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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07177/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 16 January 2015	**On 21 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JORGE GONCALVES DA SILVA
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr S Allan, Home Office Presenting Officer
For the Respondent: None

DECISION AND REASONS

1. The respondent to this appeal, Mr Goncalves Da Silva, is a citizen of Brazil born on 1 October 1962. The appellant is the Secretary of State for the Home Department, who has appealed with the permission of the First-tier Tribunal against a decision of a panel comprising Judge of the First-tier Tribunal McWilliam and Judge of the First-tier Tribunal Bartlett, allowing Mr Goncalves Da Silva's appeal against the decision to remove

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him to Brazil, having refused his application for a variation of leave under Appendix FM of the Immigration Rules, HC395.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to Mr Goncalves Da Silva from now on as “the appellant” and the Secretary of State as “the respondent”.

3. I was not asked and saw no reason to make an anonymity direction.

4. The appellant came to the UK in 2007 as a visitor and subsequently claimed asylum. His application was refused and in due course he became an overstayer. He was removed on 5 August 2010. He returned to the UK on 19 May 2011 and was detained. He made an application for leave on human rights grounds, which was refused. However, he successfully appealed that decision to the First-tier Tribunal. The respondent then granted the appellant limited leave to remain from 3 April 2012 until 3 October 2012. The decision now appealed arose from the appellant’s application for further leave, which was refused on 16 January 2014.

5. The First-tier Tribunal identified three reasons for refusal:

   (i) The presence of the appellant was not conducive to the public good;
   (ii) The appellant had not declared all his convictions in the application form; and
   (iii) The appellant had not satisfied the English language requirement of the rules.

6. The First-tier Tribunal heard evidence from the appellant and his wife, Mrs Adeola Da Silva, and also from PC Dollery, who was attached to Operation Nexus at New Scotland Yard. PC Dollery gave evidence as to the appellant’s convictions, which are listed in paragraph 10 of the determination. They are (a) possession of a bladed Article in 2008, (b) criminal damage in 2012, (c) battery in May 2013, and (d) burglary in September 2013. She also gave evidence of the appellant’s non-convictions history, which is set out in paragraph 11 of the determination. The First-tier Tribunal considered medical evidence, described in paragraphs 31 and 32 of the determination, to the effect that the appellant had an established diagnosis of severe, enduring mental illness, namely F250 schizophrenic disorder manic type for which he was treated with antipsychotic depot injections every month. He had had at least four admissions to hospital. He was incapable of taking an English language test.

7. The First-tier Tribunal found the appellant and Mrs Da Silva credible. The appellant had significant mental health difficulties and these were the primary cause of his offending behaviour. Further, at the time of his offending, his health was not properly managed. Since November 2013

he had received his medication by means of injections and he was closely monitored. With this support in place plus the support of his wife, the risk of the appellant re-offending was low. All but one of the appellant's convictions involved Mrs Da Silva rather than the public at large and she supported his appeal. The first-tier Tribunal found that it had not been established that the appellant's presence in the UKI was not conducive to the public good and allowed the appeal with respect to paragraphs S-LTR.1.5 and 1.6 of Appendix FM of the Immigration Rules.

8. On whether the appellant had failed to disclose material facts in his application form, namely some of his convictions, the First-tier Tribunal noted he had disclosed his most serious conviction and omitted the least serious one. They accepted there was no dishonesty or intention to mislead and found discretion should have been exercised in his favour. The panel also found the appellant had a mental health condition which prevented him from meeting the English language requirements of the rules. The Immigration Rules were met.

9. The First-tier Tribunal found, in the alternative, that the decision was not in accordance with Article 8.

10. The grounds seeking permission to appeal argue the First-tier Tribunal misdirected itself in law by failing to give the appellant's offending and the public interest in his removal due weight. The grounds also argued the panel had erred in relation to Article 8.

11. Permission to appeal was granted by Judge of the First-tier Tribunal Andrew.

12. The appellant is not legally represented and did not file a response.

13. The appellant attended the hearing with his wife. As he was unrepresented, I explained to him the issues for decision and the procedure to be followed.

14. I heard submissions as to whether the First-tier Tribunal had made a material error of law. Mr Allan's submissions can be summarised as follows. His first submission was that the Tribunal had erred in making its findings under paragraph S-LTR.1.5. It was not disputed that the appellant had committed serious offences and it was erroneous to say that serious harm had not been caused. The appellant had repeatedly offended in a violent manner. His second submission was that paragraph 48 of the Tribunal's decision contained a factual error. In noting the appellant had not offended since June 2013 they had overlooked the fact he was only released from prison in September 2013. Thirdly, the Tribunal had not engaged sufficiently with the separate point as to whether paragraph S-LTR.1.6 applied. The Tribunal should have taken into account the fact the appellant had re-entered the country illegally.

