Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00203/2013

THE IMMIGRATION ACTS

Heard at : Laganside Courts	**Determination Promulgated**
On : 22nd August 2013	**On : 30th August 2013**

Before

Upper Tribunal Judge McKee

Between

JOSE JULIO MONTEIRO PEREIRA FAFE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ronan Daly, instructed by Gerard Maguire, Solicitors
For the Respondent: Mr Andrew Mullen of the Specialist Appeals Team

DETERMINATION AND REASONS

1. On 16th January 2013 a decision was taken to deport the appellant, a Portuguese national now aged 34, under regulation 19(3)(b) of the EEA Regulations 2006. After residing in Northern Ireland for seven months, Mr Fafe had been arrested by the police in September 2011 and charged with offences of possessing and supplying Class A drugs. Having pleaded guilty, he was sentenced in October 2012 at

Craigavon Crown Court to three years' imprisonment, for the second half of which he would normally be released on licence. On 21st March 2013 an appeal to the First-tier Tribunal came before a panel comprising Judge Hutchinson and Dr Okitikpi, who dismissed the appeal. Leave to appeal to the Upper Tribunal was sought on the strength of grounds which asserted that the respondent had failed to observe the requirements of regulation 21(5) and (6) of the EEA Regulations before taking the decision to expel an EEA national and, without condescending to any particulars, asserted that the panel had made the same errors of law. The respondent was then lambasted for not considering whether Mr Fafe's prospects of rehabilitation would be better in this country than in Portugal, as should have been done following *Batiste, Tsakouridis* and *Essa*. The First-tier Tribunal was said to have made the same error of law, but again it was not specified how.

2. Such grounds would not ordinarily have found favour with a First-tier judge considering 'leave applications', and the appellant was fortunate that Judge Bird took it upon herself to improve upon the grounds by identifying arguable flaws in the determination for herself. She complained that the panel had not considered whether Mr Fafe was likely to re-offend (there being no mention of an OASys Report), and had not taken into account the efforts made by the appellant to improve himself, as evidenced by a letter from the Prison Service dated 8th March 2013. The only notice taken of this letter occurred, according to Judge Bird, at paragraph 34 of the determination, when the panel simply observed that the appellant had not obtained accreditation in any of the courses which he had attended while in prison. Judge Bird did note that the panel had considered rehabilitation at paragraphs 44-45 of the determination, but agreed with the grounds that the panel had arguably failed to consider properly whether deportation would prejudice the prospects of the appellant's rehabilitation.

3. Fortified by a grant of leave in such encouraging terms, the appellant may well have thought it likely that the Upper Tribunal would find that errors of law had indeed been made, despite the features of the First-tier determination pointed out by the Specialist Appeals Team in a 'Rule 24 Response'. Indeed, when the appeal came before me today, Mr Fafe had the benefit of very determined and persuasive advocacy on the part of Mr Daly, which Mr Mullen stoutly rebutted. But having heard their submissions, it was clear to me that the potential errors identified in the grant of leave did not stand up to close scrutiny, and that, although a different panel might have reached a different conclusion on the same facts, it could not be said that <u>this</u> panel had committed an error of law. A dictum of Carnwath LJ (as he was then) in *Mukarkar* [2006] EWCA Civ 1045 at paragraph 40 is pertinent here :

> "Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case. … The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal …"

4. In the instant case, it could be said that the panel has taken an *ungenerous* view of the facts. But it is not a view that was not open to them. To begin with, their determination is very well structured, setting out the relevant information under appropriate headings, until arriving at the 'Findings and Reasons' section. They first

calculate that the appellant is not entitled to the enhanced level of protection from expulsion under European law that residence in the host Member State for five or ten years would have given him. They take account of the Judge's sentencing remarks, with the points going in his favour as well as against him, and then note the view taken in the 'Reasons for Deportation' letter, derived from the Judge's remark that the appellant had taken to dealing in drugs when he found himself short of money, that the appellant might once again turn to crime if he found himself short of money.

5. At paragraphs 21-22, the panel set out in full the contents of the letter from the Prison Service dated 8th March 2013, listing Mr Fafe's commendable achievements before being released on licence, although these did not include attaining accreditation in the Art, Guitar and Computer classes which he attended. Then follows the explanation given by the appellant in his Witness Statement of how he got involved in selling drugs. But at paragraphs 24-28 the panel examine this explanation, and find that the appellant has not been telling the truth. It cannot be said that their reasons for so finding were not open to them.

