Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02064/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 30 November 2015	**On 11 December 2015**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

JORGE LUIS FIQUEIREDO GESTEIRA

Claimant

Representation:

For the Secretary of State: Mr K Norton, Home Office Presenting Officer
For the Claimant: Mr Mukulu instructed by Ricardina Bridges Ltd

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Burnett, promulgated on 13 August 2015, in which he allowed the claimant's appeal against the decision of the Secretary of State made on 15 October 2014 to deport him pursuant to Regulations 19, 21 and 24 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2. The claimant is a citizen of Portugal born on 3 September 1994. He came to the United Kingdom in 2005 and has live here since then, undertaking full time education for a number of years. His mother lives in the United Kingdom, and he has no relatives left in Portugal to which he has not returned since 2005.

3. The claimant has been convicted of three offences:

(i) failure to surrender to custody on 21 July 2012, for which he received one day's imprisonment;

(ii) possession of a knife in a public place on 26 July 2012, for which he received 8 weeks' detention suspended for 12 months; and,

(iii) supplying a controlled drug, crack cocaine, for which he received 2 years detention in a young offenders institution.

4. Consequent on the last conviction, the Secretary of State decided to deport the claimant for the reasons set out in the letter of 15 October 2014, noting that [24] he had been found to present a medium risk of re-offending; that there was insufficient evidence that he had addressed the reasons for his offending, and that [27] he has a propensity to offend, he presented a genuine, present and sufficiently serious threat to the public to justify his deportation. She was also satisfied that his removal was proportionate [28] - [32].

5. On appeal, First-tier Tribunal Judge Burnett found that:-

(i) the claimant had not acquired the right of permanent residence [34];

(ii) the claimant represents a sufficiently serious threat to public policy and/or security [48];

(iii) the claimant had started on the road to rehabilitation [54], was genuine in his remorse [55] , and

(iv) following **Essa**, that he was bound to take into account the issue of rehabilitation [57]; that it was a factors to be given some weight [58]; and, that there was a reasonable prospect of rehabilitation in the UK, enhanced by the support of his family; and, accordingly, deportation was not proportionate [62].

6. The Secretary of State sought permission to appeal on the grounds that:-

(i) having found that the claimant represents a threat to public policy and/or security, it was irrational for the judge to conclude that the respondent's decision was not proportionate [7];

(ii) the judge erred in placing undue weight on the issue of rehabilitation, contrary to **SSHD v Dumliauskas** [2015] EWCA Civ 145

7. On 20 October 2015 First-tier Tribunal Judge Simpson granted permission on all grounds

Submissions

8. Mr Norton submitted that there was a clear error in this case, the judge having erred in taking into account the possibility of rehabilitation.

9. Mr Mukulu submitted that there has been no material error, and that the Secretary of State's submissions were, in effect, a submission that all she needed to do to succeed was to show that an appellant presented a genuine, sufficient and serious threat.

Discussion

21. The main thrust of the Secretary of State's case is that the judge erred in his consideration of rehabilitation, given in particular what was held in **Dumliauskas** at [54] per Sir Stanley Burnton:

> Lastly, in agreement with what was said by the Upper Tribunal in *Vasconcelos*, I do not consider that in the case of an offender with no permanent right of residence substantial weight should be given to rehabilitation. I appreciate that all Member States have an interest in reducing criminality, and that deportation merely exports the offender, leaving him free to offend elsewhere. However, the whole point of deportation is to remove from this country someone whose offending renders him a risk to the public. The Directive recognises that the more serious the risk of reoffending, and the offences that he may commit, the greater the right to interfere with the right of residence. Article 28.3 requires the most serious risk, i.e. "imperative grounds of public security", if a Union citizen has resided in the host Member State for the previous 10 years. Such grounds will normally indicate a greater risk of offending in the country of nationality or elsewhere in the Union. In other words, the greater the risk of reoffending, the greater the right to deport

22. There is, as the respondent submits, no indication that the judge engaged with this decision, although it was handed down some months before the appeal before him.

23. Contrary to what was submitted by Mr Mukulu, it is evident from the First-tier Tribunal's decision that significant weight was given to rehabilitation, as can be seen from paragraphs [54]-[59]. While other factors were taken into account, as is required by regs. 21 (5) and (6) of the EEA Regulations, these are dealt with briefly, and it cannot be said that, had weight not been improperly attached to the issue of rehabilitation, that the appeal would nonetheless have been allowed. While the judge records the length of time the claimant spent in the United Kingdom and his ties, including family, there is no indication of this being weighed or what weight was attached to any of these factors.

24. I do not, however, consider that there is merit in the submission in the grounds at [7] that it is irrational for a judge, having found that an appellant does present a genuine, present and sufficiently serious threat to public policy and/or security, to proceed to allow an appeal. As Sir Stanley Burnton stated in **Dumliauskas** at [55], a real risk of reoffending (and thus presenting such a risk) is a condition precedent to the power to deport being exercised; only once that is established is there a need to consider the proportionality of doing so, in accordance with the principles set out in regs. 21 (5) and (6).

25. It follows therefore that the decision of the First-tier Tribunal did involve the making of an error of law, and I set it aside.

26. I consider that there will in this case be a need to hear further evidence. It is also unclear why the First-tier Tribunal considered that the applicant did represent a risk of or propensity to reoffend if, as appears from [54] ant [59] he was on the road to rehabilitation, was genuinely remorseful and would have the support of family which was likely to diminish his likelihood of reoffending. Accordingly, I am satisfied that in this case it would be appropriate to remit the appeal to the First-tier Tribunal for a fresh decision on all issues.

Summary of conclusions

1. The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

2. I remit the appeal to the First-tier Tribunal for a fresh determination on all issues.

Signed Date: 2 December 2015

Upper Tribunal Judge Rintoul