Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01274/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 27 October 2015	**On 12 January 2016**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EVANDRO OLIVEIRA DOS SANTOS
[NO ANONYMITY ORDER]

Respondent

Representation:

For the Appellant: Mr T Melvin, a Senior Home Office Presenting Officer
For the Respondent: In person

DECISION AND DIRECTIONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the appeal of the claimant against her decision to remove him to Portugal under Regulation 21 of the Immigration (European Economic Area) Regulations 2006 (as amended).

2. The claimant is a citizen of Portugal who claims to have entered the United Kingdom in June 1996, when he was 4 years old. His mother brought him here: his father remained in Portugal. His mother is a care worker and a Portuguese citizen. The claimant's residence in the United Kingdom has been lawful throughout: that was not

disputed before me or before the First-tier Tribunal. The claimant speaks very little Portuguese and his connections with Portugal are faint now. His mother told the First-tier Tribunal that she had no siblings: she did have some cousins in Portugal, but they were not close. The claimant's father in Portugal died in approximately 2013 and the claimant has 3 paternal aunts in Portugal with whom his mother is not in touch, although she did let one of her husband's sisters know, when she learned that he had died.

3. The claimant has an unpleasant criminal history. He first came to adverse attention on 11 June 2007 when he was reprimanded for shoplifting by the Metropolitan Police. He was then 16 years old. In July 2007, he was warned for possession of an imitation firearm. He was then living with his mother and 2 sisters in a council flat, in a an area which was perceived by the Probation Service as 'somewhat problematic so far as criminal active goes'.

4. Between 7 July 2008 (when he was 17) and 21 February 2013 (by which time he was 22 years old), the claimant was convicted on 6 occasions for 11 offences including theft, possessing an offensive weapon in a public offence, failure to surrender to custody at an appointed time, disorderly conduct, having a bladed article in a public place, attempted grievous bodily harm with intent, and failure to comply with the conditions of his licence. In his OASys report, the claimant admitted that he was using cannabis at this time.

5. The index offence which led the Secretary of State to decide to remove him from the United Kingdom was his conviction on 9 May 2012 at Snaresbrook Crown Court for unlawful wounding and possessing an offensive weapon in a public place. The claimant was sentenced to 3 years imprisonment on the first offence and 18 months on the second. The claimant did not appeal either conviction or sentence.

6. The circumstances were that the claimant had taken a minicab at night, diverted it from the planned route, and when the cab driver asked for payment, he at first told the driver that he would get his money then threatened the driver with a flick knife, and finally stabbed the driver in the thigh. The minicab driver required 3 stitches and suffered psychological damage. The sentencing Judge noted the claimant's evidence that he carried a knife to protect himself and to intimidate others: he considered the offence to be aggravated by its having taken place at night, that it was pre-meditated, and that a blade was involved.

7. The Judge stated that the claimant had 'a chilling attitude to carrying weapons and the use of weapons…you told the interviewing officer that you carried a knife to protect yourself and to intimidate others'. The Judge was satisfied that the offence was a Category 1 crime, having regard to the physical and psychological injury to the minicab driver, who was performing a public service.

8. The National Probation Service (NPS) Report stated that the knife offence was one in which the claimant had acted alone, rather than being influenced by criminal associates, and that his intent to intimidate the victim 'suggests predatory and risk-taking behaviour'. The NPS considered that the claimant should be managed after his release at MAPPA Level 1 and presented a Medium risk for causing serious harm,

the risk factors being identified as 'fear and intimidation' and 'physical injury'. His likelihood of re-conviction was described as by the NPS as Low (up to 40%), but his Offender Manager considered that his OGRS (offender group reconviction score) was 54% within 1 year of community sentence or discharge, and 71% at the end of 2 years. OASys rated his likelihood of reconviction as Medium, and the risk of his causing serious harm to others also rated as Medium.

9. At the end of his sentence, on 28 August 2014, the claimant was released on a lifetime licence, which meant that his crime was of such severity that he would always be a threat to the community and could be subject to recall to prison at any time for breach of conditions. However, at the time of release, the Secretary of State was satisfied that the claimant met the 'integration test' set out at Recitals 23 and 24 of the Directive and in the decision in *Tsakouridis (European citizenship)* [2010] EUECJ C-145/09. The Secretary of State considered that there was insufficient evidence that the claimant had adequately addressed the reasons for his offending behaviour: he had not produced evidence that while in prison he had completed an Enhanced Thinking Skills or Victim Awareness Course which might reduce the risk of his offending in future.

