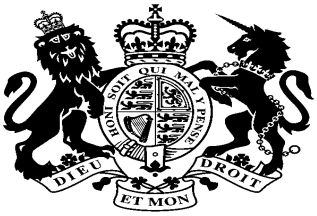

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00095/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th June 2018	**On 28th June 2018**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HA
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr Z Khan, of Counsel, instructed by Universal Solicitors

Introduction

1. The claimant is a citizen of Denmark born in 1975. His appeal against the decision of the Secretary of State to deport him to Denmark, pursuant to Regulation 19(3)(b) of the Immigration (EEA) Regulations 2006, as a result of a number of criminal convictions was allowed by First-tier Tribunal Judge I D Boyes in a determination promulgated on the 25th October 2017.

2. Permission to appeal was granted by Upper Tribunal Judge Jordan on 15th December 2017 on the basis that it was arguable that the First-tier judge had erred in law in finding that the claimant had permanent residence in the UK without sufficient evidence.

3. I found the First-tier Tribunal had erred in law for the reasons set out in the decision appended at Annex A. I now remake the appeal.

Evidence & Submissions – Remaking

4. The evidence of the claimant is that he was born in Kuwait City in Kuwait in January 1975, but moved to Denmark in 1995 and became a Danish citizen. He says he entered the UK in June 2010 and began working that month, and continued he was imprisoned in January 2017. He says that he came here after the break down of his marriage and alienation from his children, which was a traumatic experience for him. His father, Mr Z S J, arrived in the UK from Jordan as a refugee in 2011. He is very unwell with heart disease, having undergone a heart operation in 2011, and has kidney problems and is overweight. The claimant says he spends a lot of time with his UK based family, and particularly with his father. He says he lived with his father between 2011 and 2013, and then had his own flat but visited him everyday and sometimes slept over at his father's place from 2013 to January 2017. He was then in prison/ detention from January 2017 until two months ago when he was released on bail to his father's address. He says that he helps his father by taking him to medical appointments; translating for him; helping him to take his numerous medications; and doing shopping and cooking. His father was very alone whilst he was in prison, and he believes his health deteriorated as he did not access the health care he needed when he was alone.

5. The claimant accepts that he has two sisters and a brother in the UK, but says that they cannot help with his father as they are busy with their families, and his sisters particularly with their children. He was unclear if his father has any contact with Social Services, but if he does have it is only coming to check up on him every one to three months.

6. The claimant accepts that he has the criminal record as set out by the Secretary of State, and that he spent three weeks in prison with three weeks community pay back as a result of a 6 week sentence in January 2017, and three months in prison between June and September 2017 as a result of a sexual assault conviction for which he received a six month sentence, and that he is on the sex offender register until 2024. He says he had never had any criminal convictions in any country until 2015, and all of his crimes were committed in the period 2014 to 2016. He accepts that he did not plead guilty to the crimes, but now says that he was wrong and broke the law, and accepts that the offending has got more serious over time. His criminal convictions and imprisonment have been devastating for his family, and he has come to understand the negative impact on them and society and will not do anything against the law again. He does not believe his deportation would be lawful or compatible with human rights law. He is very remorseful and sorry for

his actions, and believes he will not reoffend. He accepts that he has not done any rehabilitative courses for anger management or other matters following his convictions but he was not offered these in prison as he was not in custody for a long period of time. He says he would consider doing these now.

7. The claimant says that he worked firstly for Al-Khayma Ltd as a waiter, an Arabic café on Harrow Road from June 2010 to June 2011. At this point the owner sold this café and he went to work for him at the new one, which was Al Malaki café on Goldhawk Road. He stayed in this employment until March 2012. At this point he worked as a van and worry driver for a number of fruit and vegetable stalls in Covent Garden market. His first employer was Premier Fruits in April 2012. He worked for them until February 2013, and then worked for Entremettier from March 2013 until August 2013. At this point he worked for Chef Connected until January 2014, accept for a brief two week period in December 2013 when he went back to work for Premier Fruits. In February 2014 he started to work for Medina Food Services where he stayed until April 2016. In April 2016 he became ill and was made redundant, he looked for other jobs and received employment support allowance until July 2016. Since July 2016 the claimant worked for Link Class London Ltd, until November 2016 at which point he started working for MG & Sons Wholesale Grocers, until he was imprisoned.

8. The claimant accepts that he only has payslips for his work with Al-Khayma and Al Malaki restaurants as there are no tax or national insurance records for this work. He says that he did have employment contracts but these were thrown away by his landlord when he could not pay his rent when he went into prison and then was held under Immigration Act powers in detention. His father went to his flat and managed to retrieve some of his documents, but not all of them. His father then gave the documents he managed to find to his solicitors.

