



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01673/2013

THE IMMIGRATION ACTS

Heard at Field House

**On 28 February 2014
Prepared 3 March 2014**

**Determination
Promulgated
On 10 April 2014**

Before

**UPPER TRIBUNAL JUDGE MCGEACHY
UPPER TRIBUNAL JUDGE KOPIECZEK**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARCELINO ADAO GOMES

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr E Wilford, of Counsel instructed by Messrs Audu & Co
Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission against a decision of the First-tier Tribunal (Judge of the First-tier Tribunal Callow and Mrs J L Schmitt JP, Non Legal Member) promulgated on 20 November 2013 in

which the Tribunal allowed the appeal of Marcelino Adao Gomes against a decision of the Secretary of State to make a deportation order against him under the provisions of Regulation 19(3)(b) of the Immigration (EEA) Regulations 2006, the order to be made under Section 3(5)(a) of the Immigration Act 1971.

2. Although the Secretary of State is the appellant before us we will for ease of reference refer to her as the respondent as she was the respondent in the First-tier Tribunal. Similarly we will refer to Mr Marcelino Adao Gomes as the appellant as he was the appellant before the First-tier Tribunal.
3. The appellant, born on 18 May 1985 is a citizen of Angola. He arrived in Britain on 24 February 1997 at the age of 11 with his 15 year old sister. They claimed asylum on arrival and although their claim was refused they were granted exceptional leave to remain until 19 July 1999. That leave was then extended until July 2003. They were granted indefinite leave to remain on 25 September 2008. The appellant has therefore lived in Britain for over sixteen years.
4. The appellant is married to Nilza Susana Cruz Da Costa, a Portuguese national born on 19 November 1987 who has lived in Britain since the age of 3 and is exercising Treaty rights here. They have three children: S G on 10 June 2006, S I G born on 5 August 2007 and S R G born on 13 October 2013.
5. On 18 August 2003 the appellant was cautioned on suspicion of shoplifting. On 9 January 2006 he was convicted at Camberwell Green Magistrates' Court of possessing an offensive weapon in public and sentenced to twelve weeks' imprisonment in a Young Offender's Institute. He was convicted of dangerous driving, driving otherwise than in accordance with his licence, using a vehicle while uninsured and failing to surrender and ordered to do 200 hours' unpaid work on 24 October 2005.
6. On 15 December 2007 the appellant was arrested on suspicion of robbery and held on remand in custody until he was granted bail on 28 August 2008. On 7 April 2009 he was convicted of conspiracy to rob and sentenced to eleven years' imprisonment on 22 April 2009. That sentence was reduced on appeal to ten years.
7. The appellant had served his sentence by 21 August 2013 and he was due to be released on licence. He was then kept in immigration detention until being granted bail on 17 September 2013. One of the conditions of bail was that he was required to live with his stepfather's cousin away from the family home although he could have contact with his wife and children.
8. It does not appear that the appellant has done any work in Britain apart from operating a market stall at one stage.

