



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00374/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 13<sup>th</sup> November 2017  
and 12<sup>th</sup> March 2018

Decision & Reasons Promulgated  
On 15<sup>th</sup> March 2018

Before

UPPER TRIBUNAL JUDGE COKER

Between

ATILIO CRUZ MELO DOS SANTOS

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: in person

For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. For the reasons given below, I set aside the decision of First-tier Tribunal Judge Housego to be remade:
  1. In a decision promulgated on 25<sup>th</sup> August 2017, the appellants appeal against the respondent's decision to deport him in accordance with the EEA regulations 2016 was dismissed.
  2. Permission to appeal was given by First-tier Tribunal judge Gibb on the grounds that it was arguable that First-tier Tribunal judge Housego had

failed to make a finding on the length of time the appellant had been resident in the UK and had failed to refer to anything other than the appellant's convictions when considering whether the appellant was a genuine, present and sufficiently serious threat.

3. The First-tier Tribunal judge's decision discounts evidence of the appellant's presence in the UK for a number of years; appears to require evidence for each and every day of the claimed 15 years residence and fails to accord any weight to evidence that was before him in asserting that there was 'no evidence' of residence for some years. There is no significant reasoning on the issues of proportionality or current risk.

4. I am satisfied the First-tier Tribunal judge erred in law if failing to reach a decision in accordance with the EEA Regulations.

5. I set aside the decision to be remade.

### **Uncontentious or unchallenged background facts**

2. Mr Dos Santos is a citizen of Portugal, born 18 April 1978. He claims to have been continuously in the UK since 2002 save for an absence of about 7 months when he was in Angola.
3. In 2004 the appellant met his first wife Yolanda Maria De Barros Alberto, an Angolan national. On 14<sup>th</sup> March 2005 he was issued with a Residence Permit valid until March 2010; his spouse was issued a residence permit in line, after a successful appeal, at the same time. That marriage broke down after a year and it seems she returned to Angola. They were subsequently divorced.
4. Mr Dos Santos' current partner, Claudirene Nunes De Souza, is a Brazilian national.
5. In 2010, the appellant travelled to Angola to visit his family in 2010. Whilst there he had a motorbike accident and spent over 6 months in hospital. He broke his jaw, lost the bottom row of his teeth and had a metal plate fitted. He returned to the UK in February 2011.
6. In September 2012, Ms de Souza applied for a residence permit as the unmarried partner of the appellant. That application was refused; her appeal against that decision was successful in July 2013 and she was issued with a residence permit as the dependant of the appellant, valid until 11 December 2018.
7. The respondent, for reasons set out in her letter dated 4 July 2017, decided to make a deportation order. She stated that she accepted that he had been resident in accordance with the EEA Regulations 2016 for a continuous period of 5 years but did not accept that he was entitled to enhanced protection because he had failed to provide evidence of lawful residence for 10 years prior to his imprisonment. By letter dated 7 February 2018, the respondent withdrew

her concession that he had been exercising Treaty Rights for a continuous period of five years.

8. The evidence regarding exercise of Treaty Rights is as follows:

- Letter from HMRC dated 11 October 2017 records earnings and NI contributions for each of the years 2003/4 until 2016/17 but states there are no records of earnings or NI contributions for the years 2007/8, 2010/11, 2011/12 2013/14 and 2015/16.
- Tax calculation from HM revenue and Customs year ended 5 April 2011 showing gross profit from self-employment of £6565 with overpaid income tax of £121.
- Solmaz printout statement 24/04/2012 showing gross payments for the weeks 14/03/11 to 03/04/11 of £825 total.
- Tax calculation from HMRC year ended 5 April 2012 showing gross profit from self-employment of £10,120 with an overpayment of £61.45 income tax.
- Some bank statements are produced. The appellant's bank statements in the bundle for November 2011, December 2011 show credits from Solmaz and from Candeias for painting services. Bank statements for June to September 2012, July 2015 show deposits from Solmaz
- There are invoices from the appellant to Solmaz for services during the majority of weeks in 2011.
- Tax calculation from HMRC for year ended 5 April 2013 showing profit from self-employment of £7785 with overpayment of income tax of £1313.80.
- A letter from Solmaz dated 20<sup>th</sup> August 2012 stating the appellant has been working for them self-employed since 18 June 2012.
- HMRC Tax calculation for year ended 5 April 2014 showing self-employed earnings of £7692 with no income tax due.
- HMRC Tax calculation for year ended 5 April 2015 showing combined pay and self-employed income of £14,476 with overpaid income tax of £3.80.
- HMRC tax calculation for year ended 5 April 2016 showing income from self-employment of £10,800.

