Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/13603/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 April 2014	**On 7 May 2014**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

IVO MUZINGA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr L Tarlow, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Portugal, appeals with permission against the decision of the First-tier Tribunal (First-tier Tribunal Judge Braybrook and Mrs W Jordan) which dismissed his appeal against the respondent's decision to deport him to Portugal. The appellant was born in 1990 and is now 23 years old. He was represented by

Counsel before the First-tier Tribunal but has appeared in person in both the recent hearings before the Upper Tribunal.

2. As a Portuguese citizen, the appellant is also an European Union citizen to whom the Immigration (European Economic Area) Regulations 2006 apply when his removal is contemplated.

Background

3. The appellant came to the United Kingdom in 1994, accompanying his Portuguese mother who was exercising Treaty rights in the United Kingdom. On his own account, he began using cannabis when he was about 15 years old (in 2005 or thereabouts). He later graduated to heroin and gambling, and by the time of the index offence he was in serious debt to his drug dealers (for approximately £6000). He opted to repay his drug debts by embarking on a month-long robbery spree in local bookmakers, choosing those furthest from the police station and using an imitation firearm. There were between nine and eleven attacks on bookmakers' shops in that one-month period. In each case, the appellant wielded the gun and his elder brother was the getaway driver. A number of other local youths accompanied them.

4. On 21 August 2009, the appellant pleaded guilty at the earliest opportunity to one count of attempted robbery, six counts of having an imitation firearm with intent to commit an indictable offence, and five counts of robbery. The sentencing judge considered that even an imitation firearm caused 'terror' to the staff of the bookmakers attacked, 'associated with the belief it may be used'. He considered that the appellant, despite his age, was 'a committed criminal prepared to commit crimes of the greatest seriousness'. The appellant steadfastly refused to name the other persons involved, apart from his brother, and confirmed at the hearing before me that he was still not prepared to do so.

5. The appellant pleaded guilty and was sentenced to six years in a young offender prison; he did not appeal his sentence. His brother received the same sentence and was subsequently deported to Portugal. While in prison the appellant took a number of courses. His sentence ended on 16 January 2012; he was then detained under immigration powers and notified of the intention to deport him. He was released on immigration bail on 12 February 2012.

6. A letter from the London Probation Trust on 15 June 2012 concerning the appellant had stated that he was considered to have reduced his risk of reoffending to Medium from High at the point of sentencing. The letter continued:

> "The definition of Medium risk of harm being that there are indicators to point to a potential risk to the public (e.g. the circumstances of the index offences) but that those indicators are not currently evident and unless there is a significant alteration in circumstances, such risk is not likely to be evidenced.

> My assessment of Mr Muzinga is that he has used his time in custody to good effect. I understand it is his wish to become a fully qualified plumber and to that end he has been undertaking vocational courses while in HMYOI Portland to realise that objective. He is well regarded by the prison staff who have regular contact with him and has been afforded 'Enhanced Status' for some considerable time. Furthermore he has acted in the rôle of mentor for other young inmates.
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> As stated I have visited the family home where I have spoken to family members. It is my assessment the Muzinga family are prepared to work constructively with this service and therefore less likely to collude with any bhvr that could compromise the aims and objectives of supervision. …he has a realistic and achievable release plan that we will support, and is aware of the action we will take should there be any breach of the conditions of statutory supervision on licence."

7. The appellant produced at the hearing a recent probation report which he had not disclosed in advance, dated 4 April 2014. In that letter, Mr Victor Donkin, his probation officer stated that he considered that the reference to using heroin was an error since he could find nothing in the case file to support it. There was no reason to suppose that a risk of re-offending was of concern. Mr Donkin stated that the appellant had complied with his licence and supervision terms and that:

> "He has proved to be someone who has responded appropriately to the supervision process over a protracted period and I can state I have found him to be consistently polite and courteous in my contact with him. Mr Muzinga has also demonstrated that he is someone with a positive work ethic and it is to his credit that he has striven hard to maintain himself in employment despite the difficulties he has faced in terms of the restrictions placed on him [he wears a tag which restricts and logs his movements]. He was most recently employed with the National Deaf Children's Charity as a fund raiser. Unfortunately this employment was short lived as he was advised he could not continue as his requirement to present himself each week for immigration purposes precluded him from being retained. As a consequence he is currently engaging with our partnership agency with regard to employment and training opportunities."

