Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01047/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 21 October 2013	**On 4 November 2013**
Prepared 22 October 2013	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

RUI PAULINO CARDOSO VIERA DE ALMEDIA

Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Cole, Legal Representative
For the Respondent: Miss E Martin, Presenting Officer

DETERMINATION AND REASONS

1. The Secretary of State (the respondent) appeals with permission against the determination of the First-tier Tribunal promulgated on 24 July 2013, allowing Mr De Almedia's (the claimant) appeal against the respondent's decision made on 13 May 2013 to make a deportation order against him pursuant to Section 5(1) of the

Immigration Act 1971 and Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

2. The claimant, who was born on 20 December 1988, arrived in the United Kingdom in 2005, joining his siblings here. It is his case that he has lived here ever since, apart from short visits to Portugal.

3. Between 7 October 2008 and 22 October 2012 the claimant has been convicted of fourteen offences on nine occasions. The most recent conviction was at Ipswich Crown Court when, on 18 September 2012, he was convicted upon a guilty plea of supplying controlled drugs, class A, an offence to which he was sentenced to sixteen months' imprisonment on 22 October 2012.

4. On 13 May 2013 the respondent took a decision to deport the claimant for reasons set out in the refusal letter of that date. The respondent did not accept that the claimant had acquired the right of permanent residence under the 2006 Regulations [21] considering that, pursuant to the principles set out in Regulation 21(5) of the 2006 Regulations that as the claimant poses a medium risk of harm [26], [31] and, having had regard to all the available evidence, concluded that he had a propensity to reoffend [45], represents a genuine, present and sufficiently serious threat to public to justify his deportation on the grounds of public policy. She considered also that the decision was proportionate [47] and also that his deportation was a proportionate interference with his right to respect to family and private life pursuant to Article 8 of the Human Rights Convention.

5. The appeal against that decision came before the First-tier Tribunal (First-tier Tribunal Judge Thanki and Mrs W Jordan). The panel found:-

   (i) that the claimant had acquired the right of permanent residence in the United Kingdom and thus could only be deported on serious grounds of public policy or public security [14];

   (ii) that the sentencing judge found that the claimant's offending had been isolated events [16] to which he had pleaded guilty;

   (iii) that the claimant had committed fourteen offences since 2008 including assaulting a police officer [17], that he had not completed an aggression replacement training programme [17], the reason for the index offence being that the claimant was an habitual cannabis user who had acquired a drug debt [17];

   (iv) that having considered also the OASys assessment, the assessment of risk of reoffending which is shown as high [18] that the likelihood of serious harm to others including as to children as low and others as medium and concluding [21] that the claimant did not present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society [21] noting that his sister was prepared to accommodate him and that he was willing to live with her;

(v) that the claimant's deportation was not justified under the 2006 Regulations [22] and that his removal would be disproportionate pursuant to Article 8 of the Human Rights Convention.

6. The respondent sought permission to appeal against the decision on the grounds;

(i) that the panel had failed to provide adequate reasons for their finding that the claimant did not present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, having noted that he posed a high risk of reoffending, had failed to consider whether he had shown remorse, was still associating with negative peers, whether he has addressed drug and alcohol problems, whether his siblings could exert any such influence over him;

(ii) that the Tribunal failed to provide adequate reasons for their conclusions that the claimant has formed a strong family unit or had established a family life with his siblings, there being no evidence of any dependency [6] and they had therefore erred in finding that the claimant's deportation was not proportionate.

7. Permission to appeal was granted on 14 August 2013 by Designated Immigration Judge McClure who noted "there was before the Tribunal an OASys Report which confirmed that the claimant was likely to commit further offences."

8. I heard submissions from both representatives. Miss Martin submitted that it was not clear from the determination why the Tribunal had discounted the evidence of the claimant's propensity to reoffend, his track record of offending which increased in seriousness as well as his lack of remorse and attempts to deny his past offending. She submitted also that the Tribunal had failed to take into account in a proper manner the evidence of the claimant's siblings which indicated that he had not addressed his cannabis use or alcohol abuse which appeared to be continuing.

9. Miss Martin submitted also that the panel had erred in applying the wrong test both in the Regulations given that, they had found that the claimant had acquired the permanent right of residence, and that there had been in the circumstances no proper analysis of whether there were serious grounds of public policy such that the claimant should be deported.

10. Miss Martin submitted also that the Tribunal had erred in their analysis of proportionality within the EU Regulations appearing to confuse this to a considerable degree with the analysis under Article 8 of the Human Rights Convention. It was on that basis also that part of her decision should be set aside.

11. Miss Cole submitted that the panel had given adequate consideration to the claimant's propensity to reoffend and that the reasons they had given for concluding that he was at medium risk of reoffending were borne out by the evidence. She submitted that little weight could be attached to the OASys Report given that it was now out-of-date and that the references to the claimant still being a cannabis user

and having failed to address his offending behaviour were taken out of context, that evidence being historic.

