Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00143/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 March 2020	**On 27 April 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

OLSEN MIGUEL JOAO FILIPE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K. Wass, Counsel, instructed by McCormacks Law
For the Respondent: Mr N. Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by OF, a citizen of Portugal born on 19 August 1992, against a decision of the Secretary of State dated 28 February 2019 to deport him to Portugal pursuant to regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The Secretary of State's decision, and the reasons for it, are set out in a reasons for refusal letter of the same date ("the RFRL"). The essential issue for my consideration is whether the appellant's deportation to Portugal would be consistent with the United Kingdom's obligations under the EU

Treaties, as set out in the 2016 Regulations. He claims to enjoy the highest level of protection from deportation under the 2016 Regulations, namely that he may only be removed on "imperative grounds of public security", that he does not represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society", and that his deportation would be disproportionate, in light of his claimed reformation, and the family life he enjoys in this country with his fiancée, children and step-children.

Procedural background

2. In a decision and reasons promulgated on 8 January 2020, a panel of the Upper Tribunal (Mr Justice Goss, sitting as a Judge of the Upper Tribunal, Upper Tribunal Judge Stephen Smith) found that a decision of the First-tier Tribunal (Judge P Hollingworth) allowing the appellant's appeal against the Secretary of State's deportation decision involved the making of an error of law, and set it aside to be remade in this tribunal, with no findings of fact preserved. It was in those circumstances that the matter came before me, sitting alone.

3. The decision of the Upper Tribunal setting Judge Hollingworth's decision aside may be found in the **Annex** to this decision.

Factual background

4. The appellant claims to have entered the United Kingdom in July 2004, when he was around 11 years old. The Secretary of State decided to pursue the appellant's deportation in light of his conviction, following a trial, for robbery and the possession of an offensive weapon in a public place, on 15 September 2017 before the Crown Court at Snaresbrook. For that offence, the appellant was sentenced to four years' imprisonment. He is still serving that sentence, albeit the non-custodial element of it. I will return to the details of the offence in more detail shortly, but in summary the appellant was convicted of having robbed a taxi driver at knifepoint for a small amount of money. I refer to this offence as "the index offence".

5. The appellant denied responsibility for the offence at the time, and maintains his denial before me, contending that he was wrongly convicted. He applied for leave to appeal against his conviction to the Court of Appeal (Criminal Division), but leave was refused by the single judge. He did not seek to renew his application for leave to appeal before the full court.

6. Given the nature of the findings I will have to make concerning the appellant's integration in the United Kingdom, it is necessary to set out his offending history at some length.

    a. In March 2009, aged 16, the appellant was convicted in the Youth Court of theft, and sentenced to a three month referral order.

    b. In July 2010, the appellant was convicted before the Youth Court of battery, and sentenced to a youth rehabilitation order, active until January 2011, with a supervision requirement and a curfew requirement for four months. The

appellant was also made subject to a restraining order prohibiting him from engaging in harassment.

c. In July 2013, at the North East London Magistrates' Court, the appellant was convicted of possession of a class B controlled drug (cannabis/cannabis resin). The drugs were forfeited and destroyed, and the appellant was fined £73.

d. In December 2013, before the North East London Magistrates' Court, the appellant was convicted of a single charge of the possession of a prohibited weapon (a weapon for the discharge of a noxious liquid or gas etc.) and a single charge of using a vehicle while uninsured. He was subject to a 12 month community order with an unpaid work requirement and disqualified from driving.

e. In July 2014, at the North East London Magistrates' Court, the appellant was convicted of failing to comply with a community order; the original order was continued, and the appellant was subject to an additional unpaid work requirement consecutive to those previously imposed.

f. In April 2015, the appellant was convicted before the North East London Magistrates' Court of the possession of an offensive weapon in a public place and sentenced to 12 weeks' imprisonment, wholly suspended for 12 months, and an unpaid work requirement.

g. In October 2015, before North East London Magistrates' Court, the appellant was convicted of the possession of a controlled drug of class B (cannabis/cannabis resin). He was fined £295.

h. On 22 December 2015, before North East London Magistrates' Court, the appellant was convicted of the possession of a controlled drug of class B (cannabis/cannabis resin). He was fined £80.

i. On 27 July 2016, before the Crown Court at Snaresbrook, the appellant pleaded guilty to the possession of a controlled drug of class B (cannabis/cannabis resin). He was sentenced to 7 days' imprisonment.

j. On 15 August 2016, before the Crown Court at Snaresbrook, the appellant pleaded guilty to the possession of a controlled drug of class A (cocaine). He was sentenced to seven days' imprisonment.

k. On 26 August 2016, before the North East London Magistrates' Court, the appellant was convicted of a single charge of causing the use of an uninsured vehicle and a single charge of using threatening, abusive or insulting words or behaviour with intent to cause fear or provocation of violence. For this offence, he was ordered to pay total fines of £300, and had his driving licence endorsed.

