Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20295/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 January 2014	**On 24 February 2014**

Before

THE HON. MR JUSTICE MCCLOSKEY, PRESIDENT
UPPER TRIBUNAL JUDGE FREEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JORDAN EPEE HOMB

Respondent

Representation:

For Mr Epee Homb: Miss J Elliott-Kelly, (of Counsel) instructed by Blavo & Co Solicitors

For the Secretary of State: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the determination of the First-tier Tribunal, promulgated on 28 October 2013. The appeal has its origins in a decision made on behalf of the Secretary of State in a letter dated 19 October 2012. By that

decision the Secretary of State determined to deport Mr Epee Homb from the United Kingdom under Regulation 21(5) of the EEA Regulations 2006. Though they are respectively Appellant and respondent before us, for clarity we shall refer to them in reverse, as they appeared before the First-tier Tribunal.

2. The background to the impugned decision is that the Appellant was born in France, of parents originally from The Cameroon, on 13 February 1984. As French citizens, they all moved to the United Kingdom in 2001, lawfully. Between October 2005 and October 2010, the Appellant incurred several convictions, involving mainly simple possession of drugs, with one offence of criminal damage and another of assault. None of these resulted in any form of incarceration.

3. The conviction which led to the decision under appeal was for possession of a firearm with intent to cause fear of violence, committed on 2 February 2011, for which, on 30 January 2012 the Appellant was sentenced to 4½ years' imprisonment. He had pleaded guilty, as the sentencing judge said, following discussion and on a written basis, which the judge had to follow, dealing with him as someone who had never intended to hurt anyone, but only to scare them. The offence involved the Appellant and four others. The injured party was described by the judge as a criminal associate. At the time of the incident, the man's home was occupied by his mother and her seven-year old daughter.

4. One of the miscreants, not the Appellant was carrying an unshortened shotgun, which was fired twice, through and at the front door. Luckily it was fired downwards, and no-one was hurt; but, as the judge said "… this was without doubt a frightening and dangerous episode", which the Appellant and others involved knew perfectly well would be terrifying for those on the receiving end. Assuming the Appellant received full credit for his plea, the judge must have taken the view that, on a trial, this would have deserved a sentence approaching seven years' imprisonment, even for a young man with no previous custodial disposal.

5. So far as the Appellant's family life is concerned, we shall refer to those concerned by the initials of their Christian names, so as to avoid unnecessarily anonymizing the Appellant himself: **however no further details must be published which might identify either of the children.** The Appellant has a son, T, born in 2006, out of a relationship, now over, with S: since he has been in prison, he has not seen T, who has been told he is away in France. Since 2008 the Appellant has been in a relationship with C, who has a daughter K, born in 2004, who is said to regard him as her father.

6. Against this background, the First-tier Tribunal ("the FtT") allowed the appeal against the deportation order. The sole question for this Tribunal, on further appeal, is whether the FtT, in so deciding, committed a material error of law. At this juncture, we would highlight that this Appellant is, of course, an EEA citizen, and has to be dealt with under an entirely different régime from that which applies to other immigrants.

7. The United Kingdom legislation which applies to a case of this kind is the Immigration (European Economic Area) Regulations 2006 [the EEA Regulations], which this country was obliged to enact, in order to implement Directive 2004/38/EC of the European Parliament and of the Council [the Citizens Directive]. Before the days of qualified majority voting, that Directive had of course been agreed to by Her Majesty's Government.

8. By reg. 19 of the EEA Regulations, a decision to remove an EEA national can be taken only on grounds of public policy, public security or public health. It was common ground at both tiers of this appeal that this Appellant was entitled only to the lowest level of protection, common to all EEA citizens. His case is governed by Regulation 21, the relevant provisions whereof are as follows:

> "*(1) … a 'relevant decision' means an EEA decision taken on the grounds of public policy, public security or public health*
>
> *(2) A relevant decision may not be taken to serve economic ends.…*
>
> *(5) Where a relevant decision is taken on grounds of public policy or public security it shall, … 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."*

9. The FtT allowed the Appellant's appeal on the ground that the decision to remove him did not comply with the principle of proportionality, in the light of the other considerations specified in Regulation 21 (5). Their decision to do so was then challenged by the Secretary of State's application for permission to appeal to this Tribunal, which was based on factual issues relating to the FtT's treatment of:

(a) the risk to the public posed by the Appellant, as assessed by the National Offender Management Service [NOMS];

(b) how such contact as he now has with his son could be maintained; and

(c) the extent to which his return to France would otherwise infringe his right to private or family life.