15. Mr Allan's fourth submission was that the Tribunal erred in its application of paragraph S-LTR.2.1 because the appellant had failed to disclose a material fact and whether that was dishonest or not did not come into it. If there was discretion to be reviewed by the Tribunal, its decision was not sufficiently reasoned. Finally, Mr Allan argued there was an important factual error in the Tribunal's consideration of Article 8 in paragraph 57 of its determination. In October 2008 the appellant was in the UK unlawfully.

16. I have recorded the appellant's reply and also the observations of Mrs Da Silva in the record of proceedings. Mrs Da Silva became quite emotional. Mr Allan said the Tribunal had fallen into error and effectively excused the appellant's serious offending.

17. I find no material error of law in the First-tier Tribunal's decision. My reasons for this conclusion are as follows. They follow the five arguments pursued by Mr Allan.

18. Paragraphs S-LTR.1.5 and 1.6 read as follows:

> "S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law.
>
> S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

19. A careful reading of the whole of the First-tier Tribunal's decision leaves no room for doubt that the panel fully considered the appellant's criminal record, as well as the additional "nexus evidence" called from PC Dollery. The Tribunal reminded itself this was not a deportation appeal but an appeal against the refusal of an extension of leave to remain with a spouse. It was significant that the appellant was not a "foreign criminal", as defined in the UK Borders Act 2007.

20. The panel was aware of the earlier decision of Judge Blair-Gould in 2012 which noted the appellant's conviction in 2008 of possession of an offensive weapon. The appellant pleaded guilty in the Magistrates' Court and he was sentenced to a hospital order under the Mental Health Act 1983. Indeed, Judge Blair-Gould's decision contained a detailed account of the appellant's tendency towards violent conduct in the context of his mental health problems. He also concluded in paragraph 113 that the principal cause of the appellant's behaviour was his mental illness and, as long as he remained at liberty with his (now) wife he would be likely to continue to take his medication and there would be a considerably reduced risk of any repetition.

21. The First-tier Tribunal chaired by Judge McWilliam was aware that the appellant had three further convictions after Judge Blair-Gould allowed his appeal. It directed itself correctly that Parliament had not decided the appellant's removal was conducive to the public good and it was therefore a matter for the panel to decide. Mr Allan challenged the panel’s finding that the appellant's offending had not caused serious harm (see paragraph 47). He described its conclusion as “fundamentally flawed” because the panel had not taken sufficient account of the public interest in removal. However, I find it was open to the panel to reach the conclusion which it reached in this respect and its conclusion is adequately reasoned.

22. The panel noted the relatively lenient sentences imposed and the fact that all but one of the convictions related to the appellant’s wife. Mr Allan is right that the fact Mrs Da Silva has forgiven her husband is not the issue because an objective assessment of serious harm must be made. However, what the panel was saying was that the appellant's offending was confined to the domestic situation and his offending was not therefore directly causing harm to the wider public. Mr Allan’s argument that the harm is caused by the criminality itself cannot be right. The Tribunal was entitled to look at the circumstances of the offences and the sentences imposed in order to make its own assessment.

23. Mr Allan also challenged the panel’s alternative conclusion that the appellant was not a persistent offender who shows a particular disregard for the law (see paragraph 48). In this regard the Tribunal based its decision on the fact the appellant had not offended since June 2013. Mr Allan argued this conclusion was erroneous on two grounds. Firstly, he said there was an error of fact because the Tribunal had overlooked the fact the appellant was not been released from prison until September 2013. However, the panel had noted in paragraph 42 that the appellant was not released from prison until September 2013, since when there had been no further offending. Furthermore, the appellant had resumed living with Mrs Da Silva in January 2014. I see no error on the Tribunal’s part.

24. Secondly, Mr Allan argued the appellant was a persistent offender and the Tribunal’s decision was not sufficiently reasoned. However, I do not think the panel’s conclusion on this was unreasoned, irrational or based on any misapprehension of the facts. It took into account Judge Blair-Gould’s decision and the events which followed. It did not diminish the importance of the offences committed by the appellant. It noted the timing of the offences. It was entitled to place weight on the expert opinion of the appellant's psychiatrist and also the evidence of Mrs Da Silva to the effect the appellant’s condition was now far better managed.