7. Although the RFRL rejected the representations made by the appellant that he enjoyed the right of permanent residence under the 2016 Regulations, Mr Bramble indicated that the Secretary of State now accepts that the appellant enjoys the right of permanent residence. She respondent does not accept, however, the appellant's case that he enjoys protection from removal pursuant to the "imperative grounds" threshold.

Legal framework

8. Regulation 3 of the 2016 Regulations deals with continuity of residence:

> **"3.- Continuity of residence**
>
> (1) This regulation applies for the purpose of calculating periods of continuous residence in the United Kingdom under these Regulations.
>
> (2) Continuity of residence is not affected by—
>
> (a) periods of absence from the United Kingdom which do not exceed six months in total in any year;
>
> (b) periods of absence from the United Kingdom on compulsory military service; or
>
> (c) one absence from the United Kingdom not exceeding twelve months for an important reason such as pregnancy and childbirth, serious illness, study or vocational training or an overseas posting.
>
> (3) Continuity of residence is broken when—
>
> (a) a person serves a sentence of imprisonment;
>
> (b) a deportation or exclusion order is made in relation to a person; or
>
> (c) a person is removed from the United Kingdom under these Regulations.
>
> (4) Paragraph (3)(a) applies, in principle, to an EEA national who has resided in the United Kingdom for at least ten years, but it does not apply where the Secretary of State considers that—
>
> (a) prior to serving a sentence of imprisonment, the EEA national had forged integrating links with the United Kingdom;
>
> (b) the effect of the sentence of imprisonment was not such as to break those integrating links; and
>
> (c) taking into account an overall assessment of the EEA national's situation, it would not be appropriate to apply paragraph (3)(a) to the assessment of that EEA national's continuity of residence.

9. Central to this appeal is regulation 27 of the 2016 Regulations which provides:

> **"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) 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 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.)."

10. The relevant considerations listed in schedule 1 to the Regulations include paragraph 1 (the EU Treaties do not impose a uniform scale of values on Member States, who enjoy "considerable discretion" to set their own standards of public policy and security), and the following:

"(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.

(6) For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(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;

(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child) …"

11. In relation to Article 8 of the ECHR, the relevant provisions of the Immigration Rules are contained in Part 13. In addition, Part 5A of the Nationality, Immigration and Asylum Act 2002 features a number of public interest considerations to which I must have regard, in particular section 117C.

12. It is settled law that the best interests of the child are a primary consideration when considering whether removal of an appellant under Article 8 would be proportionate, see ZH (Tanzania) [2011] UKSC 4 and Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 at [10] per Lord Hodge. The same considerations will apply for the purposes of determining

Burden and standard of proof

13. It is common ground that the appellant enjoys the right of permanent residence. It is, therefore, for the respondent to demonstrate that there are serious grounds of public policy or security to remove the appellant from the United Kingdom: Straszewski v Secretary of State for the Home Department [2015] EWCA Civ 1245 at [12].

The hearing

14. The appellant relied on the bundle he prepared for the first-tier tribunal hearing before Judge Hollingworth. In addition, Ms Wass handed up a letter from his probation officer, Ms Diplock, dated 10 March 2020, and correspondence from a cleaning company local to where the appellant now lives dated 6 March 2020, concerning a new role the appellant has recently obtained as a cleaning operative.

15. For the respondent, Mr Bramble relied upon the respondent's bundle from before the First-tier Tribunal.

16. At the hearing, the appellant, his mother, CM, and his partner, DS, gave evidence and adopted their statements. I permitted Ms Wass to ask a number of additional questions during evidence in chief, primarily to ensure that I had the most up-to-date and accurate evidence from all three witnesses. A full record of the witnesses' evidence may be found in my Record of Proceedings and, of course, the hearing was audio recorded. I do not propose to recite their evidence in full but will outline the salient elements of it to the extent necessary to give reasons for my findings.

17. The day after the hearing, Ms Wass sent the following message to the tribunal for my attention, which I took into account when considering my findings:

> "It came to my attention after the hearing that a submission which I made in respect of the above case (Mr Filipe) was unintentionally incorrect. Unfortunately as Mr Bramble had left the building I was unable to ask for the Tribunal to resume so I could correct matters. I have therefore copied the Presenting Officers Unit in on this email so that all parties are made aware.
>
> During the course of the hearing [I] was asked a question by yourself in respect of 2 7 day prison sentences received by the Appellant in 2016 and [I] made brief submissions in response as to their ability to break continuity. I was reminded by the Appellant after the hearing that he had not in fact served two separate custodial sentences for this matter. During the period of these two sentences he was on remand for an unrelated matter. He was therefore not at liberty at any stage during this period. Therefore my submission made in court may have been misleading and should corrected. I apologise for this error."

18. I reached the following findings in light of my consideration of the evidence in the case in the round, in light of all the submissions made.