6. The panel go on to consider Mr Fafe's relationship with members of his family, most of whom live in London. They note that the appellant did not turn to his family for help when he ran short of money in 2011, and that although his mother and sister have now moved to Northern Ireland, there are indications that their relationship to him is not as close as is made out. For example, although in frequent contact over the phone, his mother did not find out that he had been arrested until one month later, and that was from another source. His mother's evidence at the hearing, that the appellant wanted to be an interpreter, contradicted the appellant's own evidence, that he would look for a job in IT, having got a certificate. This is where the panel observe that, according to the letter from the Prison Service, the appellant did <u>not</u> obtain accreditation in the Computer course which he attended, and that no certificates had been adduced. This does not mean, as Judge Bird thought, that the panel did not accept the evidence in the letter of the appellant's efforts at self - improvement while in prison.

7. The panel were not satisfied that his family would act as a stabilising influence on the appellant. That may seem a harsh conclusion, but it is not one that is not supported by any evidence or reasons. As for the appellant's job prospects, the panel note that, while he expressed willingness to undertake any form of employment, he did not obtain any employment during the seven months he was here before his arrest, and that he appeared at best undecided about his employment options. This prognosis might seem gloomy, but again it is not one that is unsupported by evidence.

8. The panel go on to consider carefully all the conditions laid down by regulation 21(5) and (6), precedent to a decision to expel a Union citizen. They address a submission, repeated in the grounds of appeal to the Upper Tribunal, that the respondent's decision was based on the appellant's previous criminal convictions alone, contrary to regulation 21(5)(e). They disagree, finding that the respondent considered all the relevant circumstances, including the appellant's general conduct. They agree with the respondent that there is a risk that the appellant will re-offend, based on the fact that, as the Sentencing Judge had remarked, he had succumbed to the temptation of selling drugs when he was short of money. The risk of his committing such offences again, according to the panel, would represent "*a genuine,*

present and sufficiently serious threat affecting one of the fundamental interests of society", in terms of regulation 21(5)(c).

9. Contrary to what Judge Bird says about the panel not assessing the risk of re-offending, the panel do explicitly do that here. It is a harsh assessment, but it is not without any evidential foundation. There does not appear to have been any OASys Report provided in the instant case. There is not always one. When that happens, the tribunal must do the best it can with what there is, as happened in both *MK (Gambia)* [2010] UKUT 281 (IAC) and *BK (Ghana)* [2010] UKUT 328 (IAC).

10. That is not the end of the matter, for the panel go on at paragraphs 46-47 of the determination to look at the history of both the appellant and his family, and to take account of his good behaviour while in prison and his attendance at Ad:ept counselling. Again, this shows Judge Bird to have been mistaken in supposing that the evidence of the steps taken by the appellant to improve himself was not considered by the panel. But having considered it, the panel conclude that it is of limited value, because this behaviour was manifested in the controlled environment of a prison. There was no evidence that the appellant had addressed his offending behaviour, given the panel's rejection of the appellant's own explanation of how he had come to be involved in the offending behaviour.

11. Again, I have to say that this is not a conclusion which a differently constituted panel might have reached. I might not have reached it myself. But my task is not to re-make the decision on the appeal, but to decide whether the panel committed an error of law, such that their determination has to be set aside. One other matter is complained of in the grounds of appeal and in the grant of leave, namely the panel's treatment of the rehabilitation issue. At paragraphs 44-45 they cite *Batiste* (the name is actually *Batista*) for the enunciation of the principle, and then express the view that the appellant's links and integration in the UK are tenuous at best, and that the presence of his family here will not have the rehabilitative effect claimed for it. They acknowledge that the appellant would have the benefit of his licence conditions and a Probation Officer if he were to remain here, advantages which he would not have in Portugal. Nevertheless, they are not satisfied that this disadvantage outweighs the factors in favour of deportation.

12. Absent perversity, matters of weight are not matters of law. The panel have concluded that the appellant's prospects of rehabilitation would be better in this country than in Portugal, and if it were a tenet of European law that a Union citizen cannot be expelled if his prospects of rehabilitation are better in the host Member State, then the panel would have committed an error of law. But they are only required to weigh the prospects of rehabilitation in the balance, along with everything else. That is what they have done. Much will depend on the individual facts of the particular case. In *Tsakouridis*, for example, the claimant had been resident in Germany for many years before being sentenced to 6½ years' imprisonment for drug smuggling. Mr Fafe had only resided in Northern Ireland for seven months before he was arrested for drug-dealing.

13. The panel's finding on Article 8 has not been challenged, and the outcome of this appeal against the First-tier determination must be that it does not succeed.

DECISION

The appeal is dismissed.

Richard McKee
Judge of the Upper Tribunal

29th August 2013