9. Mr ZSJ, father of the claimant, attended the Tribunal and gave evidence. He says in summary that he is very close to the claimant and always has been. He is currently very unwell with kidney and heart problems, and also issues with his knees. The claimant has always been with him since he came to the UK and had his heart operation, and they are closer than they have ever been. He is very disappointed in the claimant's behaviour that led him to be sent to prison, but he believes that he has learned from his mistakes and should be forgiven, and be allowed to remain in the UK. If he were deported it would destroy him as the claimant is the one who cares for him by organising his medicines and ensures he attends all his different medical appointments. He also does his shopping and cleaning. He is sure that the claimant won't reoffend as he knows he regrets what he did, and he was imprisoned and detained for a whole year. He believes the claimant made mistakes but that he has changed. He believes his influence will also help him not to reoffend. The claimant is a hard-working person who works from 7am until the afternoon distributing vegetables.

10. Mr ZSJ accepts that his daughter BS did come and clean his home on Sundays when the claimant was in prison and detained, but she could only spare this amount of

time and he knows he missed medical appointments as interpreters rang him to tell him so. His other children (a daughter and a son) only manage to come and see him every two or three weeks. This daughter has three girls herself to care for and his son looks after his mother (from whom he is separated) who has had a stroke and is a disabled women. He did not believe he had any help from Social Services at the current time, or know what this would be, but he does see his GP every 21 days and his GP has said he does not need mobility care.

11. The Secretary of State argues that the claimant is not entitled to permanent residence as there is insufficient evidence to show he had worked for continuous period of five years prior to his imprisonment before January 2017. In particular it is noted that there are only payslips as evidence of working between 2010 and March 2013 and there is no National Insurance Record of HMRC evidence for this period. It is not accepted that there are no HMRC records going back more than five years. It is accepted that the claimant told the Probation Service he moved to the UK in 2010/2011, and said he moved to the UK in June 2010 on his "Additional Questionnaire", but he also had said that he lived in Denmark for 18 years in this questionnaire, which would have meant he moved to the UK in 2013 as he went to Denmark in 1995 at the age of 20 years.

12. It is argued that the claimant poses a genuine risk of serious harm to the public, and falls to be deported even if he has permanent residence, as he committed his most recent offence, a sexual assault for which he is on the sex offenders register until 2024, whilst he was under a suspended sentence for a previous offence and is on the sex offenders register until 2024 and on licence until September 2018. The claimant did not plead guilty and has shown no remorse for his actions. He shows an anti-social attitude to the public and community. His offending has become more serious over time. He has not shown any efforts at rehabilitation, and his offender manager notes that he needs to address behavioural skills, problem solving and temper control. He seems to lack understanding that he has committed the criminal offences and to be bemused by his convictions and prison sentences. Despite what is said about a low risk of reoffending in the OASys report it is not believable that he will not reoffend as the claimant has given no reason for this period of reoffending and so there is no reason why it would stop. It cannot be argued that the claimant's prospects of rehabilitation will be damaged by his deportation as he has not undertaken any rehabilitative work.

13. Whilst it may be that he is a good son who cares for his father the claimant's deportation would be proportionate as he has siblings in the UK, one of whom (BS) cared for their father whilst the claimant was in prison, and BS says that they are close family in her statement. The other siblings also visit their father every few weeks, and Social Services could be involved if needs be. The claimant could keep in contact with his UK family members through communication methods such as telephone, email and Skype. His family have not been shown to have any sufficient control over him to stop him reoffending in the past, and so would not do so in the future. It is also noted that the claimant has three children in Denmark, although he says he has no contact with them, so it cannot be said that he has no family there,

and he would be able to work to towards his rehabilitation in that country due to his past period of residence. His deportation is also said to be compliant with Article 8 ECHR and the domestic Immigration Rules on deportation. The appeal should therefore be dismissed.

14. The claimant submits that he holds permanent residence as he has been exercising Treaty rights as a worker for more than five years between June 2010 and January 2017. He claims that it is clear that there are national insurance and tax records to support his statement, and also other documents from March 2013 to January 2017. For the period April 2012 to April 2013, there is an amount of £74 of national insurance contributions recorded as having been paid. This only leaves the period January 2012 to March 2012 for which there are no tax and national insurance records, but it is contended this fits with the payslip evidence which shows the claimant did not earn enough to pay tax and national insurance during that time, and the other HMRC documentation shows that the claimant could be earning up to £107 a week without being liable to make such payments. As a result the claimant argues that he is a permanent resident, and thus may only be deported on serious grounds of public policy or public security.