Findings

Best interests of the children

19. The first issue for my consideration is to make findings of fact concerning the best interests of the children involved. The appellant has been in a relationship with DS since before he was imprisoned for the index offence. They are engaged to be married and have a daughter together, AF, born on 5 August 2017. They now live together in Essex, away from east London where the appellant lived with his mother, and where most of his offending took place. DS has two children from another relationship who live with them, born in November 2006 and December 2008. The appellant and DS describe the appellant as the step-father of these children. In addition, the appellant has a son from a previous relationship, DM, born in November 2010.

20. In the RFRL, the respondent contended that the appellant could not enjoy a genuine and subsisting relationship with any of the children in his life, as he was in prison at the time. In relation to AF, she was born only very shortly before he began serving his sentence of imprisonment, considered the respondent, and, as such, a relationship with her was not possible.

21. Having had the benefit of the updated oral evidence of both the appellant and DS, and the appellant's mother, I have reached a different view. In his evidence in chief, the appellant described the sense of purpose he has achieved following his release from custody while living with and looking after his daughter. The appellant was present at the birth and spent approximately six weeks with her prior to being imprisoned, and she was taken to visit him in prison by DS, initially fortnightly, and latterly weekly. The appellant spoke in detail in his evidence about the role he has assumed in her life following his release. He described how rewarding he finds simple matters such as returning to the family home after being out and being greeted by his young daughter. He described the joy she brings him and the positive outlook on life she helps him to achieve. Under cross-examination, he maintained a consistent approach. The evidence of DS supported the account that he gave; she described the hands-on approach that he takes to bringing up their daughter, for example taking her to the play centre and to school, whereas he would have been unlikely to have done so previously.

22. In relation to DM, the appellant described how his mother brought his son to visit him while he was in prison, and that he maintained his relationship that way. The appellant is not named as a father on DM's birth certificate, but the appellant contended that he has taken a DNA test and is in the process of having the birth certificate amended. The appellant's mother's evidence was that she took DM to see the appellant in prison and spoke in her oral evidence about how the appellant sees DM weekends and during the holidays. The evidence of DS was consistent with this evidence. While I was not presented with any documentary evidence to demonstrate that the appellant is the biological father of DM, I am prepared, for the purposes of

this assessment, to accept that the appellant has a genuine and subsisting relationship with him.

23. The evidence of DS was that, while the appellant was in prison, she struggled to cope as a single mother to three children. Childcare costs were exorbitant, she said, and she had to rely on family for help. It was a very difficult time. She spoke in warm terms of the change in the appellant's attitude to life following his release from custody and his determination to reform his life. She provided a written statement in support of the appeal which is commendable for the detail and clarity with which she writes, first, about the impact of custody on the family, and subsequently (amongst other matters) of the likely impact of the appellant's deportation on the family unit and on the children.

24. I have no hesitation in finding that the appellant is in a genuine and subsisting relationship with AF, with whom he lives, along with her mother, his fiancée, DS, and with DM, with whom he enjoys regular contact. It is in the best interests of AF and DM for the appellant to remain in the United Kingdom. AF will be a British citizen, on account of her mother's nationality, details of which were included in the papers. I was not taken to any documentary evidence concerning DM's nationality, but there is nothing to suggest that he has not resided here all his life. As such, a particular importance attaches to both children's continued residence in this country. The children that DS has from her previous relationship are in contact with their father, who lives here. It would not be possible, and nor does the respondent contend that it should be contemplated, for any of the children to accompany the appellant to Portugal. Their best interests are for them to remain in the United Kingdom.

25. Given the ongoing parental relationship enjoyed by the appellant with AF and DM, it is plainly in their best interests that he remains in this country, in order to continue and develop the parental relationship that he has begun with them.

26. That is the background against which my proportionality assessment must be conducted.

Continuity of residence

27. The appellant contends that he enjoys the benefit of the "imperative grounds" threshold for removal. I disagree, the following reasons.

28. Regulation 3 of the 2016 Regulations makes provision for determining continuity of residence. The general principle, reflected by paragraph (3)(a), is that continuity of residence is broken by a period of imprisonment, but in the case of someone who has "resided in the United Kingdom for at least ten years", where the criteria in regulation 3(4) are met, continuity of residence will not be deemed to have been broken. This reflects the approach of the Court of Justice of the European Union ("CJEU") in the line of authorities established by MG Case C-400/12 and Onuekwere Case C-378/12. As the CJEU noted in B and Vomero Joined Cases C-316/16 and C-424/16, periods of imprisonment "do not automatically entail a discontinuity of that 10-year period" (see [80]); the individual concerned must be "subject to an overall

assessment in order to determine whether or not he can avail [himself] of that enhanced protection" ([81])

"…prior to serving a sentence of imprisonment, the EEA national had forged integrating links with the United Kingdom…"

29. The first criterion in regulation 3(4) is that, prior to the period of imprisonment, the EEA national had forged integrating links with the United Kingdom. Integration "is based not only on territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host Member State" (B and Vomero at [58], quoting Onuekwere at [25], and the caselaw cited).