10. The grant of permission to appeal is couched in somewhat lean terms, referring in very summary form to the grounds as pleaded There is a lengthy document in reply to those grounds, drafted by Miss Elliott-Kelly. However, we have interpreted the scope of the appeal in the manner most generous to the Secretary of State. As a result, we have treated the parameters of the appeal as not confined to the grounds of appeal, but as augmented by Mr Melvin's written submissions. These refer to the opinion of the Advocate-General in what was to become *Onuekwere* [2014] EUECJ C-378/12: at one point, misleadingly, but we accept unintentionally, the submissions portray this as the decision of the Court of Justice of the European Communities itself.

11. The Advocate-General's opinion was superseded, by the decision of the Court, delivered on 16 January 2014, of which Mr Melvin was unaware until we enlightened him. We accept, of course the importance of rehabilitation, as a function of imprisonment, highlighted by the Advocate-General; but the point of his remarks was very much directed, as a matter of course, to the questions before the Court, and not to those before us. In short, the decision of the CJEU does not sound on the determination of this appeal.

12. We begin by noting that no error in the treatment of the facts by the FtT can amount to an error of law, requiring us to re-make the decision, except on the basis set out in *E & R* [2004] EWCA Civ 49, and repeated, at rather greater length, in *R (Iran) & others* [2005] EWCA Civ 982. The relevant passage is in paragraph [90] of the judgment of the court, and can be read *mutatis mutandis* with reference to the present structure of the immigration appeals system:

> *"1. Before the IAT could set aside a decision of an adjudicator on the grounds of error of law, it had to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings. This principle applied equally to decisions of adjudicators on proportionality in connection with human rights issues;*
>
> *2. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the Wednesbury sense, or one that was wholly unsupported by the evidence.*
>
> *3. A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way that the IAT was unable to understand why he reached that decision."*

13. Turning to the individual grounds of appeal:

(a) The NOMS assessment

Here the First-tier Tribunal recorded, correctly, at paragraph 56, that the Appellant had been assessed by NOMS in August 2012 as presenting a medium risk of re-offending and a high risk of harm to members of the public if he did so. They went on, expressing suitable caution over taking anyone's assurances of improvement at face value, to accept that he had "… matured to some degree by his time in custody". The panel saw and heard the Appellant give evidence, for what must have been some time. We consider that this was a judgment on the evidence which they were entitled, indeed obliged, to make for themselves. Ditto their assessment of the extent to which he had been rehabilitated by imprisonment. This was not a matter of some irrational, capricious or wholly subjective evaluation in preference to the NOMS assessment, as Mr Melvin argued. It was, rather, a rational evaluative judgment which had a sufficient evidential basis and cannot, therefore, be impugned.

(b) Contact between the Appellant and his son T

Here it is suggested that there would be no difference, in terms of the Appellant's relationship with T, between T's believing that his father is in France, as now; and his actually being there. However, the panel heard oral evidence from S on the Appellant's behalf, and accepted (in paragraph 46) that he and T spoke every day on the phone and that she encouraged contact between them. As Miss Elliott-Kelly pointed out, it was not unreasonable to accept that S, whose relationship with the Appellant was long over, would not wish to take T to see him in prison, but would facilitate and encourage renewed contact following his release. Again, the panel were entitled to form their own judgement on this quintessentially factual issue and did not lapse into irrationality in doing so.

(c) Life for the Appellant in France

The panel dealt with this at paragraph 57: they reviewed the Appellant's prospects, including his desire for a family life in the future with C and K, as well as his relationship with T. While it is true that the Appellant had apparently fallen into bad company, and from there into serious crime in this country, the panel were entitled to identify and weigh the difficulties he could foreseeably face in France, including the lack of any positive encouragement to rehabilitation he would have there, as compared to this country. Their predictive, evaluative judgment about these matters falls well short of the irrationality threshold for intervention by this Tribunal.

14. Properly analysed, we consider that the grounds of appeal, construed and considered in the manner explained above, resolve to a challenge to the merits of the determination of the First-tier Tribunal, a simple disagreement with the Tribunal's findings and a mere disagreement with the Tribunal's evaluative and predictive assessments on issues which were obviously germane to the factors enshrined in Regulation 21(5)(c). We can find no basis for concluding that the Tribunal left out of account any material piece of evidence or any relevant consideration. Nor do we find any basis for concluding that the Tribunal lapsed into the prohibited territory of irrationality. These are the central tenets of the Secretary of State's appeal and we conclude that they have not been established.

15. We repeat the task of this appellate Tribunal is to determine whether the decision of the FtT is vitiated by some material error of law. Having considered scrupulously all materials, we find that no such error was committed. This Tribunal, in this context, is concerned only with the question of error of law. Acting within and respecting the limits of the jurisdiction which Parliament has chosen to confer on us, we conclude that the Secretary of State's appeal must be dismissed.

DECISION

16. Accordingly, we dismiss the appeal and affirm the determination of the First-tier Tribunal.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 20 February 2014