



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00331/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 12 February 2019**

**Decision & Reasons
Promulgated
On 19 February 2019**

Before

**THE HONOURABLE MR JUSTICE WAKSMAN
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PERKINS**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MARCIO CORREIA PESTANA

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr M C Pestana in person

DECISION AND REASONS

This is an appeal brought by the Secretary of State against a decision of the First-tier Tribunal which allowed the appeal of Mr Pestana, a Portuguese national, against a decision to deport him following his conviction in 2017 of an assault which took place in 2014. It is subject to the Immigration (European Economic Area) Regulations 2016.

Although the class of offence was at the lower end of the spectrum, being an offence of assaulting occasioning actual bodily harm, it is clear from the sentencing judge that he regarded this, as he described it, as a "horrible offence" and one of the victims was left with eye problems for some time. Mr Pestana was sentenced to twelve months' imprisonment and he served six months of that, after which he went into immigration detention. There were some other matters which were of different character back in 2000.

It is clear that the relevant test so far as the putative deportation of Mr Pestana is concerned, as it is in almost all cases under the EEA Regulations, includes finding "that the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". The judge noted, as is still the case, that Mr Pestana denies having committed this offence. Mr Pestana tells us that it is not likely that he will be able to prove his innocence easily, simply because of his financial position.

The judge, having noted that, and having set out the test that I have referred to, then said in paragraph 9 that: "Recent cases have shown the threshold to be relatively high and reserved for offences involving terrorism." We agree with the submissions of the Secretary of State that that is imposing far too high a test and is not equivalent wording to that which is set out in Regulation 21(5) (c), which I have recited. On that basis alone, it seems to us that the First-tier Judge has proceeded on the wrong basis. It is, at best, a misdescription of the "imperative grounds" test that applies to people who have resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision.

There is a second problem with the Decisions and Reasons as well, which is that the judge in paragraph 12 said that the incident involved him being a willing tool of another but was not a random attack but rather an incident involving someone they both knew. We see the force of the Secretary of State's submission that it is difficult to see how here, the fact that such an assault on someone they knew, rather than someone they did not, in any way lessens the seriousness of the matter.

For those reasons we consider that the grounds of appeal are made out and we allow the appeal.

The question is then what should be done next. The Secretary of State says that on the basis of the more modest test applicable, it is plain that it is made out. They rely upon the fact that Mr Pestana has got himself into trouble when drunk. It appears even that he was drunk and was unable to attend his own hearing before the First-tier Tribunal a few months ago he has tried to make

somewhat light of that today. The core submission therefore is that if he finds himself drunk and in particular circumstances he may well be disposed to commit the same kind of act that he did in 2014.

While we can understand why the Secretary of State says that, having heard Mr Pestana today, taking account of the fact that there appears to have been no further problems, and taking account of the fact that he might in fact be able to show sufficient evidence to establish 5 year's lawful residence here, although the judge ultimately took the view that this was not established before him, we are of the clear view that what must happen here is that Mr Pestana's appeal must go back to the First-tier Tribunal for a rehearing. This will allow the evidence to be viewed within the prism of the correct test which we have identified.

UPPER TRIBUNAL JUDGE PERKINS

I agree.

Notice of Decision

The appeal from the First-tier Tribunal is allowed. Its decision is set aside and the matter is remitted to the First-tier tribunal for fresh consideration.

Signed



Date 15 February 2019

Mr Justice Waksman