Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00153/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 November 2018	**On 12 December 2018**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE OF STATE FOR THE HOME DEPARTMENT

Respondent

and

MR DIDIER [L]
(ANONYMITY DIRECTION NOT MADE)

Appellant

Representation:

For the Appellant: Miss A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr Z Malik, instructed by Iras & Co, Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge M B Hussain promulgated on 4 September 2018, allowing Mr [L]'s appeal against a decision made on 19 February 2018 to deport him. I refer to Mr [L] as the appellant as he was before the First-tier Tribunal.

2. The appellant is a citizen of France born on 7 August 1976. He entered the United Kingdom in, it is said, 2000 and worked as a self-employed barber. On 14 June 2005 the appellant was convicted upon his own guilty plea to a conspiracy to defraud, that

fraud being directed against the Department of Work and Pensions, central clearing banks and other financial institutions. The conspiracy involved the stealing of items of mail, in some cases whole bags of mail which were then scoured for financial instruments and onward passage. The appellant and one of his co-conspirators worked in the barber's shop which became a centre for the receipt of the stolen property, that is cheques and credit cards and stolen money orders. The sentencing judge concluded that the sums involved amounted to several hundred thousands of pounds. He was sentenced to three years' imprisonment for fraud and a further twelve months' imprisonment for being in the knowing possession for a false Angolan passport. There was also a recommendation for deportation.

3. It is relevant to note at this point that the appellant was convicted in the name João Didi Ndofula, an Angolan national.

4. On 4 October 2006 the appellant was served with a notice of decision to make a deportation order in that identity and he lodged an appeal against that decision on 9 October 2006. Although detained at the end of his custodial sentence on 19 November 2006, the appellant was released later that month; his appeal was dismissed on 7 February 2007.

5. On 23 March 2007 a deportation order was signed against the appellant in the identity João Didi Ndofula and served on 11 April 2007. He stopped complying with conditions of his release and was declared to be an absconder on 29 July 2008.

6. The appellant was next encountered by the Secretary of State during an enforcement visit on 8 December 2017, at which point it became clear that the appellant was married to a citizen of Democratic Republic of Congo ("DRC") who has indefinite leave to remain in the United Kingdom. They have two British citizen children. Submissions were made in which he explained his true identity and evidence of that was provided.

7. After considering representations made to him, the Secretary of State accepted that the appellant's true identity is Didier [L], a French citizen and the previous deportation order in his assumed identity was revoked. The Secretary of State then concluded that the appellant should be deported pursuant to the Immigration (European Economic Area) Regulations 2016, on the basis that he had not acquired a permanent right of residence under those Regulations.

8. The Secretary of State of State concluded that the appellant's behaviour was a threat to the fundamental interests of society as:-

   (i) He had used a false identity and nationality in order to deceive the immigration authorities, preventing the Immigration Rules being enforced in his case.

   (ii) He had been deceitful about his true identity and been convicted of conspiracy to defraud, using false instruments and was a person who had used deceit to exploit public services in the past and there was a threat that he could do so in the future.

(iii) He had been convicted of offences which are serious and his conduct was likely to cause public offence.

9. The Secretary of State also noted that the appellant had continued to reside in the United Kingdom after his offence and during his decision process under a false identity to deceive the immigration authorities. It was noted that he had used the identity for a significant period and that it was deemed that he would still pose a threat of repeating this offending in the future.

10. On this basis and having taken into account the sentencing remarks, the Secretary of State concluded that the appellant has a propensity to reoffend and represents a genuine, present and sufficiently serious threat to the public to justify his deportation on the grounds of public policy.

11. In addressing proportionality, the Secretary of State noted that although he might have developed ties here, he had been convicted here of a serious criminal offence for which he had received a substantial custodial sentence; that he was not socially and culturally integrated into the United Kingdom and given his blatant disregard for criminal immigration in the United Kingdom but there is no reason why his rehabilitation could not be undertaken in France and that the decision to deport was proportionate.

12. The Secretary of State also considered, pursuant to Article 8 of the European Convention on Human Rights, that his deportation was proportionate. In doing so it was accepted that the appellant has three biological children living in the United Kingdom but that his wife could relocate with the two younger children to France or that they could remain here and remain in contact with him by modern methods of communication.

