



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/01788/2014

**THE IMMIGRATION ACTS**

Heard at Nottingham  
On 5<sup>th</sup> August 2015

Decision and Reasons Promulgated  
On 13<sup>th</sup> November 2015

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LUIS LOPES

(Anonymity direction not made)

Respondent

**Representation:**

For the Appellant: Mr Mills – Senior Home Office Presenting Officer.

For the Respondent: Mr M Beard – non legal representative.

**DETERMINATION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge Pooler promulgated on the 23<sup>rd</sup> December 2014 in which he allowed Mr Lopes appeal against the order for his deportation from the United Kingdom.

## Background

2. Mr Lopes is a national of Portugal who was born on the 13<sup>th</sup> April 1996. He has no solicitor at this stage but was assisted by Mr M Beard, a lay representative, who is known to the family and who made an impassioned plea for Mr Lopes to be given a second chance.
3. There is no dispute between the parties in relation to the core facts. Mr Lopes entered the United Kingdom aged 6 and was educated in this country. He attended primary school from January 2003 until July 2007 and secondary school from September 2007 to January 2012 and at an alternative provision school from January to June 2012 following exclusion from his previous school. Mr Lopes has returned to Portugal in the interim for the purposes of family holidays where he has visited family members who still live there.
4. In relation to his offending history, Mr Lopes received a reprimand and warning in 2011 but no previous convictions prior to the index offences which were committed on the 27<sup>th</sup> October 2012. Mr Lopes pleaded guilty on 21<sup>st</sup> December 2012 and on 11<sup>th</sup> March 2013 he was sentenced to four years detention for Wounding with Intent (Section 18) and two years detention, concurrent, for Wounding (Section 20). Judge Pooler set out the sentencing remarks of Mr Recorder Palmer QC at paragraph 5 of the determination which refer to the events of the night in question which included the use of a knife by Mr Lopes to inflict injury in a premeditated attack upon his victims.

## Error of law findings

5. At paragraph 11 of the determination Judge Pooler records the following:
  - “11. At a case management hearing it was conceded on behalf of the respondent that the appellant fell within regulation 21(4) and could not be removed except on imperative grounds of public security. This concession was clearly made in paragraph 22 of the respondent’s letter on 10 June 2014 giving reasons for the deportation.”
6. It is not disputed that such a concession was made in the refusal letter. In the renewed grounds on which permission to appeal was sought, directly to the Upper Tribunal, it is said that the concession was incorrectly made and is withdrawn.
7. Ordinarily it is not acceptable for a party in relation to whom an adverse decision has been made to expect to be permitted to materially alter the nature of their case in an application for permission to appeal, and then claim on such basis that permission should be granted.
8. The Judge cannot be criticized for noting the concession as it formed part of the case before him. It may, however, be argued that the Judge erred if it is shown he treated the concession as determinative of the issue of Mr Lopes’ status in law, when this is not the case and is wrong. The concession is not one of fact but of

law. This was recognised by Upper Tribunal Judge Warr in his grant of permission in the following terms:

“The respondent now seeks for the first time to withdraw a concession made at a case management hearing and in the refusal letter.

It is disturbing if it be correct that such an error was not recognised at an earlier stage.

Nevertheless I grant permissions as the concession sought to be withdrawn is one of law rather than of fact.

All the grounds of appeal may be argued.”