9. Mr Dos Santos has three convictions and one caution:

11 August 2005	Caution	Theft from person
2 March 2015	10 months suspended 24 months; Drug rehabilitation for 9 months	Burglary and theft
5 May 2015	Compensation £250	Failing to comply, damage
26 November 2016	8 + 3 months imprisonment	Theft from employee, Offence during period of suspended sentence

## Discussion

10. The respondent does not, in her letter of 4<sup>th</sup> July 2017, accept that the appellant has been resident in the UK since 2002. She states there is no evidence of his entry in 2002 and that during the course of his interview with Immigration Officials in February 2011 he had said he was travelling with his girlfriend to the UK as visitors and would then be returning to Portugal where he was resident. The appellant disputes that was what he said. His partner Ms de Souza, a national of Brazil, sought and was refused a residence permit as the appellant's dependant. In the appeal against the refusal of a residence permit, heard in 2013, the appellant gave evidence; he and Ms de Souza said they were resident in the UK, not Portugal. The judge specifically records that evidence was unchallenged in cross examination. The appellant was not cross examined before me in connection with the respondent's assertion that the appellant had said he was resident in Portugal. I accept the appellant's evidence that he (and his partner Ms de Souza) were not residing in Portugal.
11. The decision of First-tier Tribunal Judge Phull in Ms De Souza's appeal in 2013 states:
- “33. Turning to the issue of the sponsor exercising treaty rights in the UK I find as follows. There was a wealth of documentary evidence in the appellant's bundle that the sponsor is working on a self-employed basis for Solmaz Limited. None of this evidence was challenged in cross - examination.
34. A letter from Vertice Accountancy and Consultancy dated 24 January 2013 (page 112, appellant's bundle) state the sponsor [Mr Dos Santos] is a self employed builder since 2005 and provide details of his SAR for 2010-2011 and 2011-2012. Copies of his invoices date back to 2011 are at pages 158 to 191. Copies of the sponsor's [Mr Dos Santos'] HMRC self - assessment returns are at pages 100-157. A statement from Solmaz provides details of the sponsor's gross pay at page 99. The sponsor's bank statements show corresponding credits into the account from Solmaz. The evidence of the sponsor is that he works for Solmaz on a self-employed basis. Evidence of the HSBC credit slips at pages 285 to 307.
35. Having considered all this evidence in the round I find on balance that the sponsor is exercising Treaty Rights in the UK as a self-employed builder...”
12. Mr Dos Santos, in oral evidence in fluent English, said that he had some difficulty remembering dates following the injury in Angola. He said he had been working in the UK as a self-employed builder. When he first arrived in the UK, because of language difficulties, he worked with his father who would then pay him in cash. He said he also worked with his partner (who is employed as a cleaner) when he had no building work. He said he had arrived in the UK in 2002 and started work with a temporary national insurance number in 2003. His permanent number had arrived in 2003. He said he had worked most years.

13. The letter from HMRC dated 11 October 2017 does not record employers or NI contributions for a number of periods. This information is contradicted by the HMRC Tax calculations in the bundle. It is also contradicted by the information in the bank statements that are produced for the years 2011, 2012 and 2015. I note that not all bank statements for all those years are produced and I take that into account. I also note that the letter from Solmaz states the appellant started working for them in June 2012 however it is plain from the bank statements that the appellant had been working for them on a self-employed basis prior to that. Although the documents that were before Judge Phull were not before me I note that the judge considered there to be a “wealth of evidence” of self-employment and makes specific reference to self-employment during the years 2010 to 2012. Again, although not before me, the judge refers to the letter from Vertice which confirms that the appellant has been a self-employed builder since 2005. This evidence was not challenged by the respondent in the First-tier Tribunal decision before Judge Phull nor was it re-opened as a challenge before me.
14. A letter from Solmaz dated 28 September 2016 confirms the appellant is working for them on a self-employed basis earning in the region of £550 per week. It does not say how long he has been working for them but says it foresees him working for them for the foreseeable future.
15. There is no explanation why the letter from HMRC should be at odds with the HMRC tax calculations. The tax calculations were not challenged as inaccurate or unreliable by Mr Deller. Taking all the evidence together, including Judge Phull’s findings, and the lack of any submission that the tax calculations are unreliable, I find the appellant has been employed/self-employed since June 2003 (the date on the HMRC that he entered the NI scheme). Although his income is on the low side, I take into account the fact that he is living with his partner and expenses are shared – as to which see below. There is no requirement to show income for each and every week of residence; he is self-employed and income of that nature does vary. The bank statements that are produced show deposits of income on a fairly regular basis although I do take note of the fact that bank statements for the whole period have not been produced. Taking all the evidence of finance and income into account, I find the appellant has been exercising Treaty Rights since the middle of 2003 save when he was in Angola from early to mid 2010 until February 2011 and during the time he was in prison serving his criminal sentence/ in immigration detention from late 2016 until early 2017.
16. It follows that Mr Dos Santos has been permanently resident in the UK for a period of five years, exercising Treaty Rights and is thus entitled to the “second” level of protection.
17. The appellant has three offences committed during a short period of time March 2015 to November 2016. They were committed, he says, in order to fund his drug habit. He had, according to the sentencing remarks that activated the suspended sentence and led to his consecutive sentences of 8 months and 3 months, previously completed a drug rehabilitation course.

