



**Upper Tribunal
(Immigration and Asylum Chamber)
DA/00548/2015**

Appeal Number:

THE IMMIGRATION ACTS

Determined on the papers

**Decision &
Promulgated
On 19 March 2019**

Reasons

Before

UPPER TRIBUNAL JUDGE LANE

Between

**VITOR HUGO DE OLIVEIRA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. By a decision dated 1 June 2018, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside:

1. The appellant, Vitor Hugo De Oliveira, was born on 4 June 1986 and is a male citizen of Portugal. He entered the United Kingdom in 2009. A deportation order was made in respect of the appellant on 13 July 2015. The index event was a conviction of the appellant on seven counts of theft, possession of an article with a blade in a public place and five breaches of a suspended prison sentence. He was sentenced to nine months' imprisonment. The appellant appealed against the decision to deport him to the First-tier Tribunal (Judge Farrelly) which, in a decision promulgated on 25 May 2017, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. I find that the First-tier decision should be set aside. I have reached that decision for the following reasons. First, I find that the judge erred by failing to make any proper finding regarding the conduct of the appellant and, in

particular, whether he represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society

(see Regulation 20(5)(c)). I agree with Mr McTaggart, who appeared for the appellant before the Upper Tribunal, that it is only in the light of a clear finding under Regulation 20(5)(c) that it becomes possible to decide whether the Secretary of State's decision was proportionate by reference to the considerations identified in Regulation 21(5-6). Judge Farrelly set out at [20] Regulation 21 but [21] whilst noting [21] that the appellant had "committed serious and repeated offences", and observing that there appeared to be "limited evidence of rehabilitation", failed to determine whether or not the appellant represented a threat as at the date of the hearing. Mr Duffy, for the Secretary of State, argued that Judge Farrelly had said enough at [21] for a reader of the decision to conclude that the judge had found that the appellant represented a threat. I do not consider that it is for the Upper Tribunal to complete work which the First-tier Tribunal was required to undertake but has failed to complete; it is not for the Upper Tribunal to take steps to "rescue" a decision of a First-tier Tribunal Judge so as to prevent it falling into error. The 'missing' finding in this instance was of crucial importance because, without making it, there existed no basis for the remainder of the judge's analysis.

3. I consider that this is an appeal which can remain in the Upper Tribunal where the decision can be remade. I therefore make the following directions:

A The decision of the First-tier Tribunal which was promulgated on 25 May 2017 is set aside. None of the findings of fact shall stand.

B Both parties shall, within 21 days of receiving these directions, send to the Upper Tribunal at Field House, Upper Tribunal Judge Lane [] and to each other copies of any written evidence upon which they respectively seek to rely concerning the remaking of the decision.

C Within 14 days of receiving the appellant's updated evidence, the Secretary of State shall write to the Upper Tribunal and to Upper Tribunal Judge Lane to indicate whether he wishes to cross-examine the appellant or any other witness. In the event that cross-examination is necessary, a resumed hearing will be convened. If cross-examination is not required then the following direction shall take effect.

D No later than 2 July 2018, both parties shall file at the Upper Tribunal and send to Upper Tribunal Judge Lane and to each other copies of any written representations upon which they may respectively seek to rely. Thereafter and without a further hearing, Upper Tribunal Judge Lane will remake the decision.

2. Following the making of the above directions, I received written submissions under cover of a letter dated 2 July 2018 from the appellant's solicitors. I received no communication at all from the Secretary of State. I have, therefore, not convened a resumed hearing but now determine the appeal on the basis of the written submissions.

3. Both parties accept that the appellant is entitled to lowest level of protection as an EU national:

Decisions taken on grounds of public policy, public security and public health

27.(1) In this regulation, a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.

...

5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(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;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person (“P”) 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 P, P’s length of residence in the United Kingdom, P’s social and cultural integration into the United Kingdom and the extent of P’s links with P’s country of origin.

4. The appellant’s solicitors have informed me that the appellant has again been imprisoned for a criminal offence. On his behalf, they submit that the appellant’s convictions were drug-related. There is been no ACE assessment. The appellant claims that he has the support of family members in Portadown but what that support consists of is not clear; I have no written evidence in support from those family members and they have not offered oral testimony at any of the Tribunal hearings. The solicitors submit that the appellant is now likely to be heroin-free given his incarceration but no evidence is adduced to support that claim. Given the prevalence of drug-taking in prisons it cannot be assumed that the appellant must now be drug-free simply because he is in prison.
5. I have considered the appellant’s age. I have little if any evidence regarding his state of health other than being aware of his drug addiction. I am aware that he has been in the United Kingdom since 2009 but there is little, if any, evidence of his social and cultural integration. He claims to

have support from adult family members they have done nothing to assist him in this appeal. I have no evidence regarding his links with Portugal. He has been imprisoned for a series of drugs offences but also violent behaviour including the possession of a knife. Having regard to all of the rather limited evidence, I am satisfied that the appellant does represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society, namely the preservation of law and order. Even following the proceedings taken by the Secretary of State to deport him, the appellant has committed further offences for which has been imprisoned. All the evidence points towards a disregard for society in this jurisdiction and a complete failure to attempt let alone achieve any meaningful integration with that society. The appellant has shown a propensity to continue offending even when doing so plainly jeopardises his continued residence here. It is conduct which strongly indicates a genuine and present threat to others in society. Accordingly, his appeal is dismissed.

Notice of Decision

6. This appeal is dismissed.

Signed

Date 2 February 2019

Upper Tribunal Judge Lane