Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00120/2019

THE IMMIGRATION ACTS

Determined at Field House without a hearing	**Decision & Reasons Promulgated**
On 17 July 2020	**On 11 May 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

WILIAN DE COSTA FERNANDEZ
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant appeals against the decision of the respondent made on 12 February 2018 to make a deportation order against him. His appeal to the First-tier Tribunal against that decision was dismissed for the reasons set out in a decision promulgated on 7 November 2019. For the reasons set out a decision by Upper Tribunal Judge Kopieczek issued on 24 April 2020 (a copy of which is annexed to this decision) that decision was set aside to be remade in the Upper Tribunal.

2. Judge Kopieczek took the provisional view that the remaking could be undertaken without a hearing, subject to the views of the parties. Neither of them has expressed an objection and both parties have provided skeleton arguments; and, in the case of the appellant, a bundle of additional evidence.

Background to this appeal

3. The appellant is a citizen of Portugal, born in 1997. He entered the United Kingdom in 2011 aged 14 to join his mother, stepfather and other relatives who were living and working here. The appellant was, he says, born in Guinea-Bissau and was left there when his mother travelled to live in Portugal. He joined her some years later, in 2009, but she then moved to the United Kingdom.

4. The appellant attended school and then college for 1½ years but left with no qualifications. Other than work as a window cleaner for 2 to 3 months when he was 17 has not been in employment except for work placements while at school.

5. The appellant currently lives with his mother and stepfather, along with 4 of his 5 stepbrothers and sisters. He is not in a relationship.

6. The appellant states that he suffers from PTSD as a result of ill-treatment he received as a child in Portugal, self-harmed in detention and is in need of treatment.

7. As a consequence of the appellant's offending, the respondent decided to make a deportation order against him on 12 February 2018 on the basis that, even had he acquired permanent residence ant thus the protection of reg. 27 (3) of the EEA regulations (which the respondent now accepts) his deportation was justified as he presented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, the respondent noting the repeat offending, a disregard for deterrence and a lack of remorse; and, that there had been repeated attempts by the courts to offer opportunities for rehabilitation.

8. The appellant was not removed until 2 April 2019. He then re-entered the United Kingdom unlawfully shortly thereafter and was arrested the pleaded guilty to entering in a breach of a deportation order.

Remaking the appeal

9. As a result of a transfer order made on 25 August 2020, this appeal has been transferred to me to determine.

10. I have the following before me:

    (i) The respondent's bundle

    (ii) The appellant's bundle

    (iii) The appellant's "short" bundle containing a recent witness statement from him

    (iv) Appellant's bundle of authorities

    (v) Skeleton argument from Mr Tufan for the respondent

    (vi) Skeleton argument from Mr Shattock for the appellant

Scope of the remaking

11. As noted above, the decision of the First-tier Tribunal was set aside, but the Upper Tribunal did not set aside all the findings of fact. At paragraph 38 of his decision, Judge Kopieczek stated:

> "38. Given that the FtJ made very detailed findings of fact, many of which are not infected by the errors of law, it is my provisional view, subject to submissions from the parties, that the following findings of fact, non-exhaustively, can be preserved:
>
> a) The appellant has acquired a permanent right of residence.
> b) The appellant is a serial and persistent offender who has not integrated into UK society.
> c) He has treated with contempt all the opportunities placed before him by the criminal justice system, since the very outset of his offending, to learn his lessons and mend his ways.
> d) His asylum claim was a fabrication.
> e) From 2011 the appellant's immediate family have played no significant role in his life, whether in terms of integration into UK society or in any other important respect suggesting a supportive role.
> f) It is highly unlikely that the appellant would be without family support in Portugal, and it is highly likely that he has other family there to whom he could turn for support if he felt the need for it.
> g) He has sufficient links to Portugal as would enable him to make his way in life there."

12. In his skeleton argument Mr Shattock for the appellant submits that other than the finding that the appellant has acquired permanent residence, none of the other findings can be preserved. Mr Tufan in his skeleton for the respondent submits that the other findings should be preserved.

13. On that basis, I consider it is necessary for findings to be made on these issues.

The Law

14. It is for the respondent to demonstrate that deportation is justified.

15. The EEA Regs provide as follows, so far as they are relevant.

> 27. (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(17).

(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.

(7) ...

(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.).

