IAC-AH-PC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07452/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th November 2015	**On 9th December 2015**

Before

MR JUSTICE PHILLIPS
UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DINO FUMO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Secretary of State: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr McKenna, instructed by Bal Dhaliwal Solicitors

DECISION AND REASONS

The Secretary of State, with permission, appeals against the decision of the First-tier Tribunal panel (Judge Colyer and Mr G Sandal, non-legal member) (hereinafter referred to as the "panel"), which, in a decision promulgated on 8th July 2015, allowed Mr Dino Fumo's appeal against the decision of the Secretary of State to make a deportation order against him by virtue of Section 5(1) of the Immigration Act 1971. The decision of the Secretary of State was to deport Mr Fumo under the provisions of

the Immigration (European Economic Area) Regulations 2006 ("the Regulations"), on the basis that the Regulations applied to Mr Fumo as a family member of an EEA national

The background:

1. Whilst the appeal is brought by the Secretary of State, for the sake of convenience we shall refer to the parties as they were before the First-tier Tribunal, therefore referring to Mr Fumo as the Appellant.

2. The Appellant's immigration history can be summarised as follows. The Appellant is a national of Mozambique born on 10th March 1991. He arrived in the United Kingdom in 2003 as a dependant of his father who is now a naturalised British citizen but at that date was an EEA national. Consequently he entered the United Kingdom as the family member of an EEA national.

3. On 23rd July 2003, the Appellant was issued with a residence document confirming his right to reside in the United Kingdom as a dependant of an EEA national which was valid until 23rd July 2008. On 11th September 2009 the Appellant was issued with a document certifying his right of permanent residence in the UK as a dependant of a Portuguese national. That remains the Appellant's status in the United Kingdom to date.

4. The findings of the panel relating to his earlier years are set out in the determination at [27] and [59] namely, that the Appellant had not lived in Mozambique since he was 3 or 4 years of age and that when he left Mozambique with his family, he moved with them to Germany where his early education took place until he arrived in the United Kingdom, aged 11. The panel found that he had no relatives in Mozambique, he did not speak the language and that he had returned to that country for a short visit in 2012.

5. The Appellant has criminal convictions. On 12th January 2011 he was convicted of an offence of theft and was ordered to pay a fine of £65, costs of £85 and a victim surcharge of £15.

6. On 13th October 2014, at Cambridge Crown Court, he was convicted of an offence of robbery and received a sentence of twenty months' imprisonment. The panel set out the circumstances of that offence at [38] and [39] of the determination by reference to the extracts that had been set out in the decision letter of the Secretary of State and the circumstances of the offence and the part played by his co-accused. The judge sentenced the Appellant solely on the basis of the offence to which he pleaded guilty, which was one of robbery (see page 5 of the sentencing remarks). The judge did not find that the provisions relating to "dangerous offenders" applied to the Appellant (page 4) and considered the appropriate sentence in the light of the sentencing guidelines for robbery, finding that, on its facts the offence fell within level 1, with a starting point of twelve months and a range of up to three years custody. Taking into account the mitigating factors and that this was not a "pre-planned robbery", the

timing of the plea and the impact upon the Appellant, the appropriate sentence was one of twenty months' imprisonment.

7. By reason of his conviction, the Secretary of State notified the Appellant that she intended to make a deportation order against him on grounds of public policy in accordance with Regulation 19(3)(b) and Regulation 21 of the Immigration (European Economic Area) Regulations 2006 ("the Regulations"). A decision to make a deportation order was made on 28th January 2015. The Appellant appealed that decision to the First-tier Tribunal. The panel heard the appeal on 11th June 2015 and allowed the appeal under the Regulations and on Article 8 grounds.

8. The Secretary of State sought permission to appeal that decision and permission was granted by the First-tier Tribunal on 14th October 2015.

The appeal before the Upper Tribunal:

9. Mr Whitwell appeared on behalf of the Secretary of State and Mr McKenna appeared on behalf of the Appellant. Mr Whitwell's submissions can be summarised as follows. First, he submitted that the panel had given material weight to the "prospects of rehabilitation" of the Appellant at paragraph [51] – [58] citing the decision of **Essa [2012] EWCA Civ 1718** but, applying the decision of **SE (Zimbabwe) v The SSHD [2014] EWCA Civ 256,** this was a material error of approach because the Appellant was not an EEA national but was a citizen of Mozambique and thus the question of rehabilitation was irrelevant and the judge had erred by giving weight to it. He submitted that the disposal of the appeal by the panel by allowing the appeal under the 2006 Regulations was unsafe.

