Upper Tribunal
(Immigration and Asylum Chamber)

Vasconcelos (risk- rehabilitation) [2013] UKUT 00378 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 July 2013	.....

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE SOUTHERN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LEANDRO SANTOS DE SA E VASCONCELOS

Respondent

Representation :

For the Claimant: E. Yerokun of A and A Solicitors LLP

For the Respondent: T Wilding, Senior Home Office Presenting Officer

(1) In assessing whether an EEA national represents a current threat to public policy by reason of a risk of resumption of opportunistic offending, the Tribunal should consider any statistical assessment of re-offending provided by NOMS but is not bound by such data if the overall assessment of the evidence supports the conclusion of continued risk;

(2) A failure by a respondent to an appeal to comply with directions, serve a respondent's notice in time, or indicate what fresh evidence is sought to be adduced to update the tribunal in the event that a decision is re-made, is likely to mean an adjournment to supply witness statements and adduce such evidence will be refused.

DETERMINATION AND REASONS

Introduction

1.
This is the Secretary of State's appeal against a decision of a panel of the First-tier Tribunal (FtT) dated 8 March 2013 allowing an appeal by Mr Vasconcelos (whom we shall refer to as the claimant) from a decision made in November 2012 to deport him.

2.
The claimant is a Portuguese national born in Angola in January 1990. His father is Portuguese and his mother Angolan. At some point in his childhood, his father went to Portugal to work and called the claimant over to live with him. He said he was 17 when he went to Portugal. His mother remained in Angola. He was still 17 when in July 2007 he said he came to the United Kingdom.

3.
He lived with his father at an address in Cyprus Close, Salford from his arrival in the United Kingdom to March 2010. There seems to have been some family tension between father and son during this period. He moved into his own accommodation provided by a housing association at Clayton Street, Failsworth, Manchester at the end of March 2010. He was joined by a girl friend, Leila Filipe, also a Portuguese national of Angolan origin, and she remained there until February 2011 when she returned to live with her parents, as the relationship was having difficulties and she wanted to focus on her studies.

4.
The claimant studied at City College Manchester in 2008 and was awarded a certificate of basic proficiency at Entry Level 2 in English as a second language (ESOL) in June 2008. There was limited evidence before the Tribunal of employment as a cleaner for a period of a week. Otherwise it appears that he supported himself from job-seekers' allowance.

5.
He has a maternal aunt (Ms Miguel) living in the Salford area of Manchester with whom he has remained in contact during his residence in the United Kingdom.

6.
On 9 August 2011 the claimant was arrested for offences of burglary and theft from a jeweller's shop that was looted during extensive rioting that took place in the city of Manchester at that time. He entered a plea of not guilty although he had been identified on CCTV as one of group of people attempting to steal property. He made a late change of plea to guilty on 12 January at the Manchester Crown Court and on 15 February 2012 was sentenced to 30 months imprisonment. He has remained in custody ever since, most recently in immigration detention following service of his criminal sentence.

7.
The panel heard from the claimant and his aunt. His father was apparently aware of the deportation proceedings but had returned to Angola in the winter of 2012 and had provided no statement or other support for the claimant's appeal. Leila Filipe had provided a statement in support of the claimant but did not attend the appeal, the panel were informed that she had been taken ill that day although no medical evidence was provided to them or ourselves.

8.
The panel concluded that the claimant was an unreliable witness and gave a number of examples where he had attempted to mislead the Secretary of State and his interviewing probation officer.

9.
The panel found at [43] that on balance the claimant is a person who remains at risk of opportunistic offending such as occurred on this occasion and that accordingly he presents a present genuine and sufficiently serious threat to the interests of public policy.

10.
The panel noted that the claimant had not established an entitlement to permanent residence and there was very little other evidence of integration [42] and [45].