9. The record of the case management review hearing contains the following: “Resp. accepts that imperative grounds of public security must be shown”. It is now said this is incorrect in law.
10. It is accepted that a concessions as to fact will form the starting point in the consideration of the evidence. A judge is not bound to accept the conclusions in the concession but any departure from a position established as true by both parties requires explanation.
11. The basis of the concession is an assessment of the level of integration of Mr Lopes into the UK. The relevant paragraphs of the refusal letter being:
  - “21. It is accepted that you have obtained a permanent right to reside by virtue of a five year period of continuous residence in accordance with the EEA Regulations between 15 January 2003 to 11 March 2013. Although it is accepted that you have resided in the United Kingdom for at least 10 years, the Home Office takes the view that you do not automatically qualify for the protection of imperative grounds of public security. The Home Office has applied the “integration test” set out at recitals 23 & 24 of the Directive and in the CJEU case of Tsakouridis to establish whether the highest level of protection is available to you. The following factors have been considered:
    - a) The cumulative duration and the frequency of any absences from the United Kingdom during the qualifying period (and the reasons for those absences);
    - b) Time spent in prison;
    - c) The overall length of your residence in the United Kingdom;
    - d) Your client’s family connection in the United Kingdom;
    - e) Your client’s links with your country of origin, and ;
    - f) Your clients age on arrival in the United Kingdom.
  22. Having assessed all these factor, the Home Office takes the view that you meet the integration criteria, as set out in Tsakouridis. As a result it is necessary to establish that your deportation is warranted on imperative grounds of public security.

12. Questions relating to the higher level of protection available under the Directive have occupied the courts for a number of years and resulted in a referral for a preliminary ruling under Article 267 TFEU on 24<sup>th</sup> August 2012 concerning the interpretation of Article 28(3)(a) of Directive 2004/38/EC. The Court of Justice of the European Union (CJEU) delivered its judgment on 16<sup>th</sup> January 2014 in two related cases of Case C-400/12, Secretary of State v MG and Case C-387/12, Onuekwere v SSHD in which it was found that the ten year period of residence referred to in the relevant provision must, in principle, be continuous and must be calculated by counting back from the date of decision ordering the expulsion of the person concerned. It was also held that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment. However, the fact that that person resided in the host Member State for the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged within the host Member State have been broken.
13. It is asserted the concession was incorrectly made by reference to paragraphs 29 to 39 of MG (C-400/12).
14. The date of the expulsion decision is the 10<sup>th</sup> June 2014 which forms the starting point. The ten year period from this date is to 11<sup>th</sup> June 2004 when it is accepted Mr Lopes was in the United Kingdom. The Youth Team Offender Worker in the Pre-Sentence Report and Mr Lopes' mother both refer to the date of entry as being 2002, 12 years before the removal decision. Mr Lopes was sentenced on the 11<sup>th</sup> March 2013 to four years detention which disrupts the period of continuous residence and is capable of affecting the decision regarding the grant of the enhanced protection, as per MG.
15. The Upper Tribunal, post receipt of the CJEU decision promulgated the case of MG (Prison - Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392 in which it was said that the judgment of the CJEU should be understood as meaning that a period of imprisonment during those 10 years does not necessarily prevent a person from qualifying for enhanced protection if that person is sufficiently integrated. However, according to the same judgment, a period of imprisonment must have a negative impact in so far as establishing integration is concerned.
16. Both decisions were available to the First-tier Tribunal and even though illustrating the assessment leading to the concession is arguably legally flawed as there is no consideration of MG, the concession was accepted without consideration of whether it was correct in law. The duty of a court is not to accept a concession and assume it is right in law in all cases. A court must ensure a concession is correct in law.

17. The issue in relation to the challenge is one of materiality. Judge Pooler found Mr Lopes is entitled to the higher level of protection. Mr Lopes was imprisoned within the 10 years immediately preceding the relevant decision but this not the only factor as otherwise no one would be entitled to the benefit of the higher degree of protection if imprisoned before attaining ten years residence.
18. The assessment requires a holistic approach to the evidence. It is not disputed Mr Lopes entered the United Kingdom aged six with his parents and has been in the country for twelve years at the relevant date. It is accepted Mr Lopes has grown up as any young person would have at the relevant time in the United Kingdom, reflecting a degree of integration. It is submitted by Mr Mills that such integration has, however, been broken by Mr Lopes.
19. It is accepted Mr Lopes does not have a long criminal record but he does have a long record of anti-social behaviour which included his being excluded from school in 2011 and later from college. The Sentencing Judge refer to this past conduct where he states:

“At seven am on that Saturday morning you had been up all night. On your own account you probably had some alcohol and you had taken some drugs. You had been up all night and on your way back, whether you were going to your home at that stage does not really matter, you and your little group went past this local shop, this neighbourhood shop, where you had already been known for your anti-social behaviour and which had been the trouble on previous occasions.”

