



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01851/2013

THE IMMIGRATION ACTS

Heard at Field House
On 6 November 2014

Determination Promulgated
18 February 2015

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FABIO TAVARES

Respondent

Representation:

For the Appellant: Mr P Armstrong, Home Office Presenting Officer

For the Respondent: Mr N Wray of Counsel, instructed by KC Chambers

DETERMINATION AND REASONS

- 1) This is an appeal with the permission of the Upper Tribunal by the Secretary of State against a decision by a Tribunal comprising Judge of the First-tier Tribunal Scott-Baker and Mr A E Armitage. The respondent before the Upper Tribunal is Mr Fabio Tavares, hereinafter referred to as "the claimant".
- 2) The claimant was born on 9 September 1994 and is a national of Portugal. He appeals against a decision dated 2 September 2013 by the Secretary of State to make a deportation order against him. This decision is based on a conviction dated 29 April

2013 for robbery. The claimant was sentenced to a period of detention of 12 months in a Young Offender's Institution and required to pay a victim surcharge of £100. He has a number of previous convictions dating back to June 2011. These include two convictions for possession of cannabis, a conviction for possession of a knife with a blade and a sharply pointed article, and a conviction in January 2012 for robbery.

- 3) The Secretary of State recognised that the claimant has a permanent right of residence in the UK, having lived here in accordance with the EEA Regulations for a continuous period of 5 years or more. His deportation therefore requires to be justified on serious grounds of public policy or public security.
- 4) According to the First-tier Tribunal the robbery of which the claimant was convicted in April 2013 was an unplanned and opportunistic robbery in which some force was used on the victim. A chain was grabbed from the victim and it had not been recovered. The claimant was acting with a co-defendant.
- 5) The Tribunal had before it a pre-sentence report of 17 January 2012 and an OASys Report of 30 December 2013. The pre-sentence report of January 2012 is in respect of the first offence of robbery of which the claimant was convicted. The claimant was with a friend. An attempt was made to snatch a chain around the victim's neck. In his defence the victim punched the claimant, causing him to fall to the floor. There was then a scuffle in which the victim was punched a further two times by the claimant's accomplice before making his escape. The claimant remained at the scene in a disorientated and dazed state where he was detained by police officers, who found the victim's chain in his trouser pocket.
- 6) The OASys Report of December 2013 states that the claimant had not recognised the impact and consequences of offending on the victim. It was considered that he had been involved in illegal activities to get money. His previous conviction for robbery was noted. It was recorded that the claimant had told a previous assessor that he spent a lot of his free time hanging around with his peers on the Broadwater Farm Estate. The writer of the report considered that the previous and current offences indicated elements of reckless behaviour. It seems he was assessed at being of medium risk both of harm to members of the public and of re-offending.
- 7) The Tribunal heard oral evidence from the claimant. The claimant said he was not in any gang. At the instigation of his probation officer he was looking into courses and apprenticeships. He had moved to the UK at the age of 10 and felt British. The only person with whom he fully conversed in Portuguese was his grandmother. His Portuguese was only basic.
- 8) The Tribunal also heard evidence from the claimant's aunt and had before it a witness statement from the claimant's mother, who did not attend the hearing. The Tribunal noted that the claimant had experienced some difficulties with his mother but were impressed by the evidence of his aunt, who is his mother's sister.
- 9) The Tribunal had regard to Regulation 21(5) of the EEA Regulations and the relevant case law. The Tribunal noted that the claimant had "strayed into criminal ways" but

if he was to be rehabilitated the chances of success were far greater in the UK than in Portugal as his close family were living in the UK and he continued to live with them. There was evidence of support networks in the UK inasmuch as the claimant was being supervised by his probation officer. There was no evidence of any facilities available to the claimant in Portugal on the basis of offences committed in the UK. The Tribunal concluded that taking all of the circumstances into account the decision of the Secretary of State was not proportionate under Regulation 21(5)(a).