10. While in prison, on 21 February 2013, the claimant had been convicted of a further offence of wounding with intent to commit grievous bodily harm and was sentenced to a further 3 years' imprisonment: he threw boiling water over his cell mate and then hit him with the kettle, causing burns and injuries described as 'really serious harm' by the Judge. The Judge in that case considered that the claimant had committed the offence 'in circumstances where anyone's patience would have been sorely tried' and that the offence arose from a momentary loss of control, the other prisoner having set the kettle to boil, so that the weapon with which the claimant attacked him was to hand and ready for use. The decision to deport the claimant was made by the Secretary of State on 11 May 2014.

11. On 10 March 2015, the Secretary of State issued a supplementary removal decision, to be read with the earlier decision, taking account of the further offence, which had not come to her attention previously. She considered that this illustrated the claimant's continued disregard for United Kingdom law, and his propensity to reoffend, as well as indicating a lack of integration into British society. She maintained her decision to remove him to Portugal. She did not state that the protection available to the claimant under the Regulations should be reduced below the 'imperative grounds' level. The claimant has not appealed against that second decision letter or sought to challenge it by judicial review.

First-tier Tribunal decision

12. It was not disputed in the Secretary of State's decision letter, and the First-tier Tribunal accepted, that the claimant was entitled to the highest level of protection (the 'imperative grounds' protection) afforded by Regulation 21(4) of the EEA Regulations because immediately before the decision to remove him he had resided in the United Kingdom for a continuous period of at least 10 years. Nor was that point raised as an issue before the First-tier Tribunal.

13. The issue in the First-tier Tribunal was accepted to be the extent of the claimant's 'social and cultural integration into the United Kingdom' as set out in Regulation 21(6). The First-tier Tribunal Judge found as a fact that the claimant was integrated into United Kingdom society and would have no memory of living anywhere else. In particular, at paragraph 41 the Judge found that the claimant

> "41…has resided in the United Kingdom since he was 4 years old. He has therefore been here for nearly 20 years. As such I accept that he will have no memory of having resided anywhere but the United Kingdom. Whilst he may not have worked since leaving prison, this does not mean he has not integrated. He has been to school here and spent his formative years here. I consider that in the circumstances he is integrated into United Kingdom society. …
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> 42. Both the [claimant] and his mother gave evidence that he had never returned to Portugal and whilst his mother has relatives there, the [claimant] does not have contact with them. There is no supporting evidence to show either that he has or has not returned to Portugal [since coming to the United Kingdom age 4]. …In the circumstances, whilst the [claimant] may have some links with Portugal, I do not consider that they are recent and any relationships he has are likely to be distant. "

14. She considered that a medium risk of further offending was not sufficient to meet the imperative grounds of public security test and that the claimant was integrated into the United Kingdom, such that his removal Portugal would be disproportionate. She allowed the appeal.

Permission to appeal

15. The Secretary of State sought permission to appeal. In her grounds of appeal, she disputed the finding that she had conceded the 'imperative grounds' test in her principal decision letter and argued that the Judge should have considered for herself whether the test was met, having regard to the offence in prison. The Secretary of State contended that the First-tier Tribunal decision was inadequately reasoned as to the lack of correlation between a medium risk of further offending and the required threat level for the 'imperative grounds' level of protection. She also considered that the Judge's finding that the claimant had never been to Portugal was unsound and insufficiently reasoned.

16. Upper Tribunal Judge Pitt granted leave on the basis that it was arguable that the First-tier Tribunal had not correctly assessed whether the claimant was 'integrated' in European Union terms.

17. That was the basis on which the Secretary of State's appeal came before me.

Upper Tribunal hearing

18. The claimant was not represented before me. He attended the hearing, accompanied by his mother, and represented himself. The claimant stated that as concerned the legal position, he had no submissions to make to the Upper Tribunal because he was not a lawyer.

19. The claimant explained his current circumstances. He stated that he had committed no further offences since his release in August 2014 but remained on licence until November 2015. He had been working as a labourer and cleaner, ever since he left prison, and would have been working on the day of the hearing if he had not been attending at Court. He could not explain why the First-tier Tribunal Judge had thought he was unemployed. It does appear that the First-tier Tribunal Judge overlooked the submissions recorded at paragraph 23 of her decision when so holding, but nothing material turns on that error of fact, if that is what it was.

