



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/02402/2013

THE IMMIGRATION ACTS

Heard at Field House

**On 18th July, 2014
Signed 4th August 214**

**Determination
Promulgated
On 19th August, 2014**

Before

Upper Tribunal Judge Chalkley

Between

CARLOS DE PAULA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Murphy, Counsel instructed by Morgan Pearse Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Brazil who was born on 28th June, 1968.

Immigration History

2. The appellant claims to have arrived in the United Kingdom on 22nd July, 2008 and claims to have spoken to an Immigration Officer on arrival who stamped his passport.
3. On 12th October, 2008, the appellant applied for a residence card as a family member of an EEA national along with his family members. The application was refused on 16th December, 2009, since the appellant's wife had failed to provide evidence that she had been exercising her treaty rights in the United Kingdom and failed to provide children's passports. The decision to refuse the appellant's application was dispatched by Royal Mail on 16th December, 2009 but the documents were returned by Royal Mail on 19th February, 2010 as the appellant was not deemed to be residing at his last known address. The appellant's application was therefore considered and eventually refused by the Secretary of State on 7th February, 2012.
4. The appellant first came to the adverse attention of the authorities on 28th March, 2011, when he was arrested by Immigration Officers working as part of an undercover operation investigating fraud.

The Appellant's Conviction

5. On 26th August, 2011, at Harrow Crown Court the appellant was convicted of making and supplying article(s) for use in fraud. He was subsequently sentenced to 64 months' imprisonment on 16th September, 2011. He did not appeal against either his conviction or sentence.

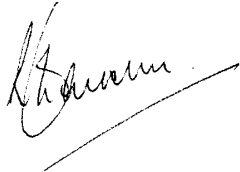
Notice of Intention to Deport

6. On 31st October, 2011, the appellant was served with a liability to deport questionnaire which he completed and returned on 4th November, 2011. On 22nd November, 2013 the respondent made a deportation order. She was satisfied that the appellant posed a genuine, present and sufficiently serious threat to the interests of public policy/public security if he were allowed to remain in the United Kingdom and that his deportation was justified under Regulation 21. She decided under Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations, 2006 ("the Regulations") that the appellant should be removed and an order was made in accordance with Regulation 24(3) requiring him to leave the United Kingdom and prohibiting from re-entering whilst in force. The appellant appealed that decision and his appeal was heard by a Panel of the First-tier Tribunal (First-tier Tribunal Judge Perry sitting with Dr C J Winstanley).
7. The panel of the First-tier Tribunal dismissed the appellant's appeal and dismissed his human rights appeal.

8. Succinct grounds of appeal were submitted on behalf of the appellant alleging errors in the determination and First-tier Tribunal Judge Cheales granted permission.
9. The first challenge points out that the offender manager assessed the appellant's risk of re-offending as low. No OASys' Report was submitted to the Tribunal. The panel, however, concluded that the offender manager was simply wrong in assessing the appellant's risk of re-offending as being low. However they did not put Counsel on notice that they were concerned at the offender manager's assessment and neither did they indicate that they would be making their own assessment. The first three grounds deal with this and assert that the panel erred in law. The fourth ground highlights the fact that in the respondent's Reasons for Refusal Letter it is accepted that the appellant's children cannot be expected to leave the United Kingdom. Notwithstanding this the panel concluded that the decision to deport the appellant was proportionate. At paragraph 66 of the determination the panel find that the decision to deport is proportionate and only then later do they give any consideration to the question of the appellant's children and their best interests. That, the grounds assert is also an error of law. The last challenge relied on the decision of the Supreme Court in *Secretary of State for the Home Department v Maneshwaram* [2002] EWCA Civ 173. The judge gave no indication that he would be going behind the concession of the Secretary of State. The children themselves are EU nationals (citizens of Italy) and the judge has made no proper assessment of the children's best interests.
10. At the hearing before me Mr Murphy relied on his grounds. Responding briefly, Mr Tufan relied on *Vasconcelos (risk - rehabilitation) Portugal* [2013] UKUT 378 (IAC). Insofar as the OASys Report is concerned, if the appellant had wanted to rely on it he would have submitted it to the Tribunal. The Home Office have no access to these reports which are made available to appellants.
11. As to the "so-called" concession, the appellant is a Brazilian citizen and so is his wife (even though she may be Italian). The children may well be Italian and they are probably also Brazilian. In any event, they are young enough to adapt to life in Brazil.
12. He reminded me that consideration of the best interests of the children is the primary consideration but it is not a trump card.
13. I have concluded that the Tribunal did err in law. If the panel were concerned about the offender manager's assessment of the risk posed by this appellant then they should have invited Counsel to address them on it. They were of course entitled to examine the sentencing judge's remarks and to consider accommodation issues since they were linked to offending behaviour. The panel demonstrate at paragraph 66 that they appear to have considered the question of proportionality first before they

considered the best interests of the children and that too was an error of law.

14. I believe that this is a case which falls squarely within paragraph 7 of the Senior President's Practice Statement and have concluded that the appeal should be remitted to the First-tier Tribunal for hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Perry.

A handwritten signature in black ink, appearing to read 'Chalkley', with a long horizontal stroke extending to the right.

Upper Tribunal Judge Chalkley