- 10) The application for permission to appeal to the Upper Tribunal was made on three grounds. The first was that it was not clear whether the Tribunal found that the claimant was a present threat to public policy. It might be inferred that the Tribunal did consider that he was a genuine, present and sufficiently serious threat because the Tribunal stated that if he was not a youth offender then it would have been proportionate to deport him. It was not clear what the Tribunal meant by the claimant's youth in the context of his offending. The offences between 2011 and 2013 were committed when he was around 17-19 years old and he was sentenced as an adult for robbery in April 2013. The findings of the Tribunal on these matters were inadequately reasoned and misdirected in law.
- 11) The second ground was a lack of clarity by the Tribunal as to whether the evidence in relation to the prospects for rehabilitation was inadequate. This was described as a vital issue, the treatment of which amounted to further inadequacy of reasoning in the determination.
- 12) The third ground was that the assessment of the claimant's links to Portugal were inadequately reasoned. The evidence was that the claimant was a Portuguese citizen, he had visited Portugal three times since 2004. On one of those occasions he was in the company of many of his family members. He converses in Portuguese with his mother and grandmother in the UK. He had not forgotten his Portuguese roots and he has several family members there. The claimant accepted that he would be able to find work if he went there. The Tribunal's assessment of there being little evidence of any connection to Portugal other than a few family members when the claimant was younger was inadequately reasoned. Furthermore, the Tribunal's assessment of the claimant's ability to speak Portuguese did not reflect the evidence of his need to speak the language with his mother and grandmother.
- 13) It was submitted that these defects rendered the assessment of proportionality fundamentally flawed and the decision should be set aside and re-made.
- 14) Permission to appeal was granted by the Upper Tribunal on the basis of these grounds.

Submissions

- 15) Appearing before me on behalf of the Secretary of State, Mr Armstrong relied on the grounds in the application for permission to appeal. The legal framework in relation to rehabilitation was derived from Essa [2013] UKUT 00316. There was no evidence

of rehabilitation in respect of the claimant. The OASys Report of February 2014 stated that he was of medium risk to the public. He had offended on several occasions, escalating in seriousness. He had no intention to work. He had resorted to robbery to top up his state benefits. The claimant was aged 18½ at the time of the index offence. The Tribunal found that his criminal offending had developed and could be classed as personal conduct, as recorded at paragraph 111. The claimant had been convicted of two similar offences of using violence to obtain property. He was a cannabis user with low school attendance.

- 16) Mr Armstrong continued that the claimant had links to Portugal. The reasons given by the Tribunal for finding there was little evidence of any connection with Portugal were inadequate. The decision should be set aside and re-made.
- 17) For the claimant, Mr Wray submitted that the Tribunal did not err by referring to the claimant as a “youth” at paragraph 110. Elsewhere in the determination the Tribunal referred to the claimant as a young man. The second offence of robbery was committed as an adult but all the offences were committed between the ages of 17 and 19. The claimant had not established an independent life and was still living at home.
- 18) Mr Wray continued that the issue before the Tribunal was one of proportionality. A relevant factor was whether rehabilitation would be frustrated by deportation. The claimant had spent only a limited time in Portugal. He was being supported by family members in the UK. In terms of Essa the issue was whether there was a reasonable prospect of rehabilitation and whether deportation would frustrate this. It had been accepted that the claimant had been continuously resident in the UK for over 5 years and had strong family ties here. In the opinion of the Tribunal deportation would frustrate rehabilitation. The claimant would then remain a serious risk to the public indefinitely. To regard the claimant as continuing to offend but in another member state would defeat the purpose of the EEA Regulations.
- 19) For the Secretary of State, Mr Armstrong responded that there was a reasonable prospect of rehabilitation in Portugal and the likelihood of this was as strong there as in the UK. It was clear that the claimant had not been rehabilitated in the UK as he had re-offended on six occasions.
- 20) Mr Wray pointed out that only one of these offences had led to a custodial sentence. Mr Armstrong responded that the claimant had used violence on his victims and this was a relevant factor in terms of Regulation 21(6). The claimant had lived in Portugal for over half his life. He had been there on holiday and spoke the language.

Discussion

- 21) The arguments presented on behalf of the Secretary of State comprise in the main challenges to the Tribunal’s reasoning. When analysed, however, these arguments more resemble disagreements with the Tribunal’s reasoning than arguments demonstrating the inadequacy of this reasoning. Much of the argument is

concerned, for example, with disagreement over the weight given by the Tribunal to particular aspects of the evidence.