20. It is also noted in the Risk of Harm section of the ASSET Report that “Luis has a history of anti-social behaviour with the local community, which appears to have taken place when he was with a group, he also has some previous for shoplifting”.
21. The index offence is illustrative of Mr Lopes’ conduct. It is noted in the sentencing remarks that:

“... On you own account the others had gone away and you then went in alone to scare the shopkeeper, the father at that stage, the father saw you off the premises. You returned, having armed yourself with a stone or rock, and as we know for certain armed somehow at that stage with a very sharp knife. You say that you have no recollection of that knife. As I pointed out to Mr Clarke, you have sufficient recollection and you had sufficient presence of mind when you left the scene to burn your clothes and shoes. It is strange that you have no recollection of what you did with the knife or where that knife came from. Anyway, with that knife when you went back in you inflicted the injuries we have heard about in this court; the one wound to the father, half a dozen wounds to the son, and those wounds, I am sure you have seen the photographs, they speak for themselves. They are serious wounds with a sharp knife, slashing and puncturing which could have so easily caused major injury, major life threatening injury”

22. It is said the son has lasting physical effects of the injuries to the functioning of his hand and ability to live life and carry, and both have psychological effects of the

attack. In the section detailing the impact on the victims in the ASSET Report it is noted:

“Both victim sustained physical injuries. One victim received five stab wounds to their left arm, side and stomach. The other victim received a stab wound to their stomach. Medical attention needed to be sought and both victims were hospitalised. Both victims will be left with permanent scarring. Victim statements indicate that although the victim’s wounds have begun to heal the victim who received the five stab wounds still has difficulty moving their arm and is unable to carry out ordinary simple tasks. This victim also has no feeling in the fingers of their left hand and they have been informed this may never return. This victim spent five days in hospital and has had to undergo two operations. They continue to have to return to hospital for further assessment and treatment and will need to undergo physiotherapy. The victim impact statement also indicates that the victims have also been psychologically harmed i.e. they feel vulnerable to further attacks, have had to change their day to day routine, and are fearful of further reprisals. They state that they live in fear of further attacks.”

23. Mr Beard in his submission to the Tribunal referred to the death of Mr Lopes’ father and step-father and to the fact he has ‘gone off the rails’. It is clear that in his conduct Mr Lopes has deliberately acted in a manner inconsistent with the laws of the United Kingdom. This is a pattern that has continued in that it has also been noted in the ASSET report that there have been altercations whilst in prison which the author states appear to be linked to Mr Lopes’ attempt to ‘gain his place among his peers’. It is not disputed Mr Lopes has been subject to adjudications and in relation to his current detention at IRC Morton Hall it is recorded that (i) on 25<sup>th</sup> November 2014 a green leafy substance thought to be cannabis was found in a card addresses to Mr Lopes of which he denied all knowledge, (ii) on 27<sup>th</sup> December 2014 Mr Lopes was in the room of another named individual. When told to return to his room for a roll-call he ignored the Officer. He eventually left but returned to the room where an argument occurred between the other person and Mr Lopes. Mr Lopes was ushered from the room back to his own room but was noted to open the observation panel and to clear his threat to spit on the panel. He was told this was disgusting as a result of which he stopped and returned to his room where he threw things about and muttered, swearing at the Officer, (iii) 4<sup>th</sup> March 2015 Mr Lopes was spoken to about his behaviour and the use of a weapon in an assault against another named person. Mr Lopes admitted using a towel rail to hit this person two or three times after he claims to have been punched. Evidence supported the reduction of his privileges and the referral of the incident to the police, (iv) 17<sup>th</sup> June 2015 it is recorded that it was noted that morning that ‘Mr Lopes was under the influence. He was laid on his bed, slurring his words, and his eyes were red and ‘glazey’. He had covered his observation panel, contrary to instruction, and refused to remove the cards he covered it with. He is noted to be very argumentative and uncooperative’.
24. Mr Lopes appears otherwise to be a capable individual able to speak a number of languages in addition to Portuguese. He has attained certificates in prison from courses he has attended but has not provided copies of the certificates he says he

was awarded showing him to be drug free. His education was disrupted as a result of his exclusion from secondary school and his adverse behaviour has continued. There was insufficient evidence of social and cultural integration into the United Kingdom before the First-tier Judge but this was not an issue canvassed as a result of the concession. Reliance on the concession is arguably material and in this regard the determination must be set aside.

## Discussion

25. In remaking the decision the first issues to be considered is the withdrawal of the concession made by the Secretary for State in her grounds. In SSH D v Davoodipannah [2004] EWCA Civ 106 the Court of Appeal said that the Tribunal can allow a concession made by either party to be withdrawn if it considers that there is good reason in all the circumstances to do so. The Tribunal must try to obtain a fair and just result and consider each case on its merits. It may be relevant to consider the nature of the concession, the timing and whether there will be prejudice to one of the parties if the withdrawal is allowed. It is not essential to demonstrate prejudice before an application to withdraw a concession can be refused. In the absence of prejudice, if a party has made a concession which appears in retrospect to be a concession which should not have been made, then probably justice will require that the party be allowed to withdraw that concession.
26. On the basis the concession is arguably wrong in law, for the reasons set out above, there is good reason to permit the Secretary of State to withdraw the same for which permission is given.
27. Mr Beard was given the opportunity to discuss with Mr Lopes whether he wanted the matter to be remitted to the First-tier Tribunal to be further considered there or for an adjournment to prepare the case on the basis the question of integration needed to be considered further. Having spoken to Mr Lopes the Tribunal were advised he wanted to proceed before the Upper Tribunal today.
28. Mr Lopes also wanted to speak to the Tribunal which he was permitted to do. He claimed that at Morton Hall he had problems with the officers. He did not realise he hit the other person with the towel rail until afterwards. He claims not to have intended to strike him.
29. Integration is defined in the Oxford Dictionary as “The action or fact of passing into, or approximating to, each other by degrees”. Mr Lopes has lived in the United Kingdom since 2002 and has been educated here. There is no evidence of secure employment or of his having setup a life or home of his own. Before being imprisoned Mr Lopes lived in the family home in the Dursley area. He previously attended Stroud College on a plumbing and electrician course which he started in September 2012 although, after one month, was excluded. Mr Lopes had a part time job washing up at a local public house.

30. On the negative side is the rejection of the laws and rules of behaviour and expectation as to conduct with the United Kingdom, illustrated by his criminal conduct, conviction, and imprisonment for a very serious violent offence.
31. All relevant factors must be taken into consideration in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State and which are of a nature to ascertain whether or not those absences involve the transfer to another State of the centre of personal, family or occupational interests. Mr Lopes has visited Portugal on holiday as set out in the papers but this is not frequent and does not represent a transfer to Portugal of his family, personal or occupational interests.
32. Until his conduct deteriorated the facts suggest Mr Lopes was sufficiently integrated as a long term resident in the United Kingdom by his presence here. There are, arguably, two elements to the concept of integration which is the need for a physical presence and intention to live in the UK and abide by its laws and the rules of society and for there to be a degree of permanence about the residence – the person must have a settled intention to make his or her home here.
33. Mr Lopes as a child in the UK would have followed his parents' wishes and entered and lived in the UK as this is what they decided. It is not therefore a case in which he made a conscious decision to come to the UK and integrate as an individual as he would have lacked the capacity to make such a decision in his early years, although during this period the fact he was in the UK, educated here and lived here and not in Portugal is relevant. Once Mr Lopes came of age sufficient to form his own thoughts in relation to his future he remained in the UK and only visited Portugal. During his teenage years it would have been unrealistic to expect that it would have been practicable for Mr Lopes to do other than remain at home as he would not have had the economic means to set himself up to live independently. During this time, and since, however his conduct has deteriorated. Whilst Mr Lopes may have formed an intention to live in the UK it is debatable that he formed an intention to abide by its laws and the rules of society in the UK. The issue is whether he has 'thrown away' that integration by his actions.
34. A period of ten years residence in a host State has for many years been accepted in Europe as being the period in which a person will become so assimilated into the society in which they live that they should be viewed as if they were in the same position as citizens of that country, and only face expulsion in exceptional circumstances. This, in some respects, reflects the concept of the European citizen in which rather than being a citizen of the Member State of birth, we are all citizens of the greater European State first and foremost. Compare this with a person subject to the domestic laws of the United Kingdom where under paragraph 276ADE of the Immigration Rules a minimum period of twenty years residence is required to enable a person to remain on private life grounds.



35. Mr Lopes' conduct must have an impact upon integrating links previously forged within UK although this does not automatically mean that his conduct or period of imprisonment prevents his from qualifying for enhanced protection if sufficiently integrated (my emphasis). The period of imprisonment came after a period of residence in excess of ten years during which, until 2011, there is no indication of a threat to the degree of integration achieved.
36. Judge Pooler also noted that that he did not have sight of section 4 of the ASSET – Youth Justice Board – Risk of Serious Harm Assessment, dated 9 October 2013, but noted that the assessment was that of 'low risk'. This Tribunal has received the missing section and noted that the classification of risk of serious harm to others is of a 'Medium Risk'. This is stated to be; 'some risk identified but the offender is unlikely to cause serious harm unless circumstances change. Relevant issues can be addressed as part of the normal supervision processes'.
37. The author of the report records the outcome of reviews dated 9 October 2013 and 24 June 2013 in which the following is noted:

'Start- Mappa guidance would indicate that Luis is category 2 level 2 at present however it is recognised he will serve a lengthy custodial sentence and further assessment will be need to take place prior to his release in order to ascertain any change to this. When taking into account the use of weapons, the substantial physical injuries the victims sustained which ultimately could have been fatal, the psychological harm inflicted and furthermore that Luis committed these offences whilst under the influence of substances, his is currently assessed as HIGH risk of serious harm.

Review 24.6.13 – Whilst it is acknowledged that to date Luis has been involved in a total of 8 altercations throughout the total period of time in which he has been on remand and sentenced none of these resulted in any serious harm being caused. Given that Luis is now in a secure and contained environment where he has no access to weapons and constant supervision along with also having no access to substances these are all relevant factors and due to these being in place at present Luis's risk of serious harm is currently assessed as Medium. However, due to the serious nature of these current offences is acknowledged and will continue to be monitored and Luis's risk of serious harm will need to be further assessed should other significant events occur whilst he is in custody and fundamentally when these protective factors are removed prior to his release into the community.

Review 9.10.13 – Although it is recognised that Luis was further involved in an altercation within the first few days of being placed at Werrington YOI to date there have been no further information or evidence to suggest his involvement in any other incidents at this time. Luis has now been placed on enhanced Regime which he has maintained for 1 ½ months to date which reflects the positive progress he has been making there. Luis continues to articulate remorse for his actions towards his victims for these offences. Luis also maintains that he does not wish to cause any further harm or distress to

the victims of this offence or others. Given the protective factors identified below remain in place Luis risk of serious harm remain is as assessed as Medium however the serious nature of these current offences continues to be acknowledged and this will continue to be monitored. It continues to be acknowledged that Luis risk of serious harm will need to be further assessed should any other significant events occur whilst he is in custody and fundamentally these protective factors are removed prior to his release into the community.'

