Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00510/2014

THE IMMIGRATION ACTS

Heard at : Nottingham Magistrates' Court	**Determination Promulgated**
On : 27 November 2014	**On:1 December 2014**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CARLOS MIGUEL LOPAS CRISTO
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms C Johnson, Senior Home Office Presenting Officer
For the Respondent: In Person (Not Represented)

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Cristo's appeal against the decision to deport him from the United Kingdom pursuant to regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Cristo as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Portugal, born on 11 August 1976. He arrived in the United Kingdom on 28 April 2004 and first came to the adverse attention of the authorities when he was arrested for burglary with intent to steal on 9 September 2009. Between 16 November 2009 and 23 December 2013 he accumulated 11 convictions for 17 offences, including 11 theft and kindred offences and six offences relating to police/courts/ prisons. On 23 December 2013 he was convicted at Coventry Magistrates Court of theft/ shoplifting and commission of further offences during the operational period of a suspended sentence order. He was sentenced on the same day to 20 weeks imprisonment. On 14 February 2014 he was served with a liability for deportation notice and on 10 March 2014 the respondent made a decision to deport him under regulation 21 of the EEA Regulations.

4. In the reasons for deportation letter, the respondent considered that the evidence submitted by the appellant was insufficient to confirm his continuous residence and employment of five years in accordance with the EEA Regulations and that he had therefore not acquired the right to permanent residence. The respondent noted that the index offence for which the appellant was convicted on 23 December 2013 was for theft of three joints of gammon steak to the value of £15 belonging to Co-Op stores and that the original offence, in respect of which a suspended order had been made on 11 February 2013, was for theft of two joints of meat from Iceland Foods to the value of £10. The respondent also noted the appellant's previous convictions for failing to comply with the requirements of a community order, failing to surrender to custody at the appointed time and commission of a further offence during the operational period of a suspended sentence order and noted that on the most recent occasion he was convicted for failing to surrender to custody at the appointed time. The respondent considered that the appellant had shown no remorse for his behaviour, that there was insufficient evidence that he had adequately addressed all the reasons for his offending behaviour and that no evidence had been provided to show that he had successfully completed any programme or addressed the issue with drugs that had led him to commit the offences. It was considered that he had a propensity to re-offend and that he represented a genuine, present and sufficiently serious threat to the public to justify his deportation. It was considered further that even if he had permanent residence in the United Kingdom the requirements for serious grounds of public policy would have been satisfied. The respondent considered that it would not be unreasonable to expect the appellant to readjust to life in Portugal, that deportation to Portugal would not prejudice his prospects of rehabilitation and that the decision to deport him was in accordance with the EEA Regulations. It was considered further that his deportation would not breach his Article 8 rights under the ECHR.

5. The appellant's appeal against that decision was heard in the First-tier Tribunal on 8 August 2014 by a panel consisting of First-tier Tribunal Judge Colyer and Ms S E Singer. On the basis of the documentary evidence before them, the panel accepted that by the time

of the index offence the appellant had acquired a right of permanent residence in the United Kingdom. They therefore went on to consider the second level of seriousness under the EEA Regulations. Having considered the nature of his offending and his circumstances in the United Kingdom and in Portugal, they concluded that his conduct did not satisfy the "serious grounds" test in Regulation 21(3) and they allowed the appeal under the EEA Regulations. They also went on to consider Article 8 and found that his deportation would breach his human rights in that respect and allowed the appeal on that basis as well.

6. The respondent sought permission to appeal to the Upper Tribunal on two grounds: that the panel had misdirected itself in finding that there were no serious grounds of public policy in deporting the appellant and had failed properly to take into account the public interest in their proportionality assessment; and that the panel had materially misdirected themselves in their consideration of the appellant's Article 8 rights and in allowing the appeal under Article 8 and had failed to consider the principles in Nasim and others (Article 8) Pakistan [2014] UKUT 25

7. Permission to appeal was granted on 2 September 2014.

Appeal hearing and submissions

8. Ms Johnson confirmed that there was no challenge to the panel's finding that the appellant had acquired a right of permanent residence in the United Kingdom and that the second level of "seriousness" was accordingly accepted as the relevant test under regulation 21 of the EEA Regulations. She relied upon the grounds of appeal and submitted that the panel had erred by failing to consider that the appellant's persistent offending over a number of years made the offending serious. The panel failed to consider the public interest in line with the judgement in SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550. The public interest was high in cases of persistent offenders. The appellant had failed to rehabilitate himself. Whilst the panel concluded that he had done so, they only considered the period whilst he was detained and subject to deportation proceedings and simply accepted his explanation, but had no probation or expert reports to assist them and had no supporting evidence such as from drugs counselling. With regard to Article 8, the appellant did not meet the high threshold to show that his deportation was disproportionate. The panel relied on the threat of deportation as a reason for accepting that the appellant would not re-offend but had nothing from experts to confirm that.

9. The appellant did not wish to make any response, but produced a letter from The Old Vicarage in relation to accommodation and voluntary work, to be considered in the event that the panel's decision was set aside.

Consideration and findings.

10. The basis upon which permission was granted in relation to the panel's decision under the EEA Regulations was their arguable failure to take into account the fact of

multiple offences, the failure by the appellant to rehabilitate himself and his propensity to re-offend, when considering whether there were serious grounds of public policy justifying his deportation. Ms Johnson's submission was that the appellant's persistent offending over a number of years and lack of genuine rehabilitation meant that his offending was serious and accordingly that the public interest in his deportation was high.

11. However it seems to me that these were matters fully and properly considered by the panel and that the grounds of appeal are, in effect, little more than a disagreement with their findings and conclusions.

12. The panel were perfectly aware of the appellant's multiple offending and thus referred to him as a "serial shoplifter" and to his "numerous petty thieving". They were aware of the fact that he had re-offended during the operational period of previously suspended sentences and they looked at the nature of his offending in some detail at paragraph 29 of their determination, describing it at paragraph 30 as "persistent petty offending". They went on at paragraphs 31 and 32 to consider whether that offending could be considered as "other serious criminal activity", such as to fall within the UKBA's internal guidance in cases of deportation of foreign national offenders from the EEA, taking into account the appellant's drug addiction throughout his offending. At paragraph 32 the panel concluded that the appellant's offending should not be classed as "serious criminal activity".

13. Having considered the nature of the appellant's past offending, including the index offence, the panel then went on to consider the risk of future offending, looking at relevant factors such as his behaviour in prison, his qualifications and employment prospects and his attempts to address his drug addiction. They did not have the benefit of any pre-sentence or probation report and accordingly were able only to look at the evidence before them, which included, as is apparent from paragraph 34, several certificates of achievements obtained by the appellant whilst in prison. It is not clear what evidence was before the panel in regard to his attempts to address his drug problem and that was a matter that I therefore put to Ms Johnson and to the appellant. The appellant informed me that the certificates related mostly to his education in prison, but that he had produced to the panel a signed letter relating to the question of drugs. Ms Johnson was unable to advise on the nature of the certificates and evidence produced before the panel but she submitted that paragraph 34 of the determination suggested that they merely relied upon the appellant's own oral evidence.

14. What is clear, however, from paragraphs 34 to 38, is that the panel gave careful consideration to the matter of the appellant's drugs problem, the impact that that had on his past offending and the impact that his efforts to address the problem had on his future risk of re-offending. It was their conclusion that, whilst the respondent's decision was based on an absence of any evidence of efforts made by the appellant to address his problems and thus reduce the risk he posed of re-offending, they were able to be satisfied on the evidence before them, that those issues had since been resolved. They were entirely satisfied that the appellant had been drug-free since 23 December 2013, that he had successfully attended a relevant course in prison and that he was intent on remaining

drug-free. They were satisfied that, having successfully addressed his drug problem, the appellant was not likely to re-offend and would not pose a risk or a threat to the public. The respondent's submission is, in effect, that that was not a conclusion that was open to the panel to reach, given the limited evidence before them. However it seems to me that the panel, having heard from the appellant and considered the evidence available, were perfectly entitled to reach such a conclusion.

15. It was also Ms Johnson's submission that there was no genuine rehabilitation on the appellant's part, given that any effort to address his offending behaviour had been undertaken only whilst there was a threat of deportation and whilst he was in prison. It is the case that the appellant's drugs-free status had existed only since he had been detained and that the panel's findings, in particular at paragraph 35 and 39, reflected the influence upon the appellant of the Home Office's actions. However it seems to me that the panel were entitled, on the basis of the evidence before them and having heard from the appellant, to find that the continuing threat of deportation and the prospect of return to imprisonment or detention was sufficient to motivate him to desist from further criminal activity. Indeed it must surely be that a certain degree of speculation is required in all such cases and that that is justifiable providing that that speculation is rooted in the available evidence and is cogently reasoned.

16. For all of these reasons I consider that the panel reached a decision that was open to them on the evidence before them, having taken into account all material factors and properly addressed the relevant test in accordance with regulation 21 of the EEA Regulations. The panel plainly took full account of the public interest and gave careful consideration to the level of risk or threat the appellant posed to the community. They were entitled to conclude that the higher threshold of seriousness had not been reached to justify the appellant's deportation under the EEA Regulations.

17. I accept that there may well have been some arguable merit in the grounds of appeal relating to the panel's decision on Article 8, had that decision stood in isolation. However, it seems to me that the fact that the appeal was allowed under the EEA Regulations and that I uphold that decision means that nothing material arises from this ground of appeal.

18. Accordingly I find that the panel did not make any errors of law requiring their decision to be set aside, but that they were entitled to reach the decision that they did.

DECISION

19. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The Secretary of State's appeal is dismissed and the decision of the First-tier Tribunal to allow Mr Cristo's appeal stands.

Signed
Upper Tribunal Judge Kebede