



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

Appeal Number: DA/00317/2014

THE IMMIGRATION ACTS

Heard at Field House

On 19 October 2015

Decision & Reasons

Promulgated

On 5 November 2015

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BRAIMA SONDE SO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: Mr D Chirico instructed by Lawrence Lupin Solicitors

DECISION AND REASONS

1. I see no need for, and I do not make, any order restricting publicity about this appeal.
2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal, Judge Devittie, allowing the appeal by the present respondent, hereinafter "the claimant", against the decision of the Secretary of State on 15 November 2013 to make him the subject of a deportation order.
3. The claimant is an EEA national. It follows that he must not be deported just because he has committed a serious crime. His presence in the United Kingdom must "represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" and that cannot be established just by reason of his having committed a criminal offence.

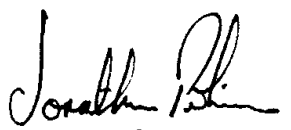
4. He is a citizen of Portugal and as a consequence of that his circumstances are rightly considered under the Immigration (EEA) Regulations 2006. He has previously appealed, unsuccessfully, against a decision to make him the subject of a deportation order but he was not removed and the claimant on the advice of his solicitors made an application that he be not deported. The Secretary of State refused to entertain it but was ordered by the High Court that it ought to be considered. I do not entirely understand the procedures that have brought this appeal before the First-tier Tribunal but there was clearly a hearing before the High Court and there is no doubt that as a consequence of that hearing there was a further decision on 15 November 2013 to deport the claimant. An appeal against that decision was allowed by the First-tier Tribunal and it is the Secretary of State's appeal against that decision that is before me.
5. I remind myself that it is not my task to decide if this person should be deported. Rather it is to decide if the Secretary of State has exposed any material error of law in the First-tier Tribunal's decision to allow the appeal and if I am so satisfied then to decide what to do as a consequence.
6. The claimant has been in trouble with the authorities in the United Kingdom I think on two occasions. He was sentenced to community service for handling stolen goods that was eventually commuted to a sentence of imprisonment of fourteen days and in July 2011 he was convicted of the offence of robbery and sentenced to twelve months' imprisonment.
7. The circumstances of the offence of robbery are set out very fully in the decision of the First-tier Tribunal. The Tribunal quotes extensively from the sentencing remarks of the trial judge. I hope I do not demean in any way the offence, which I regard as very nasty, by summarising it as follows. It was a case of a person being robbed of a mobile phone. The claimant who was then an adult held the victim roughly whilst the co-accused, a younger person, searched him and relieved him of his phone. There can be no doubt that the First-tier Tribunal appreciated the seriousness of the offence because the circumstances are so clearly set out in the Decision. The fact that robberies can be considerably more serious than this does not in any way alter the fact that this was a serious and unpleasant crime about which little can be said to the claimant's credit except that he seems to have admitted his guilt and to have accepted his punishment.
8. When the claimant appealed on the first occasion the appeal was determined by a panel. That division of the First-tier Tribunal was persuaded that this was a case where an EEA national had conducted himself in such a way that he presented a genuine and sufficiently serious threat to justify his deportation.
9. The Secretary of State challenges the different finding of Judge Devittie on three grounds. I will deal with the first one last.
10. Ground 2 complains that the Tribunal misdirected itself in that it made proportionality findings that did not have proper regard for the decision of the Court of Appeal in **Secretary of State for the Home Department v Dumliauskas & Others [2015] EWCA Civ 145**. There is a quotation from the judgment relied on in the grounds in these terms:

“Lastly, in agreement with what was said by the Upper Tribunal in *Vasconcelos*, I do not consider that in the case of an offender with no permanent right of residence substantial weight should be given to rehabilitation.”

11. With respect I do not think it is reasonably arguable that the First-tier Tribunal erred in the way it alleged on this occasion. The criticism appears to me to be of a throwaway remark by the Judge at paragraph 13 of the Decision that the process of rehabilitation would not be advanced if the claimant's contact with his son was broken. The judge clearly gave it some weight but it was not substantial part of his reasoning and the error warned against in **SSHD v Dumliauskas & Ors [2015] EWCA Civ 145**, is not an error committed here. It was not a case of giving it the prospects of rehabilitation in the United Kingdom excessive or undue weight. Rather it was just something that the judge noticed in his reasoning.
12. The third ground is that the judge muddled himself dealing with proportionality because he appears to have confused proportionality under the Regulations and proportionality on Article 8 grounds. The point is that the Regulations require that the removal must be proportionate and, additionally, a decision involving removal must be proportionate to comply with Article 8 of the European Convention on Human Rights. There is with respect something in that ground. The judge does seem to have confused himself slightly. Certainly I am confused about what particular tests he applied. This is regrettable and if that had been all there was to the case it might have been difficult for me to have upheld the decision. Even so there is clearly merit in the observation of Mr Chiricio that in fact the judge's error made it harder for the appellant to succeed and therefore it was not a material error.
13. I come now to the first ground which everyone before me agreed was decisive. If the Secretary of State cannot succeed on this the Secretary of State cannot succeed. The contention is that the First-tier Tribunal erred in law by failing to give proper reasons for reaching a different decision about the prospects of the future behaviour of the claimant when making its decision, bearing in mind that not so very long before a differently constituted division of the Tribunal decided exactly the same point entirely the other way. Because the circumstances are not identical it is perfectly obvious that the First-tier Tribunal knew what the earlier Tribunal had decided. Again I say this with the same confidence that I say about the Tribunal appreciating the seriousness of the offence. The First-tier Tribunal has quoted extensively from the earlier decision and it would be absurd to think that the Tribunal had quoted it extensively and forgotten it. That clearly is not what happened and it is not what was suggested. The suggestion in the grounds was more subtle than that. It was that there was just not sufficient evidence to support the conclusion that the claimant no longer presented a risk. I have thought very carefully about that mindful both of my responsibilities and the very serious view I take of the offence of robbery.
14. I conclude that the First-tier Tribunal conspicuously gave reasons to justify its decision.

15. The first and main reason is that the claimant is now that much older and has lived in the community for two years without attracting further trouble. To people who have no experience of criminals this might seem unremarkable but to people experienced in criminal matters I do not think it is at all controversial to say that it is not unusual for young people in their late teenage years and early 20s to indulge in serious crime and then to sort themselves out and live industriously for the rest of their lives. A two year gap is not insignificant.
16. Whether I would have given it the same weight that this Tribunal has given it is not the point as I have been properly reminded more than once.
17. The Tribunal did not just rely on that the passage of time but on the claimant having established a relationship with his son and this relationship is in its embryonic form. He sees his son for (I think) supervised contact for two hours a fortnight. This is not very much but it would be wrong to assume this is the end of things. This is an order of the court made in care proceedings brought by the local authority because of concerns about the way the child was looked after by its mother and it made sure that the claimant had some link with his son now to start off a relationship.
18. It is plain that the First-tier Tribunal gave considerable weight to this developing relationship with the child and found it indicative of an emerging sense of responsibility and commitment that was not there on an earlier occasion.
19. So there are two significant things: there is a period of time out of trouble and there is a new sense of responsibility expressed towards the child.
20. The First-tier Tribunal also heard from the claimant and it was entitled to form a view of his attitude and did. It noted evidence that he may be a promising footballer and has been offered semi-professional terms. No one is making too much of that but it is an indication of somebody who has got something to live for in a way that was not there before.
21. The claimant expressed his regret for what he had done and expressed a desire to behave himself in the future. Again words like that are very easy to utter but they are sometimes not uttered at all. When they are uttered the Tribunal was entitled to take a view on the sincerity with which they were uttered and it did. Cynicism comes very easily to lawyers but the fact is that custody is intended to be a punishment and a jolt in a person's life. It is not unknown for it to cause a person to re-think what he or she is doing and to reorganise his life accordingly. That could be what has happened here. The Tribunal was entitled to give weight to the oral evidence that it heard.
22. I step back and look at the case as a whole. I repeat, it is not necessarily the view of the evidence that everybody would have taken but I cannot say that this was perverse or unjustified or unexplained. It was none of those things. The First-tier Tribunal has taken a view of the evidence, mindful of the earlier evidence and has reached a conclusion that the Secretary of State does not like, that is not the same as erring in law.

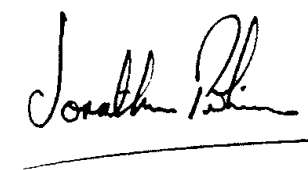
Notice of Decision


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23. The Secretary of State's appeal is dismissed.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 30 October 2015

A handwritten signature in black ink, appearing to read "Jonathan Perkins", is written over a horizontal line.