11.
It can be observed:

i.
If his claim of entry in July 2007 is accurate, the claimant had been resident in the United Kingdom for 4 years and 7 months before he started his 30 month sentence. Very little of this residence was lawful residence within the meaning of the Directive, namely studying, working or remaining as a dependent family member. There was little evidence before the panel of him even seeking employment.

ii.
He had not been a member of his father's household since March 2010 and his father had now left the United Kingdom without supporting any appeal by the claimant to remain.

iii.
He had not been living with his girlfriend since February 2011; she had gone to Portugal with her family for an extended visit between June 2011 and September 2011 and had then worked in London for two months in the summer of 2012. There was some evidence of contact with the claimant whilst he was serving his sentence but little else.

iv.
There was no history of employment, advanced studies, or close community ties. His level of English was such that he preferred to give evidence through an interpreter.

12.
The panel did however note the recent decision of the CA in R (Daha Essa) v Upper Tribunal and SSHD [2012] EWCA Civ 1718 and concluded at [46] that the claimant's prospects of rehabilitation were better in UK than Portugal. They accordingly allowed the appeal on this basis.

13.
The SSHD appeals on the basis that the panel made a material error of law in coming to this conclusion.

Error of Law

14.
Shortly, before the hearing of this appeal the Upper Tribunal (UT) published its decision in Daha Essa [2013] UKUT 316 (IAC) which the Court of Appeal had remitted to us. Mr Essa had been resident in the United Kingdom for approximately 12 years and it was accepted by the Home Office had a permanent right of residence. At [23] to [36] of the decision, the UT considered the class of persons for whom 'the risk of compromising the social rehabilitation of the Union citizen in the state in which he has become genuinely integrated' was a material consideration. It concluded:

2. The Court of Justice's reference in Case C-145/09 Land Baden-Wurtemberg v Tsakouridis [2011] CMLR 11 to genuine integration, should mean people who have resided lawfully in the Host state for five years and so have the right to permanent residence, rather than people who have resided for ten years.

3. For those who at the time of determination are or remain a present threat to public policy but where the factors relevant to integration suggest that there are reasonable prospects of rehabilitation, those prospects can be a substantial relevant factor in the proportionality balance as to whether deportation is justified. 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 well very well be disproportionate to proceed to deportation.

4. 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, it cannot be seen 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 propensity to commit sexual or violent offences and the like may well fall into this category.

15.
On the basis of this decision, Mr Wilding developed his submissions in the support of his first ground of appeal as follows:

i.
The FtT had treated the comparative prospects of rehabilitation as a decisive factor in the proportionality balance, when it could only be one factor in the balance.

ii.
The FtT had given decisive weight to this factor despite the fact that the claimant had not acquired the right of permanent residence, represented a current threat to public policy, was not well integrated into UK society, and his prospects of future rehabilitation here were uncertain.

16.
When asked to respond to Mr Wilding's succinct submissions on this issue, Mr Yerokun accepted that in the light of the UT's decision in Essa, the FtT had made an error of law. We recognise, of course, that the panel did not have the benefit of the UT's considered opinion, and that the previous references to the issue in earlier decisions of the Court of Appeal were limited in scope.

17.
We accordingly find that the decision of the First-tier Tribunal involved an error of law. Since the error was in respect of an important issue in the appeal, it was a material error, of the kind that would normally lead us to exercise its discretion to remake the decision under s.12 (2) (a) Tribunal Courts and Enforcement Act 2007. This is subject to Mr Yerokun's submissions that we consider in this section of this determination below.

18.
We add that we see no merit in the second ground of appeal, advanced by the Secretary of State, namely that the Tribunal had erred in their assessment of the human rights element of the case by failing to have regard to Appendix FM,

19.
Mr Wilding recognised that the panel stated that the decision was not in accordance with the law, because it failed to properly apply EU law. It made no positive assessment of human rights outside the EU context. In reality we fail to see how any such assessment could be made. Length of residence, family ties, and other factors relevant to the Article 8 balance are all catered for in regulation 21 of

the Immigration (EEA) Regulations 2006 and identify the issues to be considered. Appendix FM is not brought to bear in the EEA assessment.