16. I must also take into account Schedule 1 of the 2016 Regulations which provides as follows, so far as is relevant:

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

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—

(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;

17. It is accepted that the appellant is entitled to the protection of paragraph 27 (3). With regard to what are "serious reasons" I take into account SSHD v Straszewski [2015] EWCA Civ 1245 that Moor-Bick LJ observed at [13]:

> "13. Given the fundamental difference between the position of an alien and that of an EEA national, one would expect that interference with the permanent right of residence would be subject to more stringent restrictions than those which govern the deportation of nationals of other states. Moreover, since the right of free movement is regarded as a fundamental aspect of the European Union, it is not surprising that the Court of Justice of the European Union ("CJEU") has held that exceptions to that right based on public policy are to be construed restrictively: see, for example *Van Duyn v Home Office (Case C-41/71) [1975] Ch 358* and *Bonsignore v Oberstadirektor der Stadt Koln (Case C-67/74) [1975] ECR 297* ."

18. Commenting on that, the Inner House Court of Session in Goralczyk [2018] CSIH 60 at [22]:

> "22. Moore-Bick LJ's expectation that there should be stringent restrictions on a Member State's ability to remove an EEA national, including a "foreign criminal", who has acquired the right to reside in the United Kingdom is borne out by the terms of the 2006 Regulations. In particular, a decision to deport an EEA national with a permanent right of residence may not be taken except on serious grounds of public policy or public security: regulation 21(3) . Regard has to be had to the word "serious", a point made by Mr Caskie when explaining the effect of the 2006 Regulations as being to establish three levels of rights and consequent degrees of protection against removal. A decision to remove a person who has resided in the United Kingdom for less than five years may be taken "on grounds of public policy" but a decision to remove a person who has resided in the United Kingdom for more than five years cannot be taken "except on serious grounds of public policy". *It follows that "serious grounds" of public policy must mean something different from "grounds" of public policy, and it follows from that that the decision-maker must identify just what the relevant grounds are and then evaluate them as to their seriousness*[emphasis added]. Moreover, a relevant decision must be taken in accordance with the principles set out in regulation 21(5) . Finally, in terms of regulation 21(6) , before taking such a decision the decision-maker must take into account considerations such as the age, state of health, family and economic situation of the person, his length of residence in the United Kingdom and the extent of his links with his country of origin"

19. At [26] the Court of Session stated:

> "[26] As we have already indicated, what is under consideration is a decision by the state to abrogate the appellant's EU treaty rights in relation to free movement of workers on the grounds of public policy. That is only lawful if the state demonstrates that the requirements of the 2006 Regulations are met. The starting point is the requirement of regulation21(3) that a relevant decision may not be taken except on serious grounds of public policy, allied with the principle set out in regulation 21(5)(a) that the decision must comply with the principle of proportionality. Thus, a decision to remove must have not just a policy objective

> but a serious policy objective. Moreover, it must comply with the principle of proportionality…
>
> [27] … Thus, in order to take a decision which complies with the principle of proportionality the decision-maker must have in mind the objective which the outcome of the decision is intended to achieve"

20. Turning first to what findings are to be preserved, I start with the appellant's convictions which are not in doubt. The appellant has been convicted on 8 occasions of 18 offences:

    (i) On 20.05.15 before Huntingdonshire Juvenile 12 months conditional discharge for use of threatening/ abusive words or behaviour.

    (ii) On 03.09.15 before Cambridgeshire Magistrates by means of the variation of a previous order imposed on 26.08.15 a community order of 12 months for a battery and no order on a breach of the conditional discharge.

    (iii) On 04.01.16 before Cambridgeshire Magistrates for failing to comply with the community order of 03.09.15 it was extended.

    (iv) On 01.04.16 & 06.01.17 before Cambridgeshire Magistrates for possession of controlled drug Class B cannabis/ cannabis resin, a community order maintained on 01.04.16 for the original conviction on the drug offence revoked for breach of the community order and resentenced to 6 weeks Youth Offenders Institution suspended 12 months.

    (v) On 27.06.17 before Northampton Magistrates for driving without due care and attention; failing to stop after an accident; failing to report an accident; driving without a licence; driving without insurance; disqualified 6 months; and additional fine of El 20 for failing to surrender to custody.

    (vi) On 24.08.17 before South London Magistrates for possession of a knife 8 weeks imprisonment suspended 12 months and fine of E625.

    (vii) On 29.11.17 before the Cambridge Crown Court, upon committal on 06.11.17 from the magistrates, for burglary with intent to steal of a non-dwelling 8 months Young Offenders Institution and suspended imprisonment of August 2017 to take effect, amounting in total to 10 months imprisonment.