9. The reasons for the decision to deport the appellant were set out in a letter of 9 August 2013 in which a member of the Criminal Casework Group at the Home Office considered the appellant's relationship with his wife and children and the issue of removing the appellant under the EEA Regulations. It was accepted that any deportation of the appellant had to be in accordance with Regulation 21 of the 2006 Regulations which state that an EEA national or a family member of an EEA national who had the right of permanent residence in the United Kingdom could only be deported on serious grounds of public policy or public security and that an EEA national who had resided in the United Kingdom for a continuous period of at least ten years prior to the deportation could only be deported on imperative grounds of public security. Having referred to Regulation 15 of the 2006 Regulations and to the judgments of the European Court of Justice in **Lassal (C-162/09)** and **Ziolkowski (C-424/10)** and **Tsakouridis (C-145/09)** and the Court of Appeal judgment in **FE [2012] EWCA 11199** it was stated that it was not accepted that time spent in prison constituted lawful residence.
10. It was accepted that the appellant met the criteria to qualify as a family member of an EEA national exercising Treaty rights but it was stated that it was only from the date of his marriage, 19 November 2008, that his residence could be counted and that the time spent in prison should be deducted. It was therefore stated that the appellant had not resided in Britain in accordance with the EEA Regulations since his marriage for a continuous period of five years and therefore he would not be entitled to permanent residence under the EEA Regulations. He could therefore be deported on grounds of public policy and it was considered that his deportation was warranted on those grounds.
11. The writer of the letter then assessed the removal of the appellant under Regulation 21(5)(a) of the Immigration (EEA) Regulations 2006. He pointed out that on Saturday, 15 December 2007 the appellant had been arrested as part of a gang that had committed thirteen robberies and attempted robberies between June and December 2007. On that day an employee of the Argos store which was to be robbed, a woman, had been grabbed and threatened by a man wearing a woolly hat and scarf around his face, a mobile phone had been taken and she had been told that she would be shot if she moved. The appellant had provided a false name and address when questioned by the police. The offence had been committed in the context of a series of premeditated robberies by an organised group. It was stated that the appellant had been assessed as being subject to the minimum level of Multi-Agency Public Protection Arrangements (MAPPA, level 1) which had been set up to limit the effect on society of those convicted of offences which were of a violent and sexual nature and also to provide a level of protection to those whose criminal history and personal history notoriety had placed them in the public consciousness.
12. In the NOMS1 Report the offender manager had found that the appellant posed a medium risk of harm to the public which meant that the appellant

had the potential to do harm and his risk factor was identified as being a lack of finance, and criminal peers.

13. The trauma to the victims of the robberies was emphasised as well as the impact on society.
14. In paragraphs 37 through 46 of the letter the writer of the letter considered the risk of re-offending stating:

“Risk of reoffending

37. In completing your NOMS 1 assessment the Offender Manager found that you posed a low risk of re-offending. In reaching this conclusion your Offender Manger has taken into consideration those factors which originally led to your offending behaviour and whether those same factors continue to exist. However, the overall score given on your report is in conflict with the written comments of the offender manager in particular the following issues have been highlighted within the NOMS 1 report. In the NOMS 1 report you stated that you had known one of your co-defendants all of your life and had little knowledge of what he was up to, adding that you were only convicted by phone calls to the co-defendant. You also acknowledged the fact that you ‘associate with people that have committed crimes and been to prison because of the area that you grew up in’.
38. It is therefore considered that there is an increased possibility of you reoffending through your associations and peers.
39. You have been assessed as posing a medium risk of harm should you reoffend. Whilst the risk of you re-offending is viewed as low the serious harm which would be caused as a result is such that it is not considered reasonable to leave the public vulnerable to the effects of your re-offending.
40. You have provided evidence of completing a Behaviour Change course – understanding the victim (dated 19 March 2012), Social/Victim awareness course (completed on 27 September 2011) and the Assertiveness and Decision Making course (completed on 12 January 2012). The Home Office is of the view that there is insufficient evidence that you have adequately addressed the underlying reasons behind your offending behaviour. It is considered that the completion of programmes such as an Enhanced Thinking Skills course or courses that addressed the reasons for offending would have been of benefit in your rehabilitation.
41. In the absence of suitable evidence that there has been an improvement in your personal circumstances since your conviction, or that you have successfully addressed the issues that prompted you to offend, it is considered reasonable to conclude that there remains a risk of you re-offending and continuing to pose a risk of harm to the public.

42. The offence of which you have been convicted is a serious one and the sentence that you received reflects this. Whilst you do not have an extensive criminal record and your offender manager has calculated that your risk of re-conviction as low, the Home Office takes the view that the serious harm which would be caused as a result of any similar instances of offending is such that it is not considered reasonable to leave the public vulnerable to the potential for you to re-offend.
 43. Furthermore, there is clearly an escalation in seriousness of the offences you have committed, as evidenced by the sentences you have received.
 44. You have used seven alias names, it was highlighted on the Judge's Sentencing Remarks: *'From the minute you were stopped by the police you lied and lied hard. You are one of the people with a bunch of different names under which you operate and somebody whose life has shown little or no decent promise'*. There is no legal reason to use alias names. It is therefore evidence that you may resort to using alias names again, in the future and have demonstrated a propensity to reoffend.
 45. You committed a serious offence, for financial gain. There is no evidence of any employment in the United Kingdom or any evidence that you have disassociated yourself from associates therefore it is considered you will reoffend.
 46. All the available evidence indicates that you have a propensity to re-offend and that you represent a genuine, present and sufficiently serious threat to the public to justify your deportation on grounds of public policy."
15. The writer of the letter went on to consider the issue of proportionality having noted Regulation 21(5)(a) stated that a decision maker must take into account a number of relevant factors. It was noted that the appellant was 28, believed to be in good health, was married to a Portuguese national and had three children who were being looked after by his wife. The length of time the appellant had lived in Britain was also noted.
 16. Having referred to the Court of Appeal judgment in **Essa** [2102] EWCA Civ 1718 it was stated that that judgment established that in applying Regulation 21 a decision maker must consider whether a decision to deport might prejudice the prospects of rehabilitating from offending in the host country and weigh that risk in the balance when assessing proportionality. It was noted the appellant had had minimal work experience but also that he had completed some courses in rehabilitative work while in custody and had applied for and had been accepted for a position with "New Age Development Limited" as an Engagement Mentor. There was no evidence as to whether or not that was a voluntary or a paid job. It was concluded that the prospect of deportation to Angola would not prejudice the prospects of the appellant's rehabilitation. It was stated that the threat of serious harm which the appellant posed to the public and his personal circumstances did not preclude his deportation being pursued.

17. The rights of the appellant under Article 8 were then considered as were the provisions of Section 55 of the Borders, Citizenship and Immigration Act 2009. It was pointed out that the appellant's children had been in the care of his wife since he had been imprisoned and that his wife had said that she had had to struggle but had coped. It was concluded that the removal of the appellant would not be disproportionate.
18. The appellant appealed and his appeal was heard by the Tribunal on 13 November 2013. They heard evidence from the appellant and his wife, noting that the appellant had attempted to take courses to address the reasons for his offending but had been rejected as unsuitable and noting the appellant's regret for the offences which he had committed. They considered a detailed Special Education Needs Report prepared by a local authority revealing that Shuheed presented with delayed social communication skills affecting his social interaction, use of language, behaviour and emotional development and stated that amidst that background there was a certain climate of unease existing between the appellant and his son.
19. Having referred to the provisions in Regulation 21 of the Immigration (EEA Regulations) 2006, in paragraphs 23 onwards of the determination the Tribunal set out their assessment of credibility and findings of fact. They stated that the appellant had acknowledged his wrongdoing and that he had been proactive in taking steps to obtain assistance in education and understanding his propensity to offend. They said that he had secured paid employment to mentor young people with social problems.
20. In paragraph 24 of the determination they referred to the NOMS 1 assessment and the fact that the offender manager had found the appellant posed a low risk of re-offending and a medium risk of serious harm to others. They noted that the risk of re-offending related to the likelihood that a further offence would occur and the risk of serious harm to others was of what would occur in the event of further offending. The Tribunal stated:-

"24. ...The appellant's Offender Manager would have been aware, unlike the respondent, of all the progress made by the appellant during his detention and it is not open to the respondent to gainsay the author's conclusions without reference to all of the material before her. Such material would have included the Categorisation Review Document in which the author noted the appellant's changed 'views and opinions towards people in society and as a whole' and his marked improvement in attitude and behaviour. Such conclusions, based in part on the appellant's completion of relevant courses, but also on his improved behaviour in detention, served to justify the recommendation that he should then be re-categorised to Category C. In all of the circumstances it has been established that the appellant represents a low risk of re-offending. This assessment is also viewed in the context of the appellant's wife's evidence that her husband has genuinely changed and is calmer since his release from prison. In substance, the

respondent seeks to deport the appellant as a result of his past offending in contravention of the principle enshrined in reg 21(5)(e).”