30. The appellant is able to point to some integrating factors prior to his imprisonment for the index offence. He had spent time at school (and at times could boast an impressive attendance record) and had obtained a number of GCSE qualifications. He is the father to two children, at least one of whom is British, and nothing has been drawn to my attention to any evidence that the other, if not British, has not lived here all his life. The appellant assumed step-father responsibilities in relation to two other children. In her statement, the appellant's mother writes that they would attend church weekly together; a weekly prayer meeting and the main Sunday service. The appellant would be active in helping to lead the prayers, she wrote. He started training with the Princes Trust in 2016 and had a prospective job lined up in 2017 which he could not start due to being imprisoned.

31. Set against that is the considerable offending history of the appellant. I accept that the mere fact that an individual has convictions which led him or her to being subject to a period of imprisonment cannot, in and of itself, be determinative of the absence of integrating links. That would deprive the approach of the CJEU, outlined above, of any useful effect; it would be to pose a question which would admit of only one answer, for the only reason the question of integrating links would arise would be because an offence had been committed. Nevertheless, the appellant's offending history *prior* to his 2017 sentence of four years' imprisonment is a relevant factor when considering the question of integration. He does not face deportation for those offences, but they illuminate his offending.

32. The appellant's offending history demonstrates a worrying crescendo of offending, commencing with lower level offences, at a young age, increasing in seriousness. Reading the appellant's antecedent history, one has a sense of the appellant being given chance after chance after chance by the criminal courts, as demonstrated by the relatively low penalties he received for frequent, serious offences. He was, however, sentenced to a period of suspended imprisonment in April 2015 for the possession of an offensive weapon in public, one of the same offences for which he would later be convicted before the Crown Court. Although that was a suspended sentence of imprisonment, it nevertheless related to conduct which must have passed the custody threshold; it was so serious that only a custodial sentence would suffice. As the evidence of DS made clear, the appellant's commitment to his family was minimal if at all existent *before* his imprisonment. It was his imprisonment that has

led to him manifesting signs of integration and commitment that he did not demonstrate previously.

33. I find that the length and frequency of the appellant's offending history for his pre-index offence offences was such that the appellant cannot claim to have been integrated in the United Kingdom. He had never worked and spent a good deal of his youth committing criminal offences. According to DS, before the appellant was imprisoned, his interest in his parental responsibilities was minimal (although I accept he was present at the birth of his youngest child). The appellant's offending history includes offences of violence, weapons offences, drugs offences and failing to comply with a community order. This is conduct which flies in the face of the fundamental interests of society, as set out in schedule 1 to the 2016 Regulations. Under schedule 1(4), little weight is to be attached to the integration of an EEA national if the alleged integrating links were formed at or around the same time as the commission of a criminal offence. I find that the appellant was not integrated prior to his imprisonment.

"…the effect of the sentence of imprisonment was not such as to break those integrating links…

34. The criteria in regulation 3(4) are cumulative. Only if the appellant met the criterion in sub-paragraph (a) would it be necessary to consider the remaining criteria. There is a degree of artificiality in any attempt to consider whether the appellant's imprisonment for the index offence "was not such as to break those integrating links" as required by regulation 3(4)(b), because I have found that the appellant did not have any integrating links in the first place. Out of an abundance of caution, I have considered the impact of the appellant's imprisonment on this consideration in any event.

35. The appellant was imprisoned for the index offence having denied his guilt, refusing to admit responsibility to the probation officer, and maintaining his denial before me. I accept that the appellant maintained contact with his mother, DS, and his children while imprisoned. I also accept that the experience of imprisonment has resulted in him realising the how much he loves his family, resulting in a new-found commitment to his fiancée, children and stepchildren (which, according to the evidence of DS, he did not have previously). However, he still denies responsibility for the offences for which he was imprisoned. The sentence of imprisonment has not had a rehabilitative effect on his underlying attitude to his offending conduct, which persists to this day, nor on his remorse or rehabilitation.

"…taking into account an overall assessment of the EEA national's situation, it would not be appropriate to apply paragraph (3)(a) to the assessment of that EEA national's continuity of residence…"

36. My overall assessment falls to be conducted in relation to an individual who denies his guilt, and who refuses to accept responsibility for the serious offences for which he was convicted. I accept that there are positive factors which mitigate against removal, such as the appellant's length of residence here, his family situation, and

the fact he has – just – found work. However, bearing in mind the hierarchy of residence rights conferred by the 2016 Regulations, and the corresponding expectation of integration which the authors of the EU regime sought to reflect by each of the tiered levels of protection, I do not consider that it is consistent with that expectation for the appellant to benefit from the highest level of protection. Integration is inconsistent with the appellant's continued denial of the offences of which he has been convicted.