    (viii) On 15.05.19 for entering the United Kingdom in breach of a deportation order, sentenced to 2 months' imprisonment.

21. I consider that, on any reasonable view, the appellant is a serial offender and that he is a persistent offender. That does not, however, mean that he will reoffend; there is also some merit in the submission that he has ties to the United Kingdom as submitted by Mr Shattock at [17] but those are with his immediate family. There is little evidence of ties to the wider community. The appellant did attend school here

and then college, but there is little evidence that he derived much benefit from it. I accept that school implies some degree of participation in wider society as does the time he spent working as a window cleaner, but it is limited.

22. As regards the appellant's attitude to the opportunities to learn his lessons, I consider that finding of Judge Raymond was, certainly up to the last of the conviction on 29 November 2017, correct. The appellant had not complied with community orders or the other youth punishments; that, and his failure to engage properly with the deportation process, is indicative of an attitude which is at best immature and militates against the idea that the appellant may no longer represent a threat of reoffending. The submission that the appellant has been compliant with the licence conditions bears little weight in the light of the conviction for entry in breach of a deportation order. The appellant simply ignored the deportation order and sought to re-enter in breach. He pleaded guilty to that offence.

23. I agree with the cogent reasoning of Judge Raymond that the asylum claim was fabricated in that it was not true. How much weight should be attached to that is another matter but it is, however, an indicator of the appellant's immaturity that he could have thought this would assist him resisting removal, as indeed is his failure to engage with the deportation process. I note also that it appears he was not well advised by his previous representatives

24. I accept the appellant's unchallenged evidence that he is now living again with his family. There is, however, little in the way of evidence of active support and encouragement from them, or of what help they could offer to prevent him turning again to the acquaintances, habits and lifestyle which led him in the past to criminality of increasing severity. Although there some support for the view that his mother and her partner would help him, it is limited; a belief to that effect from a probation officer in the absence of relevant evidence is not something capable of bearing much, if any weight. The letters of support from the family add little in that they do not explain what they would do to help him reform.

25. There is, however, limited support for the finding that the appellant would not be without family support in Portugal. There is nothing in the material to suggest that, other than his stepfather's family, he has anyone there, having been born in Guinea-Bissau and having lived there for most of his childhood. He speaks Portuguese, but he has little experience of life there except as an adolescent. Given his limited education, there appears to be little to enable him to make a life for himself there.

26. Accordingly, I accept that the facts identified as f) and g) cannot be sustained. The remainder of the findings I accept, albeit with significant caveats as set out above.

27. Deporting the appellant is an infringement of his EU Treaty Rights. That can, in these circumstances, only be done on serious grounds of public policy and when the appellant represents a genuine, present and sufficiently serious threat.

28. In line with Goralczyk, it is for the respondent or decision-maker to identify just what the relevant grounds are and then evaluate them as to their seriousness. The

skeleton argument provided does not do so and the refusal letter of 13 March 2018 restated in the letter of 16 January 2019 states simply:

> "Given the nature of the offences you committed and the threat that your pose to society, even if you had permanent residence in the United Kingdom, the requirement for the serious ground of public policy would be satisfied"

29. Schedule 1 to the EEA Regulations provides that it is for a member state to decide what public policies are but does not identify any hierarchy of seriousness

30. The guidance issued by the respondent provides:

> 'Serious grounds is not defined in the EEA Regulations 2016 or the directive. To justify a decision on serious grounds, there must be stronger grounds than would be applicable for a person who does not have a permanent right of residence'

31. I note the submission from Mr Shattock that in December 2017 the respondent had assessed the appellant as not meeting the serious grounds threshold. But that is not binding on the respondent and there has now been further offending, nor can it be said that the *sole* objective is preventing further offending.

32. It is, however, wholly wrong for Mr Shattock to seek to rely at [48] on unreported cases which are not even produced. He has not even attempted to comply with the relevant rules for citing unreported decisions and I do not take them into account. Further, the most serious offence is not as is characterised in the skeleton argument at [49] an attempt to leave without paying. The conviction was for burglary.

33. The respondent's case is properly understood, that protecting the fundamental interests of society is a serious ground of public policy. I accept that may be so, but while involvement with drugs receives support from Tsakouridis [2010] EUECJ C-145/09 the nature of offending in that case is of a wholly different order from mere possession. There is also, I consider, a serious public policy interest in the law being followed and upheld. That is of relevance here to the entry in breach of a deportation order which undermines the rule of law as indeed does his persistent failure to comply with court orders. Accordingly, I am satisfied that on the facts of this case, serious grounds of public policy have been identified.