21. Having noted that the interests of the community as a whole should be considered in assessing the proportionality of the decision to remove, the Tribunal referred to the terms of the determination in **Essa (EEA: rehabilitation/integration [2013] UKUT 00316 (IAC)** from paragraphs 32 onwards of that determination. They quoted paragraphs 32 through to 35 which state:

- “32. We observe that for any deportation of an EEA national or family member of such 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 conduct 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.
33. It is only where rehabilitation is incomplete or uncertain that future prospects may play a role in the overall assessment. Here we must take our guidance from the Court of Justice in *Tskouridis* and the Court of Appeal in the present case remitting the matter to this Tribunal. It is in the interests of the citizen, the host state and the Union itself for an offender to cease to offend. This is most likely to be the case with young offenders who commit a disproportionate number of offences, but many of whom will stop offending as they mature and comparatively few of whom go on to become hardened criminals and persistent recidivist offenders. We can exclude consideration of offenders beneath the age of 18 as EEA law will prevent their deportation save in the unusual event that it is in their own interest (Article 28(3)(b) of the Citizens directive).
34. If the very factors that contribute to his integration that assist in rehabilitation of such offenders (family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like) will assist in the completion of a process of rehabilitation, then that can be a substantial factor in the balance. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may very well be disproportionate to proceed to deportation.
35. At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, we cannot see how the prospects of rehabilitation could constitute a significant factor in the balance. Thus

recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with impulses to commit sexual or violent offences and the like may well fall into this category.”

22. The Tribunal went on to reach their conclusions under the Regulations in paragraphs 27 through to 29 of the determination. They wrote:

“27. The appellant falls within the category of offender considered at [32]-[34] above. He has engaged with the courses offered to him and remained ‘well motivated and focussed throughout’ his social/victim awareness course undertaken while in prison. The appellant’s life is in the UK and he is likely to benefit from the support of his wife and children while he re-establishes life in the community. His expulsion would be a retrograde step in his ongoing rehabilitation and detrimental to the interests of the community as a whole.

28. When one takes into account and gives appropriate weight to all the circumstances of his personal conduct and the threat to public policy that it represents; the age and state of health of the appellant; his family situation in the UK and his claimed country of origin; his length of stay in the UK and degree of integration and his lack of links with his country of origin, we conclude that the removal of the appellant would not be in accordance with the requirements of the Regulations. In particular, it cannot be justified on the grounds of public policy in order to address any ‘genuine, present and sufficiently serious threat’ posed by the appellant’s continued presence in the UK.

29. Accordingly the appellant’s appeal is allowed under the Regulations. In these circumstances, mindful of the decision in VB cited above, it is not necessary to further consider the appellant’s claimed Article 8 rights and those of his wife and children. However, should we be found to be in error in allowing the appeal under the Regulations we address the issue of Article 8.”

23. In paragraphs 30 onwards they set out their assessment of the appellant’s rights under Article 8 of the ECHR allowing the appeal also on those grounds.

24. The Secretary of State appealed. Although the application was not admitted in the First-tier the application was renewed in the Upper Tribunal and was granted by Upper Tribunal Judge Freeman on 23 January 2014.

25. The grounds of appeal, having referred to the fact that the appellant could only be afforded the lowest level of protection and stated that as the Tribunal had found that the appellant had not integrated into society the concept of social rehabilitation and the unknown prospect of the appellant being rehabilitated in Angola compared to the measures in the UK was not a material consideration. The grounds of appeal then went on to refer to the judgment of the Court of Appeal in **MF (Nigeria) v SSHD [2013] EWCA Civ 1192** arguing that the Tribunal should not have allowed the

appeal on deportation in the light of the judgment in **SS (Nigeria) [2013] EWCA Civ 550**.