37. I find, therefore, that the appellant enjoys the right of permanent residence (pursuant to Mr Bramble's concession), and that the appellant's prospective removal must be assessed by reference to whether there are "serious grounds of public policy or security".

Serious grounds of public policy or security

38. The appellant was sentenced to four years' imprisonment for a single count of robbery, and to one year's imprisonment for the offensive weapon charge, to run concurrently. According to the remarks of the sentencing judge, the knife used by the appellant in the attack was a hunting knife. He targeted a vulnerable taxi driver, and made untrue allegations concerning the victim's alleged racism towards him at his trial in the Crown Court. The jury must have rejected that aspect of his case by their verdict. The judge described the fear the victim relayed to the court about the experience of being of being attacked, and the threats the appellant had made towards him during the process.

39. I have no hesitation in finding that the index offences provide serious grounds of public security for the deportation of the appellant.

Genuine, present and sufficiently serious threat affecting one of the fundamental interests of society

40. The mere fact that the conduct of the appellant provides "serious grounds" of public security for his removal is, in isolation, an insufficient basis for the appellant to be deported. It is necessary for there to be an ongoing and current threat.

41. Ms Wass submits that the reforming experience of the appellant's imprisonment is such that he is now much less likely to reoffend, if at all. He has moved away from London, and the influence of the peers with whom he was involved in his past offending, and now lives in Essex. There is a degree of merit to these submissions; I have already outlined the positive in fact the appellant's family have had on him following his release. He has begun to take an interest in his children which he did not demonstrate previously, according to the evidence of DS. He has not offended since his release from prison in October 2019. These are significant features in the appellant's favour.

42. Set against those considerations, however, is the reality that the appellant's family responsibilities pre-date his time in prison for the index offences by a considerable margin. Although AF was born after he committed the offences, the appellant's son, DM, was born in 2010. He was also in a relationship with DS at the time he

committed the offences. There is considerable force in the submission of Mr Bramble that the family circumstances of the appellant exerted a minimal restraining influence on him during his escalation into the territory of the serious offences with which I am now concerned. He may well have a genuine desire to reform at the present time; given the factors I outline below, I do not accept that it is a resolve which is resilient or which engages with the underlying causes of his offending.

43. Ms Wass submits that the risk of further offending identified by the two OASyS reports before the tribunal, dated 29 September 2017 and 29 November 2018, demonstrates a downward trajectory of risk. At page 34 of the 2017 report, the appellant was assessed as presenting a "medium" risk of reoffending overall, with a "high" risk of nonviolent reoffending and a "medium" risk of violent offending. In the 2018 report, the risk assessment for both categories was "medium". In that respect, there is some force to the submission of Ms Wass. From 2017 to 2018, the risk of the appellant committing a nonviolent offence was downgraded from "high" to "medium". I bear in mind that the assessment I must perform is an assessment of the position at the date of the hearing before me, and I do not hold against the appellant the fact that there is not an updated OASyS report, which is a matter likely to be out of his hands.

44. The appellant handed up to letters claiming to be from officers at HMP The Mount attesting to his good behaviour in prison and during classes.

45. In his evidence, the appellant explained that, as part of his licence conditions, he will be required to attend a "Thinking Skills Programme". He was unable to obtain a place on the course in custody but will do so before the end of his licence period. The main priority for his probation officer at the moment, he said, was for him to obtain employment. To that end, the appellant ended up a letter from a cleaning company local to where he lives, dated 6 March 2020, with an offer of employment. In his oral evidence, the appellant explained that he had experienced difficulties in securing offers of employment given his offending record. As such, he was pleased to have secured employment with this local company. He also claimed to have had an offer of employment shortly before being imprisoned in 2017 but was unable to take up that role due to his imprisonment.

46. In Ms Diplock's letter, the appellant is described as having "fully engaged" with the probation service. The letter records that he demonstrated enthusiasm and a proactive attitude towards resettling in the community. He applied for a variety of jobs and demonstrated a willingness to work in any sector (the letter predated the appellant's most recent offer of employment). Ms Diplock wrote that the appellant appeared to continue to build a strong relationship with DM, as well as with DS and their children. Ms Diplock said that she did not doubt the appellant's desire to be a positive role model towards his family. He had recently passed his driving test, which demonstrates that he was able to set himself goals and that he had a "good understanding" of the issues identified as being linked to his offending behaviour.

47. The difficulty with the above analysis is that the appellant continues to deny responsibility for the main offences for which he has been convicted. That is identified as a concerning factor in both OASyS reports, as it demonstrates that the appellant does not have any understanding of the underlying conduct of which he stands convicted. It shows no empathy or insight into the harm he has caused. It prevents the appellant from engaging in any meaningful rehabilitation, on the basis that, on his view, there is no need to rehabilitate. Ms Wass realistically did not invite me to purport to be able to go behind the appellant's conviction. He was convicted by a jury following a trial and did not seek to renew his application for leave to appeal against his conviction, as he would have been entitled to, following refusal on the papers by the single judge.