38. The reports from Morton Hall show further occurrences of violent and anti-social behaviour within that secure environment which supports the concerns of the author of the report.
39. It has not been shown there is acceptable an explanation for Mr Lopes' actions other than that this is the way in which he has chosen to behave. Juvenile delinquency has been recognised as a relevant factor when assessing the actions of young persons. In *Maslov v Austria* (Applic 1638/03) EctHR (First section) it was found that the decision was disproportionate under Article 8 because the offences were committed during a difficult period of adolescence and were qualified as non-violent juvenile crimes, because the claimant's good conduct in prison and because of his close ties to the host country.
40. In this appeal the index offence is a serious violent crime committed when Mr Lopes was under 18. The reference to 'very serious reasons' is satisfied when considering the nature of the very violent offence and the ongoing risk as demonstrated by Mr Lopes' conduct since his being sentenced and being detained in immigration detention. Specific elements also include that fact the offence was committed under the influence of substances the use and possession of which is illegal, the use of weapons including a knife and rock which he must have deliberately obtained and disposed of after the event, the infliction of numerous stab wounds upon his victims, and the fact the victims in the shop were known to Mr Lopes and specifically targeted. The ASSET report at page 58 records the following features of Mr Lopes' behaviour on the night of the offence (a) use or acquisition of a weapons (b) unpredictability (c) seems driven/impelled e.g., desire for revenge (d) loss of control e.g. temper (e) recklessness and (f) intention to hurt or harm. It is also noted as an area of concern that Mr Lopes (a) denied any recollection of having or using a knife (b) left his peers and then specifically sought the victims out unaccompanied and (c) both victims are likely to have permanent scarring from their injuries.
41. In the pre-sentence report it is recorded:
 

'When taking into account Luis's move to England at the age of six, English being his second language, his relatively small stature, and his record of anti-social behaviour the majority of which has taken place in the presence of other peers. I would conclude that Luis perception of himself, his desire to "fit in" and be accepted amongst his peers, may have a greater influence upon his thinking and behaviour than he is willing to acknowledge.'

42. It is also recorded in the report:

'Positive factors

3.13 Luis has previously engaged with training and education albeit for a short period of time. He tell me that he intends to utilise custodial sentence as an opportunity to focus upon gaining qualifications in order to increase the change of him being able to secure employment when released. Luis has a strong link with his family and it is evidence that he will receive ongoing support particularly from his mother and other family members.'

43. Mr Lopes is also recorded as having informed the reports author that he will no longer use substances and has identified changes that he plans to make [3.12] which are matters that need to be considered by reference to the Morton Hall reports. It is, however, noted at page 60 of the ASSET report that he is known to associate with other peers and older males known to the police and linked to the drug fraternity and that his strong desire for belonging within his peer group could make him more susceptible to peer pressure.
44. Although the draft of this determination was set out shortly after the hearing the delay in promulgation has been to enable further consideration of the issue of the circumstances in which a period of integration can be said to have been 'lost'. This can only be determined as a question of fact, not law, based upon the conduct of the person concerned. Had this been a case in which Mr Lopes was accused of acts classified as juvenile delinquency arising from the type of odd thinking some young men and women have at that age in relation what they perceive as acceptable behaviour, it is likely that a finding that such status had been lost would not be a proportionate assessment. In this case the offence is not that of a minor nature but the offence alone cannot justify the decision. That offence is illustrative of a process in the mind of Mr Lopes in relation to how he sees himself in society. He appears to have made a conscious choice that his status within his peer group and desire to 'belong' has become the determinative driving factor in his conduct, irrespective of the fact that this may involve acts contrary to the laws of the United Kingdom.
45. In addition there is the key offence in which Mr Lopes, acting alone but under the influence of substance MCAT which is Mephadrone, an illegal class B drug, deliberately targeted the victims for revenge using weapons. The violent element in his personality appears to remain and to have been exhibited since his conviction and imprisonment.
46. I find after careful thought and having weighed up the evidence as a whole that the rejection of the laws and norms of society in favour of a self-centred approach based upon a desire to enhance his profile among his peers supports the respondents case that any integration into the society of the United Kingdom has been rejected and lost in other than the physical sense of living at home with his mother and sibling, which too has been lost as a result of his imprisonment and subsequent period of immigration detention. This is a case in which I find,

notwithstanding Mr Lopes age, integration links previously forged within the host Member State have be broken. I find Mr Lopes has not discharged the burden of proof upon him to the required standard to show he qualifies for the enhanced protection as he has not shown that since 2011 he is sufficiently integrated.