20.
Mr Wilding recognised:-

i.
Appendix FM has no application to EEA cases that apply a discrete code including human rights inside the EEA assessment;

ii.
At best it is a statement of executive policy that may have some persuasive effect in cases falling outside EEA law, or where EEA law permits regard being had to such policies.

21.
We can see no room for the application of Appendix FM in this case. In particular the Court of Justice has made it plain that the concept of threat to public policy, serious threat to public policy, and imperative grounds of public policy cannot be assessed simply by reference to the length of sentence imposed.

The factual basis for re-making the decision

22.
We would normally re-make a decision flawed by error of law in the light of the facts found by the First-tier Tribunal that were not affected by the error and any up-dating evidence that the claimant had asked us to take into account that was not available to the panel below.

23.
We were satisfied that the hearing before the First-tier had been fair; the claimant was legally represented by his present solicitors who had had the opportunity to respond to the detailed Home Office decision letter of 5 November 2012 and present any evidence in the appeal that he thought appropriate.

24.
Mr Yerokun submitted that we should not adopt this course because the panel's findings that the claimant's evidence was unreliable and that he remained a personal risk to public policy were not open to them as a matter of law. On 8 July 2013 he had served on the Home Office a response under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. We will consider this notice further in the following sections of this determination. For present purposes we note that paragraph 2.4 of the notice claims that the First-tier Tribunals findings were 'perverse and unsafe' and at 2.9 'notwithstanding the adverse credibility findings …the panel has not made material errors of law sufficient to occasion a different conclusion'.

25.
This rather broad-based attack of the panel's factual findings was developed at the hearing before us. We reject Mr Yerokun's submissions on this issue. We will explain our reasons under the three headings of reliability, risk and integration.

Reliability

26.

As to the claimant's reliability, each of the six reasons given by the panel at [38] of its decision accurately reflected the evidence before them and together entitled them to conclude that there was deliberate misrepresentation by the claimant rather than a sequence of innocent errors.

27.
The first two reasons given were the inaccurate information given by the claimant in the faxed response dated 9 October to the notice of liability questionnaire served on him in detention. At Q 6 he stated he entered the United Kingdom in July 2006 and at Q 12 he stated he had a daughter. Neither statement is true. Mr Yerokun submitted that the panel had failed to take into account that the claimant speaks Portuguese and the letter of 12 June 2012 was in English as were the manuscript answers. Nowhere in his witness statement or in his oral evidence did the claimant address the October answers or explain why they differed from his account in the witness statement. In particular he never said that someone else completed the form without consulting him; that he did not understand the questions because they were in English; or that he made a mistake through his weak knowledge of English. If the claimant does not address the apparent discrepancy in his account in his later evidence it is open to the panel to identify the contradiction and assign such weight as is appropriate.

28.
The third reason given was the conflicting accounts of how he came to be involved in the offence. The panel noted at [34] that the claimant had told his probation officer in February 2012 that he was walking from Salford to Failsworth with a friend when they met up with a group of people who were committing the offence; he became involved with them and put his hand in the broken window before changing his mind. In his witness statement of February 2013 at [8] ' it was during one of my hang outs with my friends that I got into all these problems although my aunty wanted me not to go into town that day….I had been having a drink with my friends earlier so we all got carried away with the euphoria of the moment when got to the town' . In his oral evidence he reverted to the version given to the probation officer and stated he had been with one friend only and that they had got drawn into a group of other people. We agree with the panel that the two versions are not the same, and reject that submission that the drinking had been with more than one friend but the walking into town was a reference to one friend only.

29.
The fourth issue was that Ms Felipe's statement at [10] said that the claimant 'got Portuguese by birth but lived in Angola before coming to the UK'. There is no mention of a period of stay in Portugal before coming to the UK. Ms. Felipe's source of information was the claimant. The omission of a period of residence in Portugal is consistent with an attempt to advance his period of residence in the UK by a year. Although small points in themselves, taken together they are consistent with an attempt to misrepresent the primary facts.

30.
The fifth point was that although the claimant stated that on release he proposed to stay with his aunt; Ms Miguel's statement at [19] says 'I will do my best to support him to begin a new life and be more responsible' but she did not offer in the witness statement or her oral evidence to provide a home for her nephew. If this was an important part of the plan for the claimant's rehabilitation it was reasonable to expect her to say so.

31.

The sixth point was that the claimant's evidence that his father did not know of his deportation was contradicted by Ms Miguel who said that he did but he had done nothing about it. It was open to the Tribunal to draw the inference that either the claimant was misleading them about what he knew of his father's response to the deportation decision or that he had not been frank about the break down of relations between claimant and father which explained lack of communication between them and expression of concern by the father.

32.
In addition to these points, the panel had previously noted that the claimant had not been frank with the probation officer whom he told that in February 2012 that prior to his remand in custody (we understand in January 2012 on his plea of guilty) that his girl friend was still living with him at a time when the clear evidence was that she had left the flat they once shared in February 2011.

33.
In summary the panel's conclusions on this issue were not irrational.

Risk

34.
Further the panel were entitled to bring these negative conclusions to bear on the assessment of whether at the time of the hearing before them the claimant represented a personal risk to public security. In so far as his claims of reformation and rehabilitation depended on his own evidence, they were entitled to reject it.

35.
In our judgment the panel were fully entitled to find on balance that the appellant remained a risk of opportunist offending such as occurred in the index offence and thus a source of a genuine threat to public policy by his personal conduct.

36.
The panel had before it the trial judge's sentencing remarks. He stated:-

'I have seen the CCTV footage showing the burglary of those shop premises by you when you were in the company of others. You were part of a large group of perhaps 20 or more, predominantly male offenders, who late at night, just before 11.00pm attacked those premises and you were a party to forcing an entry into the shop; that is clear from the CCTV footage which shows you as you were wearing distinctive clothing. Moreover you sought on a number of occasions to reach into the shop to steal property. No stolen property was found on you subsequently when you were arrested by the police shortly thereafter and I deal with you on the basis that you were part of a large group participating in the burglary where the group as a whole, stole property. You were part of the first wave of offenders; attacking the premises and stealing what could be stolen from it. The shop owners suffered a great deal of loss; property to a value of £20,000 was stolen and there was a large amount of damage.'

37.
It is clear that his account to the probation officer and the repetition of a version of that account to the panel involved the claimant minimising his culpability considerably. His failure to acknowledge that this was an offence committed as part of a group and was not a single instant of opportunistic theft of picking up looted goods does him no credit. It suggests that he has not addressed his offending behaviour and the conduct and associations that led him to offend.

38.
He had disputed guilt in the face of the video evidence until a late stage, and thereby deprived himself of the opportunity to show remorse, contrition and address his conduct pre-sentence. There was evidence that his aunt had warned him about the poor influence of the peer group he was associating with prior to the offence and he had continued to associate with the group and offended despite this advice. The Pre-Sentence Report showed there were risk factors of spontaneous crime in the presence of a group of bored youths losing self control. Until these factors are acknowledged they cannot be addressed.

39.
Mr Yerokun submits that it was not open to the panel to find that the claimant was a medium risk of re offending in February 2013 in the light of the assessment of the Pre-Sentence Report in February 2012 of an offender group reconviction score (OGRS) of static risk factors of a 19% likelihood of reconviction in a 24 month period; and a NOMS assessment based on this report of a low risk of reconviction using OASys scoring although no OASys assessment was referred to in this report.

40.
We note that OGRS is assessed out of 100 and OASys out of 168, rendering both as a percentage, the low risk group encompasses scores of 0-24%; medium risk 25-59% and high 60-100%. 19% is thus on the high end of the low range for risk.

