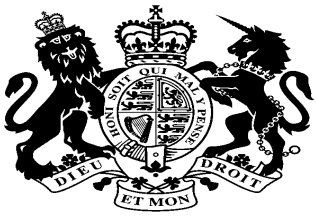

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00743/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 October 2018	**On 13 December 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

PAULO JORGE BARBOSA FERNANDES
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms A Nizami, Counsel instructed by Turpin and Miller LLP solicitors
For the respondent: Mr D Clarke, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 7 December 2017 to make a deportation order against him pursuant to Regulation 23(6)(b) with Regulation 27 of the Immigration (European Economic Area) Regulations 2016. The appellant is a citizen of Portugal.

Background

2. The appellant has been in the United Kingdom since approximately May 2000. He has a history of offending, having been convicted on 7 February 2006 of driving a motor vehicle with excess alcohol (fined and disqualified from driving for 12 months, licence endorsed); on 29 April 2009, on 7 counts of supplying a controlled drug, for which on 11 September 2009 he was sentenced to 2½ years' imprisonment; on 1 June 2011, for common assault (56 days' imprisonment and a restraining order to protect the victim); and on 23 April 2015, for conspiracy to possess a class A drug (heroin) with intent to supply, for which on 1 June 2015 he was sentenced to 5 years' imprisonment and a victim surcharge.

3. At an appeal hearing in November 2010, the immigration judge was satisfied that the appellant had acquired a permanent right of residence in the United Kingdom under Regulation 15 of the Immigration (European Economic Area) Regulations 2006.

4. The respondent in his refusal letter in 2017 did not accept that the appellant had continued to reside and exercise Treaty rights thereafter and considered, therefore, that the appellant might have lost his permanent residence entitlement. The appellant was not, in any event, entitled to the highest level of protection because he could not show 10 years' lawful residence before his imprisonment for the index offence on 1 June 2015.

5. The appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

6. The First-tier Judge noted that the appellant had been warned of the risk of deportation if he continued to offend after his 2010 appeal, but had nevertheless continued to do so, committing an assault against his former partner, and further heroin dealing offences, from which he would have had significant profit as well as paying for his own supply.

7. The First-tier Judge noted that the appellant claimed to have been in the United Kingdom for 16 years and was now 42 years old. He accepted that the appellant had been working in the United Kingdom and exercising Treaty rights here, but that he was estranged from both his former partner and his wife. He had four children with his ex-partner, but had no direct contact with any of them: he had only indirect contact with his two younger children, who lived with their maternal grandmother. His ex-partner had moved away and the appellant had no contact at all with his older two daughters, who were teenagers.

8. The appellant had a heroin habit but was trying to break it. The Judge accepted that at the date of hearing he was drug free but that, having regard to the lengthy periods he had spent in prison, his integration was 'severely detracted from', particularly in the light of his drug dealing. Any interference with the appellant's rehabilitation by removal to Portugal, which he had last visited in 2005/2006, would be justified.

9. The Judge noted that the index offence attracted a sentence of more than 4 years and that applying section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) the appellant therefore needed to show very compelling circumstances over and above those set out in Exceptions 1 and 2 in that section. Exception 1 did not apply, as the appellant was neither socially nor culturally integrated in the United Kingdom and nothing in the grounds of appeal reached the level of very compelling circumstances over and above the Exceptions.

10. The Judge accepted that the appellant had family life with his two younger children, but by way of indirect contact, which could continue when he returned to Portugal. The appellant's removal would not be disproportionate and the appeal was dismissed.

11. The appellant appealed to the Upper Tribunal.

Permission to appeal

12. Permission to appeal was granted on all the grounds advanced, as follows:

> "2. The grounds argue that the Judge erred as follows: Ground 1 at [9] of his decision, in his assessment of risk with reference to the OASys report; Ground 2, in his interpretation of the Judge's sentencing remarks; Ground 3, in his assessment of the question whether the appellant poses 'a genuine, present and sufficiently serious threat' to one of the fundamental interests of society; ground 4, in his assessment of Article 8 ECHR, in terms of the appellant's prospective contact with his children. …"

Rule 24 Reply

13. There was no Rule 24 Reply for the respondent.

14. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

15. In oral argument, Ms Nizami repeated the contents of the grounds of appeal. She contended that the OASys report was nuanced and balanced and that the First-tier Judge had not given it sufficient weight. The author of the report was a probation officer who knew the appellant well and was in a position to give a view on his risk profile.

16. Ms Nizami reminded us that the First-tier Judge had found that this appellant had achieved a permanent right of residence before the 2009 sentencing remarks and contended that the Judge should have found that the appellant did not present a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom. The Judge's reasons at [11] were inadequate.

17. Ms Nizami accepted that the appellant had no direct contact with any of his four children and confirmed that no contact proceedings had been issued in relation to that situation. The appellant hoped to pay for legal advice once he was permitted to work again, and in the meantime, there was evidence that his eldest daughter, now age 16,

was seeking to resume contact via Facebook. She relied on *Razgar v Secretary of State for the Home Department* [2004] UKHL 27 at [53] and argued that in certain situations, the state had an obligation to take positive steps to encourage family life.

18. Ms Nizami argued that the appellant had demonstrated a material error of law and the decision should be set aside for remaking in due course.

19. For the respondent, Mr Clarke noted that at [9] of the First-tier Judge's decision, he had gone way beyond reliance on the OASys report. He had taken account of the sentencing remarks, of the fact that the appellant was selling drugs not only to fund his own habit but for significant profit, that he had committed further offences after 2009, that he had been treated as a category 3 significant drug dealer and that he had never admitted the offence. The First-tier Judge had been entitled to take account of the seriousness of the conduct relied upon and of the burgeoning pattern of offending mentioned at page 18 of the OASys report.

20. The First-tier Judge correctly treated the 2010 decision as the *Devaseelan* starting point for his decision, noting that the appellant had continued to use heroin and to profit from his drug dealing activities, as well as paying for his own supply. The First-tier Judge found that the situation had become more serious since that conviction, which was open to him on the facts.

21. As regards the Article 8 ECHR claim, that was misconceived: the appellant was a foreign national offender whose offending attracted a 5-year sentence and there was a public interest in deporting him. Removal was not unduly harsh: the family life on which the appellant sought to rely was presently only indirect contact with his two younger children, which could be maintained from Portugal. The appellant had not shown very compelling circumstances over and above exceptions 1 and 2 in section 117C and putative future family life was not capable of meeting that test.

22. The decision of the First-tier Tribunal should be upheld.

Analysis

23. This appellant is a foreign criminal as defined by section 32 of the UK Borders Act 2007. In EEA terms, he is a 'medium' offender, as set out in Regulation 27(3) of the 2016 EEA Regulations. It is not suggested that the higher 'imperative' grounds test applies to him. Contrary to the position taken by the respondent in his refusal letter, the First-tier Judge accepted that the appellant had established a permanent right of residence before his imprisonment and not lost it subsequently.

24. The respondent may not remove the appellant under Regulation 23(6)(b) except on serious grounds of public policy and public security and only then, pursuant to Regulation 27(5), if the decision is proportionate and his personal conduct represents a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent'.

25. In this case, the appellant is a recidivist dealer in heroin, for profit as well as his own use, who for the moment appears not to be using the drug. There is still a restraining order in place and he has no partner nor any direct contact with any of his children in the United Kingdom.

26. The appellant in his grounds of appeal argued that it was not open to the First-tier Judge to find that there was a significant increase in seriousness in his conduct and behaviour, because the sentencing judge said in 2015 that the offence committed was exactly the same as in 2009. However, the sentencing judge in 2015 clearly viewed the second offence more seriously, sentencing him to 5 years imprisonment, not 2½ as in 2009. The OASys report was broadly supportive of the appellant but the weight to be given to evidence is a matter for the First-tier Tribunal as the fact-finding Tribunal. In this appeal, we are satisfied that the First-tier Judge gave appropriate weight to all the evidence before him and was entitled to reach the factual conclusions he did, including the weight he placed on the OASys report. It cannot be said that he overlooked that report.

27. The First-tier Judge gave adequate reasons for regarding the appellant's conduct as having increased in seriousness between 2009 and 2015. Despite warnings that if he reoffended he faced deportation, the appellant had continued not just to use heroin but to deal it for profit.

28. The First-tier Judge was entitled to find that the appellant presented a 'genuine present and sufficiently serious threat' to the fundamental interests of the United Kingdom. As stated by the sentencing Judge, dealers in heroin cause grave harm to society and to individuals. The appellant has twice been found to be such a person and has only recently attempted to give up his habit, while in prison. The question of rehabilitation is not determinative in this appeal as the appellant is not fully integrated, despite having acquired a permanent right of residence (see *MC* (Essa principles recast) [2015] UKUT 520 (IAC) and *Secretary of State for the Home Department v Dumliauskas & Ors* [2015] EWCA Civ 145). Treatment for his problems would also be available in Portugal, if required.

29. There remains the question of Section 117C of the 2002 Act and the statutory presumptions therein. The appellant is a foreign criminal and section 117C of the 2002 Act was applicable to him. Section 117C(1) states that the deportation of foreign criminals is in the public interest.

30. Section 117C, so far as relevant, is as follows:

> **"117C Article 8: additional considerations in cases involving foreign criminals**
> (1) The deportation of foreign criminals is in the public interest.
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal. …
> (3) Exception 1 applies where—
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
> (b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2. …"

31. The appellant cannot bring himself within Exception 1. He lived in Portugal until 16 years ago and he is only 42 now. He has not lived in the United Kingdom for 'most of his life'. There is no challenge in the grounds of appeal to the First-tier Judge's finding that he had not shown 'very significant obstacles' to his reintegration into Portugal, nor that he was not fully integrated here, given his imprisonments and his heroin habit.

32. As regards Exception 2, whilst the First-tier Judge accepted that there was family life, albeit indirect, between the appellant and his younger two children, there was no evidence whatsoever to indicate that the effect of his removal on those children, or any of his children, would be unduly harsh.

33. The First-tier Judge was fully entitled to find, on the evidence, that the appellant remained a genuine, present and sufficiently serious threat. Section 117C does not avail him since he cannot bring himself within either of the Exceptions therein nor has he demonstrated, as section 117C(6) requires, that there are very exceptional circumstances over and above those described in the Exceptions. I therefore dismiss this appeal and uphold the decision of the First-tier Tribunal.

DECISION

34. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Date: 7 December 2018 Signed *Judith AJC Gleeson*

Upper Tribunal Judge Gleeson