**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: DA/00307/2015**

**THE IMMIGRATION ACTS**

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| **Heard at Royal Courts of Justice** | **Decision & Reasons Promulgated** |
| **On 14 March 2016** | **On 6 July 2016** |
| **And at Field House** | |
| **On 5 July 2016** | |

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**IVANILDO DANIF GOMES SEMEDO**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr R Parkin, Solicitor
For the Respondent: Mr I Jarvis, Presenting Officer (14 March 2016)
Mr L Tarlow, Presenting Officer (5 July 2016)

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Callow promulgated on 13 January 2016.

2. Mr Gomes Semedo, to whom I refer as the appellant, is a citizen of Portugal born on 10 January 1996. He entered the United Kingdom as a dependant of his mother on 13

July 2009. He has lived here continuously since then, attending school and then college. He has two children from two different relationships.

3. The appellant has a number of convictions:-

   (a) On 29 September 2011 a conviction at Stratford Juvenile Court for handling stolen goods resulting in a referral order for nine months.

   (b) On 28 March 2012 he was cautioned for shoplifting.

   (c) On 27 May 2014 he was convicted of travelling on a train without paying a fare and fined £50 plus costs.

   (d) On 29 May 2014 theft from a dwelling and sentenced to pay a fine of £150 and costs.

   (e) On 11 March 2015 at Snaresbrook Crown Court of two counts of robbery and sentenced to two years' imprisonment.

4. On account of the most recent and most serious conviction the respondent made a deportation order against him. The appellant appealed against that decision pursuant to the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

5. The appeal came before the First-tier Tribunal sitting at Hendon Magistrates' Court on 23 December 2015. The judge, having heard evidence from the appellant, his mother and his girlfriend concluded that:-

   (i) the appellant had not acquired a permanent right of residence due to a gap of five months and 25 days between 13 July 2012 and 7 January 2013 [4], it being noted [23] that he did not have compulsory medical insurance which would have been necessary were he to have claimed the right of residence as a student;

   (ii) he appellant represents a low risk of re-offending [25], the offender manager having found that he posed a low risk of re-offending and a medium risk of serious harm to others in the OASys assessment to which weight could be attached;

   (iii) the appellant fell into the category of offender identified in **Essa (EEA: rehabilitation/integration) [2013] UKUT 00316** at [32]-[34] in that his life in the United Kingdom is likely to be with the support of his mother and girlfriend while he re-establishes his life in the community under licence;

   (iv) Taking into account all the circumstances, his removal was not justified in order to address any "genuine, present and sufficiently serious threat" posed by his continued presence [29].

6. The respondent sought permission to appeal on the grounds that the judge had erred:-

(i) In failing to provide reasons for the finding that the appellant intends to lead an honest life which underpinned the conclusions that the appellant did not present a genuine, present and sufficiently serious threat;

(ii) in finding that he presented a low risk, had failed adequately to address the continued denial of the offence for which he had been convicted in the context of a lengthy and prolonged history of offending;

(iii) in concluding that the respondent was seeking to justify deportation solely on the basis of past offending contrary to Regulation 21(5)(e) and thus the finding that he did not pose a genuine, present and sufficiently serious threat is unsustainable.

(iv) in failing to consider the principle of proportionality within Regulation 21(5)(a) and the finding that the appellant intends to return to college and support his children were equally lacking in reasons.

(v) in his assessment of rehabilitation by failing to take into account the decision **MC (Essa principles recast) Portugal [2015] UKUT 520** in light of the decision in **Dumliauskas & Others [2015] EWCA Civ 45.**

7. On 29 January 2016 First-tier Tribunal Judge Fisher granted permission on all grounds.

**The hearing on 14 March 2016**

8. Mr Jarvis submitted that the judge's findings were unclear it being not at all clear whether he had concluded that the appellant did not constitute a genuine, present and sufficiently serious threat before going on to assess matters which improperly included a reliance on possible rehabilitation. He submitted further that the judge had erred in his approach to the OASys Report, this is not binding on the Secretary of State.

9. Mr Parkin accepted that it was unclear whether the judge had concluded that the appellant did not constitute a genuine, present and sufficiently serious threat although it was implicit in the decision that he had reached this conclusion. He submitted that the judge's approach to the OASys Report was open to the judge and that the judge had not misdirected himself with respect to that.

