IAC-FH-AR-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01939/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 October 2014	**On 10 November 2014**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NILTON INUSSA ABDULLAH

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Senior Presenting Officer
For the Respondent: Mr J Plowright, Counsel, instructed by Perera & Co Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the appellant, as he was before the judge and I will continue to refer to him as the appellant, against the Secretary of State's decision of 26 June 2013

to make a deportation order against him on the grounds that his personal conduct represents a genuine present and sufficiently serious threat to the interests of public policy and is accordingly justified under Regulation 21 of the EEA Regulations.

2. I do not think it is necessary for me to set out all the evidence that was before the judge. In summary there was a history of offending. The appellant arrived in the United Kingdom from Portugal at the age of 13 in 1996 and some five years later the first offence referred to was committed. This culminated in a sentence of six years' imprisonment after a conviction of two counts of possessing a prohibited fire arm and one count of possession a fire arm without a certificate and the sentencing date was 13 October 2011 and the judge set out the sentencing remarks from the sentencing judge, set out the legal framework, the reasons why the respondent decided a deportation order was appropriate and the points made on behalf of the appellant and then also the written and oral evidence of the appellant and of his partner and his sisters who also gave evidence.

3. The judge set out the relevant provisions of the Regulations and the relevant legal tests, noted that the OASys Report found that he posed a medium risk of offending and that the harm to the public would be serious and then at paragraph 28 he turned to consider proportionality having found at paragraph 27 that the appellant was entitled to no more than the minimum level of protection, namely that his deportation had to be justified on grounds of public policy and there is no challenge to that finding which arose as a consequence of an assessment of the evidence in the context of the tests set out in cases such as MG and Tsakouridis.

4. The judge then set out the terms and the effect of Regulation 21(6) and the matters to be taken into account in considering proportionality, the age, state of health, family and economic situation, length of residence in the UK, social and cultural integration to the UK and the extent of links with the country of origin, and those factors were all considered. In passing referring in relation to his relationship with his partner he noted that as she had not been aware until it was put to her in cross-examination that he had served a period of imprisonment during the relationship for a drug offence of eight months, this did not inspire confidence and the level of influence she was likely to have on him in enabling him to reduce the risk he posed to society.

5. The judge then went on at paragraph 28(e) to say that

> "The sincerity and commitment of his family members and his partner to his rehabilitation persuade me that the appellant stands better prospects of rehabilitation in the United Kingdom than he would in Portugal. Their support has been consistent over the years. The likelihood of the appellant drifting back into a life of crime would be much greater in Portugal than it would be in the United Kingdom where he would have the support of his family and his partner."

6. The judge then went on to say at paragraph 29:

> "I recognise the compelling public interest in considerations in this case namely, the protection of members of the public from harm in the light of the level of risk that the appellant poses, and the lower level of protection to which he is entitled.
>
> In my view in the assessment of proportionality the factor that tips the balance in the appellant's favour is the shared interest that the EEA countries have in helping an individual to progress towards a better form of life."

7. The Secretary of State sought and was granted permission to appeal against the decision on the basis that there was an arguable misdirection in terms of proportionality and referring to decisions of the Upper Tribunal in Essa and Vasconcelos and these are matters that understandably since they are the basis on which permission was granted Ms Isherwood relies on today and Mr Plowright on the other hand argues that the judge assessed the evidence properly and considered the relevant matters to be taken into account in proportionality and this was one of the factors considered which was treated as tipping the balance as one factor among others and that it was right to do so.

8. This has to be seen in the context of what was said in particular by the Upper Tribunal in Essa and in particular quoting from paragraph 26 in relation to levels of protection and integration.

> "We agree that the court's reference to genuine integration must be directed at qualified persons and their family members who have resided in the host state as such for five years or more. People who have just arrived in the host state, have not yet become qualified persons or have not been a qualified person for five years can always be removed for non-exercise of free movement rights irrespective of public good grounds to curtail free movement rights. If their presence during this time makes them a present threat to public policy it would be inconsistent with the purposes of the Directive to weigh in the balance against deportation their future prospects of rehabilitation."

9. And then the Tribunal went on to say at paragraph 27:

> "If they achieve rehabilitation on return to their state of origin with whom they have not yet lost links then they can always apply to revoke the deportation order that would otherwise prevent them exercising free movement rights in the host state in the future."

10. So there is this clear statement which was endorsed subsequently I think in Vasconcelos and one can clearly see the logic behind this. If a person is not integrated in the sense that they are a person who only has the minimum level of protection then there is no good reason in effect for them not to return to their country of origin if they are a present threat to public policy because they are not

integrated in the host state. The logic of that I think is compelling. And this is really the only factor I think that the judge found to be particularly in the appellant's favour in this case.

11. It was as he said at paragraph 29, the factor that tips the balance in the appellant's favour and although Mr Plowright is right to say that it is one of the factors considered, it was the factor that made the difference in this case and it was a factor that as a matter of law it was wrong for the judge to regard as dispositive in light of Essa and Vasconcelos. It was wrong to treat the issue of rehabilitation as a relevant one in the case of a person who was entitled to no more than the minimum level of protection and where he posed a medium level of risk of reoffending the harm to the public would be serious and these are matters dealt with further in some detail at paragraph 27, setting out the concerns that the judge had about the risk of reoffending.