34. I turn next to whether there is a genuine, present and sufficiently serious threat to a fundamental interest of society.

35. Unlike in many cases there is here no OASys report, pre-sentence report. There is a psychiatric report but that is focussed on PTSD rather than criminal behaviour. The sentencing remarks from Cambridge Crown Court are relatively brief, providing:

> "Having failed to comply with court orders before, in breach of a suspended sentence imposed for carrying a knife, you take part in a commercial burglary when you enter a shop with two other men and load up with alcohol and cigarettes. Happily, you are observed by a member of the public, the police arrive, and you are effectively caught red-handed.

> So far as the burglary is concerned, I take the view that it is the lower end of category 1, upper end of category 2. I will give you full credit for your pleas of guilt which will reduce the sentence that would otherwise have been imposed, to one of eight months i imprisonment ... so far as the suspended sentence is concerned, that should be activated in full which is eight weeks, so the total sentence will be eight months plus eight weeks, making, in effect, a sentence of 10 month imprisonment. You will serve ... half of that sentence, and upon release there will be an additional period of post licence supervision, when you will be in a position to obtain support and assistance from others. You would be well advised to do so, because at your age, you are on a downward path, when you are obviously an intelligent young man, and could work hard and lead an honest and industrious life."

36. Despite that, the appellant went on not to engage properly with the deportation appeal process and unlawfully returned.

37. There is, I find, a thread of poor decision making running through the appellant's behaviour be it in associating with the wrong people first at school, then in becoming involved with drugs, carrying a knife, failing to comply with community orders, and then participating in a commercial burglary. It was that which resulted in him receiving an immediate custodial sentence. It appears that he then complied with the terms of his licence, yet failed to engage with the threat of deportation. Reading the correspondence on file, however, I am concerned that the appellant who has limited education was not properly advised by his former lawyers. That does not excuse him, but it is consistent with his immaturity and poor decision making skills, as does his remaining in Portugal for only a week before returning irregularly.

38. The appellant says that he is sorry for his criminal offending, but in his most recent statement says nothing about what insight he has developed into that, or why he would not be tempted again into crime and poor decision making.

39. That said, his crimes are at a relatively low level. There is no indication of him dealing in drugs; rather, his offending is indicative of anti-social and disruptive behaviour until the more serious offence of burglary. That, again, is at a relatively low category as shown by the length of sentence and I bear in mind the judge's sentencing remarks set out above and the admonition that he should comply with his licence which he did.

40. While the appellant did enter in breach of his deportation order, there is little indication of him returning to the pattern of behaviour which resulted in his other convictions.

41. Taking all of these factors into account, and bearing mind the finding above, I conclude that there is a risk that the appellant will commit crimes in future and it is, on the particular facts of this case, necessary to consider whether that risk is sufficiently serious.

42. In approaching this issue, I bear in mind the observations of Simon Brown LJ in B v SSHD [2000] 2 C.M.L.R. 1086 at [45]. Here, the appellant's clear and consistent failure to comply with court orders is tends to show that that there is no other means by which the containment of the threat the appellant presents can be achieved.

43. I bear in mind that the appellant has lawfully spent a significant part of his life in the United Kingdom from the age of 14 until his deportation in 2019, some 8 years. I accept also that he has PTSD, and has little or no support from family or other connections in Portugal. He is, to a degree, integrated into the United Kingdom and it is, effectively the only "home" he has known since he was 14. His connection with Portugal is limited.

44. Taking into account all these factors, the relatively low level but persistent offending, the lack of reoffending and the needs for there to be serious grounds of public policy to be established, I am not satisfied that as at now, this appellant presents a sufficiently serious risk such that deportation is justified as, for these reasons, it has not been shown that it would on the facts be proportionate.

45. Accordingly, I allow the appeal under the EEA Regulations.

Addendum

46. I am asked to consider the respondent's conduct of this appeal. It is not for the Upper Tribunal to make an assessment of whether there has been maladministration; that is for any complaints or ombudsman process. I therefore decline to consider this issue or make findings thereon.

Summary of Conclusions

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

2. 1 remake the appeal by allowing the appeal on EU grounds.

Signed Date 12 November 2020

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul