Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00138/2015

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 14 April 2016	**On : 19 April 2016**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HASMUKH CARSANE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer
For the Respondent: No Appearance

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Carsane's appeal against the decision to deport him from the United Kingdom pursuant to regulation 19(3)

(b) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Carsane as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Portugal, originally from India, born on 22 February 1970. He claims to have first come to the United Kingdom in 1999. On 24 January 2002 he was issued with an EEA Residence Permit, valid until 24 January 2007. On 17 July 2007 he was granted permanent residence and given a permanent residence card on the basis of having exercised treaty rights for five years. His wife and children were granted permanent residence in line with his residence.

4. On 19 February 2014 the appellant was convicted at Harrow Crown Court of battery and threats to kill and was sentenced to 12 months' imprisonment, suspended for 24 months. He also received a supervision order for 18 months and an activity requirement of 25 days. On 27 October 2014 he was convicted of common assault, affray, threatening to kill and breach of suspended sentence and was sentenced to a total of 21 months' imprisonment. His earlier suspended sentence was activated. On 31 December 2014 he was served with a liability for deportation notice and on 1 April 2015 the respondent made a decision to deport him under regulation 21 of the EEA Regulations.

5. In the reasons for deportation letter, the respondent accepted that the appellant had acquired the right to permanent residence but did not accept that he had been continuously resident in the UK for 10 years in accordance with the Regulations. The respondent then considered whether deportation was justified on serious grounds of public policy or public security.

6. The respondent considered the circumstances of the appellant's offence which occurred on 24 October 2014, when his 11 year old daughter called the police and told them that he was hitting her mother, his wife, and that it happened a lot. The appellant and his family were having dinner in the family home celebrating Diwali and he was consuming alcohol. He then became aggressive and he threatened his wife and raised his crutch to assault her and shouted that he would kill her. That offence also put the appellant in breach of the suspended sentence order imposed on 19 February 2014 for a similar offence of domestic violence when under the influence of alcohol, when he had demanded money from his wife who refused and later threatened her and put two knives in his pocket threatening to kill her. The police were again called by his daughter and they found the two knives under a duvet.

7. The respondent noted that the appellant had previously received three cautions on 1 July 2007, 23 February 2011 and 18 October 2012 for assault occasioning actual bodily harm, common assault and battery, relating to incidents involving a ticket inspector on a bus, his brother-in-law and his wife. The respondent noted that the appellant's offences all involved violence and

considered that he had a lack of regard for the law, a lack of remorse for his offending behaviour and a lack of understanding of the negative impact his offending behaviour had on others. The respondent considered that there remained a risk of the appellant re-offending and continuing to pose a risk of harm to the public, a known adult and known children. It was considered that the appellant's deportation was justified on serious grounds of public policy and, having regard to the principles of proportionality in Regulation 21(5)(a) and the factors in Regulation 21(6), the respondent concluded that it was reasonable to expect him to return to India or Portugal and resume life there and that deportation to Portugal would not prejudice his prospects of rehabilitation. The respondent considered further that the appellant's deportation would not breach Article 8 of the ECHR. Whilst he had a wife and two children, it was noted that they were Indian nationals. It was not accepted that he had a genuine and subsisting relationship with them. It was considered not to be unduly harsh for them to accompany him to Portugal or India or to remain in the UK whilst he was deported. The respondent did not accept that the appellant met the requirements of paragraph 399 or 399A of the immigration rules or that there were very compelling circumstances outweighing the public interest in his deportation for the purposes of paragraph 398.

8. The appellant appealed against that decision and his appeal was initially heard in the First-tier Tribunal on 10 August 2015 by First-tier Tribunal Judge Ross. Judge Ross allowed the appeal to the extent that the decision was not in accordance with the law, on the basis that the respondent ought to have considered the appellant's position as an EEA national who had lived continuously in the UK for 10 years, so that the higher "imperative grounds" threshold had to be met. That decision was set aside in the Upper Tribunal following an appeal by the Secretary of State, on the basis that consideration had not been given to the case of Secretary of State for the Home Department v MG (Judgment of the Court) [2014] EUECJ C-400/12 in regard to the calculation of the relevant 10 year period. The case was then remitted to the First-tier Tribunal to be determined afresh.