- 22) Before making its decision the Tribunal carefully directed itself to the relevant regulations and case law, taking into account the EEA Regulations as they stood at the date of the hearing in May 2014.
- 23) So far as the Tribunal's reasoning is concerned, the Secretary of State pointed out that the claimant had lived in the UK for less than half of his life. Although this is factually correct the more significant factor from the Tribunal's point of view, which they rightly took into account, was that the claimant had come to the UK as a child and he had spent his adolescent and teenage years in this country. The Tribunal took into account that the claimant has a permanent right of residence in the UK and could be removed only on serious grounds of public policy or public security, in terms of Rule 21(3). Having regard to the claimant's offending, the Tribunal clearly concluded at paragraph 111 that the personal conduct of the claimant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The Tribunal recognised that the fundamental interests of society include the prevention of crime and the upkeep of law and order. The Tribunal correctly identified, however, that as well as showing that the claimant's personal conduct was such a threat, for removal to be justified, the decision had to be proportionate having regard to the circumstances as a whole, including the factors set out in Regulation 21(6).
- 24) So far as the claimant's age was concerned, the Tribunal was entitled to take this into account. A number of the offences of which he has been convicted were committed while the claimant was under the age of 18. The only custodial sentence imposed upon him was for detention in a young offender's institution. It may have been that the Tribunal partly had in mind when referring to the claimant as a youth at paragraph 110 that he was still below the age for imprisonment in an adult prison. The other factor the Tribunal took into account was the support the claimant was still receiving from his family and the scope for rehabilitation as he matured. These were factors that the Tribunal was entitled to take into account. There is no error of law arising from the use by the Tribunal of the word "youth" at paragraph 110. The word does not have any technical meaning in this context.
- 25) The Secretary of State contended that Tribunal was unclear as to whether the evidence relating to rehabilitation was inadequate. In the view of the Secretary of State there was a lack of clarity by the Tribunal in considering this issue. I note that at paragraph 107 the Tribunal, referring to the case of Essa, asked in effect whether the extent of integration suggested that there were reasonable prospects for rehabilitation. If so, those prospects could be "a substantial relevant factor" in the balancing exercise in assessing proportionality.
- 26) The Tribunal recorded that the claimant had completed his custodial sentence and his licence had expired. There was a letter from his probation officer stating that he had met him on only two occasions. He had reported to probation on a weekly basis

but had missed two offered appointments. He had provided an explanation in respect of only one of these. The claimant's timekeeping was poor but when at sessions he was polite and willing to engage.

- 27) At paragraph 108 the Tribunal took into account that the claimant's family were now anxious to support him with "re-integration" (presumably meaning rehabilitation). If he were to return to Portugal it was unlikely that any support facilities such as supervision by a probation officer would be in place. There was no evidence to support the assertion by the Secretary of State that rehabilitation support and facilities would be available in Portugal. The Tribunal nevertheless noted that the claimant had a tendency to use violence and his offending history indicated that he had not learned from corrective measures taken in the past. He was still at risk of re-offending.
- 28) From this part of the Tribunal's assessment it may be inferred that the Tribunal were not satisfied on the evidence that the prospects for rehabilitation were a significant factor in the balancing exercise. Nevertheless, the Tribunal concluded that the claimant's prospects for rehabilitation were better in the UK than they would be in Portugal.
- 29) The Tribunal then went on to consider the claimant's links with Portugal and reached conclusions with which the Secretary of State subsequently took issue. In particular, the Tribunal stated that there "was little evidence of any connection to Portugal other than a few family holidays" when the claimant was younger. The claimant was fluent in English, more so than in Portuguese. His access to education might be hampered were he having to speak Portuguese. The Secretary of State pointed out that the claimant still had relatives in Portugal but this was not in dispute. The Tribunal noted that the claimant spoke to his grandmother in Portuguese but this was not inconsistent with the Tribunal's findings about the claimant's language skills. The Secretary of State further asserted that the claimant conversed with his mother in Portuguese but, according to the mother's witness statement, which was before the Tribunal, she and the claimant spoke together more in English than in Portuguese and the claimant showed little interest in Portugal. To say, as the Secretary of State asserted, that the claimant had not forgotten his Portuguese roots does not contradict the Tribunal's finding that there was little evidence of any connection to Portugal.
- 30) The prospect of the claimant's rehabilitation in the UK was only one factor, and seemingly not the strongest factor, which the Tribunal took into account in its assessment of proportionality. Under Rule 21(6) the Tribunal was required to take into account of considerations such as the age, state of health, family and economic situation of the claimant, the claimant's length of residence in the UK, the claimant's social and cultural integration into the UK and the extent of the claimant's links with his country of origin. The Tribunal made findings on these matters and gave particular weight in the proportionality assessment to the claimant's age, his family situation, his length of residence in the UK, the extent of his social and cultural integration into the UK and the extent of his links with Portugal. On the basis of its

findings the Tribunal was entitled to conclude that the decision to remove the claimant did not comply with the principle of proportionality. In reaching this conclusion the Tribunal did not take into account any irrelevant factor or disregard any relevant one. The Tribunal neither misapprehended any material fact nor misdirected itself in law. Despite strenuously attempting to do so, the Secretary of State has not shown that the reasons given by the Tribunal are inadequate to support its conclusions. Accordingly, the Tribunal's decision shall stand.

Conclusions

- 31) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
- 32) I do not set aside the decision.

Anonymity

- 33) The Tribunal did not make any order for anonymity and no application has been made to the Upper Tribunal for such an order. I see no reason why such an order should be made.

Signed

Date **6 December 2014**

Judge of the Upper Tribunal