15. The claimant argues that he does not pose a threat of re-offending, despite the OASys report which states that he is a medium risk of reoffending to the community, public and staff, as that report only assesses that he is a low risk of reoffending despite it being clear that he had been charged with the sexual assault at the time of writing of that report. It is argued that all of his period of offending took place prior to his being in prison/detained and that this has had the effect of meaning he will not reoffend, and he has also stated that he has realised the consequences of his behaviour and is willing to do courses to rehabilitate himself. The claimant also argues that he does not pose a sufficiently serious threat as the offences whilst unpleasant have all been minor. The claimant argues that his deportation would also not be proportionate as he has very close relationships with family members, particularly with his unwell father for whom he is the main carer, and he has no family or friends in Denmark. He is integrated in the UK as he speaks English, works, and has most of his family here.

16. At the end of the hearing I reserved my decision.

Conclusions – Remaking

1. The first issue for me to determine is whether the claimant has permanent residence in accordance with Regulation 15(1)(a) of the Immigration (EEA) Regulations 2006 and is thereby entitled to enhanced protection against deportation so he can only be deported if the Secretary of State can show serious grounds of public policy or public security. The burden of proof is on the claimant and he must prove his contention that he is entitled to permanent residence on the balance of probabilities. It was accepted by Mr Melvin and Mr Khan that the relevant five-year period was from January 2012 to January 2017.

2. National Insurance Records set out in the HMRC letter of 17th April 2018 indicate that the claimant was employed from April 2012 to April 2017, although the record is not complete for the year April 2012 to April 2013 indicated a level of earnings below £107 for part of that year. The tax records set out in the HMRC letter regarding Pay As You Earn and Self Assessment dated 11th June 2018 show records of the claimant working from March 2013 starting with the job with Entremettier Ltd through to work ending in April 2017.

3. On the basis of this evidence, which is supported by further documentation from the claimant, in the form of payslips, tax documents, job descriptions and terms and conditions documents, P60 and job-seekers allowance documents I am more than satisfied on the balance of probabilities that the claimant was a worker for the period April 2013 to January 2017.

4. The evidence for the period January 2012 to March 2013 is less complete. The claimant has said that he worked for the for the Al Malaki Café Ltd from June 2011 until March 2012 as a waiter for a Mr Kamran Naser working at 141 Goldhawk Road in Shepherds Bush, and then for Premier Fruits as a packer and van driver/deliverer of fresh fruits and vegetables at Covent Garden market from April 2012 to February 2013.

5. In terms of documentary evidence supporting the claimant's history there are payslips for Al Malaki Café Ltd from June 2011 until March 2012, which do show that no tax or national insurance was paid during this time and thus are consistent with the fact that the claimant has no tax or national insurance payment record during this period of time. The claimant could have lawfully earn up to £102 a week without being liable to pay tax or national insurance during this period. There is also a letter from the accountants of Al Malaki Ltd which states that the claimant had worked there from June 2011 until March 2012.

6. I acknowledge that the Secretary of State has suggested that the claimant may not even have been in the UK at this time based on a questionnaire he completed for them, but I find that he has been consistent in asserting that he entered the UK in June 2010, and consistent with his having been present for his father when he had his heart operation (which is supported by medical documents in the bundle) in November 2011. I am satisfied that the claimant gave honest testimony before me. He did not attempt to defend his criminal behaviour and has no convictions for dishonesty. I found that he lacked insight into his criminal behaviour as he could not explain why between 2014 and 2014 in middle age, with no particular or new difficulties, he had committed these wrongful acts but that he did not attempt to diminish the seriousness of what he had done and was sincere in his regret at having broken the law. On the basis of the complete evidence, witness evidence and supporting documents, I am satisfied on the balance of probabilities that the claimant worked for the Al Malaki café during the months of January 2012 to March 2012 as he has claimed.

7. With respect to the work for Premier Fruits between April 2012 and February 2013 the only supporting documentary evidence is the during this period 31 national insurance class 1 credits (which would indicate receipt of jobseekers allowance) were paid for the claimant in this tax year along with £74.32 of national insurance contributions which would indicate a period of time where the claimant worked and earned more than £107 a week and thus paid national insurance. Looking at the evidence as a whole, including the credible witness evidence of the claimant, I am satisfied, on the balance of probabilities that the claimant was also a worker during this period of time. As a result, the claimant may only, in accordance with Regulation 21(3) of the Immigration (EEA) Regulations 2006, be deported on serious grounds of public policy or public security.