18. The unchallenged evidence from the appellant, supported by a letter dated 5 March 2018 was that he is currently admitted to Remar Association UK for a recommended minimum period of 12 months. Remar is a residential centre assisting people with drug addiction and alcoholism. During his stay with them his basic needs such as food, accommodation, clothing and health are met. In his oral evidence, unchallenged, the appellant expressed his deep regret for the offences committed; that evidence and his witness statement set out the problems he had as a child and adolescent but, although no excuse whatsoever for the criminal behaviour was, he said, the reason behind his drug addiction. He was, he said, committed to dealing with his drug addiction and that was why he had referred himself to Remar. I am satisfied the appellant genuinely intends to address his addiction and his self-referral to Remar is strong supportive evidence of this.
19. The appellant's partner, who required an interpreter, gave unchallenged evidence that she was working. The unchallenged evidence from the couple was that their relationship continued and although they were currently not living together because of the appellant's admission to Remar, the relationship continued and would continue; they have been living together since 2009, sharing expenses. They anticipated that as he progressed through the rehabilitation programme he would be given leave to spend more time together and she would come to Hamilton, where he was staying. I am satisfied the relationship between the appellant and Ms de Souza remains intact and that she is genuinely supportive of him. I am satisfied that but for the fact that he is currently likely to be living at Remar for the next 10-12 months, they would be cohabiting. I am satisfied they intend to resume living together when he leaves Remar and that despite their physical separation they continue to maintain a genuine and subsisting relationship.
20. The appellant's parents returned to Angola in 2006 or 2007 where they remain living. The appellant, again in unchallenged evidence, says he has a difficult relationship with his father since his latest conviction and his drug addiction. In unchallenged evidence he says he has visited his parents on that one occasion and only stayed the time he did because of the serious accident he had whilst there. He has made a holiday visit to Portugal since being in the UK, but no more.
21. The respondent in the decision letter refers to the lack of evidence that the appellant has adequately addressed the reasons for his offending behaviour or undergone any appropriate courses whilst in prison or addressed the issues that prompted him to offend. There was no evidence that the appellant had undergone a Victim Awareness Course or Enhanced Thinking Course. The evidence now is that he is tackling his drug problem and although only a short time has elapsed since this commenced he self-referred and is complying. I accept that unchallenged evidence and, as said above, I find that he has a genuine intention to combat his drug addiction.
22. The appellant was born in Luanda, Angola and acquired Portuguese nationality through his father. He lived in Angola until he was aged 10 where he went to school until aged 16. He came to the UK, with his father, in 2002/3 aged about