12. Miss Cole submitted that although the Tribunal had erred in applying the wrong test under the 2006 Regulations, this was not material given that that test imposed a significantly higher threshold and that it could not properly be argued that had the claimant succeeded under the lower level, that he would not have succeeded had they applied the correct test.

13. There is no challenge to the Tribunal's finding that the claimant had acquired the permanent right of residence. Accordingly, the test which the Tribunal should have applied when considering the decision to deport the claimant is that set out in Regulation 21(3):

> "A relevant decision may not be taken in respect of a person with the permanent right of residence under Regulation 15 except on serious grounds of public policy or public security".

14. It is established law that this test requires a significantly higher threshold to be achieved than that imposed by Regulation 21(5)(c) which provides that the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It follows from this, that if the panel did not err in concluding that the claimant succeeded on the lower test established by regulation 21 (5)(c), their failure to apply the higher test made no material difference to the outcome.

15. It also follows that if the panel did err in the manner averred in the grounds, that error was material only if it could be shown that the claimant would not have succeeded on a proper application of the test set out in regulation 21 (3).

16. There is in the material before the Tribunal an OASys assessment which although initially created in early 2012 does contain several reviews, the most recent being on 18 June 2012. This document was, it appears, forwarded to the Home Office and I note from the exchange of emails between the Home Office and the Probation Service (E1-E2) that the overall risk of harm is said to be medium. The NOMS Report was not completed and whilst, as Miss Martin correctly submitted, there is one section in which the claimant's risk of reoffending is said to be high, the overall assessment indicates medium risk to known adults, staff and the public. That is despite a high OVP score indicating a high risk of proven violent-type reoffending.

17. It is to be noted that the OASys assessment defines medium risk of serious harm as follows:

> "There are identifiable indicators of risk of serious harm. The offender has the potential to cause serious harm but is unlikely to do so unless there is change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse".

18. In this case there was evidence before the Tribunal that the claimant, who it is accepted had been violent towards his partner, was no longer in a relationship with her. The Tribunal identified that the claimant's sister would be providing accommodation [21] and has the support of his brothers.

19. It is evident from the determination that the Tribunal had had regard to the judge's sentencing remarks [12], [16] as well as his criminal record [14]. They also took into account the particular circumstances of the offence [17] and referred to previous offences.

20. In assessing the claimant the panel was entitled to take into account the fact that he had attended part of programmes on aggression replacement training. The panel also sets out at paragraph 20 what they took into account in assessing the risk presented by the claimant.

21. Whilst it is correct that in their witness statement the claimant's sister referred to the claimant only staying with her for a few weeks in the past, that was in 2005. The panel heard evidence from her and her brothers as well as the claimant and were entitled to come to the conclusion that she would now be providing accommodation on a secure basis for the claimant.

22. There are references in the witness statements to the claimant needing a purpose and structure to his life and needing to stop smoking cannabis, but there is merit in the submission that this needs to be viewed in context which is that the claimant has been in prison now for a substantial period and whilst there is no positive evidence of him testing negative for drugs, neither is there any evidence that there had been any negative tests or that there had been any adjudications against him during his detention. Further, there is insufficient indication that it was submitted to the panel that they should have taken adverse inferences from the claimant's account.

23. It is not properly arguable that the claimant sought to diminish his offences. Whilst it is clear that he accepted his guilt, the basis of which Miss Martin submits that the claimant had diminished his offences is that he did not take full responsibility for it. That is not correct. It was accepted by the sentencing judge that the reason that the claimant had undertaken the sale of drugs was as a result of a drug debt and it is significant that the consequent custodial sentence was at the low end of the range of possible sentences for possession with intent to supply class A drugs.

24. In conclusion, the Tribunal gave adequate reasons for concluding that the claimant did not represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society. It is not properly arguable that they failed to deal properly with the issue of propensity to reoffend given their acceptance that overall he presented a medium risk of reoffending, one which was open to them and which, in the light of their other sustainable findings, entitled them to conclude as they did.

25. Whilst the panel did err in applying the wrong test, it is unarguable that had they addressed themselves to the higher test, serious grounds of public policy, they would

not have come to the same conclusion. The panel did not err in its assessment of proportionality under Regulation 21(5) given that they had set out in sufficient detail the factors they took into account, including the claimant's ties with the United Kingdom and lack of ties to Portugal and it is not properly arguable that, having found that he did not represent a genuine, present and sufficiently serious threat affecting the fundamental interests of society that it could have been proportionate to remove him.

26. On that basis, I find that the decision to deport the claimant was not in accordance with the 2006 Regulations. It did not involve the making of an error of law capable of affecting the outcome. Accordingly, it follows that any error in the assessment of Article 8 cannot have been material.

27. For these reasons, I find that the determination of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

SUMMARY OF DECISIONS

1 The determination of the First-tier Tribunal did not involve the making of an error of law, and I uphold it.

Signed Date: 31 October 2013

Upper Tribunal Judge Rintoul