13. The Secretary of State then certified the decision pursuant to Regulation 33 and the appellant was later removed but returned to the United Kingdom to participate in his appeal as indeed he returned to participate in the appeal before me.

14. The judge heard evidence from the appellant and his wife which was taken into account along with a number of documents relating to the position of the appellant's wife and children. The judge concluded that:-

(i) the Secretary of State had shown that the appellant had been convicted of a serious offence and that more than one fundamental interest had been affected by this action and that it could not be ignored that the appellant was sentenced to return to prison for no less than four years, had assumed another's identity and that it was not a wish that he reveal his true identity;

(ii) the Secretary of State had not demonstrated that the appellant represents a genuine present threat to the fundamental interests of society since there was no indication that since his conviction he had been the subject of adverse interest by the police or: "Has acted in any other manner that is not conducive to the public good", the Secretary of State's representative being unable to point to evidence indicating a propensity to reoffend;

(iii) the Secretary of State had not proved that the appellant had used deceit to exploit public services and that his case was based entirely on the appellant's previous criminal conviction, contrary to Regulation 27(5)(e);

(iv) the appellant has a family life with his partner and two children and that he has a close relationship with his child from a previous marriage whom he sees regularly;

(v) the older child of the current relationship has a serious hearing problem and requires to be taught at a specialist deaf school and that for her to make progress it is essential that she has support from the whole family;

(vi) it was not reasonable to expect the child to interrupt the continuity of her treatment regime to go to a different country to enjoy a family life with her father there nor was it reasonable to expect family life to be maintained by the appellant through "modern means of communication"; and accordingly, the decision was not proportionate;

(vii) the Secretary of State sought permission to appeal on the grounds that the judge had erred by misdirecting himself in law, that he had failed properly to consider the judge's sentencing remarks in respect of the appellant's convictions which detailed the appellant's involvement and the conspiracy to defraud directed the DWP resulting in benefit payments being stolen from intended recipients, noted to be an aggravating factor; and accordingly, the judge had erred in finding the appellant had not presented a genuine presence and sufficiently serious threat to the public;

(viii) the judge had erred in not taking into account the fact that the appellant used a false identity and had not revealed his true identity until January 2018, a factor of which the sentencing judge would not have been aware and, the judge had not taken properly into account as adverse conduct when assessing whether the appellant presents a genuine present and sufficiently serious threat, the appellant's adverse conduct when using a false identity and not ending until January 2018, matters which are highly relevant to the public interest assessment; and the judge had failed to have regard to Schedule 1 of the 2016 Regulations as required to do.

15. On 3 October 2018, First-tier Tribunal Judge Robertson granted permission noting that it was arguable that the judge had not taken into account the appellant's conduct in absconding and using a false identity in assessing whether the appellant represents a genuine and present threat, and the continued use of a false identity until fairly recently indicating fraudulent conduct.

16. As Miss Everett submitted, the issue here is not so much that the appellant had persisted in using a false, Angolan identity but rather that he had adopted that identity and had then shed it when it suited him and had made no attempt, until he came to the attention of the Home Office, to regularise his position or to explain the error over identity.

17. Mr Malik submitted that this was not sufficient to show either on its own or in connection with the other matters that the appellant represented a genuine presence and sufficiently serious threat to the public interest; and, in the alternative, that any error was not material given the overwhelming factors in support of the removal being seen to be disproportionate.

18. What the appellant did was to use the fact that he had been convicted in a false identity to avoid the consequences of that by simply slipping back into his true identity. First there was no evidence before the judge that he had committed a crime. He continued to benefit from the confusion over his identity and avoided deportation as a result. The judge was therefore incorrect in stating [that he had acted in a manner which is not conducive to the public good]. On the contrary, his actions were such as to allow him to continue to live in the United Kingdom, contrary to the decisions taken against him, a course of action which had continued until he was discovered.

19. Accordingly, I was satisfied that the decision did involve the making of an error of law and set it aside I then heard evidence from the appellant who adopted his former witness statement.

20. The appellant was asked why he had not revealed his true identity when convicted. He said that although he was amongst a group of people who were arrested and that the arresting officers had said that "we know who you are" and attributed the identity of Mr Ndofula to him as he was living at the address which that man had lived. He said that he had tried to tell them that his true identity was Didier [L]. He said that he had tried to give his true identity but thought that it would all come out once he had been fingerprinted which would reveal his proper identity. This, however, did not occur.

21. Asked why on his release he had not said anything he said that the main reason was he was ashamed and that he felt it could not go on in the false identity which is why he stopped reporting. He said that he had spoken to his lawyer who had taken a statement from him but that matter had not been progressed. He said that he had given his proper identity when arrested in 2017. He said that he had not been able to provide evidence of his French identity in 2005.

22. In cross-examination he said that his solicitor did know of his true identity they did anything about it. He said he had not told the judge. He said that he could easily have proved his identity but had not done, that he had told the police nothing had happened. He said that, as he had said earlier, he was waiting for his identity to be found out from fingerprints.

23. The appellant said that since his release he had on occasion when applying for jobs had to declare whether he had had convictions. He had said that he had but that he had not been pressed for any details of this as to the nature of the conviction. It was put to him that this was difficult to believe as was his claim not to have been able to prove his proper identity.

24. Asked why he absconded that he could not go on using a false identity. Tt was put to him he could have contacted the French authorities to obtain confirmation of his identity; he said he had asked his solicitor to do so.

25. The appellant said that he was being supported by his older brother in France but he was not using as he had been waiting for this appeal. He said that the children speak a few words of French and that he and his wife normally speak to each other in English.

26. I then heard submissions and reserved my decision.

The Law

27. Regulation 27 of the EEA Regulations provides as follows:-

> **27.**—(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—
>
> (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
>
> (b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989
>
> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy orpublic security it must also be taken in accordance with the following principles—
>
> (a) the decision must comply with the principle of proportionality;
>
> (b) the decision must be based exclusively on the personal conduct of the person concerned;
>
> (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
>
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

…

(8) A court or Tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

28. It is important to note **Dumliauskas [2015] EWCA Civ 145** at [40]

> I have to say that I have considerable difficulty with what was said by the Advocate General in relation to rehabilitation. In the first place, it had no, or very little, relevance to the questions referred to the Court, which concerned the meaning of "imperative grounds of public security". **Secondly, it is only if there is a risk of reoffending that the power to expel arises** [emphasis added] It is illogical, therefore, to require the competent authority "to take account of factors showing that the decision adopted (i.e., to expel) is such as *to prevent* the risk of re-offending", when it is that very risk that gives rise to the power to make that decision. Secondly, in general "the conditions of [a criminal's] release" will be applicable and enforceable only in the Member State in which he has been convicted and doubtless imprisoned. …

29. The sentence highlighted is confirmed at paragraph [55].

30. In **MC** the Upper Tribunal held as follows:-

1. *Essa rehabilitation principles are specific to decisions taken on public policy, public security and public health grounds under regulation 21 of the 2006 EEA Regulations.*
2. *It is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (regulation 21(5)(c)) that it becomes relevant to consider whether the decision is proportionate taking into account all the considerations identified in regulation 21(5)-(6).*
3. *There is no specific reference in the expulsion provisions of either Directive 2004/38/EC or the 2006 EEA Regulations to rehabilitation, but it has been seen by the Court of Justice as an aspect of integration, which is one of the factors referred to in Article 28(1) and regulation 21(6) (Essa (2013) at [23]).*
4. *Rehabilitation is not an issue to be addressed in every EEA deportation or removal decision taken under regulation 21; it will not be relevant, for example, if rehabilitation has already been completed (Essa (2013) at [32]-[33]).*
5. *…*

31. The core issue in this case is whether the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It is common ground between the parties that he is not entitled to any enhanced level of protection pursuant to reg 27 (4).

32. The appellant has been inconsistent about the circumstances in which he came to be known as Mr Ndofula. In his witness statement signed on 6 June 2018 he said:

> "Fear of the future consequences of my acts [before] I rather gave the details of my friend Mr Joao Didi Ndofula when I was arrested as at that time he had already left the country."

33. That is in direct contrast to the account given that it was the police who attributed the name to him. But I can accept that in the heat of a raid there may have been a mistake as to identity, but the explanation as to how the appellant did not put this right is lacking in credibility. The appellant is a French citizen. He has not provided any credible explanation as to why if there were difficulties over his true identity, he could not for example contact the French Embassy. As he himself accepted, he was able to get the relevant documents with ease after his release. There is no documentary evidence that he in fact did tell the police of his true identity and I note that he maintained the false identity throughout the deportation hearings and appeals which followed his release. He did not stop using the identity when released; he persisted in using it until the end of the deportation process. I conclude that the appellant has simply lied in an attempt to absolve himself from any responsibility for what is on any view an entirely discreditable course of action.

34. I find that the appellant has tried to evade the consequences of his serious offending and that the reason he did not give his true identity was that this would have resulted in a conviction in his name and, possibly, attempts to remove him in his true identity.

35. That the appellant has persisted in this lie is, I consider, conduct of such a nature as to cast doubt on whether he has in fact rehabilitated. He was able to avoid some of the consequences of his offending. He cast off his old identity over 10 years ago and resumed his true identity, but there is no evidence of any further criminal offending for a period of now 12 years.

36. Taking that into account and the length of time since the offending, and applying schedule 1 of the 2016 Regulations, I am not satisfied that the appellant does present a genuine, present and sufficiently serious threat to the interests of society. In reaching that conclusion, I conclude that despite my concerns as to his truthfulness, there is no genuine in the sense of real risk that the appellant is a threat to any of the issues set out in Schedule 1, Paragraph 7, or otherwise. While he may have done so in the past, there is simply insufficient evidence that he now presents such a threat, given the lack of evidence of criminal behaviour. The appellant's conduct may cause offence in that he has through failing to tell the truth about his identity, managed to avoid deportation and has undermined both immigration control and has also sought to undermine the integrity of the criminal justice system. I accept,

nonetheless, that those activities took place some time ago and there has been no repeat offending. Whether or not the appellant could now be prosecuted for his actions and deception during the criminal proceedings is not a matter for me.

37. Further, and in the alternative, I am not satisfied that his deportation is proportionate. In doing so I take into account the provisions of Schedule 1 of the 2016 Regulations which at paragraph 5 provides as follows:-

> "The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate."

38. In assessing proportionality, I bear in mind that there are a number of serious factors which add weight to the public interest in this case. First there is the persistence in the conduct referred to above which included maintaining a false identity through court proceedings. He failed to tell the truth about his identity, managed to avoid deportation, undermined immigration control and the integrity of the criminal justice system. I accept, nonetheless, that those activities took place some time ago and there has been no repeat offending.

39. I accept that the appellant has a family life with his current wife and their two children; he also has a family life with his son from a previous relationship. Those are significant ties to the United Kingdom and there is no indication that he will be able to maintain those ties were he to leave.

40. Of particular and significant importance of the facts of this case is the position of his older daughter. As noted by Judge Hussain she has a significant and serious hearing problem such that she is now effectively deaf. She requires intensive specialised learning and she has been brought up in an English language medium. There is nothing to suggest that she is being taught in anything other than an English environment and will be taught, if appropriate, to lip read in English and to use British sign language. The material before me suggests this is intensive therapy which will need to continue for a number of years and is integral to her ability to function fully as a member of society.

41. There would be inevitably a significant and serious disruption to that progress were she to live in France. I accept that she does not speak French and she would, assuming that an appropriate school were found for her in France, face the difficulty of not being dead but having no knowledge of French. I accept that she would fact significant as a result and that any progress she had made in lip reading would be as to nothing and she would have to learn French sign language from scratch.

42. In addition, the child would be taken away from her normal surroundings and it needs to be borne in mind that she is a British citizen.

43. I have no doubt the effects on the child would, in the particular circumstances of this case and the sensitive stage of her education upon which she has just embarked, be harsh. She could not be expected to leave the United Kingdom to live in France; that would simply not be in her best interests and indeed would be highly detrimental to them. Equally, were she to remain in the United Kingdom and be separated from her father, it is difficult to see how any meaningful relationship could be continued given her disability. I accept the evidence that in her circumstances and in light of the nature of her disability, being hugged and tactile contact with her father as part of their relationship is of significantly greater importance.

44. Taking all of these factors into account and bearing in mind fully the weight to be attached to the factors as set out in Schedule 1, I found that on the particular facts of this case, in particular on the relationship with his daughter, that deportation would not be proportionate and I therefore allow the appeal albeit with reasons different from that reached by the First-tier Tribunal.

Summary of Conclusions

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the decision by allowing the appeal under the Immigration (European Economic Area) Regulations 2016

Signed Date 7 December 2018

Upper Tribunal Judge Rintoul