Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **DA/00398/2018**

THE IMMIGRATION ACTS

Heard At Royal Courts of Justice
On 04.02.2019

Decision and Reasons Promulgated
On 06.02.2019

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Fabio TAVARES
(anonymity direction not made)

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Ali Bandegani* (counsel instructed by Cassalys)
For the respondent: Mr Ian Jarvis

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Hariqbal Singh Sangha), sitting at Birmingham on 2 November 2018, to dismiss an EEA appeal against deportation by a citizen of Portugal, born 9 September 1994. The judge had written an extremely painstaking decision, and the only ground of appeal was that he had not taken account in it of the latest Offender Assessment System [OASys] report, of 1 November 2018.

2. It is agreed that the 1 November report had been before the judge, though inevitably not as part of the Home Office appeal bundle: perhaps he overlooked it between the hearing on the 2nd and signing his decision on the 26th. Whatever the reason, it was clearly relevant evidence before him, and wrong in law to overlook it. The question for me, as recognized

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

by the very experienced judge who gave permission to appeal, is whether that error was material in all the circumstances.

3. **History** To answer that question, the November report needs to be set in context. The appellant arrived in this country in 2005, when he was 11. In 2011 and 2012 he was found guilty of offences, apparently committed when he was under 18, involving a class 'B' drug (cannabis) and possession of a knife, for which he was dealt with by Youth Rehabilitation Orders. Within a year of the second occasion, as the judge points out, he was convicted of robbery (by this time not as a person under 18), and in April 2013 sent to a young offenders' institution [YOI] for 12 months. That led to a deportation decision; but his appeal was allowed by the First-tier Tribunal in May 2014, and that decision upheld by the Upper Tribunal, following a hearing in November, in February 2015. The Home Office sent the appellant a warning letter about his future behaviour on 2 December that year.

4. Meanwhile however the appellant had been convicted in November 2014 of possession of cannabis with intent to supply, and sentenced to 6 months in a YOI, suspended for 2 years. That was followed by the offences for which the appellant was sentenced on 7 April 2017. The first two, involving once again possession of cannabis with intent to supply, and of a knife, were committed on 13 January 2015. Next he took part in a group burglary of a dwelling-house on 29 September that year.

5. A few days later, on 4 October, the appellant and another young man called Hardy went for a woman walking along the road with her autistic son of 8. Hardy pushed her to the ground, and wrenched two gold chains she was wearing from her neck, as well as her gold ear-rings. The sentencing judge described them as substantial chains, so that significant force had been required: not surprisingly, both the mother and son were still seriously affected by what had happened. The appellant drove off at the wheel of a car, which the judge found had been bought as a get-away car shortly before; but the number was taken by a member of the public.

6. This led three days later, on 7 October 2015, to the appellant being seen by police once again at the wheel of that car. He refused to stop, and drove off in a clearly reckless way: the police decided they must give chase, and did so for about two miles. At that point the appellant deliberately drove onto a pavement as he turned a corner, apparently without seeing a woman walking along with her grandson, also 8: he ploughed into them, and fled on foot, though he did hand himself in to the police on the 15th.

7. The grandmother had been very fit before this, and played a very important part in the life of her family; the judge described her as having been grievously injured, with both legs broken, and other injuries, all of which required three operations and five months in hospital. The judge gave a detailed description of how the appellant had "… simply and starkly, destroyed that former life". The boy was knocked aside, without

significant physical injury, but, as the judge pointed out, must have been dreadfully affected by what he had seen.

8. The sentencing judge gave the appellant full credit for his age and pleas: the sentences of imprisonment he passed were as follows, and the total was 6 years and 2 months.

a. cannabis: 10 months (knife 8 months concurrent)

b. burglary: 10 months, also concurrent

c. robbery: 2 years, consecutive

d. causing serious injury by dangerous driving: 3 years 4 months, consecutive

The appellant had been in custody since he handed himself in, and so would have been released on 16 November 2018, if not kept in immigration detention, as he has been.

9. **Discussion** Judge Sangha found that the appellant had acquired a permanent right of residence in this country; but, owing to his previous imprisonment, not the enhanced protection given by 10 years' lawful residence here. He correctly stated the question before him as being whether the appellant's deportation was justified in all the circumstances by 'serious grounds of public policy or public security', on the principles set out at reg. 27 (5) of the Immigration (European Economic Area) Regulations 2016.

10. The only relevant authority on the point in hand is *MC* (Essa principles recast) [2015] UKUT 520 (IAC), referred to both in the in the grounds of appeal, and in the Home Office response to them. The relevant parts of the judicial head-note are as follows, shorn of references to other authorities:

> "5. Reference to prospects of rehabilitation concerns reasonable prospects of a person ceasing to commit crime, not the mere possibility of rehabilitation. Mere capability of rehabilitation is not to be equated with reasonable prospect of rehabilitation.
>
> …
>
> 10. In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor. Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide-ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence."

11. Though the judge did not directly refer to that authority, he dealt with the appeal in accordance with the principles set out in it, and so the only question is whether consideration of the November OASys report might reasonably have affected the result he reached. The report considered, at

some length, by the judge, dated from January 2018: that was the only one in the appeal bundle, at annex M. There is a copy of a general guidance note to OASys information in immigration appeals at N. Although every page of the report at M is dated 22 January 2018, oddly enough the assessment pages are shown as completed (M40) on 31 May 2017, but signed (M41) on 25 April that year. If so, then they dated from a very early stage of the appellant's sentence, passed on 7 April: this impression is confirmed by the sentencing judge's reference (F10) to the author of the report before him as 'Mr Fone', clearly a mis-type for the name given at M41 as 'Peter Fung'.