8. The Secretary of State made a decision under Regulation 19(3)(b) of the Immigration (EEA) 2006 Regulations to deport the claimant on 31st January 2017 because he had been convicted on 3 occasions of 8 offences between 5th March 2015 and 11th January 2017. The offences were one offence against the person; one offence against property; one public order offence; three offences relating to the police/courts and prison; and two miscellaneous offences. As a result the claimant had received a community service order, a suspended sentence and a 6 week prison sentence in January 2017.

9. The index offence was one which took place in September 2016 where by the claimant was convicted of two counts of assault of a policeman in the course of his duty and assault by beating for which he was sentenced to one month and 14 days imprisonment. The claimant assaulted the police officers when they tried to speak to him without provocation or justification. As a result the Secretary of State found that the claimant posed a genuine, present and sufficiently serious threat to the interests of public policy and thus that his deportation was justified under Regulation 21 of the EEA Regulations 2006.

10. After these proceedings were commenced, on 19th June 2017. the claimant was also convicted of a sexual assault, whereby he intentionally touched a female person with no penetration on 2nd November 2016, and was sentenced to six months in prison. Prior to the index offence the most significant instances of the claimant's criminal behaviour are that he had used racial aggravated threatening behaviour on a tube train in September 2014; and committed a battery by way of punching in the face and kicking when he had a driving accident with the victim in February 2016.

11. The OASys Report dated 22nd March 2017 assesses the claimant as being a low risk of reoffending for both violent and non-violent types of reoffending. The risk to the community of serious harm if he were to reoffend is low with respect to known adults and children, but medium in relation to the public and staff (police). As the report sets out the claimant needs to work on his attitudes and thinking to address his propensity to offend, and there is an indication that poor mental health may have contributed to his aggressive behaviour. The claimant's evidence before the Upper Tribunal did, I find, indicate an element of taking responsibility, in that he

was sorry for what he had done and acknowledged that he had not been right and made no attempt to justify his behaviour. This understanding appeared to have been reinforced by his having spent a long period in prison/detention, and what I assessed to be a genuine decision not to have that happened to him again not just due to the personal impact but also due to the impact on his family and particularly his father with whom he undoubtedly has a deep and loving father son relationship. It remained concerning that the claimant did not insight as to what had led him into criminal behaviour at this juncture in his life when there appeared to be no external trigger or stressor. It was also the case that he had no undertaken any courses or done any other type of work on his thinking or mental health condition. It would of course be highly advisable for the claimant to undertake such courses to reduce further the possibility of reoffending. I find however that the oral evidence of the claimant was ultimately consistent with the OASys assessment, and that there is a low risk of recidivism for the claimant.

12. On consideration of the claimant's criminal record, which is unpleasant and repugnant but not in the context of such records a serious one as is reflected in the nature of the charges and the length of his sentences, and the low likelihood of his reoffending my ultimate conclusion is that the Secretary of State has not shown that there is a present, real and sufficiently serious threat to a fundamental interest of society justifying the claimant's deportation on serious grounds of public policy and security. As such the Secretary of State has not shown that the claimant falls to be deported under the Immigration (EEA) Regulations 2006.

Decision:

1. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal.

3. I remake the appeal by allowing it under the Immigration (EEA) Regulations 2006.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original claimant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the claimant's family.

Signed: *Fiona Lindsley* Date: 27th June 2018
Upper Tribunal Judge Lindsley

Annex A

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Denmark born in 1975. His appeal against the decision of the Secretary of State to deport him to Denmark as a result of a number of criminal convictions was allowed by First-tier Tribunal Judge I D Boyes in a determination promulgated on the 25th October 2017.

2. Permission to appeal was granted by Upper Tribunal Judge Jordan on 15th December 2017 on the basis that it was arguable that the First-tier judge had erred in law in finding that the claimant had permanent residence in the UK without sufficient evidence.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. Mr Lindsay argued on behalf of the Secretary of State that the finding of the First-tier Tribunal that the claimant has permanent residence is infected by error due to a wrong legal direction on the burden of proof; due to inadequate reasoning; and due to being irrational. It states at paragraph 14, immediately before dealing with the issue of permanent residence, that the burden of proof is on the respondent, which is incorrect with respect to this issue. It was accepted by the First-tier Tribunal that the claimant had not been able to provide complete documentary evidence pertaining to his work history as he was only assisted by his non-English speaking father but in fact the claimant had had legal representation, and this finding was part of the credibility assessment in the claimant's favour. The decision that the claimant had been present for five years was therefore inadequately reasoned, and absent a complete record of his work over the five year period materially wrong. It was argued by Mr Lindsay that the documents only showed a period of 1 year and 9 months continuous employment from June 2015 to March 2016.

