Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01638/2014

THE IMMIGRATION ACTS

Heard at Nottingham	**Decision & Reasons Promulgated**
on 5th August 2015	**On 14th August 2015**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Vasco Lua-Antunes
(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr Mills – Senior Home Office Presenting Officer.
For the Respondent: No appearance.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Colyer promulgated on the 6th May 2015 in which he allowed the appeal against the order for the deportation of Mr Lua-Antunes from the United Kingdom.

Background

2. Mr Lua-Antunes is a national of Portugal born on 27th June 1994. On 2nd May 2014 an order was made for his deportation from the United Kingdom following his conviction on 18th July 2014 at Leicester Crown Court for the offence of Robbery.

3. The Secretary of State has been granted permission to appeal on the basis of an arguably flawed assessment of risk and in relation to the assessment of Article 8 ECHR.

Discussion

4. Mr Lua-Antunes failed to appear before the Upper Tribunal. He is aware of the hearing but refused to leave the Immigration Detention Centre to be brought to Nottingham. The Tribunal also received a fax transmission from IRC Morton Hall on 15th July 2015 containing text written and signed by Mr Lua-Antunes to the effect that he wished to "retract his appeal as soon as possible". It is understood a meeting has been arranged with a representative of the Government of Portugal today for the purposes of arranging a travel document to enable Mr Lua-Antunes to return to Portugal.
5. Although his family in the United Kingdom have provided additional information on his behalf, including a letter from his mother received on 4th August 2015 and a letter from a Mr John Flynn, who are aware of the wish to withdraw and who ask the Tribunal to disregard the same, there is no evidence Mr Lua-Antunes lacks capacity to make such a decision for himself. In addition to the signed statement that he wishes to withdraw the appeal there is the voluntary act of refusing to be brought to the hearing which is illustrative of Mr Lua-Antunes position. As all parties have been served with the notice of hearing and in the absence of any reason suggesting it was not appropriate to do so, the Tribunal find it in accordance with the overriding objectives and fairness to proceed in Mr Lua-Antunes' absence.
6. Mr Lua-Antunes entered the United Kingdom in 1994 with his parents and has lived here since. His father left the family and retuned to Portugal leaving the Mr Lua-Antunes with his mother thereafter.
7. The Judge found in paragraph 71 of the determination under challenge that Mr Lua-Antunes has acquired permanent residence in the United Kingdom having lived in this country for over ten years. It is not clear if the Judge meant the level of protection is that available to a person with a right to permanently reside in the UK or that it is at the higher level available to those who have been in the UK and integrated here for over ten years from his wording. The position is clarified in the phrase in the same paragraph "As such his removal from this country can only be justified on imperative grounds of public security or public policy". The question that arises is, however, how the Judge assessed the entitlement to the higher level of protection. There is reference to a supplementary refusal letter of 4th February 2015 in which the SSHD accepted that Mr Lua-Antunes has more than ten years continuous residence in the United Kingdom but the Upper Tribunal in MG (Prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392 (IAC) found that the requisite period must be calculated from the date of the decision under challenge and that a period of imprisonment during that ten year period does not prevent a person from qualifying for enhanced protection if that person is sufficiently integrated. This element is not discussed in the determination which appears to base

the finding of entitlement to enhanced protection on time in the UK without more.

8. There is also reference to Mr Lau-Antunes not presenting the level of risk that is required to be posed in the case of a perosn with a right of permanent residence which is acquired after five years satisfying the relevant qualifying criteria and which is the second of the three levels of protection, but which is not the relevant test in a ten year 'imperative ground' case. Such may be applicable if it was not to be found the necessary degree of integration had been proved.

9. Also of concern is paragraph 58 of the determination in which the Judge finds:

> 58. This appellant's violence appears not to have been pre-planned and there is no suggestion that offensive weapons were involved, although the kicking and punching the victim appears not to have had serious life changing injuries. I note that this is not part of a series of offences. To his credit he pleaded guilty. I find that the level of violence was seen by the sentencing judge to pass the custody threshold but there is no indication that the appellant's offending shows a propensity to commit serious violent crimes. It has not been established that he represents a genuine and sufficiently serious risk to the public that there is a requirement to deport him.

10. Two issues arise, the first of which is that it is acknowledged that the offence which led to his imprisonment was pre-planned. The Sentencing Judge stated "I accept that your motive in committing the robbery was to get yourself effectively into prison because immediately you did it, you then took your victim to nearby police and told then what you had done and indeed, you told the police that that was your aim. What you did at 20 to ten at night was to run up to a 15 year old, punch him so hard in the forehead that he fell to the floor. When he was on the floor, you kicked him twice on the bottom, demanding money and when you then went to the police, you were, I would say, incoherent and to a degree, violent." This is suggestive of a deliberate act. The offence was also committed during the period of a suspended sentence.

11. The second issue relates to Mr Lua-Antunes' previous convictions. At paragraph 35 of the determination the Judge lists Mr Lua-Antunes criminal convictions from July 2011 of which there are twelve separate entries excluding the offence which triggered the deportation decision. The offences include acts of violence and criminal damage, possession of an offensive weapon and robbery. The risk assessment available to the Judge also found Mr Lua-Antunes to present a medium risk of reoffending and medium risk of harm to the public which do not appear as part of the findings in relation to the assessment of future risk.

12. In an EEA deportation case it is imperative that a judge starts by identifying the status of an appellant and supports such a finding with clear coherent reasons based upon relevant case law, if applicable. A judge is then required to identify the correct level of protection applicable to such status and set out clear findings supported by adequate reasons in relation to whether the required threshold is crossed or not. This should not be by reference to the test for a lower

level of protection unless it is clearly stated that such a finding is made in the alternative.

13. For the above reasons Mr Mills has made out his case that the determination under consideration is infected by legal error.
14. The determination shall be set aside. Ordinarily at this stage the Tribunal will consider the merits of the appeal against the deportation decision and substitute a decision to allow or dismiss the appeal. It is at this stage the burden passes to Mr Lau-Antunes as the person bringing the appeal and to consideration of his request to withdraw his appeal. As this is his stated wish, both in writing, by his voting with his feet and refusing to be brought to the Tribunal, and his voluntarily attending the member of the Portuguese Embassy to facilitate the issue of a travel document, and in the absence of evidence of a lack of capacity, his request is granted.
15. Following the withdrawal of the appeal there is nothing extant before the Upper Tribunal upon which a decision can or is required to be made.

Decision

16. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. Following the withdrawal of the appeal there is nothing extant before the Upper Tribunal upon which a decision can or is required to be made.**

Anonymity.

17. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed……
Upper Tribunal Judge Hanson

Dated the 6th August 2015