26. At the hearing before us Mr Melvin stated that at no stage did the appellant exercise Treaty rights. He stated that there was a lack of findings regarding integration and that that impacted on the assessment proportionality. Having referred to the judgments of the Court of Appeal in **SS (Nigeria)** and **MF (Nigeria)** Mr Melvin referred to paragraphs 398 and 399 of the Rules. With regard to the interests of the children he stated that they remained in the primary care of their mother. It was his view that as the Tribunal had not considered integration as part of the assessment under the Regulations they had erred in law particularly with regard to the appellant's serious offending.
27. In reply Mr Wilford said that the grounds raised only a reasons challenge. He stated that grounds had focused on the proportionality of removal referring to the prospects of rehabilitation in Angola and in the UK, the issue of the appellant's Article 8 rights following the changes in the Rules in July 2012 and the weight to be placed on deportation as set out in the judgment of the Court of Appeal in **SS (Nigeria)** in that the Tribunal had failed to give adequate weight to the public interest in the removal of the appellant.
28. He pointed out that the Tribunal had considered in paragraph 19 that the appellant was entitled to the first level of protection. They had stated that:-
- “The fifth anniversary of his wedding is only due to occur after the date of the hearing of the appeal on 19 November 2013. In any event, recognising the appellant was sentenced for an index offence on 22 April 2009 it was accepted by the appellant, without formal concession, following the opinion of Advocate General Bot in *Onuekwere [2013] EUECJ C-378/12* that the time spent in prison by him did not count for the purpose of acquiring permanent residence under Regulation 15.”
29. He stated therefore that the question was whether or not the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (Regulation (5)(c)), when coupled with the principle of proportionality as referred to in Regulation 21(5)(a) and the further issues of whether or not with reference to Article 8 the appellant enjoyed a family life with his wife and three children all of whom were born in the United Kingdom and therefore whether or not the appellant's removal was proportionate under Article 8(2) of the ECHR. Turning to the first issue he stated that it was for the respondent to demonstrate that the appellant represented a present threat to one of the fundamental interests of society. It was clear from the judgment of the Court of Appeal in **Bulale v SSHD [2008] EWCA Civ 806** that past offending did not in itself justify expulsion.

30. He referred to the detailed assessment made by the probation service and emphasised that it should not lightly be dismissed – he relied on the judgment in **AMM (Turkey) [2012] EWCA Civ 1634**. He stated that the ultimate conclusion of the author of the report was that the appellant presented a low risk of re-offending and a medium risk of serious harm to others. The first finding he stated related to the likelihood that a further offence would occur and the second to the impact or harm which would occur in the event of further such offending.
31. He argued that the Secretary of State was incorrect to suggest that that conclusion conflicted with the comments of the offender manager and said that there was no proper evidential basis for that argument. He referred to the progress which he said the appellant had made during detention and his improved behaviour which had justified his recommendation to be re-categorised to category C.
32. With regard to the issue of proportionality under Regulation 21(5)(a) he stated that the Tribunal had reached conclusions which were open to them. He referred to the issue of proportionality under community law as set out in the Court of Appeal judgment in **Essa [2012] EWCA Civ 1718** and stated that the respondent had been correct to consider that the dicta therein applied equally to the spouse of an EEA national.
33. He referred to the Upper Tribunal’s decision in **Essa [2008] UKUT 00316 (IAC)** which stated that the fact of a criminal conviction was not enough to justify deportation nor indeed was the issue of deterrence. He asked us to note that the Tribunal had stated:-

“This tends to mean, in case of criminal conduct short of the most serious threat to the public safety or the state, that a candidate for deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending.”
34. He then referred to the issue of the appellant’s relationship with his wife and children emphasising that that relationship was considered to be strong. Finally, referring to the issue of proportionality under the ECHR he emphasised the best interests of the appellant’s children and stated that realistically it was not suggested that it would be proportionate for the appellant and his family to continue their family life in Angola or indeed in Portugal.
35. He emphasised the length of time which the appellant had lived in Britain and the fact that he had lived here since the age of 11, spending his formative years in Britain. He also referred to the time that had elapsed since the appellant had been released.
36. He emphasised the relationship between all members of the family.
37. He asked us to find that the conclusion of the Tribunal that the removal of the appellant was disproportionate was fully open to them and that they

were correct to allow the appeal both under the EEA Regulations and Article 8 of the ECHR.