47. Although Mr Lopes is unable to show he is entitled to the higher level of protection it is accepted by Mr Mills he has acquired a permanent right of residence as a result of his being in the United Kingdom for five years in accordance with the Directive. As such the required test is that to be found in Regulation 21(3) that a relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.
48. In MG and VC (Ireland) [2006] UKAIT 00053 the Tribunal said that “where regulation 21(3) applies to an individual (because he is an EEA national with a permanent right of residence but not a minor or along term resident) he may be removed as previously on the grounds that there is a risk of his committing further offences, with the proviso that the risk of harm must constitute serious grounds of public policy for his removal.”
49. In BF(Portugal) v SSHD [2009] EWCA Civ 923 the Appellant, a citizen of Portugal, arrived in the UK and had acquired permanent residence. He was convicted of battery against his partner and sentenced to 42 months imprisonment. He could only be removed on serious grounds of public policy or public security. The Tribunal first had to determine the claimant’s relevant personal conduct; secondly whether the conduct represented a genuine present and sufficiently serious threat; thirdly whether that threat affected one of the fundamental interests of society; and fourthly whether deportation would be disproportionate in all the circumstances. The Tribunal noted the evidence that the claimant had a high propensity to re-offend against the same victim and any new partner, but went on to find that the SSHD had failed to prove that there were serious grounds of public policy or security which made deportation proportionate. In remitting the appeal, the Court of Appeal said the Tribunal should have reached a conclusion as to whether the threat, which was clearly present at the time of the offence, was still present at the hearing. The Tribunal had to decide whether there was a present serious threat and if so the extent of that threat.
50. Following the four stage procedure outlined in BF (Portugal): in relation to Mr Lope’s personal conduct, this is referred to above. In relation to the question whether Mr Lopes’ conduct represents a genuine present and sufficiently serious threat, it is necessary to consider the evidence made available in relation to the risk of reoffending. Judge Pooler comments in the determination that he had not been provided with a complete copy of the ASSET Report. The missing pages have now been made available as shown above. It is also noted in the assessment that Mr Lopes remains in a protective custodial environment and that he will need to be reassessed should other significant events occur whilst he is in custody and when the positive protective factors are removed prior to his release into the community.

The entries referred to above in relation to his ongoing conduct, including the use of a weapon to attack another detained person earlier this year, suggest the threat which was clearly present at the time of the offence is still present at the hearing and represents a present serious threat of violent offending which may include the use of a weapon against his victims.