5. Further Mr Lindsay argued for the Secretary of State that the decision errs in finding that the claimant had not shown he had a propensity to reoffend and thus was not a danger to society as when the predictor scores and risk category are examined in the OASys report they indicate the claimant is a medium risk of harm to the public, see the information provided in Vasconcelos (risk – rehabilitation) Portugal [2013] UKUT 378. The OASys report also records the fact that the claimant has either denied or justified his offending behaviour and thus must remain a risk to society. A failure to properly set out the complete conclusions of the OASys report means

that all material factors were not considered when concluding that there were no serious grounds of public policy justifying the claimant's deportation. The finding that the deportation was not proportionate at paragraph 21 was also contaminated by the findings with respect to risk as there must have been a consideration of risk in this exercise too.

6. The First-tier Tribunal is therefore said to have erred in finding that the claimant should not be deported.

7. There was no Rule 24 notice from the claimant but in oral submissions Ms Ferguson argued as follows with respect to the issue of contended errors over the findings of permanent residence. Firstly, with respect to the error regarding the findings of permanent residence and the standard of proof at paragraph 14, it is said that this relates to the deportation issue and not the question of whether the claimant had permanent residence. Secondly, it is said that there was a separate finding at paragraph 16 that the claimant was a credible witness so it was not material why he had produced only a certain amount of evidence as it was open to the First-tier Tribunal simply to believe the claimant, and perfectly lawful if there was no or little documentary evidence supporting this issue. Thirdly a very substantial amount of evidence had been produced so it was not material if the First-tier Tribunal had said it was not complete due to his father as it was in fact sufficient to prove his period of residence on the balance of probabilities.

8. Regarding the contention of there being an incomplete summary of the OASys report Ms Ferguson argued that a medium risk of serious harm was not enough alone to meet the serious grounds test given the low risk of reoffending so failure to set this out was not a material error; and the appeal had been allowed in the alternative on grounds of proportionality at paragraph 21 of the decision.

Conclusions – Error of Law

9. I find that it is not clear that the First-tier Tribunal had applied the correct standard of proof when considering the issue of permanent residence. There is a burden of proof statement which places this on the respondent at paragraph 14 of the decision which is in the paragraph before permanent residence is considered and it is not stated that this does not apply to the issue of permanent residence, where clearly the burden is on the claimant. The combination of paragraphs 7 and 16 does imply that the inability of the appellant to obtain a complete set of papers relating to his work was due to his detention and his father being ill and not speaking English. This does omit a material factor from consideration, namely that the claimant was legally represented for his appeal. I find that this makes the finding that the appellant was credible and therefore to be believed in his period of residence absent a complete set of documents for the whole period unreliable as the material matter of his legal representation was not considered. The findings of the First-tier Tribunal do not rely upon the documentary evidence which was submitted, and Ms Ferguson did not show me that this evidence was in fact complete in evidencing a continuous period of five years work, and thus I find that errors relating to the

burden of proof and lack of consideration of the claimant's legal representation were potentially material ones, and make the finding that the claimant had permanent residence unreliable.

10. The OASys assessment paints a picture of a man who struggles to cope with difficult situations and has a deficit in problem solving, possibly due to mental health problems, and that this leads him to have a pattern of threatening and violent behaviour. The report indicates that the claimant is likely to continue to offend due to his denial of wrong doing and attempts to justify his behaviour, and thus he could potentially cause harm to others. The summary of his risk is that he poses a medium risk of serious harm to the public and staff but otherwise a low risk of such harm, and that his overall reoffending risk was low, as he was quite motivated and capable of reducing his offending. The First-tier Tribunal has not put a full picture of this report in the decision at paragraph 19 of the decision, and this evidence was clearly material. Ms Ferguson was not able to show me that if the full conclusions had been considered that the outcome of the appeal would inevitably have been the same.

11. In these circumstances I set aside the decision and all of the findings of the First-tier Tribunal and adjourned the remaking to come back before me at the earliest possible date in light of the claimant's detention.

Decision:

1. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal.

3. I adjourn the remaking hearing as the claimant had not been produced and needed to give witness evidence.

Directions:

1. Any further evidence upon which a party seeks to rely for the remaking hearing is to be filed and served on the other party 10 days prior to the hearing date.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant's family.

Signed: *Fiona Lindsley* Date: 27th February 2018
Upper Tribunal Judge Lindsley