



IAC-FH-AR-V1

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

Appeal Number: DA/01386/2014

THE IMMIGRATION ACTS

**Heard at Royal Courts of Justice
On 14 September 2015**

**Decision & Reasons Promulgated
On 18 September 2015**

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**DECIO DAVID PEREIRA DA SILVA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondent: Unrepresented

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Portugal born on 10 June 1993, as the appellant herein.
2. He claims to have arrived in this country in 2002 and 2003. He has a lengthy criminal history including convictions for arson, assault and robbery. The Secretary of State decided to make a deportation order against him on 10 July 2014 following a further conviction for arson for

which he was sentenced to 32 months' detention in a Young Offenders Institution.

3. The appellant appealed and his appeal came before a First-tier Judge on 9 February 2015. The appellant was unrepresented before the judge as he is before me.
4. Having referred to the appellant's lengthy criminal record the judge concluded that there remained a risk of reoffending and that if he did reoffend there was a high risk to the public in respect of such reoffending. Those at risk included his mother, his girlfriend and his daughter. The judge concluded there was a real likelihood that the appellant might offend again and he did not accept that the appellant was fully sincere in his expressions of remorse and contrition. Furthermore, the index offence was a very serious offence.
5. The judge found that the appellant had established a permanent right of residence although he acknowledged in paragraph 56 that he had no documentary evidence to prove that his parents had worked in the United Kingdom, thus showing that they were exercising treaty rights. The judge found in paragraph 68 of his determination that the appellant represented a genuine, present and sufficiently serious threat to one of the fundamental interests of society and that there were serious grounds of public policy and security. This was in the light of the appellant's series of serious criminal offences and the risk to the public if he offended again.
6. The judge concluded by considering the issue of proportionality in the light of paragraph 21(6) of the EEA Regulations. He referred first to the appellant's appalling criminal record and length of residence, concluding that the appellant had no real contact with family members in Portugal. He found that the appellant had a child in the United Kingdom but it was too early to form a concluded view on the best interests of the child and the factor was neutral. He noted in paragraph 77 that there was little documentary information about the appellant and to support his claims. He found that the appellant represented a genuine, present and sufficiently serious threat to society and that the issue of rehabilitation had *little* weight although not *no* weight in the case. The judge nevertheless concluded that the appellant's deportation would not be proportionate. He allowed the appeal.
7. The Secretary of State applied for permission to appeal. Permission was refused by the First-tier Tribunal but Upper Tribunal Judge Taylor granted permission on 8 July 2015, finding it was arguable that the judge had failed to give adequate reasons for the decision that deportation would not be proportionate. She added that the grounds had merit and may be argued generally and if established the appeal would have to be reheard by a differently constituted Tribunal, since one of the issues to be resolved is whether the appellant had a child in the UK and if so the nature of the relationship the appellant had, if any, with that child.

8. At the hearing Mr Melvin relied on the grounds of appeal and his skeleton argument. In the grounds it was argued that the judge had failed to give reasons for finding that the appellant had a child in the UK in the absence of DNA evidence or a birth certificate. The judge had acknowledged that little documentary evidence had been put in to support the appellant's case. The respondent pointed out that the judge had found that the appellant had support in the UK but not in Portugal, whereas the NOMS report had stated that the appellant posed a risk to his mother, girlfriend, daughter and the public, and accordingly the judge had erred in considering the appellant's actual or alleged family members as "support". The grounds point out that during the course of the determination the judge had recorded that the appellant said he had a gambling addiction and still had it. There was no documentary evidence to prove that the appellant had acquired a permanent right of residence. The judge had misapplied the relevant burden of proof which remained on the appellant.
9. In the grounds it was argued that the judge's findings under Article 8 added nothing to the findings in relation to the EEA Regulations. In the skeleton argument it was additionally argued by Mr Melvin that in relation to Article 8 the judge ought to have considered Section 117 of the 2002 Act. In his oral submissions Mr Melvin relied on the points that had been made in the grounds and skeleton argument and added that the judge's findings came close to being irrational and perverse.
10. The appellant confirmed that he had been waiting for the results of a recent DNA test and I was given a copy of a letter dated 11 September 2015 referring to a DNA paternity test which would be available on 15 September - the day after the hearing. The appellant said his partner was in court. I was told that she had paid for the DNA herself. She was aged 19. The appellant and her partner were back together over the last five or six months.
11. Having carefully considered the representations on each side and having reminded myself that I can only interfere with the decision if it was materially flawed in law, I find there is force in the suggestion that the determination is materially lacking in reasons, and such reasons as have been given have been made in the absence of appropriate supporting evidence. The findings that the judge made, as the respondent contends, make it difficult to understand why he concluded that deportation would not be proportionate. The findings in relation to Article 8 add nothing and as Mr Melvin argues, it would be necessary to take into account the amendments made by the 2014 Act.
12. In the circumstances I have concluded that the determination is materially flawed in law.
13. Having reached that conclusion I find that I should apply the assessment of Judge Taylor in granting permission in this case. She concluded that if the grounds were established that the appeal would have to be reheard by a differently constituted Tribunal. It appears implicit that such a rehearing

would be before the First-tier Tribunal since a hearing before the Upper Tribunal would involve a differently constituted Tribunal in any event.

14. She was doubtless of the view that this was a case in which what was said at paragraph 7.2(b) of the Senior President's Practice Directions applied and I agree that this is the appropriate outcome in this case.
15. I note that there are two potential developments since the previous hearing of potential significance. The first is that the appellant's relationship with his partner is said to be re-established and his partner was present in court, and, secondly, that DNA evidence has been sought to support the claimed paternity of the child.
16. Accordingly in the light of what was said by Upper Tribunal Judge Taylor this appeal is remitted to the First-tier Tribunal to be heard afresh by a different First-tier Judge.

Notice of Decision

The determination is flawed by a material error of law. Accordingly I set aside the decision and remit the appeal to be heard afresh before a different First-tier Judge.

Anonymity Direction

The First-tier Judge made no anonymity order and no anonymity direction is made.

Fee award

I make no fee award

Signed

Date

Upper Tribunal Judge Warr