41.
The claimant relied on the authority of Flaneur [2011] NICA 72. But the Northern Ireland Court of Appeal explains at [24] and [25] that neither the Secretary of State nor the Tribunal are bound by an assessment of NOMS; all sources of evidence and inference should be examined. We accept that any expert opinion should be taken into account and any contrary conclusion sufficiently explained.

42.
The panel noted that no OASys assessment in custody had been performed or was available. It was aware that the claimant had misrepresented the strength of his community ties to the probation officer (residence of Ms Filipe in January 2012; intention to return to his father’s house on release). It had before it direct evidence of continued minimising of culpability and no evidence it considered reliable of remorse, rehabilitation or addressing offending behaviour or a coherent plan for work, place of residence, response to licence or stable social factors in his life.

43.
The panel reached a conclusion on the evidence as a whole and one they were entitled to reach on that evidence. We would have reached the same conclusions on the same material.

Integration

44.
All the above are relevant to the degree of integration that the claimant has with the United Kingdom. There is no evidence of integration by way of work; course of professional study, or family ties with his father. He has not cohabited with Ms Felipe since 2011.

45.
We recognise that he is being deported to Portugal where he appears not to have relatives residing and has only spent a few months, but it would always be open to him to return to Angola where he resided for the first 17 years of his life and where both his parents are.

46.
His limited knowledge of English was considered an obstacle to employment in the Pre-Sentence Report. He may have improved his knowledge of English whilst in custody but it is significant he gave evidence to the panel through an interpreter.

47.
We, therefore, propose to re-make the decision applying the same factual conclusions as the First-tier Tribunal reached about the credibility of the claimant's account, his prospects of re-offending the lack of evidence of integration and good prospects of re-facilitation.

Further evidence

48.
Paragraph 3.0 of the respondent's notice states:

'The Respondent would request an oral hearing and where the Tribunal is minded to find a material error of law, permission to adduce additional evidence to show that he has sufficient support in the UK for his successful rehabilitation'.

49.
This is quite hopeless for a number of reasons.

50.
Judge Chohan granted permission to appeal on 8 May 2013. Notice of this was sent to the respondent on 9 May 2013 with the Upper Tribunal's standard directions requiring the respondent to indicate within 28 days of that notice whether fresh evidence would be relied on in the event of the appeal being remade. The respondent's notice was served on the Tribunal on 7 July 2013. It was outside both the period of one month set by the Tribunal procedure (Upper Tribunal) Rules 2008 (rule 24 (2)) and the 28 period set by the directions. No explanation of the failure to meet the time limit and no application for an extension of stay was made in the notice, contrary to rule 24 (4).

51.
Paragraph 3 of the notice does not state what fresh evidence will be adduced, and whether it relates to events before February 2013 or subsequently. The purpose of the standard directions is to enable the Tribunal to receive relevant supplementary material (if any) in a case where up to date evidence may be needed on the relevant issues in the appeal. It is not intended to give the claimant a second opportunity to present his primary case. The information is needed so further directions can be given about how and when the evidence is to be received depending on whether it is admitted or contested. This very late and vague notice achieves none of these purposes and singularly fails to comply with the standard directions.

52.
All parties need to be reminded that if there is serious failure to comply with the rules and directions, it is improbable that extensions of time or adjournments will be granted even if relevant and credible fresh evidence might be available.

53.
Updating evidence is admissible and potentially relevant in EU cases concerned with risk of offending, integration and strength of ties, but none has been presented to us or no prior indication given of what it might be.

54.
It is particularly important that there is prompt compliance with rules and directions where the claimant is in custody. Prolongation of custody is neither in the public nor the claimant's interest.

55.
We were somewhat surprised to hear that the claimant was still in custody given that he had succeeded in his appeal on 8 March 2013; the absence of a previous record or an index offence to violence to the person.

56.
It appears that his representatives made no bail application on his behalf in March; instead they took a point about whether the Home Office application for permission to appeal was in time.

57.
We were informed that the claimant had made two bail applications and were provided with some documentary material. The first was made on 7 May and then withdrawn and the second proceeded to a hearing on 20 May. The judge's reasons for the decision indicate that there was no evidence that the proposed accommodation was approved by NOMS; that the claimant can be trusted to comply with conditions; that the first surety (a paternal aunt) has any funds or been in touch with the claimant for the past three years; or that the second surety (Ms. Miguel his maternal aunt) has understanding of the duties of a surety. It is probably very unfortunate that the claimant did not have professional assistance in preparing such applications but there is certainly no positive evidence of rehabilitation or integration arising from this.

58.
At the hearing we were informed that Ms Miguel and Leila Felipe attended and were sitting at the back of the hearing room. No witness statement from either had been prepared. Mr Yerokun accepted responsibility for the failure to prepare and supply supplementary evidence. He stated that a decision had been taken to resist the appeal on the basis of the evidence below, but that the UT's decision in Essa had obliged a change of approach. He proposed to call both women.

59.
We were aware of the potential contribution a stable relationship can make to integration and rehabilitation: see Batista [2010] EWCA Civ 896 [27]. We asked Mr Yerokun what Ms Felipe could add. He indicated that she might be willing to consider a resumption of her relationship. We were informed that her failure to appear before the First-tier Tribunal was because she was suffering from menstrual cramps on the day of the hearing, but did not need to seek medical attention. None of this suggested the existence of a strong relationship likely to prove relevant to the issues we were considering.

60.
We note that Ms Miguel's address was an address in the first Home Office response to bail dated 9 May 2013, in the a sense that if bail were to be granted this was the address where the Home Office would propose that he would reside. Inferentially it suggests that the aunt has expressed a willingness to accommodate the claimant on release.

61.
We will take the limited data arising from the bail application into account, but refuse an adjournment for the claimant to supplement his evidence. He has failed to adduce the relevant evidence before the panel; failed to avail himself of the opportunity to update his case by complying with the directions,

has served a very late and inadequate notice and provides no information to suggest that there have been significant material developments.

62.
Further, there is a compelling case for this appeal to be resolved finally as promptly as possible consistent with the requirements of fairness, in the light of his continued detention.

63.
In the event that credible evidence of a material change of circumstances does come to light, it is always open to the claimant to apply to the Secretary of State to revoke the deportation or exclusion order but only if such application is made from abroad (see regulation 24 A (2) and (3) of the Immigration (EEA Regulations) 2006 as amended). We cannot see that the claimant would be worse off in Portugal than in detention.

The time point

64.
At the conclusion of his submissions Mr Yerokun raised whether the Home Office application for permission to appeal was made in time. We were surprised at this course, because no intimation of it had been given in the respondent's notice (late as that was).

65.
The normal position where a judge considers whether a notice has been served in time and considers that it has been, this is not a decision on which there is a right of appeal to the Upper Tribunal. It is a decision on a preliminary matter and therefore an excluded decision: see ss. 11(1) and 11(5)(f) Tribunals, Courts and Enforcement Act 2007, read together with 3(m) the Appeals (Excluded Decisions) Order 2009 as amended by the Tribunals, Courts and Enforcement Act 2007 (Miscellaneous Provisions) Order 2010 [1] . If an excluded decision is challenged such a challenge can only be brought by way of judicial review.

66.
When a First-tier judge fails to appreciate that the application is out of time and has not therefore considered whether to grant an extension of time, the grant of leave remains conditional unless and until such extension is granted by the Upper Tribunal, in this instance sitting as a First-tier judge: see Samir (FtT Permission to appeal; time) [2013] UKUT 3 (IAC).

