**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: EA/01256/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 8 March 2018** | **On 19 March 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**MR FRANK JOSEPH REBELLO**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Ian Jarvis, Senior Home Office Presenting Officer
For the Respondent: No appearance

**DECISION AND REASONS**

1. The Secretary of State ("SSHD") appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge G Clarke sitting at Hatton Cross on 10 May 2017) allowing the claimant's appeal against the decision of the SSHD made on 13 January 2016 to remove him from the United Kingdom under Regulation 19(3)(a) of the Immigration (EEA) Regulations 2006 as a person who did not have, or had ceased to have, a right to reside under

the Regulations 2006. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires anonymity in these proceedings in the Upper Tribunal.

2. The claimant is a Portuguese national, who was born in Goa, India, on 12 June 1979 and who appears to have spent much of his life in Goa. The core bundle contains a number of certificates which the claimant obtained in Goa, including certificates issued by the Nusi Maritime Academy, which (according to the claimant's CV) were preparatory to the claimant obtaining employment on various cruise chips as an Assistant Cook.

3. According to the claimant's CV, his last employment on a cruise ship ran from 2 November 2012 until 30 March 2013. The claimant is recorded as having applied for a national insurance number in the UK in the latter part of 2014. On 17 November 2014 Job Centre Plus wrote to the claimant at an address in London SW1 acknowledging that he had recently applied for a national insurance number, and allocating a NINO to him.

4. On 13 January 2016, the claimant was served with a notice of immigration decision informing him that the SSHD had decided to remove him under the Regulations 2006. In the specific Statement of Reasons contained in the IS15A (EEA) Notice, it was explained that the claimant was specifically considered to be a person to whom Regulation 19(3)(a) applied because he had been in the UK for between 3 months and 5 years and had failed to demonstrate that he was a *"qualified person"* as defined under Regulation 6, namely that he was either working, job seeking, self-sufficient, self-employed or studying. Therefore, by virtue of Regulation 24(2) of the same Regulations, he was considered to be an overstayer as defined by section 10(1)(a) of the Immigration & Asylum Act 1999, which was an offence under section 24(1)(b) of the Immigration Act 1971 as amended.

5. In his grounds of appeal, the claimant said that the decision had breached his rights as an EEA national, since he was a job seeker and he had registered as a job seeker with the relevant employment office.

6. The claimant provided evidence to show that he had entered into a Job Seekers' Agreement on 26 January 2016. In his job seeker profile, he said that the type of work he was most likely to get was that of a chef. His work experience comprised three cruises with the Mediterranean Shipping Company, each trip being about 9 months. His current circumstances were that he was living at home, and seeking employment. He had an Indian driver's licence.

## The Hearing Before, and the Decision of, the First-Tier Tribunal

7. The claimant's appeal was listed for an oral hearing, but neither the claimant nor a Presenting Officer appeared before Judge Clarke. The Judge proceeded to "*hear the case on the papers in the absence of the parties*" pursuant to Rule 28 of the Tribunal Procedure Rules 2014.

8. In his subsequent decision, the Judge pronounced himself satisfied on the balance of probabilities that the claimant was a job seeker. This was because he had provided documentary evidence that he was registered as a job seeker. This evidence included an email dated 22 January 2016 from the Department of Work & Pensions confirming receipt of the claimant's application for job seekers' allowance; a commitment agreement signed by the claimant on 26 January 2016; and the claimant's job seeker profile. On the basis of this documentary evidence, the Judge was satisfied that the claimant was a job seeker at the date of the decision.

9. The Judge observed that the date of the hearing was some 16 months after the date of the decision, and some 16 months after the claimant had signed his agreement with the Job Centre as a job seeker. He also acknowledged that, as this was an EEA appeal, the general approach was that he ought to consider the circumstances at the date of the hearing. However, he was of the view that he was entitled to rely on the evidence from the Job Centre at the date of decision because of the provisions of Regulation 29(3) of the Regulations 2006. The Judge continued in paragraph [22]: "*On the basis of Regulation 29(3), I find that he is a qualified person under Regulation 6 as a job seeker and as such was exercising Treaty rights in the United Kingdom.*" The Judge went on to allow the appeal under the Regulations 2006.

## The Reasons for Granting Permission to Appeal

10. On 29 December 2017 First-tier Tribunal Judge Lever granted the SSHD permission to appeal to the Upper Tribunal for the following reasons: "*The Judge had noted that neither the appellant nor the respondent attended at the hearing. The Judge had set out the findings on the very limited evidence available to him. Bearing in mind the burden of standard of proof on the appellant it is arguable that the Judge failed to provide adequate reasons why he found the appellant was exercising Treaty rights as at the date of hearing, particularly given his reference to Reg 29(3) which does not appear to be relevant but upon which he appears to rely.*"

## The Hearing in the Upper Tribunal

11. At the hearing before me to determine whether an error of law was made out, there was no appearance by the claimant or by his former representatives, Shoe Lane Chambers. I was satisfied that notice of hearing had been properly served on the claimant and his former representatives, as the claimant had been served at his last known address in London SW1, and Shoe Lane Chambers had corresponded with the Upper Tribunal about the upcoming hearing. They informed the Upper Tribunal that they were no longer acting for the claimant, as he had gone back to India and they had heard that he had died in India. The response of the Upper Tribunal was that, as this was the SSHD's appeal, it would continue to be listed for hearing.

12. Mr Jarvis submitted that the decision of the First-tier Tribunal should be set aside for the reasons given in the application for permission.

## Discussion

13. A job seeker is defined in Regulation 6(4) is a person who enters the UK in order to seek employment and who provides evidence that he is seeking employment and has a genuine chance of being engaged. In **AG & Others (EEA - job seeker - self-sufficient person - proof) Germany [2007] UKAIT 00075**, it was held that, when considering what period of time a job seeker has to find work, six months may be a general rule of thumb, but there is no fixed time limit. Assessment of what is reasonable must be made in the context of each individual case. Thus it may sometimes be less, and sometimes more, than six months. In all cases, however, the period in question must start from the date of the person's arrival in the UK.

14. According to Home Office records, the claimant entered the UK in October 2014. The Judge did not have specific evidence as to the claimant's date of entry, but he knew that the claimant must have entered the UK before November 2014 as this was when he obtained his NINO.

15. The Judge failed to have regard to the fact that the claimant had apparently only applied to be registered as a job seeker after being served with the decision to remove him, and more than two years after he had entered the UK. In order to qualify as a job seeker under Regulation 6, the claimant had to show that he was a person who had entered the UK in order to seek employment.

16. The Judge did not find that the claimant had entered the UK in order to seek employment. So it was not open to him to treat the claimant's application for job seeker's allowance in January 2016 as demonstrating that he met the definition of a job seeker contained in Regulation 6. As stated in the permission application, there was no evidence before the Judge that the claimant had been working or had been looking for work in the period between his entry to the UK in October 2014 and his application for Job Seekers' Allowance, which was made after he had been served with the decision to remove him under Regulation 19(3)(a).

17. Another requirement for meeting the definition of a job seeker is that the applicant should have a genuine chance of being engaged. There was no evidence before the Judge that the claimant had obtained employment between registering for Job Seekers' Allowance in January 2016 and the date of the hearing. Moreover, in order to show that the removal decision was wrong in substance, the burden was on the claimant to show that he was exercising Treaty rights at the date of the hearing.

18. The Judge appears to have recognised that this was problematic, as the claimant had not attended at the hearing, and there was no documentary evidence of the recent exercise of Treaty rights. However, the Judge relied on Regulation 29(3) as providing an exception to the general rule that the merits of the appeal should be assessed as of the date of the hearing. The Judge's reliance on Regulation 29(3) for this purpose was misconceived. The Regulation does not provide an exception to the general rule.

19. For the above reasons, the decision of the First-tier Tribunal was vitiated by a material error of law, such that it must be set aside in its entirety.

**The Re-making of the Decision**

20. On the evidence that was available to the First-tier Tribunal, the only sustainable conclusion was that the appeal should be dismissed. The burden was on the claimant to show that the decision appealed was wrong in substance, and he wholly failed to discharge that burden. No evidence has tendered in response to the arguments advanced in the permission application. Thus, no evidence has been tendered to show that the claimant was in fact exercising Treaty rights in the UK between October 2014 (the date of entry) and the date of the hearing in the First-tier Tribunal in May 2017.

21. As previously observed, merely applying to register for job seeker's allowance two years after entering the UK does not constitute the exercise of Treaty rights. Accordingly, the claimant's appeal must be dismissed.

**Notice of Decision**

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

The claimant's appeal is dismissed.

I make no anonymity direction.

Signed Date 13 March 2018

Judge Monson
Deputy Upper Tribunal Judge

**TO THE RESPONDENT**
**FEE AWARD**

As I have dismissed this appeal, there can be no fee award.

Signed Date 13 March 2018

Judge Monson
Deputy Upper Tribunal Judge