10. Second, he submitted that, in allowing the appeal on Article 8 grounds, the panel failed to direct itself as to the relevant provisions of the Nationality, Immigration and Asylum Act 2002 and did not apply the Section 117 factors as set out in **Badewa (117A – D and EEA Regulations) [2015] UKUT 00329**. Mr Whitwell made no specific oral submissions in this regard, relying on the written grounds. He invited us to set aside the decision and to remake the appeal dismissing the Appellant's appeal.

11. Mr McKenna, on behalf of the Appellant, relied upon his skeleton argument. In addition, he submitted that the panel had heard oral evidence from the Appellant and the family members all of whom they found to be credible witnesses and this was clear from the determination. He referred us to paragraph 8 of the determination and that the evidence before the panel demonstrated that the Appellant did not represent a genuine, present and sufficiently serious threat and that he was not likely to reoffend and that that was the crux of the issue. The panel had a report or letter from the Probation Service referred to at [54] and was entitled to rely upon that. The panel also were entitled to take into account what he had done since release from custody and that there was no evidence of a breach of the licence conditions nor had he breached any bail conditions. Mr McKenna submitted that evidence in the bundle showed the level of rehabilitation that the Appellant was undergoing and that he had used the time in custody to get off drugs and the panel

accepted from the evidence that they had heard and read that he had made efforts to be drug-free, relying on paragraphs [6], [8] and the evidence from the Appellant's father at [9].

12. As to Article 8, Mr McKenna submitted that it was open to the judge to rely on the findings of fact made in the earlier part of the determination to demonstrate that removal would be disproportionate and that, whilst Section 117 had not been expressly taken into account, those provisions were implicit in the determination. He invited us to uphold the determination.

13. We reserved our determination.

Conclusions:

14. There are two written grounds relied upon by the Secretary of State; firstly, that the judge made a material misdirection of law when giving weight to his prospects of rehabilitation when the Appellant was a national of Mozambique and not an EEA national, secondly that the panel failed to give weight to material matters and that in allowing the appeal on Article 8 grounds the panel failed to consider the provisions of Section 117A D (in accordance with the decision of **Badewa** (as cited).

15. Mr Whitwell on behalf of the Secretary of State made oral submissions in relation to ground 1 but did not seek to enlarge upon or otherwise engage with ground 2. Insofar as that ground is concerned, the written grounds do not expressly refer to the legal test set out in Regulation 21(5)(c), but assert that the panel did not give adequate consideration of the evidence relating to the issue of reoffending.

16. In our judgment, it is necessary to reach a conclusion on ground 2 before considering ground 1 as it is plain from the relevant Regulations that, if the panel concluded that Regulation 21(5)(c) was not met then in the light of the decision of **MC (Essa principles recast) [2015] UKUT 520** at [29], it is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (Regulation 21(5)(c)) that it becomes relevant to consider whether the decision is proportionate taking into account all the considerations identified in Regulation 21(5) – (6). It therefore follows that if the conclusions the panel reached on Regulation 21(5)(c) were open to them upon the evidence and they properly took into account the relevant considerations, then ground 1 is not material to the outcome of the appeal.

17. We have therefore considered ground 2. Whilst the Appellant was a national of Mozambique, the panel properly identified the nature of the appeal at [41] onwards and the acceptance by the Secretary of State that, by reason of the immigration history of this Appellant, he was a family member of an EEA national. Consequently his case fell within the 2006 Regulations and not the provisions relating to automatic deportation of foreign criminals. As the decision to make a deportation order stated at [15], in the light of his immigration history the Appellant had acquired a permanent right of residence under the 2006 Regulations and thus consideration was

given to whether his deportation was justified on "serious grounds of public policy or public security" to the intermediate level.

18. The panel set out the Secretary of State's view at [47] and made reference to the public interests at play at [48] – [50]. The panel had previously set out the legal framework under the 2006 Regulations, setting out Regulations 19 and 21 and making specific reference to the provisions of Regulation 21(5) and (6). In addressing these issues the panel identified that the "central decision in the case" was whether the Appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. (See [51]).

19. Therefore Regulation 21 was central to the appeal and, so far as relevant, provides as follows:-

> "(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.
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who -
>
> (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision ...
>
> (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."

20. As the Appellant is a family member of an EEA national, his deportation must comply with the requirements of the 2006 Regulations and in particular, Regulation 21. The Secretary of State set out in the decision letter that he had established a right of permanent residence in the United Kingdom and therefore the heightened level of protection in Regulation 21(3) which required proof of "serious grounds of public policy" applied.

21. Regulation 21(5)(c) requires the personal conduct of the prospective deportee to represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." A "threat affecting one of the fundamental interests of society" means a threat to do something prohibited by law (see **GW (Netherlands) [2009] UKAIT 00050**). In order to represent a "genuine, present and sufficiently serious threat" it is necessary to establish a future risk of reoffending and an assessment is required as to how likely it is an offender will reoffend and the nature and seriousness of such offences. It is only if there is such a future risk that an individual will present a "present" threat. Past offending may be relevant in assessing future risk but the seriousness of the past conviction and indeed the fact that he has a past conviction cannot in itself justify the deportation of an EU national or a family member of an EU national, unlike the provisions that deal with non-EEA foreign criminals under the automatic deportation provisions.

22. In this respect the panel made reference to the evidence before them relating to the risk of reoffending and highlighted that the panel had not been provided with any OASys report or probation reports and that there was "no indication that the Home Office has undertaken their own professional assessment of the Appellant's own risk of reoffending" (At [53]). The panel then turned to the only professional assessment before them consisting of a letter/report from the Appellant's current supervising probation officer and set out the contents of that letter in its entirety at [54] which made reference to the Appellant having been currently assessed as a low risk of reoffending but a medium risk of serious harm to the public due to the nature of the index offence. The report went on to set out that he had complied with his licence conditions and had attended all appointments and was currently engaged in the TSP (a Thinking Skills Programme) and had not further offended since his release.

23. The panel went on to state that they accepted the professional assessment provided by the Appellant's supervising probation officer and found him to pose a low risk of reoffending. As this was the only evidence from the Probation Service before the panel concerning risk of reoffending, it was wholly open to the panel to place weight and reliance upon it (see **AM v The SSHD [2012] EWCA Civ 10** and **The SSHD v Vasconcelos [2013] UKUT 0678**). The grounds do not challenge the panel's findings on the probation officer's report or the weight they were entitled to place on such a report when considering the test under Regulation 21(5)(c).

24. As Mr McKenna submitted, the panel had the advantage of hearing the oral evidence of the Appellant, and the witnesses who included his parents and girlfriend. At [56] and [68] the panel made reference to that evidence, which they found to be credible and upon which they placed reliance and weight. At [56] the panel considered the Appellant's contention that he had now indicated a willingness to change his ways and that this had been supported (by the witnesses) that he had now matured. In this respect, the findings at [56], [57] and [68] should be read together. Whilst the grounds assert at [16] that the Appellant claimed that his drug use caused him to offend, that ignores the panel's findings as to his present circumstances, his behaviour, conduct and motivation and that there was no evidence that he had taken drugs either whilst in custody or subsequently. The panel accepted the Appellant's evidence set out at [6] and there was no evidence of any drug-taking before the panel. Furthermore, the panel accepted and found that the Appellant wished to live a drug-free life and the panel found that he had a strong desire to remain in the UK and this was an inducement to remain drug-free and also crime-free.

25. At [68] the panel placed weight and reliance upon the continued support of his girlfriend, family members and the Probation Service whom they found would significantly reduce the risk of reoffending. They found that the threat he represented was undermined to a significant degree. Thus at [73] they reached the overall conclusion that it had not been established that the Appellant represented a "genuine, present and sufficiently serious threat to the public" to justify his deportation on the grounds of public policy. The conclusion at [74] was that the Respondent had not established that his deportation was justified under Regulation 21.

26. The grounds also assert at paragraphs 13 to 15 that the panel did not properly consider the circumstances of the crimes committed. In this respect in reaching an assessment under Regulation 21(5)(c) past offending may be relevant to the assessment of future risk but the seriousness of the past conviction cannot in itself justify the deportation of an EU national (or family member of an EU national as this Appellant is) unlike the provisions that apply to the deportation of non-EEA foreign criminals.

27. Under the EEA Regulations, the panel were required to consider the relevant personal conduct of the Appellant, that is, the Appellant's criminal offending, and did so at [36 – 40] and also in their conclusions reached at [70 – 72]. The panel were plainly aware and treated this offence as a serious one as demonstrated by the circumstances of the offence and the length of the sentence that was ultimately imposed. Whilst the grounds make reference at paragraph 14 to the victim who had died from injuries inflicted in the robbery, that that fails to take into account the basis upon which the Sentencing Judge expressly dealt with the Appellant at paragraph 5 of the sentencing remarks, which was for an offence of robbery and not manslaughter, a offence for which he was acquitted.

28. Nor do we find the grounds at 15 adequately reflect the evidence before the panel that the Appellant had failed to accept responsibility for the crime when giving

evidence before them. When considering the circumstances of the offence at [69] the panel took into account that the offence was not pre-planned and there was no suggestion that offensive weapons were involved although there was the use of the car that led to the victim's injuries resulting in his death but noted in this context that the Appellant was acquitted of the charge of manslaughter. At [70] they took into account that this was not part of a series of offences or that the Appellant has significant previous offences of a similar nature. They took into account his plea of guilty to the charge of robbery and that the level of offending as considered by the Sentencing Judge, whilst passing the custody threshold, was not one which demonstrated an offending pattern which "shows a propensity to commit serious violent crime". At [72] the panel took into account that he had a previous conviction for theft and the second (and far more serious) of robbery. The panel found "that there is no clear pattern of serious offending by the Appellant. He has not indulged in a series of crimes that may endanger the general public or criminal conduct that may endanger the economic wellbeing of the UK."

29. Consequently we do not consider that the Secretary of State has demonstrated that the panel erred in the conclusions reached under Regulation 21(5)(c) as set out at [70], [73] and [74.] Contrary to the grounds, the panel, who had the advantage of hearing and assessing the oral evidence before them reached conclusions that were open to them properly on the evidence that was before them.

30. As stated in the decision of **Essa (rehabilitation/integration) [2013] UKUT 316** at [32]:-

> "We observe that for any deportation of an EEA national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in case of criminal convictions short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. In such a case, if there is acceptable evidence of rehabilitation, the prospects of future rehabilitation do not enter the balance, save possibly as future protective factors to ensure that the rehabilitation remains durable."

31. On the findings of fact and the panel's assessment of the evidence, they did not find the Appellant to be someone who could properly be described as having "a propensity" to commit further such offences. Nor could it be said that there was an "unacceptably high" risk of the Appellant reoffending such as he would present a "genuine, present and sufficiently serious threat" which is required under Regulation 21(5)(c) of the Regulations. The public policy grounds for removal is an exception to the fundamental principles of the free exercise of EU rights and as such an EU citizen (or family member) should not be expelled as a deterrent to others without the personal conduct of the person concerned giving rise to consider that he will commit other offences that are against the public policy of the state. Furthermore it is accepted and acknowledged by both advocates that the appellant's

deportation could not be justified simply on the basis of his previous criminal conviction, even of such a serious nature as an offence of robbery and the imposition of the sentence he received. This is because the legal regime for deporting EU criminals is different and can properly described as more restrictive than that for foreign national criminals under the UK Borders Act 2007. It must be established that the Appellant represents "a genuine, present or sufficiently serious threat affecting one of the fundamental interests of society". In this context the future risk of reoffending was considered in the light of his conduct and the grounds of the Secretary of State are simply a disagreement with the findings of fact reached by the panel on their assessment of the evidence, both oral and documentary. It was open to the panel to reach a favourable view of the Appellant and his witnesses and for this to be considered in the light of the Appellant's offending history, and the probation officer's recent report. It was therefore open to the panel to reach their conclusions under Regulation 21(5)(c).

32. In summary, the findings of the panel were that there were no serious grounds of public security to justify the removal of the Appellant because he was not a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. For the reasons we have given, they were sustainable findings that they were entitled to make on the evidence before them. Plainly, in terms of proportionality, the assessment following the primary findings have the inevitable consequence of the decision being disproportionate, having found that his removal could not be justified.

33. In the light of our conclusions as to ground 2, it is unnecessary to consider ground 1. However, we consider that whilst the panel appeared to give consideration to the issue of future rehabilitation by reference to Mozambique and the lack of links to that country, we are not satisfied that the panel, by reference to future rehabilitation, was engaging in the reasoning set out at paragraph 49 of **SE (Zimbabwe)**.

34. Furthermore, in the light of the panel's finding that Regulation 21(5)(c) was not met, the panel allowed the appeal under the EEA Regulations and therefore they were not required to consider Article 8. Thus any failure to consider the statutory factors of Section 117 in relation to Article 8 are immaterial to the outcome reached.

Notice of Decision

The decision of the First-tier Tribunal panel does not involve the making of an error on a point of law. The decision shall stand.

No anonymity order was requested or made.

Signed Date

Upper Tribunal Judge Reeds