Discussion

38. We note the terms of the grounds of appeal which claimed that the Tribunal had erred when considering the issue of rehabilitation and that the Tribunal had erred in their consideration of the proportionality of the appellant's removal by not taking into account the judgment of the Court of Appeal in **MF (Nigeria)**. They assert that the appellant had failed to give adequate consideration to the appellant's criminality in light of the Secretary of State's interest in removing foreign criminals.
39. The reality is, however, that when considering the proportionality of removal under Regulation 21 of the Immigration (EEA) Regulations 2006 the Tribunal were not considering the same assessment as they would when considering the rights of the appellant under Article 8 of the ECHR in the deportation of a foreign national who was not exercising Treaty rights. It would not be proportionate for them to have placed weight on the deterrent effect of deportation. That is not a factor to be taken into account when considering the deportation of someone who is exercising Treaty rights.
40. The reality is that the factors in this case which are of relevance to the issue of proportionality relate to the propensity to re-offend and the appellant's relationship with his wife and children and that under the Regulations previous criminal convictions do not, of themselves, justify the decision. In reaching their conclusions with regard to these issues we consider that the Tribunal reached findings of fact and conclusions which were fully open to them on the evidence before them. They were correct to find that there was clearly a close relationship between the appellant, his wife and their children: that, in itself, is a finding on the integration of the appellant with society here. They were also entitled to find that the likelihood of the appellant re-offending was low. They correctly read the NOMS report and distinguished between the likelihood of re-offending, which was found to be low, and the likelihood of serious harm which only arose when if the appellant re-offended. Their conclusions relating to the likelihood of re-offending clearly indicated their consideration of the rehabilitation of the appellant which flowed, in part from the courses, which the appellant had taken in prison.
41. They set out in detail the relevant law referring to the judgment of the EU CJ in **Onuekwere [2013] EU CJ C-378/12**, noted correctly that the appellant was entitled to only the lowest level of protection but having followed the terms of the determination of the Upper Tribunal in **Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC)** reached conclusions in paragraphs 27 through 29 of the determination, which we have set out in full above, which were open to them. They were entitled to conclude that the appellant had engaged in the courses offered to him and remained well-motivated and focused and that he was likely to benefit

from the support of his wife and children while he re-established himself in the community.

42. They took into account all relevant matters including his age, health, his family situation, the length of stay here and his degree of integration and the lack of links with his country of origin and we consider that they reached conclusions, to which they were entitled that the appellant's appeal should be allowed under the Regulations.
43. The grounds of appeal which refer to the judgment of the Court of Appeal in **MF** and the guidance regarding the issue of proportionality of the removal of criminals therein, do, as we have stated above, not properly engage with the terms of the Regulations. The Tribunal were entitled to find, under the Regulations that the removal of the appellant would be disproportionate. They were also correct to state that, having found that the appeal should be allowed under the Regulations, that they were not required to consider the rights of the Appellant under the Convention but again their decision that the removal of the appellant would be a breach of his rights under the Convention was fully open to them – not least because that his removal would not have been in accordance with the law. They were also entitled to find that, on the various factors which they set out above and indeed given their reliance on the various criteria set out in the judgment of the European Court of Human Rights in **Maslov [2008] ECHR 546**, that the removal of the appellant would be disproportionate.
44. In all we consider that their conclusions were fully open to them and we therefore find that there is no error of law in their decision. We therefore dismiss the appeal of the Secretary of State. The decision of the First-tier Tribunal that this appeal is allowed both under the Immigration (EEA) Regulations 2006 and under Article 8 of the ECHR shall stand.

Signed

Date

Upper Tribunal Judge McGeachy