8. That is the probation evidence before me. There is no timeline as to the employment the appellant has managed to obtain, how long he held the posts, or what training he has undertaken since leaving prison. Nor is there any mention of plumbing qualifications. In addition, the appellant produced a letter from another fundraising organisation, Homefundraising Ltd, dated 23 April 2014, recording his appointment with that organisation as a fund raiser for a probationary period of three months.

Immigration (European Economic Area) Regulations 2006

9. Regulation 21 of the Immigration (European Economic Area) Regulations 2006, which so far as relevant, is as follows:

> "21. (1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
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> (2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; …

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

The deportation decision

10. The respondent's deportation decision on 8 June 2012 was made under regulation 21(3) of the EEA Regulations 2006 (serious grounds of public policy or public security). She now accepts that the applicable provision is regulation 21(4) (imperative grounds of public security) and on 7 February 2014 she gave supplementary reasons for her decision under that provision.

11. After setting out the appellant's offending history, in her 7 February 2014 letter the respondent noted that the appellant's elder brother and co-defendant, also a Portuguese national, had already been deported for the same offence. The circumstances of the two brothers were almost identical. She considered that this appellant had entered the criminal world at a very serious and committed level and continued to pose a risk of reoffending:

> "18. Your client's personal conduct since the age of 15 is one of spiralling criminality…he began to use drugs at this age – both cannabis and heroin – and ended up in such a severe debt to his dealers that your client concluded the solution was 'armed' robbery. These facts belie the statements of those who have testified to your client's previous good character. Your client is still assessed as posing a medium risk of further offending and therefore it cannot be said that his personal conduct does not still pose a risk to the fundamental aim of society to protect its citizens from criminal violence. …
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> 22. … Further it is noted that whilst your client pleaded guilty at the earliest opportunity there were other participants in his 'armed' robberies who he has, as yet, failed to identify. The Secretary of State finds this fact of significant – and negative – interest in measuring your client's rehabilitation and potential for a positive rôle in United Kingdom society.
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> **Conclusion**
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> 23. Having given the extremely serious nature of the threat posed by your client further consideration in the light of the imperative test under the EEA Regulations, and taking into account your client's potential to become fully rehabilitated, the Secretary of State is satisfied that any interference in your client's human rights is fully justified and proportionate in accord with the imperative test and essential to the fundamental aim of protecting the United Kingdom."

First-tier Tribunal determination

12. The First-tier Tribunal heard the appeal in September 2012. The Tribunal in its findings of fact noted that in his account to the probation officer, the appellant had stated that it was he who invited his elder brother to help him commit the robberies; his brother obtained the handgun from a friend. In his account to the First-tier Tribunal, both in his witness statement and his oral evidence, the appellant said it had been the brother's idea. His parents, who both gave evidence, said the same. The Tribunal considered that this inconsistency arose out of the desire of the appellant and his parents to minimise his offending.

13. The family had heard that the brother, after being removed to Portugal, was now living in France. The appellant was still living at home: before his offences he had been on Jobseekers' Allowance and a further benefit related to college attending. The plumbing career which seemed so certain in June 2012 had not materialised, and was now described as 'just an idea'. The appellant had taken an NVQ7 in rail track work but considered himself unable to work on the railways because he was still tagged and could not work at night. He had been offered a job with a Mr Ali, who had apparently employed him before his offences, but had decided not to take it up because of his immigration status. The appellant stated that he knew he needed to keep busy, in order not to return to his previous lifestyle.

14. The appellant's parents still live in the United Kingdom. However, the Tribunal found that he had an uncle, aunt, and grandparents in Portugal, as well as his brother (when not working in France). The family had continued to have holidays in

Portugal regularly since the appellant was five years old. The Tribunal found that he would be able to reintegrate socially and linguistically if returned to Portugal. They found that the decision to deport the appellant was proportionate in all the circumstances.

Error of law hearing

15. permission to appeal was granted on the basis that the First-tier Tribunal had erred in law in applying regulation 21(3): that is no longer disputed. On 12 February 2014, I set aside the decision of the First-tier Tribunal on that basis and adjourned the appeal to a substantive hearing. The appellant's mother was present at that hearing but there was no new witness statement from her and she did not give evidence at either of the hearings before me. The appellant gave brief evidence in relation to his bail, to the effect that he was unable to pursue a post he had obtained, because of the tagging provisions, which he had not disclosed when applying for the job. I refused to vary the terms of his bail after hearing from the respondent.