25. Mr Allan was unhappy with the Tribunal's record that he did not specifically refer to paragraph S-LTR.1.6 in his submissions. He said he had submitted that it was not necessary to rely strongly on paragraph S-LTR.1.6 because the appellant's appeal must fail under paragraphs S-LTR.1.5 and 2.2. He had expressly relied on the reasons for refusal letter, which did refer to paragraph S-LTR.1.6.

26. Paragraph S-LTR.1.6 is plainly designed to catch some persons who do not fall into paragraph S-LTR.1.5 because of their conduct, character, associations or other reasons. As noted, the panel heard "nexus evidence" from PC Dollery. The panel's consideration, at paragraph 50, was limited to noting the appellant was not part of a criminal gang.

27. Mr Allan argued that such consideration was inadequate because it ignored other factors. The other factor he identified was the appellant's "illegal entry" in 2011. He argued this did not appear in the Tribunal's reasoning.

28. I find the Tribunal was entitled to regard the respondent's case under paragraph 1.6 as secondary to its primary challenge based on paragraph 1.5. The only reason given in the refusal letter on this point was that the appellant had been convicted of three offences between September 2012 and June 2013 which had resulted in prison sentences and harm to another person. These issues were fully considered. Rightly, the Tribunal then focused on whether the evidence showed the appellant had undesirable associations, which is often disclosed in "nexus evidence". The evidence did not show the appellant was associated with a criminal gang.

29. It is clearly the case that the Tribunal had regard to the appellant's entry in May 2013, specifically noting that Judge Blair-Gould had made an adverse finding in this respect and, more importantly, setting out the evidence of the circumstances in paragraph 23. The appellant and Mrs Da Silva returned to the UK from Brazil and the appellant had not secured entry clearance, as he was required to do, with the result he was detained on arrival. He was not an "illegal entrant". Judge Blair-Gould had been hearing an appeal against a decision to refuse to grant him leave to enter. Following that appeal, the appellant was granted a period of leave. The Tribunal chaired by Judge McWilliam was hearing an appeal against a decision to refuse to vary leave and to remove under section 47 of the 2006 Act. I do not agree with Mr Allan that the Tribunal erred by overlooking this matter.

30. I now turn to Mr Allan's fourth challenge. Paragraphs S-LTR.2.1 and 2.2 of the rules read as follows:

> "S-LTR.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR.2.2. to 2.4. apply.
>
> S-LTR.2.2. Whether or not to the applicant's knowledge –

(a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or

(b) there has been a failure to disclose material facts in relation to the application."

31. The appellant submitted his application on 31 December 2012 at which time he had two convictions. The refusal letter recorded that he disclosed the earlier one in June 2007 but he failed to disclose the conviction for criminal damage on 25 September 2012 for which he was fined. The First-tier Tribunal found he had therefore failed to disclose material facts in relation to his application under paragraph S-LTR.2.2(b). No discrete issue arose under subparagraph (a). Paragraph S-LTR.2.1 shows that discretion must be exercised in reaching a decision on this ground and the Tribunal was entitled to exercise that discretion itself.

32. Mr Allan's argument was that the Tribunals' decision was not sufficiently reasoned or clear. I disagree. The Tribunal was entitled to find there was no dishonesty or intention to deceive and that the appellant had disclosed the more serious offence. The decision must be read as a whole and it is clear the Tribunal considered the appellant's criminality should be viewed firmly in the context of his mental health problems. The Tribunal gave sufficient reasons, based on the evidence, for its decision to exercise discretion in the appellant's favour.

33. Mr Allan's final argument concerned the Tribunal's finding in paragraph 57 that the appellant had been in the UK unlawfully when he started his relationship with Mrs Da Silva. It is not strictly necessary to see whether the Tribunal's conclusions on Article 8 were vitiated by any error of law because I have found its findings under the rules were sound. In any event, I do not see any material error in the wording of paragraph 57. In October 2008 the appellant was an asylum seeker. As such had he not established any right to remain here but neither could he be removed pending the outcome of his application. The Tribunal correctly noted his status might well have been "precarious".

34. The First-tier Tribunal's decision does not disclose any material error of law and shall stand.

<u>NOTICE OF DECISION</u>

The First-tier Tribunal did not make a material error on a point of law and its decision allowing the appeal under the Immigration Rules shall stand.

No anonymity direction has been made.

Signed **Date 19 January 2015**

Judge Froom, sitting as a Deputy Judge of the Upper Tribunal