



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00246/2018

THE IMMIGRATION ACTS

Heard at Field House
On 8 October 2019

Decision & Reasons Promulgated
On 17 October 2019

Before

THE HONOURABLE MR JUSTICE WARBY
UPPER TRIBUNAL JUDGE CANAVAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOAO PAULO MONTEIRA FERREIRA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms S. Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr D. Lemer, instructed by Duncan Lewis

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal ("FtT"), in a case of removal pursuant to the Immigration (European Economic Area) Regulations 2016 ("the Regulations"). The appeal is brought with the permission of the Upper Tribunal. The respondent, ("Mr Ferreira"), is a citizen of Portugal, born on 2 November 1962.

2. On 8 March 2018, the Secretary of State decided to remove Mr Ferreira from the UK on grounds of public policy (“the Decision”). Mr Ferreira challenged the Decision by way of an appeal to the First-tier Tribunal. His case was that the Decision was not in accordance with the regulation 27 and Schedule 1 of the Regulations, and/or that it was incompatible with his rights under Articles 3 and 8 of the Convention, and thus unlawful by reason of s 6 of the Human Rights Act 1998.
3. By a decision and reasons promulgated on 25 March 2019, the FtT (Judge O’Keefe) allowed the appeal, holding that the Decision was not in accordance with the Regulations. The judge did not need to, and did not, consider the Convention grounds.
4. The Secretary of State appealed, with the permission of the Upper Tribunal. In summary, the grounds of appeal were that the judge failed to apply or misapplied the Regulations and binding precedent, reaching findings of fact which were not open to her, and provided insufficient reasons for her proportionality assessment. We heard the appeal on 8 October 2019. At the end of the hearing we announced our decision to dismiss the appeal, for reasons to be given later. This is the formal decision and our reasons for it.

Factual background

5. The key factual background is relatively straightforward, and was not contentious before us. It is set out in detail in the decision of the judge, from paragraph [22] onwards, where the judge sets out her findings of fact. We can outline it shortly.
6. Mr Ferreira came to the UK in 1991 and, apart from visits to Portugal from time to time, he has resided here since then. He has a long-term drug addiction. Between 1994 and the date of the hearing below, he accumulated 58 convictions for 121 offences, including 99 convictions for shoplifting. These offences were mostly low-level thefts from supermarkets, carried out to fund his addiction to Class A drugs. The judge found that all of the offending was “directly related to his long-standing addiction to heroin.” The judge also found that whilst Mr Ferreira’s record showed that he had offended almost every year since 1994, there had been no convictions between March 2013 and December 2016, and the most recent conviction was in December 2017.
7. Before the judge, Mr Ferreira sought to dispute or play down his offending to some extent, whilst at the same time expressing remorse and shame. The judge rejected his attempts to dispute his guilt of some of the offences, and found that he did himself no favours by this contradictory stance. She found, however, that there was a wealth of evidence that he was now seeking “professional and targeted support” to deal with his addiction.
8. He had completed a six-week course with Mind, and engaged with a local Wellbeing Centre. The offender manager assigned to Mr Ferreira following his most recent custodial sentence reported that he had attended most of his appointments, and had engaged with offender management. His engagement with treatment was, found the

judge, a factor in the reduction in the rate of his offending. He had been drug-free since his release from custody, save for one “relapse”, unaccompanied by further offending. Since 29 January 2019 he had been screened weekly, and found to be drug-free.

9. In late 2013, Mr Ferreira met Emma Mitchell, a British national, with whom he established a relationship. They became a couple in 2014. There had been a break in their relationship, and at one time they had lived separately, and they seem to have had differing views as to whether they were or were not engaged to be married. But the judge, having considered the evidence about this relationship, found, contrary to the case of the Secretary of State, that this was a genuine and subsisting relationship. This was supported by a report from an independent social worker, indicating that the couple lived together in Folkestone. It was, she found “clear ... that this relationship has had an impact on the appellant’s offending behaviour although not stopped it entirely.”

The Law

10. Regulation 27 of the Regulations provides, so far as relevant:

27. – Decisions taken on grounds of public policy, public security and public health

(1) In this regulation, a “*relevant decision*” means an EEA decision taken on the grounds of public policy, public security or public health.

(2) ...

(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 a right of permanent residence under regulation 15 and who 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 1989².

(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 or public 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 must represent 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;

(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.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

...

(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.).

11. Schedule 1 contains the following relevant provisions:

"3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

(a) the commission of a criminal offence;

(b) an act otherwise affecting the fundamental interests of society;

(c) the EEA national or family member of an EEA national was in custody."

5. 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.

...

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

...

(c) preventing social harm;

...

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

...

(j) protecting the public; ...”

The Decision

12. The Secretary of State noted that Mr Ferreira had not demonstrated that he had been residing in the UK in accordance with the Regulations, and that he had not acquired a permanent right of residence. Consideration had therefore been given to whether his deportation was justified on grounds of public policy or public security. The evidence was found to demonstrate a propensity to offend, such that Mr Ferreira represented a genuine, present and sufficiently serious threat to the public to justify deportation. The language is that of Regulation 27(5)(c).
13. The decision letter went on to consider the principle of proportionality (Regulation 27(5)(a)). It reviewed Mr Ferreira’s offending history, the extent to which he had demonstrated respect for the law, remorse, and progress towards rehabilitation. The letter considered his age, his health - including his drug use and his mental health - and his connections with Portugal, before concluding that his deportation was proportionate and in the public interest.

The decision of the FtT judge

14. The judge recorded that it was common ground before her that Mr Ferreira did not qualify for the higher levels of protection against deportation enshrined in Regulations 27(2) and (3). His entitlement was to the lesser protection conferred by Regulation 27(5) in combination with Schedule 1, which has been described as “the basic level” of protection.
15. Unsurprisingly, the judge had no hesitation in concluding that Mr Ferreira was a persistent offender, within paragraph 3 of Schedule 1: [31]. She was also satisfied that his personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. She identified in particular, the fundamental interest specified in Schedule 1, para 7(f). Mr Ferreira has not sought to challenge those conclusions. The issue, therefore, is whether the judge was wrong to allow the appeal, as she did, on the issue of proportionality.

16. The judge's reasoning on that issue was detailed, but can be summarised as follows. Mr Ferreira was 56. He was born in Portugal and lived there until 1991, and speaks Portuguese. His mother lives in Portugal, but is in a care home due to dementia. He has a daughter in Portugal, with whom (contrary to his own account) he had been in contact to some extent. On the other hand, he has been here since 1991, and is in a genuine and subsisting relationship with a British national, with whom he is living. He was reliant on benefits and his partner's income, but looking for employment. There was much evidence to show links to the community in Folkestone, including a petition signed by almost 500 people, opposing his deportation. That said, Mr Ferreira had been offending for most of his long residence in the UK. The Regulation required little weight to be given to integration achieved during a period of offending. There had however been times, including the period since 2017, when no offending had occurred, to which some weight could be given. In addition, although his criminal activity was prolific, no single crime could be considered particularly serious; his record was one of acquisitive crime; he showed no propensity to commit violent or public order offences.
17. The judge referred to the medical and other evidence about the appellant's health, and the practical support given to him by Ms Barlett. He had chronic physical health conditions which limited his mobility. His condition was progressive and likely to deteriorate. Ms Bartlett provided support and a high level of care in the community. The judge accepted that without that support he was likely to lose motivation and experience debilitating loneliness, and to fail to engage with the medical and therapeutic supports he required to maintain his physical and mental health.
18. The judge considered the evidence relating to the prospects of integration in Portugal. There was evidence from a Chartered Clinical Psychologist, Roy Shuttleworth, that the outcome of deportation to Portugal "could be quite catastrophic" for Mr Ferreira's physical and mental health. His mental state would make it very difficult for him to provide adequately for his day to day existence. Maintenance of his current regime of treatments was crucial to his physical and mental health. Significant changes would "hasten his deterioration and reduce his life expectancy ...". The judge's conclusion was that the evidence demonstrated that Mr Ferreira was suffering from mental and physical ill health for which he would require ongoing treatment. Deporting him to Portugal would have a significant adverse effect on both aspects of his health.
19. A material issue, therefore, was the prospect of rehabilitation, an issue considered by this Tribunal in *Essa*. The judge's approach to the issue was to direct herself by reference to this Tribunal's decision in *MC (Essa Principles Recast) Portugal* [2015] UKUT 00520 (IAC), which summarised the law in the light of the decision in *SSHD v Dumliauskas* [2015] EWCA Civ 145. She found as facts that:-
 - (1) The risk was that the appellant would continue to offend if he continued to misuse drugs, in order to feed his habit. But he would be "highly unlikely to reoffend if he was able to remain drug free". He had engaged with local services successfully, bar a brief relapse which did not lead to reoffending [44], [48].

- (2) There was a reasonable prospect of rehabilitation in the UK; the reduction in his offending behaviour “can be linked to his engagement with treatment and the positive influence of” Ms Bartlett [45]; her role in ensuring he continued to take his medication and attended appointments was crucial [46].
- (3) His prospects of continued rehabilitation in Portugal were “considerably lower than they are in the UK”; he had forged links with relevant drug and alcohol services and other health care professionals here; there was no evidence to suggest that Mr Ferreira’s daughter would be willing or able to take on the role adopted by Ms Bartlett in the UK [46]; there was a risk that he would not engage with the facilities available in Portugal without the support he has in the UK: [49].
- (4) There was a very real risk to his mental and physical health, given the risk that he would fail to engage promptly with the appropriate services in Portugal: [51].
20. Summarising (at [50-51]) her chief conclusions, the judge gave “some weight” to Mr Ferreira’s integration into the UK and “some weight” to the better prospects of rehabilitation in the UK; she gave “substantial weight” to his health problems and the risk of harm to his health attendant on deportation. She took account of his links to Portugal, but noted that they were limited. She took into account the strength of the relationship with Ms Mitchell and the support she provided to Mr Ferreira. Overall, she concluded that deportation would be disproportionate, and hence not in accordance with the Regulations

The appeal

21. Ms Cunha did not press the written grounds, which asserted a failure to consider factors specified in Schedule 1. Rightly so, in our judgment. The judge made clear reference to Schedule 1, and we are in no doubt that she gave consideration to all the listed factors, in so far as they are material to this case.
22. Ms Cunha did seek to persuade us that the judge had made one or more errors of law in her approach to the question of proportionality and, in particular, the application of the *Essa* principles. The judge had accepted that Mr Ferreira’s continuing presence in the UK represented a threat to society. Rehabilitation, on the authorities, is an issue to be given little weight in a case concerning someone with no right to reside in the UK. The judge had given the matter undue weight. In Mr Ferreira’s case, there was no evidence the he had in fact rehabilitated, nor was there any evidence that there was a “reasonable prospect” of rehabilitation which might limit his risk to society in the UK. Ms Cunha argued that there had been a one-sided approach to the assessment of the prospects of rehabilitation. She further submitted that the judge had failed to ask herself a key question: what were the prospects of Ms Bartlett continuing to provide the support which the judge considered so crucial, given the differing views of the couple as to whether or not they were engaged? The reality was that the highest it could be put was that there was a possibility of rehabilitation.
23. The Tribunal queried whether some of these points could fairly and properly be advanced. In paragraph [44] of her decision the judge set out in full the headnote to *MC (Essa Principles Recast) Portugal*, including paragraph 5, which reads, “Reference

to prospects of rehabilitation concerns reasonable prospects of a person ceasing to commit crime ... not the mere possibility of rehabilitation.” In paragraph [45], the judge found in terms that there were “reasonable prospects” of rehabilitation. It also seemed to us difficult to maintain that the judge had given undue weight to the prospects of rehabilitation, when she twice reminded herself of what the *Essa* principles say about the weight that should be given to the matter. Pressed by the Tribunal to encapsulate the Secretary of State’s grounds of appeal, Ms Cunha confirmed that she was not seeking to suggest that these passages amounted to nothing more than lip service. Her central contention was that the judge’s decision on this aspect of the case was *Wednesbury* irrational.

Our assessment

24. The issue before the FtT was whether the decision was proportionate to the public interest aim pursued, having regard to the appellant’s health, family and economic situation, his length of residence in the UK, his social and cultural integration here, and the extent of his links abroad, as well as the public interest factors specified in Schedule 1 to the Regulations. The judge was required to make an evaluative judgment, that took account of all the material facts. This Tribunal would not interfere with such an assessment, unless the appellant in this Tribunal was able to show that the decision was infected by an error of law.
25. We see no merit in the criticisms contained in the grounds of appeal, and initially advanced in argument by Ms Cunha, that the judge failed to have regard to the factors listed in Schedule 1 to the Regulations, or failed to apply the relevant authorities. As we have indicated, the decision of Judge O’Keefe expressly cites the legal materials to which she is alleged to have failed to have regard, identifies the appropriate tests, and expressly applies them.
26. A suggestion was made in the grounds and skeleton argument for the Secretary of State, that there was a conflict or inconsistency between (1) the judge’s acceptance that Mr Ferreira represents a present threat to society and (2) her findings in relation to rehabilitation. This is a false dichotomy. The first issue concerns the situation as it stands at the time of the Tribunal’s decision, and is concerned with the risk that something may happen in the future. The second issue is what may come to pass in the future, and the degree of likelihood of it happening; the question, to be precise, is whether the “prospects” of rehabilitation are reasonable. The fact that Mr Ferreira could not demonstrate that he was already rehabilitated was relevant, but could not properly be viewed as determinative of what might reasonably be expected in the future.
27. The grounds of appeal, and to some extent Ms Cunha’s submissions to us, criticised Judge O’Keefe for allegedly overlooking material facts, or failing to make findings, or providing an insufficiently reasoned decision. We see no merit in any of those criticisms. The grounds complain, for example, that the judge made no finding as to the likelihood of Mr Ferreira’s rehabilitation if Ms Barrett travelled to Portugal with him, if he was deported. But, as the judge recorded at [16], Mr Ferreira’s case was

that he could not expect her to do this, her whole life being in the UK. We see no sign that this was challenged on behalf of the Secretary of State.

28. In our judgment, Mr Lemer was right to submit that the Secretary of State comes nowhere near making out a case of irrationality. The judge identified the applicable principles, reviewed the relevant evidence, made findings of fact which were open to her on that evidence, and arrived at an assessment of proportionality which cannot be impugned as irrational.
29. The reality is that this appeal is borne of little if anything more than disagreement with the decision of the FtT judge. That decision was one which the judge was entitled to reach on the evidence before her. The Secretary of State has failed to establish any of the errors of law which have been alleged, and the decision of the FtT must stand.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

Signed *Mark Warby* Date 16 October 2019
The Hon Mr Justice Warby, sitting as an Upper Tribunal Judge