12. So for these reasons I consider the judge did materially err in law in this case and as a consequence the decision will have to be remade I invite the parties' representations as to how we should best proceed on this.

13. In his submissions Mr Plowright noted that the First-tier Tribunal Judge's determination which had just been set aside covered the factual issues. A relevant factor in contrast to the position in Essa [2013] UKUT 00316 (IAC), and Vasconcelos [2013] UKUT 00378 (IAC) was that the appellant had been living in the United Kingdom since the age of 13 and was now 31. He had therefore spent most of his adult life in the United Kingdom. It was appreciated that some of that time had been spent in prison and so for EU purposes it did not count, but he had been here for a long time. The judge had found that he had no more connections with Portugal and he was in fact originally from Mozambique and had been in Portugal for eight years after moving there from Mozambique and all of his family were in the United Kingdom and his partner was British. So his connections with the United Kingdom were strong, albeit he did not have a permanent right of residence. It was relevant that he had a network in the United Kingdom and to take account of the impact on them if he were deported to Portugal.

14. The Tribunal was entitled to take into account the extent of his integration into United Kingdom society. Prison was another factor relevant to proportionality but also it should be noted that he had been at school and college in the United Kingdom, had his family here and no family in Portugal and had only been back to Portugal once. He had taken courses in prison and posed a medium risk of reoffending. He had the support of his family and his girlfriend. If these were all not taken into account and weighed against his criminal history the balance just about favoured his remaining in the United Kingdom and it being disproportionate to deport him to Portugal.

15. In her submissions Ms Isherwood referred to the positive and negative factors identified in the determination. She emphasised that the appellant did not meet the

high level of protection within the EEA Regulations, and his family had not been able to stop him committing the index offence. He had been clearly aware of what he was doing and the wider impact of guns in the community but nevertheless had committed the offence. It had not been shown that the situation was any different from what was said in the OASys Report about him having committed the offence also because he needed the money.

16. By way of reply Mr Plowright made the point that the appellant had been in custody until about four weeks ago, so given the time factor it was difficult to say much on the last point, though time would tell and he had the family support referred to despite his past and that had been referred to by the sentencing judge. Although much of the skeleton argument before the First-tier Judge was now academic, the factual history was set out there at paragraph 5 onwards.

17. I reserved my determination.

18. I have referred above in the error of law decision to the essence of the appellant's immigration history and to the period over which his offences culminating in the sentencing on 16 December 2008 of committing an act or series of acts with intent to pervert the course of justice, possession of a Class C controlled (cannabis), an aggravated vehicle, taking and causing damage to property other than a vehicle under £5,000, a conviction on 27 March 2009 of taking a motor vehicle without consent and using a vehicle while uninsured, a conviction on 6 April 2009 of driving whilst disqualified and driving a motor vehicle without consent and a conviction on 5 February 2010 of possession of a controlled Class A drug (heroin).

19. As Mr Plowright said, the judge's determination largely covers the factual issues. There is no issue as to entitlement to any more than the minimum level of protection and therefore his deportation has to be justified on grounds of public policy. I endorse the judge's finding at paragraph 27 that the evidence demonstrates that his personal conduct poses a genuine, present and sufficiently serious threat to the interests of public policy. This is because first, the OASys Report found that he posed a medium risk of offending and harm to the public would be serious, yet over the last twelve months he had displayed a level of aggression towards members of staff in prison ad there was little evidence that he had developed thinking skills necessary to reduce the level of risk he posed to members of the public, that he had had the benefit of a written warning informing him that he would be shown leniency if he continued to reoffend, and did not heed this warning and his criminal history demonstrate an escalating pattern of reoffending which in itself points to a propensity to reoffend, and that there was a financial motive to the index offence and the evidence suggests that his previous convictions were not wholly unrelated to his financial needs, he has little in the way of work experience and has not shown a genuine commitment and capacity to become gainfully employed. His financial needs in the future and his capacity to meet them through lawful means are a significant factor in assessing the likelihood that he would reoffend.

20. Like the judge, I note the factors set out at Regulation 21(6), which require the decision maker to take into account the age, state of health, family and economic situation, length of residence in the UK, social and cultural integration into the UK and the extent of links with the country of origin of the person to be removed. The period of residence is relevant to the proportionality of expulsion. The appellant has now lived in the United Kingdom for some eighteen years, having arrived at the age of 13 and has therefore spent a significant part of his formative years in the United Kingdom. He has no family ties in Portugal and has only visited that country once since he came to the United Kingdom. He retains cultural ties with Portugal. He is fluent in Portuguese and the evidence is that he communicates in Portuguese with his mother. He is a young man in good health and would not be destitute if removed to Portugal. Although he has family support and the support of his partner, that support appears to have had no influence on him because he has continued to reoffend, and in relation to his partner, she was unaware of the fact that he had served a period of imprisonment during their relationship for a drug offence, of eight months.

21. As I have concluded above in the error of law decision, in the case of a person such as the appellant who is not a qualified person, who is a present threat to public policy, it is inconsistent with the purposes of the Directive to weigh in the balance against deportation the future prospects of rehabilitation.

22. Taking all these matters together, it is clear to me that the proportionality balance falls very firmly on the side of the public interest in this case and the respondent's decision to deport the appellant is upheld and the appeal against that decision is as a consequence dismissed.

Signed Date

Upper Tribunal Judge Allen **6 November 2014**