16. I did not proceed to remake the decision at the 12 February hearing because the respondent served the supplementary letter dated 7 February 2014 at the hearing, and the appellant was plainly disadvantaged by not having had an opportunity to seek legal advice and file further evidence in response, if he chose to do so. I therefore adjourned the substantive hearing to the first open day after four weeks and directed both parties to file and serve any further documents on which they intended to rely, including witness statements, not later than seven days before the resumed hearing.

Remaking the determination

17. The question for the Upper Tribunal at the substantive hearing on 30 April 2014 was whether the First-tier Tribunal's error was material to the outcome of the appeal, that is, whether the difference between 'serious grounds of public policy' and 'imperative grounds of public policy' on the facts of this appeal was sufficient to lead to a different outcome for the appeal. The appellant appeared in person again. No new material was served before the hearing: the appellant did not obtain legal representation in the period of approximately ten weeks before the resumed hearing. No member of his family accompanied him.

18. In his evidence at the hearing, the appellant accepted that he had committed a serious crime. However, he had done so as a young person of 18 and was now a different person. He was seeking an opportunity for normal life, recognising that his behaviour had hurt people and changed the lives of others, maybe forever. Nobody could say now that he was not a changed man. A few days before the hearing, he had obtained employment representing St Mungo's Homeless Charity.

19. Mr Tarlow asked the appellant whether he had studied further since leaving prison. The appellant said that the job centres were very busy and although he had done one or two free work programmes, he had not really gone to the job centre very much. They had other people to think about, thousands of them. He had been registered for

about 18 months now. The free courses he had taken, one in 2012 and one in 2013 were not at his level: he could get proof of attendance but those courses were for less intelligent people and were unlikely to rehabilitate him. He was occupied and 'very workaholic'. He wanted to change his life.

20. When I asked the appellant why there were no letters from his family and no one had accompanied him to the hearing, the appellant said he was ashamed to bring them to every court hearing; the problem was his, not that of his family. When asked whether he was aware that the present hearing might be the last one, the hearing which sent him home to Portugal, the appellant said that he did know that, but had not really been thinking about it in those terms.

21. In submissions for the respondent, Mr Tarlow relied on her letters of refusal and in particular the February 2014 letter dealing with the 'imperative grounds' test. He reminded me that the appellant, his brother and a number of other youths whose identities the appellant had declined to disclose had gone on a robbery spree, hitting at least nine bookmakers' shops and stealing approximately £17000 over a period of a month. The imitation firearm wielded by the appellant had terrified staff in the shops. Evidence of rehabilitation after leaving prison was very slight indeed: the appellant had not established any settled employment and was a single man who could properly and proportionately be returned to Portugal. The respondent's decision was correct in law.

22. The appellant in his submissions asserted that he had indeed been rehabilitated. He relied on his latest employment letter, the probation letter, and the courses he had studied in the Young Offenders' Institution, which had included drug awareness, advice and guidance, and P-ASRO. He was unable to tell me what P-ASRO stood for: an internet search suggests that it stands for Prison - Addressing Substance Related Offending. He remained on licence and had not committed any further offences. There had been no change in his bail conditions. He asserted that he was no longer a risk to society.

Discussion

23. The narrow point for me is whether, applying the higher test of 'imperative grounds', the respondent's decision to remove the appellant to Portugal is lawful. I am satisfied that it is. The appellant's offences were very serious and he was the one with the gun (albeit apparently a replica). Although he pursued education in prison, since leaving he has had only sporadic employment, mostly when there is a hearing pending. He produces no evidence of family support in the United Kingdom. He does not disclose that he is tagged when applying for posts, suggesting that he is not doing so through his probation officer. He applies for posts the conditions of which require him to breach his tagging conditions and then does not pursue them for that reason. He has not stuck at anything for any length of time.

24. The respondent has applied her mind to the requirements of paragraphs 21(5) and 21(6) of the Regulations and the conclusions she reached were open to her on the facts of this case. There is nothing in the very limited evidence before me to suggest

that the appellant is not still at least a medium risk of re-offending, should his circumstances change. He is intelligent enough to make sure that while he is tagged and on licence no further offences are committed but absent any settled life in the United Kingdom that is not sufficient reassurance for the future. The appellant has family both in the United Kingdom and Portugal, which he has visited regularly since coming to the United Kingdom. The respondent did not err in considering that he could be reintegrated easily there and that his removal would not be disproportionate.

25. I remake the decision by dismissing the appellant's appeal under the Rules, the EEA Regulations, and on human rights grounds.

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 dismissing it.

Date Signed

Judith Gleeson
Judge of the Upper Tribunal