the ten years protection, the 'imperative grounds'. However that is subject to decisions on how imprisonment will have the effect of severing the relevant period. See the judgments of the Court of Justice in *Onuekwere* [2014] EUECJ C-378/12 and *Secretary of State for the Home Department v MG* [2014] EUECJ C-400/12.

6. The period with which we are concerned is a period which spans from 3 December 2005 to 3 December 2015. During that period there were a number of convictions albeit convictions which only resulted in a short period of imprisonment.

7. Consequently the judge was wrong (as far as we can tell) in his assessment of the appellant having acquired a permanent right of residence and was also wrong not to consider the apparent position that he had resided in the United Kingdom for a period of at least ten years prior to the relevant decision. By failing to conduct those enquiries, we are satisfied there is a material error of law.

8. We should say at this stage that there have to be quite fundamental findings of fact in relation to the relevant requirements of the 2006 Regulations as well as findings made to the extent of his becoming involved in life in the United Kingdom and the impact of his removal to Portugal. He arrived at the age of 5 and has therefore spent very little time in Portugal.

9. In these circumstances we consider that the appropriate forum for the re-making of the decision is the First-tier Tribunal and the appeal will be remitted to be heard afresh by the First-tier Tribunal.

DECISION

1. The determination of the First-tier Tribunal Judge contains an error of law and is set aside.

2. The re-making of the decision is to take place in the First-tier Tribunal.

No anonymity direction is made.

Dated 23 February 2018

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL