Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01572/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 February 2014	**On 20 February 2014**

Before

MR JUSTICE JAY
UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MATHEUS PEREIRA DA ROSA

Respondent

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: In person

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal sitting as a panel, Judge Lloyd and Sir Jeffrey James, promulgated on 4 October 2013 whereby the claimant's appeal against his deportation was allowed.

2. We can take the background for this case from the First-tier Tribunal's determination. The claimant is a Brazilian national. He entered the United Kingdom as a visitor in 2009, aged 16. The claimant and his mother applied for an EU residence card as members of the family of Mr John Whittaker, her partner. After an appeal residence cards were granted valid until 17 December 2015. Paragraph 2 of the determination appears to contain a typographical error as to that date.

3. On 18 October 2011 the claimant, then aged 19, was convicted at the Crown Court on four counts of robbery and one count of assault by beating. He was sentenced to three years and three months' detention in a young offenders' institution. We have been told that during the currency of his sentence of imprisonment he received one adjudication of violence against a fellow prisoner.

4. On 4 March 2013 the Secretary of State issued a notice of intention to deport the claimant subject to the provisions of the Immigration European Economic Area Regulations 2006. The claimant successfully appealed that decision and on 30 May 2013 the Secretary of State gave a further decision to make a deportation order. In the absence of a timely appeal a deportation order was signed by the Secretary of State on 2 July 2013. On 1 August 2013, and therefore out of time, the claimant made an application to appeal the deportation order from within the United Kingdom. This appeal was accepted and time was extended.

5. The Secretary of State's position at all material times has been that the claimant has not accumulated five years' lawful residence in this country and that having regard to the matters set out under Regulation 21, sub-Section 5 of the 2006 Regulations it would be proportionate to deport the claimant. Although a person's criminal convictions alone could not justify the decision, here in the Secretary of State's estimation the claimant's conduct was such as to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Furthermore, in the context of the claimant's Article 8 rights, it was and is the Secretary of State's position that the claimant could re-adjust to life in Brazil and that removal would not be disproportionate in all the circumstances of this case.

6. The evidence before the First-tier Tribunal may be summarised as follows. In the pre-sentence report which was before the Crown Court and available to the Tribunal the assessment by the offender manager was that the claimant posed a low risk of re-offending, but if that risk resulted there was a medium risk of harm to the public and teenagers. The identified risk factors were binge drinking, cannabis use, feeling under attack and association with a negative peer group. There was a risk of violence and harm which could possibly be caused through the use of a weapon.

7. It should be recorded that the Secretary of State's position before the First-tier Tribunal was that the claimant in fact represented a high risk of re-offending. Overall, said the Secretary of State, "the claimant represents a genuine, present and sufficiently serious risk to the public to justify his deportation on the grounds of public policy". As to the position under Article 8, the claimant's evidence to the First-tier Tribunal was that he was genuinely sorry for what he had done. He had

fallen under the influence of others; he would not do it again. The claimant's mother gave emotional evidence before the First-tier Tribunal as to the very real difficulties he would face if deported to Brazil. In essence he would have nowhere to go and no one to look after him. Moreover the claimant does not speak Portuguese.

8. The First-tier Tribunal concluded that the claimant "is on any analysis a young man who is very vulnerable in a strange country". We set out paragraphs 44 to 47 of the First-tier Tribunal's determination in full:

> "44. Having listened carefully to the appellant at this hearing and weighed carefully in our minds the bulk of evidence before us of his conviction, his imprisonment and what has happened since, we find ourselves unable to conclude that his conduct represents a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'
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> 45. The cornerstone issue for us is that of whether the Secretary of State has correctly concluded that his deportation to Brazil is warranted on the grounds of public policy or public security. Having regard to the relevant standard of proof which we must observe we concluded that this young man's deportation in the context of the Regulations is not warranted on such grounds.
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> 46. It would be far too simplistic for us to conclude that he deserves 'the benefit of the doubt'. However, it is just and equitable for us to conclude on the evidence that the risk of this appellant re-offending is on the evidence very low and in turn, therefore, the risk to the public must in turn be low.
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> 47. For all the reasons we have identified in this determination we conclude that there are grounds to revoke the deportation order made under the 2006 Regulations and we intend therefore to allow the appellant's appeal on immigration grounds."

9. As for the claim under Article 8 the First-tier Tribunal recognised that the claimant could not avail himself of Appendix FM and HC 194 of the Rules. However in the First-tier Tribunal's words "we believe that quite a robust case has been set out on the appellant's behalf" under Article 8. He had clearly established a private and family life here and deportation to Brazil would create "immense and gravely disturbing" consequences.

10. We set out paragraph 50 of the determination in full:

> "50. In truth however because of this - we think – isolated but massive mistake on his part the effect of the deportation will be an equally massive interference with his private and family life rights and we are satisfied will have a truly devastating effect upon those who he leaves behind; in particular his mother but also his siblings and the man whom he has

known as his stepfather since about 2006. We believe that **Chikwamba** must be applied positively in these circumstances."

11. We should add that in **Chikwamna** there was reference to the consequences of removal being "harsh and unpalatable".

12. The Secretary of State appeals on the sole ground that the First-tier Tribunal failed to give adequate reasons for finding that the claimant's record does not meet the requirements of the EEA Regulations namely Regulation 21(5). Reliance is placed on paragraph 26 of the case of **Essa v Secretary of State for the Home Department [EEA: rehabilitation/integration) Netherlands [2013] UKUT 316 (IAC)**, a decision of this Tribunal presided over by Mr Justice Blake and decided on 3 June 2013. Permission to appeal was granted in the instant case on the basis that it was arguable that the First-tier Tribunal failed to follow the principles of **Essa** and failed to attach proper weight to the fact that the claimant did not have permanent residence.

13. Although in the section of its demonstration headed "Findings and Conclusion" the First-tier Tribunal did not make express reference to the fact that the claimant did not have permanent residence in the United Kingdom, that point was not seriously in issue. Furthermore, at paragraph 13 of its determination the First-tier Tribunal set out the Secretary of State's view that the claimant did not have permanent residence and that the appellant did not advance a positive case that he did. The issue before the First-tier Tribunal was as to how the Regulation 21(5) assessment fell to be carried out in this case on ordinary principles of proportionality – see paragraph 14 of the First-tier Tribunal's determination and the approach which the Tribunal adopted under paragraphs 44 and 45 in particular. This was not a case where serious grounds of public policy or public security had to be established. In our view there is nothing in the point that the First-tier Tribunal did not have proper regard to the fact that the claimant did not have permanent residence in the United Kingdom. That is patent from the decision.

14. Further the decision in **Essa** does not really avail the Secretary of State's argument in any event: this was not the sort of case where issues as to rehabilitation or re-integration arose. The claimant is not removable to a country within the EU. The Secretary of State proposes to remove him to Brazil.

15. The Secretary of State's real complaint, although it was not put forward to us in that way, is that this was a perverse decision by the First-tier Tribunal. These were undoubtedly serious criminal offences, four counts of robbery, and the Secretary of State believes that the claimant constitutes a serious risk to the public.

16. We would have to think long and hard before concluding that the decision of an experienced panel such as this was perverse. We note that the sentencing judge accepted that the claimant had played a lesser part in the robbery and also that he had no previous convictions. It was for the First-tier Tribunal to weigh up all the available evidence and to reach an assessment within the framework of Regulation 21(5). The one aspect of the First-tier Tribunal's decision which gives us some minor

cause for concern is that the panel apparently concluded on the evidence that the risk of the claimant re-offending was "very low" and "the risk to the public must in turn be low". As previously observed, the pre-sentence report was not quite into those terms. However the Secretary of State does not raise a challenge to the First-tier Tribunal's decision on that basis and overall we do not believe that it would have been sufficient to impugn the whole decision under the 2006 Regulations.

17. In any event the Secretary of State does not challenge the First-tier Tribunal's determination under Article 8 which constitutes a freestanding basis for allowing the appeal below – see paragraph 53 of the First-tier Tribunal's determination which links with paragraphs 49 and 50. For all these reasons this appeal is dismissed.

18. However we should add this that if this appellant were to re-offend in any serious manner in the future it is probable that the Secretary of State would serve on him a further notice of intention to deport. At that stage the public interest considerations under the Regulations may well be different. This appellant should not regard this decision on appeal as safeguarding his right to remain in the United Kingdom for all time and for all purposes. He should therefore pay close regard to the need to abide by the law for the foreseeable future.

19. As I have said, this appeal is dismissed.

Signed Date

Mr Justice Jay