48. The appellant's refusal to take responsibility for his offending conduct means that I am unable to accept the submission of Ms Wass that the trajectory of the appellant's risk of reoffending will have reduced by a significant margin. It is difficult to see how it could do so, given he refuses to accept guilt for the offences of which he has been convicted.

49. Although Ms Diplock writes that she does not doubt the appellant's resolve to be a positive role model for his family, she does not address his risk of reoffending in any detail. In her final paragraph she writes:

> "[The appellant] has recently passed his driving test, which he worked hard towards achieving. He is able to set himself goals demonstrates a good understanding of the issues identified as being linked to his offending behaviour. [The appellant] understands what is required of him to successfully complete his sentence and is aware of the opportunities available for him to utilise during this time also."

50. It is not clear on what basis Ms Diplock is able to state that the appellant "demonstrates a good understanding of the issues identified as being linked to his offending behaviour" given he maintains his denial for the offending behaviour in question. It may be that Ms Diplock is referring to certain other matters identified in the earlier OASyS reports, for example the absence of an identifiable income stream. However, it is difficult to ascribe much weight to the letter from Ms Diplock when assessing the appellant's likelihood of reoffending, given he maintained before me, as he always has done, that he bears no responsibility for the serious offences of violence for which he was sentenced to 4 years' imprisonment. In any event, her letter is silent as to the issue of the risk of future harm posed by the appellant.

51. I also note that paragraph (3) of schedule 1 to the 2016 Regulations states that where an EEA national has received a custodial sentence, the longer the sentence, the greater the likelihood that the individual's continued presence represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. This appellant received a sentence of four years' imprisonment. In isolation, this is not a factor which would count significantly against the appellant; the underlying regime which the 2016 Regulations seek to implement is based on individual assessments, rather than general principles applied in a non-case specific

manner. Nevertheless, when addressing the risk that the appellant is likely to pose, the seriousness of the offence, as indicated by the length of the sentence, is a factor which must be considered, and which I do consider. A sentence of four years' imprisonment is a weighty sentence, for a serious offence.

52. Ms Wass submits that it is to the appellant's credit that he has not sought to feign accepting responsibility. I disagree. He has been convicted of the offence and so can enjoy no "credit" for continuing to deny the offences of which he stands convicted. There is no reward in this tribunal for such attitudes.

53. I find that, given the refusal of the appellant to take responsibility for his serious offending, the continued presence of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I reach this conclusion taking into consideration the fact that the appellant no longer lives in the area of London where his previous offending took place, the fact that he has not committed any offences since 18 October 2019, when he was released from prison, and that he currently has a genuine and heartfelt desire to be a good role model for his family. Those factors are of some merit, but not determinative merit. The appellant presents a risk, partly because he is unable to accept that he has engaged in any conduct which would give rise to the possibility that he presents a risk.

Considerations such as the age, state of health, family and economic situation…

54. The appellant has resided in the United Kingdom for a significant portion of his life; he arrived aged 11 and is now 27. He has spent the entirety of his formative years here. He claims a history of minor kidney problems, but nothing that could not be treated in Portugal.

55. There was no challenge from Mr Bramble to the appellant's evidence that he has no real links with Portugal and that all his Portuguese family live here (although I note that the RFRL highlights the serious criminal record of his cousin). That said, no part of the appellant's case was that he can no longer speak Portuguese, where he completed his primary education until moving here aged 11, and so I find that, if he were able to return, he would be able to at least speak the language.

56. The appellant has not known his father since he was a young age and has been brought up by his mother. His mother would be impacted deeply by his deportation.

57. I have found that the appellant currently has a genuine and heartfelt desire to be a positive role model for his son and daughter, and for his stepchildren. He now plays an integral role in the family life he enjoys with DS, and now helps with childcare and fatherly responsibilities in a way that he did not previously. His current desire is to maintain this level of support, and to find work. His deportation is contrary to the best interests of his children; as I have set out above, their best interests are overwhelmingly in favour of him remaining in this country. If the appellant is removed, his son and daughter will be deprived of their father.

58. The appellant's pre-imprisonment social and cultural integration was minimal, but the steps he is taking at the moment demonstrate a trajectory of integration, with his responsibilities as a father and a prospective employee. He no longer lives in London, where he was surrounded by offending influences (although I recall he refuses to accept his guilt for the index offence). In response to a question from me, he said that he has not smoked cannabis since before being imprisoned. The appellant is now more integrated than he has ever been. While, on one view, that is not saying a great deal, given this appellant's history, it is nevertheless progress of a sort which I can take into account.

59. The appellant's economic situation is poor, in that he appears never to have worked previously, although I accept that he does enjoy an offer of employment at the moment, and there is no suggestion that DS does not work.

60. Drawing the above analysis together, I find that it would be proportionate for the appellant to be deported. He has committed very serious offences for which he refuses to take responsibility, and therefore continues to represent a risk of reoffending. The length of his residence here and his wider family circumstances are factors which are outweighed by the serious grounds of public policy his continued presence represents. Although DS found life without the appellant while he was in prison difficult, she was able to cope. She will be able to remain in contact with him, and Portugal is a relatively short flight away for the purposes of visiting, should she wish to do so. The genuine, present and sufficiently serious threat affecting one of the fundamental interests of society is a weighty reason for the appellant's deportation to proceed. The cumulative force of these factors is capable of outweighing the best interests of the appellant's children in this country. Depriving children of their father in this way is not a decision I take lightly. However, it is the sad reality of criminal conduct that it wrecks families. The impact on the children, and on DS, has not been demonstrated to exceed that which would normally flow from the consequences of deportation.

61. Although the appellant claims not to have any remaining contacts in Portugal, he has not sought to contend that he does not speak the language. No reasons have been provided as to why he would not be able to re-familiarise himself with the culture and customs of his childhood. His desire to work will be able to find expression in the Portuguese labour market; there is nothing to stop the appellant from being able to search for work in Portugal upon his return. He is a relatively young adult of working age. The fact he has recently received an offer of employment in this country demonstrates his ability and resolve to engage with the labour market. No part of his case demonstrated that he would not be able to search for work upon his return. I have been taken to no evidence which demonstrates that the appellant would not receive adequate healthcare in Portugal.

62. The appellant's deportation would be a proportionate response to the risk that he poses, taking into account his family situation and the matters outlined above. His deportation would not breach the appellant's rights under the EU Treaties.

Article 8

63. Ms Wass did not pursue any standalone Article 8 submissions. Turning to paragraph 398 of the Immigration Rules and section 117C of the Nationality, Immigration and Asylum Act 2002, as applied to the appellant's situation, the appellant could only succeed under Article 8 if he could demonstrate there are very compelling circumstances over and above the exceptions contained in paragraph 399 or 399A.

64. To satisfy one of the exceptions in paragraph 399, the appellant would have to demonstrate that the effect of his deportation would be unduly harsh on either his children or DS. For the reasons set out above in my analysis of the appellant's wider circumstances, this exception is not met.

65. The exception in paragraph 399A would require the appellant to demonstrate that there would be very significant obstacles to his integration in Portugal. Again, for the reasons set out above, I find that there would be no such obstacles.

66. There are no features in the case which go beyond the above two criteria. The overall proportionality assessment under EU law leads to the same conclusion if applied to the appellant when assessing Article 8(2). The cumulative force of these factors is capable of outweighing the best interests of the children involved. The appellant cannot succeed under Article 8.

Anonymity

67. I do not consider it appropriate to maintain the anonymity order made by Judge Hollingworth (and nor did Mr Justice Goss in his error of law decision). I have anonymised the details of the appellant's family in this decision. There is no public interest sufficient to override the principle of open justice which otherwise demands publication of the details of the appellant and this appeal.

Notice of Decision

This appeal is dismissed on EU law grounds.

This appeal is dismissed on Article 8 grounds.

No anonymity direction made.

Signed *Stephen H Smith* Date 13 March 2020

Upper Tribunal Judge Stephen Smith

IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00143/2019

THE IMMIGRATION ACTS

Heard at Field House
On 17 December 2019

Decision & Reasons Promulgated

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Before

THE HONOURABLE MR JUSTICE GOSS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLSEN FILIPE
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Ms K Wass, Counsel instructed by McCormacks law

DECISION AND REASONS

1. This is an appeal by permission granted on 28 October 2019 against the decision of First-tier Tribunal Judge Hollingworth promulgated on 26 July 2019 allowing the respondent's appeal against the Secretary of State's decision of 28 February 2019 making a deportation order pursuant to the Immigration (European Economic Area)

Regulations 2016 ("the Regulations") on the grounds that his deportation was not justified on imperative grounds of public security.

2. For the avoidance of confusion, we shall refer to the respondent in this appeal as the claimant.

3. The appellant is a Portuguese national born on 19 August 1992. He claims to have entered the United Kingdom in July 2004. Between 18 March 2009, when he was aged 16 years, and 15 September 2017, when he was 25 years of age, he acquired twelve convictions for fifteen offences including offences against the person, property and public order as well as five controlled drugs offences and three firearms or offensive weapon offences. His last conviction, on 15 September 2017, was for offences of robbery and the possession of an offensive weapon for which he was sentenced to a total of four years' imprisonment. That resulted in his imprisonment until 15 September 2019 followed by immigration detention until 21 October 2019. He had previously been imprisoned for a period of days, it is not clear precisely how many, but anywhere between four and eleven, in July 2016 for an earlier offence.