12. The difference between the two reports put forward by Mr Bandegani as potentially significant were as follows: numbers refer to the pages of the November one.

a. (21) there had been no disciplinary adjudications against the appellant since April 2016, and the last of five warnings "for mainly compliance issues" had been in December 2017;

b. (22) the appellant had expressed remorse and "… has realised that he needs to make some changes";

c. (54) the liaison arrangements for the appellant's release were now much more comprehensive: so far as relevant to the question of rehabilitation, intelligence on him was to be gathered by the Police Gang Unit, and a Gang Worker was to support him in his efforts to lead a crime-free life; a requirement to live in Approved Premises would provide enhanced monitoring of his movements, visitors, associations drug use, thinking and behaviour, and help and support for his managed reintegration into the community; an adviser from the Shaw Trust was to help him with employment.

13. While I was not referred to any discussion of the appellant's disciplinary record in prison in the January report, any improvement was still relatively recent. On his attitude to his offending, the January report (see M11) makes it clear that he accepted responsibility, and (M36, R 6.1) that his perceived immaturity seemed "… to be changing for the better as he reflects fully on his actions and his future". Mr Bandegani frankly acknowledged that the only real difference, for present purposes, in the two reports consisted in the need to measure the appellant's personal characteristics against the more comprehensive arrangements for his supervision on release.

14. Looking back at the equivalent arrangements in the January report, the section in question (M38, R11.12) also contains references to a named police officer, and two named local authority officers, as responsible for monitoring any gang-related activity by the appellant on release. There was also a reference to a named advisor from another organization in connexion with the appellant's employment on release; so the only

additional measure seems to have been the Approved Premises requirement.

15. The striking similarity between the two reports, as the permission judge noted, was in the risk assessments reached. The notes at N explain the methodology: while the Offender Group Reconviction Scale [OGRS] predictor score is essentially statistical, "… based on static factors, such as age and gender and number of previous sanctions", the Offender General Predictor [OGP] and Offender Violence Predictor [OVP] both incorporate 'dynamic factors', of which examples are given in the following paragraph. Looking at the OVP reconviction assessments for the appellant, those were 22% over one year, and 35% over two in January (M39), while in November (at p 43) they were 20% and 32%. In both reports, all three assessments contained very similar percentage assessments on all three scores, which fell into the 'medium' category.

16. So far as the risk of serious harm is concerned, the Guidance Notes say this, at M3: "Alongside static and dynamic predictors of general and violent reoffending, the Offender Manager uses all of the information provided to them from other agencies and specialist tools and applies their professional judgment, in order to make an assessment of the offender's risk of serious harm to others as being Low, Medium, High or Very High". The January report gives the serious harm risk assessment as low all round, in or out of custody, apart from that to 'staff' in the community, given as 'medium'. However the risk of serious harm to the public in the community is given as 'high'.

17. The November report is unequivocal in its date, being dated 1 November, but explicitly based (see p 55) on an assessment made on 30 October, following a 'sentence planning board' on the 5th. Once again, the writer's professional assessment of the appellant was that he posed a low risk to children, known adults and (this time) 'staff', either in custody or in the community; but a high risk of serious harm to the public in the community.

18. **<u>Conclusions</u>** As Mr Jarvis pointed out, the more comprehensive liaison arrangements in the November report seem to be directed as much to controlling any errant behaviour on the appellant's part, as to providing him with improved support for rehabilitation. Mr Bandegani realistically accepted when I put it to him, the November report was completed only a fortnight before the appellant's planned release (if not further detained), and so the writer must have been alive to the imminent potential need of controlling the high risk to the public he still presented. in the light of the previous one, with enhanced measures, if necessary.

19. Looking at the November report in that light, and in the light of *MC* (see **10**), the following conclusions can be reached on this appellant's case:

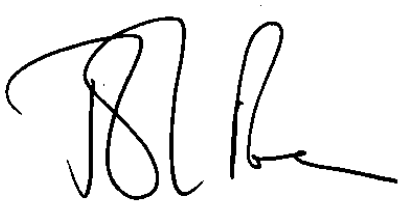
a. there is nothing in the November report to show a reasonable prospect of rehabilitation, where there had been none before, rather than a mere capability of it;

b. though the judge accepted that the appellant has a permanent right of residence, he did not accept that he had achieved the necessary integration over the last ten years for an enhanced right; so the weight to be given to any future prospects of rehabilitation could at best be limited.

20. This appellant had a record of offences while under 18; but that did not apply to his 2013 conviction for robbery, still less to his 2017 convictions. At least so far as the robbery and the dangerous driving offences for which he was dealt with in that year are concerned, they were very serious indeed: the sentencing judge passed the maximum term then allowed by law, discounted for the appellant's plea, on the driving.

21. Taking the November report together with the judge's assessment of the appellant's case, nothing if not holistic with that one exception, in the light of *MC*, it cannot reasonably be concluded that it could have made any difference to his final decision. The result is that, though overlooking the November report was an error of law, it was not a material one.

Appeal dismissed



(a judge of the Upper Tribunal)

Dated 04 February 2019