20. The claimant stated that in the past he had been lost and young, but that he had matured a lot since then. He had got into railway engineering, and was working on track renewal. He was not the same person he had been. He had not been able to join an apprenticeship with Network Rail because he was required to sign on at Beckett House each week, but he was no longer a risk to the public.

21. For the Secretary of State, Mr Melvin argued that the First-tier Tribunal Judge had erred in law in concluding that the claimant could not be removed. He had shown a persistent reluctance to obey the law of the land and the Upper Tribunal should find an error of law and set aside the decision. The findings of fact were not in dispute: the question for the Upper Tribunal would be whether they amounted to integration. The prison sentence should be treated as reducing the level of protection applicable and the two removal decisions should be read together. The Upper Tribunal should dismiss the claimant's appeal on the basis of all the evidence before it.

22. I reserved my decision, which I now give.

Discussion

23. I first consider the applicable level of protection for this claimant under the EEA Regulations. It is clear from the First-tier Tribunal decision that this point was not in issue before the First-tier Tribunal Judge, since the Judge recorded that the Secretary of State's representative conceded that the 'imperative grounds' protection was the correct level. Neither the May 2014 removal decision nor the supplementary decision of 10 March 2015 asserts to the contrary. My attention was drawn to the decision of the Court of Justice of the European Union in *Secretary of State for the Home Department v M.G.* [2014] EUECJ C-400/12, which held as follows:

> "1. On a proper construction of Article 28(3)(a) of Directive 2004/38/EC … the 10-year period of residence referred to in that provision must, in principle, be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned.
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> 2. Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment. However, the fact that that person resided in the host Member State for the 10 years prior to imprisonment may be taken into consideration as part of the

> overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken."

24. It follows from that judgment that, in principle, the continuity of residence in this appeal could properly be regarded as broken by the claimant's imprisonment, such that Regulation 21(3) rather that 21(4) would be the applicable provision and the Secretary of State would only be required to show 'serious grounds of public policy or public security'. However, the highest that the grounds of appeal put the Secretary of State's argument is that 'had the Judge considered *MG* she could have decided that *imperative grounds of public security* was not the proper threshold'. If the point had been placed in issue by the Secretary of State, that would be a criticism which she could properly make, but that was not the case here. The First-tier Tribunal Judge was entitled to, and did, rely upon the Secretary of State's concessions in her removal decision and at the hearing, and Secretary of State cannot now be heard to assert that she should have done otherwise.

25. The challenges to the First-tier Tribunal's findings on the claimant's having been to Portugal, the treatment of the likelihood of reconviction finding by the NPS, and the applicant's integration into the United Kingdom, are all challenges to findings of fact in the First-tier Tribunal decision. I remind myself that part 5A of the Nationality, Immigration and Asylum Act 2002 as amended is not applicable in EEA Regulations cases and that the statutory presumptions therein are also inapplicable. The standard for reopening a finding of fact on appeal to the Upper Tribunal was set out in *R (Iran) & Ors v Secretary of State for the Home* Department [2005] EWCA Civ 982 at paragraph 90.2 in the judgment of Lord Justice Brooke:

> "90. It may now be convenient to draw together the main threads of this long judgment in this way. During the period before its demise when the IAT's powers were restricted to appeals on points of law:
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> 1. Before the IAT could set aside a decision of an adjudicator on the grounds of error of law, it had to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings. This principle applied equally to decisions of adjudicators on proportionality in connection with human rights issues;
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> 2. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the Wednesbury sense, or one that was wholly unsupported by the evidence.
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> 3. A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way that the IAT was unable to understand why he reached that decision. …"

26. Appeals to the Upper Tribunal are also restricted to points of law. Contrary to the submission in the grounds of appeal, the First-tier Tribunal Judge did give reasons for all of the disputed facts, and in particular, at paragraphs [41]-[42] of her decision, she gave adequate reasons supporting her finding that the claimant is integrated into the United Kingdom. He has been educated here, he has lived here for almost 20 years

since he was 4 years old, he spoke very little Portuguese, had not travelled to Portugal since leaving the United Kingdom, and had no access to extended family support in Portugal. On that basis, while another Judge might have reached a different conclusion, it is not possible to say that the integration decision is perverse or *Wednesbury* unreasonable and no error of law has been established in relation to the First-tier Tribunal's reasoning in that respect.

DECISION

27. For the foregoing reasons, my decision is as follows: The making of the previous decision involved the making of no error on a point of law and the First-tier Tribunal decision stands.

Date: 11 January 2016 Signed *Judith AJC Gleeson*

Upper Tribunal Judge Gleeson