Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01254/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 January 2018	**On 06 February 2018**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MR HOUSEYN ESENCHAY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Hayward, Counsel, instructed by Owens Stevens Solicitors
For the Respondent: Ms R Pettersen, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Cyprus and his date of birth is 17 May 1982. The Appellant has committed a series of relatively minor offences resulting in ten convictions since 2005. The Secretary of State made a decision to remove him under Section 10 of the 1999 Act with reference to Regulation 19(3)(a) of the 2016 Regulations on the basis that the Appellant does not have or ceases to have a right to reside under the 2016 Regulations. There is mention in the paperwork before me of a decision under Regulation 21B (2) of the Regulations but my understanding is that there

has not been a decision in relation to this Appellant involving abuse of rights. This was agreed by both parties.

2. The Appellant has been in the UK since 2002. He appealed against the decision of the Secretary of State on the basis that he has permanent residence here. His appeal was dismissed by First-tier Tribunal Judge S J Clarke following a hearing on 31 August 2017. The decision was promulgated on 14 September 2017. Permission was granted to the Appellant by First-tier Tribunal Judge I D Boyes on 22 November 2017.

3. The judge heard evidence from the Appellant and his partner, Ms Miliotis and the Appellant's parents.

4. The judge concluded that the Appellant was not exercising treaty rights and that he did not have permanent residence. The Appellant gave evidence of employment between 2002 and 2013 and at the hearing he produced some payslips. The judge relied on a record of the Appellant's interview with the Respondent (Annex C of the Respondent's bundle). During this interview the Appellant was asked for dates of his employment and he stated in answer 2008 – 2009. The judge found that the Appellant had made no attempt to produce evidence to support his evidence as advanced before him that he had been employed from 2002 to 2013. He did not produce the email that he stated was sent to him with his pay slips and there was no P60 or bank statements to corroborate his claims.

5. At the start of the hearing Mr Hayward, representing the Appellant before the First-tier Tribunal, made an application for an adjournment on the basis that the Appellant had made enquiries with HMRC and was awaiting a response. The application was opposed by the Respondent. The HOPO relied on what the Appellant was recorded as having said in the interview (Annex C). The judge rejected the Appellant's evidence that he was not given a full opportunity to provide a complete history. The judge concluded that "it was fair and in the interests of justice to proceed in the absence of evidence from HMRC". In any event, the judge did not accept that the Appellant had made enquiries with HMRC as claimed.

6. The grounds of appeal argue that the Appellant submitted evidence to the Tribunal on 14 September 2017 from HMRC (following enquiries that he had made) post the date of the hearing, but before the determination was finalised and promulgated. The evidence is a letter of 23 August 2017 relating to the Appellant and previous employment and attaching a schedule detailing the Appellant's national insurance contributions. It seems from this document that contributions were made between 2006 and 2011/2012 and in 2012/2013.

7. The first ground of appeal raises the issue of fairness. It is asserted that the judge failed engage with the post- hearing evidence. It was forwarded to her prior to the promulgation of the determination. Having considered the evidence from HMRC, I conclude that it is capable of corroborating the

Appellant's evidence. Had the judge engaged with this post- decision evidence or had it been before her at the hearing she may well have reached the same conclusion dismissing the appeal. However, it is possible that the judge may have attached less weight to the record of the interview (Annex C) and reached different conclusions in respect of the Appellant's credibility. In addition the evidence is at least capable of establishing that the Appellant made enquiries with HMRC prior to the hearing. This was not accepted by the judge when refusing the adjournment request. I cannot conclude for certain that had the evidence now before me been before the judge it would not have made any difference to the outcome of the Appellant's appeal. For the above reasons fairness demands that the decision to dismiss the appeal is set aside and remitted to the FtT.

Notice of Decision

The decision of the judge is set aside and the matter remitted to the FtT for a hearing de novo.

No anonymity direction is made.

Signed Joanna McWilliam Date 30 January 2018

Upper Tribunal Judge McWilliam