51. When asked about the incident involving the towel rail Mr Lopes denied being able to recall details and then stated that it was in self-defence. The inability to recall or remember is specifically commented upon by the Sentencing Judge and appears to be a pattern of denial of responsibility and lack of acceptance of personal responsibility. Mr Beard describes Mr Lopes as 'going off the rails' and the use of disproportionate violence if he thinks he or one of his friends have been 'wronged' is a cause for concern.
52. The evidence suggests there is a real risk of serious reoffending. There has been no work undertaken in relation to emotional difficulties said by his mother to emanate from the time of the death of his step-father and it is not known if work has been undertaken in relation to Mr Lopes perception of himself and his desire to 'fit in' and be accepted by his peers. It is noted in the Report that "Given the nature of this offence and the information provided whilst Luis maintains he wanted to "scare" the victim it appears Luis did in fact lose control during the commission of the offence. Luis claims that he does generally give thought to his actions however from discussions with his mother it appears that Luis does have the potential to act impulsively often not thinking about the consequences of his actions until after he has acted". It is also said that Luis desire to be accepted amongst his peer group "may have a greater influence upon him that he is willing to acknowledge".
53. The report is somewhat dated having been prepared on 9th October 2013 but it illustrates the real issues facing Mr Lopes. Unless he resolves such issues there is a real risk of further offending resulting in serious harm as a result of the use of violence as he has in the past both outside and within the prison/immigration detention environment. It is on the evidence made available that I find he presents a genuine present and sufficiently serious threat at the date of the hearing.
54. Mr Lopes plea for a further chance and assurance of remorse and that he will not re-offend in the future is noted but he made such a claim to the author of the ASSET report and yet used a weapon thereafter and has demonstrated continued anti-social behaviour, meaning his word is not sufficient. There is no evidence of an acceptance of responsibility for important elements of his conduct such as use of the knife or of the events in Morton Hall and no suggestion of his willingness to work with professionals to remedy the cause of his conduct.
55. The third element is the question whether that threat affects one of the fundamental interests of society. In GW (EEA reg 21: 'fundamental interests') Netherlands [2009] UKAIT 00050 the Tribunal said that the 'fundamental interests' of a society within the meaning of reg 21 (a threat to which may justify the

exclusion of an EEA national) is a question to be determined by reference to the legal rules governing the society in question, for it is unlikely that conduct that is subject to no prohibition can be regarded as threatening those interests.

56. Mr Lopes' record shows a propensity to renewed violence such as to satisfy the relevant test. The offences he has committed and in relation to which there is a real risk of repeat is prohibited by the criminal law.
57. In relation to the question of whether it would be disproportionate in all the circumstances, Mr Lopes was born on 13<sup>th</sup> April 1996 and so is now 19 years of age. Although the index offence was committed as a minor he has continued use acts of violence as an adult. He is in good health with no identified health needs. Mr Lopes has his immediate family of his mother and half-brother in the United Kingdom and a cousin, and family in Portugal. The issue of Mr Lopes' integration into the United Kingdom is discussed above. Although he has no recent knowledge of living in Portugal he is fluent in the language and his claim not to be able to read or write Portuguese is not substantiated. It is noted that in his deportation interview when asked what languages he is able to speak Mr Lopes did not claim to be able to speak Portuguese until he was asked how he communicated with his mother who speaks no English, at which point he admitted it was in Portuguese. There is no evidence family in Portugal are unwilling to assist him in adapting to life in Portugal or that the consequences of removal are such that the decision is disproportionate when considering the free movement principle. Mr Lopes was asked in the deportation interview whether there was any reason why he did not want to be deported to Portugal to which he replied "No reason why I can't. I wouldn't like to go back. I've lived in the UK 12-13 years. It would be hard to get a job. I can't read and write Portuguese and to go back to Portugal after all of these years it is not going be easy for me."
58. In relation to the question of rehabilitation, the Report refers to some areas Mr Lopes could benefit from working with but it has not been shown he cannot access the same in Portugal. European law makes it necessary to consider whether a decision to deport may prejudice the prospects of rehabilitation from offending in the host country, and weigh that risk in the balance when assessing proportionality under regulation 21(5)(a). It has not been shown that this is the case or that any prospect of rehabilitation is less in Portugal than in the United Kingdom. The peer group who are said to be an element in the offending are in the UK and so removal from them could in fact enhance prospects of rehabilitation.
59. The Secretary of State has discharged the burden of proof upon her to show that there is a present serious threat and that the decision is proportionate on the facts. Regulation 21(3) is satisfied.
60. In relation to Article 8 ECHR. It has not been shown Mr Lopes is able to satisfy the requirements of the Immigration Rules and the assessment of the proportionality of the decision by reference to the disruption with his family and private life in the

UK must be considered by reference to the above findings. In this regard I find the respondent has discharged the burden of proof upon her to the require standard to show the decision is proportionate to the legitimate aim of the protection of the public and the right of the State to removal offenders by the use of a lawful deportation decision.

**Decision**

**61. The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

62. 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 7<sup>th</sup> August 2015