24. His unchallenged evidence is that for the last two offences he handed himself in to the police and confessed.
23. The evidence of family in either Portugal or Uganda is limited. I accept that he has limited contact with his family in Angola following his convictions but I note that in his witness statement the appellant says he did receive support from his father when his drug addiction was first disclosed to him when they lived in Portugal. I take the view that although there may be limited contact now, his father has previously shown himself to have at least some sympathy and that their relationship is capable of being rebuilt. In any event the appellant is now nearly 40 years old, an adult who has worked and supported himself and his partner for many years despite his drug addiction. When he was 16 he had a paternal grandmother in Portugal. Although there was no evidence to that effect she is either very elderly now or deceased. There has been no mention of any other relatives in Portugal but, as in relation to Angola, the appellant is some 40 years old, has worked, speaks Portuguese and English fluently and there is no reason to suggest that he would not be able to re-establish himself in Portugal. There is reference to some relatives in the UK but there were no letters of support or assistance from them. I am satisfied that whether relationships as do exist with un-named relatives in the UK, they are not of such importance that they have any bearing on his life in the UK.
24. The appellant's criminal offending has been of relatively recent origin. He has lived in the UK since at least 2003, worked almost consistently throughout that time with the same firm as a self-employed worker. His relationship, which remains strong, was formed in 2009, many years before his criminal offending.
25. The appellant has been in the UK for some 15-16 years. He speaks fluent English. He has worked. He has a strong relationship with a partner whom he met here in the UK. Although criminal offences which lead to a custodial sentence may be indicative of a lack of integration, I am satisfied that in this case, given the more recent offending and its level and frequency, that the appellant's offending does not displace the level of integration previously shown through his work and residence.
26. Although the root cause of his criminal offending was his personal drug addiction, the criminal offences for which he "gave himself up" were directed to enable him to support that habit and thus indirectly related to drugs. There is no suggestion that he was involved in drug offences with intent to supply and he has not been convicted of, or charged with, any specific drug related charges of possession. Although misuse of drugs unquestionably leads to societal harm, even indirectly, the appellant's crimes are crimes for which he has been punished as society demands.
27. The decision leading to the appellant's deportation order can only be taken on serious grounds of public policy and public security. It must be taken in accordance with the following principles:
- Must comply with the principle of proportionality;

- Must be based exclusively on the personal conduct of the person concerned;
  - The personal conduct must represent a genuine, present and sufficiently serious threat affecting on of the fundamental interest of society, taking into account past conduct of the person and that the threat does not need to be imminent;
  - Matters isolated from the particulars of the case or which relate to considerations of general prevention do not in themselves justify the decision;
  - Previous convictions do not in themselves justify the decision;
  - The decision may be taken on preventative grounds even in the absence of a previous criminal conviction provided the grounds are specific to the person;
  - Must take into account the age, health, family and economic situation, length of residence, social and cultural integration and links with country of origin.
  - In deciding whether the requirements are met the decision maker must have regard to the considerations in Schedule 1 Immigration (European Economic Area) Regulations 2016<sup>1</sup>.
28. The respondent in her decision relies upon the appellant's offending behaviour and in particular the number of offences committed over a relatively short period of time, their escalating nature and that the last offence was committed whilst he was subject to a suspended sentence.
29. Mr Deller's core submission was that the criminal offending of the appellant, related as it was to drugs, was a fundamental threat to the interest of society, the threshold was met and the appeal should be dismissed.
30. As can be seen above, although the appellant's criminal offending is related to drugs, they are not drug offences. His offending is relatively recent and although they will have caused considerable and serious stress and anxiety to the victims, as all criminality does, I am satisfied for the reasons given above that he is addressing his criminality and the cause of his criminality. I have taken all the evidence before me into account and in particular the interests of society. The appellant's last offending was recent and of a similar nature to his earlier offences. Nevertheless, I do accept that, given his self-referral to serious rehabilitation, the length of time he has been in the UK, his integration into British society, the strength of his longstanding relationship and all the factors above, that he is not a genuine, present and sufficiently serious threat affecting the fundamental interests of society. It will be noted that I have found that the threshold test to be met, because of the length of time that he has been exercising Treaty Rights, is that there must be *serious* grounds of public policy. It follows from my findings that given he does not meet the lower threshold, he cannot meet the threshold set of "serious".
31. I allow the appeal.

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<sup>1</sup> See Annex below



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.

Date 14<sup>th</sup> March 2018

A handwritten signature in black ink, appearing to read "Jme Coker".

Upper Tribunal Judge Coker

## Annex

### SCHEDULE 1

#### CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

##### Considerations of public policy and public security

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

##### Application of paragraph 1 to the United Kingdom

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

- (a) the commission of a criminal offence;
- (b) an act otherwise affecting the fundamental interests of society;
- (c) the EEA national or family member of an EEA national was in custody.

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including—

(a) entering, attempting to enter or assisting another person to enter or to attempt to enter, a marriage, civil partnership or durable partnership of convenience; or

(b) fraudulently obtaining or attempting to obtain, or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

The fundamental interests of society

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;

(j) protecting the public;

(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);

(l) countering terrorism and extremism and protecting shared values.