67.
What appears to have happened here is that on receipt of the panel's decision, the respondent made a prompt request for reconsideration under rule 60 of the First-tier Procedure Rules, on the basis that as she had won on the disputed issues of fact she believed that the panel had intended to dismiss the appeal. Unfortunately, there was no response to this application until 10 April 2013 by when time to seek permission to appeal had expired unless the decision was modified. The panel might have intended to amend the decision by re-serving it as they invited the respondent to apply for permission to appeal. The respondent lodged such application promptly on 15 April within three working days.

68.
Rule 60(3) provides that:

"The time within which a party may apply for permission to appeal against, or for review of, an amended determination runs from the date on which the party is served with the amended determination."

69.
Judge Chohan applied that rule and concluded the application for permission to appeal was in time. By its terms the rule only applies where the panel has amended its decision in response to an application, but an applicant will not know whether a decision is to be amended until the time for making an application for permission to appeal has passed. We conclude that fairness would generally require a panel who has received a bona fide request to amend the decision because of incompleteness or ambiguity to preserve the applicant's ability to seek permission to appeal; from a decision that is not amended in substance, either by re-promulgating the decision or extending time for permission to appeal.

70.
The claimant gave no indication from the grant of permission until the date of the hearing that he intended to take a point on time. At the end of the hearing when the matter was raised before us we indicated summarily that this was too late to raise the matter. No substantive discussion of the legislative scheme or the above history took place.

71.
We have no doubt that the interests of justice require the Home Secretary to be afforded a reasonable opportunity to appeal, and if the only way that this could be achieved would be for us to consider the matter as a First-tier Tribunal judge and extend time in the circumstances above we would do so.

72.
Having not heard submissions on it we can reach no concluded view of the true meaning of rule 60 or what the panel intended by their 10 April 2013 decision, but we would be inclined to conclude that the panel had acted in the way discussed at [69] above and that his decision should not now be re-opened in this appeal.

73.
There was no prejudice caused to the claimant in the respondent's conduct. His position could and should have been protected by a bail application. His own conduct in taking no action on the point after grant of permission to appeal, is likely to have misled the respondent into thinking that the matter was no longer in issue.

74.
For the avoidance of doubt, in the event that it is needed, we extend time for the respondent's application.

Re-making the decision

75.
For the reasons given by the panel we cannot rely in the claimant's unsupported assertions.

76.
There is no evidence of any stable future employment that would provide him with funds to live off and a disciplined life style. Indeed there is very little evidence to suggest that he was exercising Treaty rights as a worker at all before this imprisonment. He has not acquired permanent residence. The basic public policy test applies to him.

77.

There is little or no evidence of integration by reason of strong family ties with his father or that side of his family or with a partner. The strength of his connection with his maternal aunt or her ability to promote his rehabilitation is contentious and has not been proven.

78.
Nothing has emerged since the panel's decision to throw doubt on their conclusion that the claimant presented an unacceptable risk of re-offending; and that his presence is a genuine and sufficiently serious threat on one of the fundamental interests of society apart from the mere fact of his conviction.

79.
The criteria for making a decision to deport in accordance with the EEA Regulations are thus met. Having regard to his age, state of health, family, economic considerations, length of UK residence, and degree of social and cultural integration, an exclusion decision taking affect as if it were a deportation order would be proportionate. We accept that his present links with Portugal do not appear to be strong apart from his nationality and ability to speak the language but that single factor does not suffice to outweigh other ones.

80.
His future prospects of rehabilitation are uncertain and whatever they are cannot be a weighty factor in the balance given the absence of integration and a right of permanent residence.

81.
We will re-make the decision by dismissing the claimant's appeal. Both members of the panel have contributed to this decision.

Signed Date 15 July 2012

President of the Upper Tribunal

---

[1] Excluded decision includes:

(m) any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under section 40A of the British Nationality Act 1981(**m**), section 82, 83 or 83A of the Nationality, Immigration and Asylum Act 2002(**n**), or regulation 26 of the Immigration (European Economic Area) Regulations 2006(**o**).