**The Law**

10. The powers of the United Kingdom to exclude and remove from the United Kingdom, that is to deport, are governed by the Citizenship Directive. Its provisions are reflected in Regulations 19 and 21 of the EEA Regulations. Reg. 21 provides as follows:-

**Decisions taken on public policy, public security and public health grounds**

21. (1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) 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.

…

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

11. I do not accept, contrary to what is averred in the grounds of appeal at [1] that the judge has not provided full reasons for the findings set out at [24]; that is evidently a summary of what follows in the paragraphs set out below. Further, it was sufficiently clear from the determination that the judge was aware of the appellant's denial and took this into account; what is said in the grounds at [3] does not identify that the judge's assessment of this matter was perverse nor for that matter do I consider that the judge's reference at [25] to the Secretary of State's intentions identify any error of law.

12. What is said in the grounds at [6] and [7] do not identify errors of law. The fact that these are said to be submissions is indicative that this is an attempt simply to put the Secretary of State's case rather than to identify any error. This is not a lack of evidence in terms of findings nor do they properly identify that the judge's findings were perverse.

13. As was noted in **Dumliauskas** at [55] the power to deport is predicated on a real risk of re-offending. That is also apparent from the decision in **SSHD v Straszewski [2015] EWCA Civ 1245**, in particular at [17].

14. It is evident from the decision of the First-tier Tribunal at [18]-[22] that the judge directed himself properly as to the law although not identifying the facts as provided for in **Dumliauskas** [55].

15. There is, I consider, merit in the submission that the judge's decision is unclear as to whether he found that the appellant does present a genuine, present and sufficiently serious threat. The finding that someone is at low risk of re-offending is not of itself sufficient given that here it is also clear from the OASys Report that in two out of the three categories the risk was medium. Indeed, the probability of proven re-offending as part of the OGRS3 score is 57% after two years, 39% after one year. That is not to say that the judge was wrong to attach weight to the OASys scores as a whole.

16. While I accept that it would in the circumstances have been open to the judge given the other findings of fact to conclude that removal was not proportionate, the findings on that do rely on what was said in **Essa** to a significant degree. There is no indication that the judge was aware of the difficulties in so doing as identified in **Dumliauskas**. The position is as set out helpfully in **MC (Essa recast)** in the headnote.

17. The fact that the judge did go on to consider rehabilitation is an indication that he had found that the appellant does represent a genuine, present and sufficiently serious threat given that, had he not done so there would have been no need to consider these issues – see **Dumliauskas** at [52]-[55].

18. Accordingly, I am satisfied that the decision of the First-tier Tribunal did involve the making of an error of law in that the judge failed properly to address the issue or indeed answer the question of whether the applicant is a genuine, present and sufficiently serious threat. That error is made material by the flawed assessment of proportionality flowing from a failure of the judge to direct himself as to the prospects of rehabilitation and in directing himself to follow **Essa** rather than directing himself to follow **Dumliauskas**. Accordingly, I set the decision aside for it to be remade.

**Hearing on 5 July 2016**

19. Given that the appellant is aged under 21 and was, prior to his imprisonment, living with his mother who, as it appears from the decision of the First-tier Tribunal (Social Security), had acquired the permanent right of residence on 3 December 2014, Mr Tarlow accepted that the appellant had in fact acquired permanent residence, before his imprisonment.

20. It then became apparent that the appellant had now been released from detention, was employed, and was living with his mother. Although I had given directions to remake the decision in the Upper Tribunal, it in reality, given the change in circumstances since the hearing in the First-tier Tribunal, it would be necessary to

make fresh findings of fact an all material issues through the prism of the acceptance that the appellant now meets the requirements of reg. 21 (3) of the EEA Regulations.

**SUMMARY OF CONCLUSIONS AND DIRECTIONS.**

1. The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

2. I remit the decision to the First-tier Tribunal for a fresh determination on all issues, save the acceptance by the respondent that the appellant acquired the permanent right of residence prior to his imprisonment in 2015.

Signed Date: 5 July 2016

Upper Tribunal Judge Rintoul