4. There is a single main ground of appeal, namely that the judge made a material error of law in his determination by finding that deportation had to be justified on imperative grounds of public safety and thereby applied the wrong test.

5. The Secretary of State accepts that the claimant had acquired the right of permanent residence and so benefited from the medium level of protection from deportation pursuant to Regulation 27(3), namely that the decision could only be taken on serious grounds of public policy and public security.

6. By Regulation 27(4) a relevant decision, being defined in Regulation 27(1) as an EEA decision taken on the grounds of public policy, public security or public health, may not be taken 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".

However, it is clear that imprisonment is capable of breaking the ten year period as is provided for by Regulation 3, the provisions relating to continuity of residence.

7. Regulation 3 provides:

> "**Continuity of residence**
>
> **3.** - (1) This regulation applies for the purpose of calculating periods of continuous residence in the United Kingdom under these Regulations.
>
> …
>
> (3) Continuity of residence is broken when-
>
> (a) a person serves a sentence of imprisonment;

…

(4) Paragraph (3)(a) applies, in principle, to an EEA national who has resided in the United Kingdom for at least 10 years but it does not apply where the Secretary of State considers that –

(a) prior to serving a sentence of imprisonment, the EEA national has forged integrating links with the United Kingdom;

(b) the effect of the sentence of imprisonment was not such as to break those integrating links; and

(c) taking into account an overall assessment of the EEA national's situation, it would not be appropriate to apply paragraph (3)(a) to the assessment of that EEA national's continuity of residence."

8. The judge determined that the claimant's continuity of ten years' residence prior to the making of the deportation decision had not been broken by his periods of imprisonment. He did not specifically refer to Regulation 3 though he may have intended, in paragraph 10 of his judgment, to have been referring to it. In any event, he did not engage with the requirements of Regulation 3. He made no specific reference to the period of imprisonment for the index offences. The judge considered that his integration was not broken by reason of the short period of imprisonment in 2016 and then took the wrong date in relation to determination of the ten years preceding which there had been continuous residence when he should have taken the date of the deportation decision.

9. Further to that finding, and critically, in our view, in paragraph 14 of his judgment the judge said:

> "I find that the approach which has been taken by [DS] (the claimant's fiancée) is fundamental to the prospects of the [claimant] in achieving successful rehabilitation … I find that the [claimant] has plainly damaged his level of integration through his behaviour. I find that [the claimant] is able to secure full reintegration into the United Kingdom through the family life which will be led with [DS] and the children."

9. Flaux LJ, in paragraph 4 of the lead judgment of the Court of Appeal in the case of **Secretary of State for the Home Department v Viscu [2019] EWCA Civ 1052**, with which Lewison and Underhill LJJ agreed, after reviewing the relevant recent cases of the CJEU relating to protection against expulsion, stated:

> "44. The CJEU jurisprudence to which I have referred establishes (i) that the degree of protection against expulsion to which a Union national resident in another member state is entitled under the Directive is dependent upon the degree of integration of that individual in the member state; (ii) that in general a custodial sentence is indicative of a rejection of societal values and thus of a severing of integrative links with the member state but (iii) that the extent to which there is such a severing of integrative links will depend upon an overall assessment of the individual's situation at the time of the expulsion decision."

10. The passage of the judgment to which we have referred, at the very least, implies that the judge found that the claimant was not integrated in the United Kingdom at the

time of the material decision, but that he had the potential to reintegrate in the future. We consider that to be an error of law. Under Regulation 3(4), it was for the judge to determine whether the integrating links previously forged by the appellant had been broken by his imprisonment. In his discussion at paragraph 10, the judge appeared to conclude that the appellant's imprisonment had not broken his previously forged integrating links. That finding was inconsistent with the judge's later findings, quoted above, that the appellant's fiancée would help him to reintegrate in the future. Either the appellant was integrated, or he was not. If reintegration was required, by definition, the appellant must have lost his previous integrating links, and could not enjoy the protection of the "imperative grounds" protection from removal. In these circumstances, we need go no further in relation to an analysis of the judge's decision or the basis for his conclusion that integrating links had previously been forged by the appellant, given his background of persistent offending; this passage alone reveals that the basis for the claimant being entitled to the enhanced level of protection from deportation under Regulation 27(4) was materially flawed.

11. Accordingly, we find that there was an error of law in this case such that the decision of the First-tier Tribunal must be set aside.

Notice of Decision

The appeal is allowed.

The decision of Judge Hollingworth involved the making of an error of law and is set aside.

We order that the appeal be reheard by this Tribunal.

No findings of Judge Hollingworth are preserved for the purpose of that hearing.

No anonymity direction is made.

Signed J R W Goss Date 6 January 2020

Mr Justice Goss
Sitting as a Judge of the Upper Tribunal