9. The appellant's appeal then came before First-tier Tribunal Judge O'Malley on 14 January 2016. As previously, the appellant was not present but appeared in person and gave oral evidence before the judge. He confirmed to the judge that he had three children, two girls who had Portuguese passports and a boy who had a British passport. His wife had an Indian passport but had indefinite leave to remain. He was not living with his wife and children and had not done so since his last offence. He was not allowed to see them and was waiting for a social services report to be completed. His wife had a non-molestation order in place which she had applied for before he left prison. He referred to his own health problems consisting of difficulties with his leg and ankle and a heart problem which required surgery. He denied having used violence against his wife and denied having threatened her with a knife. He confirmed that he had gone to India with his family in July 2014 and had stayed with his wife's mother. He disputed references in his medical records to having sold his medication in prison for drugs and tobacco. He confirmed that he had had no alcohol since

leaving prison. He confirmed that he had worked until July 2013 when he underwent operations on his leg and heart and that he currently had no income.

10. Judge O'Malley found that the appellant had not been in the UK for a continuous period of ten years counting back from the date of the decision and that he could not rely on the protection afforded under Regulation 21(4)(a) on "imperative grounds". She therefore considered that the respondent had applied the correct "serious grounds" test. She considered that the appellant's offences were of escalating violence and involved serious threats exacerbated by the use of knives on one occasion; that the appellant's claim not to have been violent to his wife was untruthful; that he had a violent nature; that his pattern of offending involved a disregard for the safety of others, in particular his wife and children; that his behaviour was grave and serious and repellent to society; that he had shown a disregard for the legal system as he had failed to be persuaded by the suspended sentence to change his behaviour; that he had failed to adhere to the terms of his probation including his unauthorised trip to India; that his denial of the extent of his criminality and violence towards his wife was not consistent with someone taking real steps to rehabilitation and indicated his controlling behaviour and attitude; and that he remained a current threat. She concluded that the appellant remained a real, current and sufficiently serious threat affecting the fundamental interests of society.

11. The judge then went on to consider proportionality and the requirements in Regulation 21(6). She took account of the fact that the appellant's relationship with his three children would be significantly affected if he was deported and that their separation would be prolonged. She found that deportation would affect his rehabilitation as he was currently being supported in sobriety. She found that deportation would compromise his ability to engage with the social services process in regard to an assessment of his suitability to have contact with his children, which would in turn affect his future relationship with his children and may affect his continued sobriety. She considered that the fact that the appellant worked and paid taxes until his health was compromised, and that he had purchased a property and had three children in the UK was an indication of integration. She noted that the appellant's mother and siblings were in the UK and that he had no links to Portugal. Overall, the judge found the appellant's deportation to be disproportionate. She found that there was some opportunity for rehabilitation in the UK and that there were safeguards in place for his wife and children. For those reasons the judge then allowed the appeal under the EEA Regulations.

12. The respondent sought permission to appeal to the Upper Tribunal on the following grounds: that the judge's approach to the significance of the appellant's integration in the UK was unlawful; that the judge's acceptance of the appellant's alleged sobriety was unlawful; that the judge had erred in her findings on rehabilitation; that the judge had erred in her approach to the appellant's future relationship with his family and had unlawfully speculated; and that the judge had unlawfully sought to minimise the threat posed to the appellant's wife and children by relying upon current safeguards in place.

13. Permission to appeal was granted on 26 February 2016 on all the grounds.

14. The appeal came before me on 14 April 2016. The appellant was not present at the hearing. Information recently provided to Ms Brocklesby-Weller indicated that the appellant had failed to report to his probation officer or to respond to attempts to contact him and that he had also previously mentioned to his probation officer about being homeless. Accordingly it seemed to me that, whilst there were doubts as to whether the appellant had received the notice of hearing, the notice had been properly served at his last known address and there was no reason why the appeal should not proceed in his absence.

15. Ms Brocklesby-Weller made submissions on the error of law, expanding upon the grounds, and asked that the First-tier Tribunal's decision be set aside and re-made by dismissing the appellant's appeal.

Error of Law

16. There is no challenge to Judge O'Malley's finding that the appellant's conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, for the purposes of Regulation 21(5)(c) and indeed I find no errors of law in her decision in that regard. The judge gave detailed and cogent reasons for concluding that the appellant remained such a threat, as I have summarised at [10] above.

17. However, having made such findings, and for the reasons given by the respondent in her grounds and expanded upon by Ms Brocklesby-Weller, the judge's findings and conclusions on proportionality under Regulation 21(5)(a) and on Regulation 21(6) are undoubtedly perverse and irrational. The reasons set out by the respondent in the grounds are comprehensive and clear and there is little need for me to expand upon them. Nevertheless I make the following observations.

18. The basis upon which the judge formed her view on those matters is summarised at [73] of her decision. As the respondent asserts at ground one, the judge's approach to integration was to give particular weight to the appellant's period of employment, his financial contribution to the economy and his purchase of a house in the UK, and his family ties to the UK. However, as she herself noted at [70] and [73], his English language skills were limited despite his length of residence in the UK, his job involved working with members of his own community, he had shown a disregard for the laws of the UK by offending whilst subject to a suspended sentence and by leaving the country in breach of the conditions of his licence, none of his family members had attended the hearing to support him and, at [72] he had not fully integrated into the UK. Accordingly the judge, in placing substantial weight upon matters indicating a level of integration, simply ignored the other matters which she herself found to indicate a lack of integration.

19. The judge also placed significant weight upon the appellant's claimed sobriety and the support he was receiving in that regard, noting that his risk of re-offending was reduced if he remained sober. Yet, in accepting the appellant's claim to be sober and to be able to remain alcohol-free, she ignored her own findings that the appellant had also refused to admit having been violent towards his wife and having threatened her with knives and, furthermore, ignored her own comments at [68], with reference to the OASys report, about him minimising his alcohol use to professionals and not attending any courses outside prison. There was, in fact, no evidence before the judge to suggest that the appellant would be able to remain sober and accordingly it was irrational for her to place such significant weight upon his assurances that he would.

20. The judge took into account the appellant's sobriety and the support he was given in placing the weight that she did upon his opportunities for rehabilitation in the UK. She also considered rehabilitation in terms of the appellant receiving support from social services in assessing his ability to have contact with his children. Yet, again, that was simply no more than speculation and indeed was completely at odds with her earlier findings at [62], that the appellant's behaviour, in terms of his denial of violence towards his wife and his criminality, and his controlling attitude, was not consistent with someone who was taking real steps to rehabilitation. Furthermore, as the respondent asserted in ground 4, there was no proper basis for the judge's speculation about the appellant's potential future relationship with his children and the weight that she attached to that, when she herself noted his lies about using violence and threats in front of the children and when the evidence in relation to the social services provided no indication of any likelihood of contact. The judge's reliance upon safeguards in place for the appellant's wife and children as a matter weighing in his favour completely ignored the reasons for the safeguards and the fact that those safeguards, including a non-molestation order, was an indication that he presented as a danger to them.

21. Accordingly, as her own findings reflected, there was no proper basis for the significant weight the judge gave to any of the matters which she considered in her assessment of proportionality and her assessment under Regulation 21(6). In light of the many adverse findings she made against the appellant, such findings having been properly made on the evidence before her, the judge's reasons for allowing the appellant's appeal were simply perverse and irrational. I therefore set aside her decision in that regard.

Re-making the Decision

22. For the same reasons as given in above it is clear that, in re-making the decision, the appellant's appeal cannot succeed.

23. In terms of proportionality under Regulation 21(5)(a), the respondent's decision to deport the appellant undoubtedly complied with the principles of proportionality. The factors in favour of integration in the UK are limited to little more than the appellant's length of residence here and a period of past

employment, but that in itself is greatly outweighed by his disregard for the law and his criminality and violence. He has clearly failed to show that he has integrated into British society. There is no evidence to show that he has sought to address the claimed source of his violence, namely his alcohol problem, and indeed the information supplied by Ms Brocklesby-Weller confirms that he has relapsed into alcohol misuse. There is no evidence of attempts made towards rehabilitation and thus no reason to believe that rehabilitation could be achieved better in the UK than in Portugal. Neither is there any evidence to suggest that contact with his children is likely to occur in the near future, if at all, or that the appellant's presence in the UK would be in their best interests.

24. For all of these reasons, and considering the fact that the appellant remains a threat to his wife and children and has not sought to address his violent nature, that he has shown disregard to the laws of this country and has made no attempt to address his controlling and violent behaviour, I find that his deportation is justified on serious grounds of public policy and public security. I find that the higher threshold of "serious grounds" has been met, for the purposes of Regulation 21(3), and that the respondent's decision was therefore in accordance with the EEA Regulations.

25. For the same reasons I find that the appellant's removal would not breach his human rights under Article 8 of the ECHR. He cannot meet the requirements of paragraph 399(a) or (b) as he has no subsisting relationship with his wife or children. Neither is he able to meet the requirements of paragraph 399A, having spent the majority of his life outside the UK and not being socially and culturally integrated in the UK. There are no very compelling reasons outweighing the public interest in deporting him for the purposes of section 398 of the immigration rules. None of the factors in sections 117B and 117C of the Nationality, Immigration and Asylum 2002 apply so as to provide any weight in the appellant's favour in assessing proportionality. His deportation is clearly not in breach of Article 8.

DECISION

26. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing Mr Carsane's appeal on all grounds.

Signed
Upper Tribunal Judge Kebede