Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00477/2019

THE IMMIGRATION ACTS

Heard at Field House (via MS Teams)	**Decision & Reasons Promulgated**
On 5 July 2021	**On 3 August 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

FM (PORTUGAL)
(ANONYMITY DIRECTION MADE)
Respondent

Representation:
For the Appellant: Mr Bates, Senior Presenting Officer
For the Respondent: Mr Walsh, instructed by Turpin Miller LLP (Oxford)

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals, with permission granted by First-tier Tribunal Judge Parkes, against First-tier Tribunal Judge Carolyn Scott's decision to allow FM's appeal against the decision to deport him from the United Kingdom.

© CROWN COPYRIGHT 2021

2. To avoid confusion, I shall refer to the parties as they were before the First-tier Tribunal ("FtT"): FM as the appellant and the Secretary of State as the respondent.

Background

3. The appellant is a Portuguese national who was born on 4 December 1985. He arrived in the UK with his mother and sister in 2001. He has a long history of psychiatric difficulties and a confirmed diagnosis of Paranoid Schizophrenia.

4. The appellant has been convicted of criminal offences in the United Kingdom. He received a caution for actual bodily harm in 2015. In September 2017, he was convicted of an offence of racially or religiously aggravated disorderly behaviour with intent to cause harassment, alarm or distress. He was sentenced by West London Magistrates' Court to a 12-month conditional discharge. The respondent did not take any deportation action in response to that conviction.

5. On 20 May 2019, however, the appellant was convicted at Isleworth Crown Court of two offences, which were committed in the same course of events. The first was possession of a bladed article in a public place, for which he received a 4 month custodial sentence. The second was wounding with intent, contrary to s20 of the Offences Against the Person Act 1861, for which the appellant received a sentence of 27 months' imprisonment. The two sentences were to run concurrently.

6. Those offences arose out of a confrontation with the appellant and his neighbour. There is said to have been a history of bad blood between the two men. On 19 October 2018, things came to a head and the appellant attacked the neighbour with a knife, causing two wounds, one to the bicep and one to the back, both of which are described in the papers as superficial. The appellant subsequently brandished a metal pole at the victim and said to the arresting officers that he had intended to teach the victim a lesson 'so he won't fuck with me again'.

7. Sentencing the appellant to the terms of imprisonment I have described above, HHJ Edmunds QC took into account the aggravating and mitigating features in the offence, including the appellant's mental health diagnosis, which was set out in a detailed report from a Consultant Psychiatrist, Dr Agarwal.

8. These offences did cause the respondent to take deportation action. She wrote to him in June 2019 to state that she was considering his deportation. Later that month, the appellant's sister and the Mental Health In-Reach Team at HMP Wormwood Scrubs replied on the appellant's behalf. They stated, in

summary, that the appellant's mental health condition was managed in the UK and he was concerned that it would not be in Portugal; that he had all of his close family in the UK, including two children by an ex-partner; and that he had lived in the UK for many years.

9. The respondent notified the appellant on 9 September 2019 that she had decided to make a deportation order against him. The letter is very long – running to 112 paragraphs in total – and it suffices to record the bones of the reasoning. The respondent did not accept that the appellant had acquired permanent residence in the United Kingdom or that she was required to justify his deportation on anything more than ordinary grounds of public policy or public security: [12]-16]. Having considered the available evidence including the sentencing remarks of HHJ Edmunds QC and the OASys report, the respondent concluded that the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of the UK: [17]-[39]. The respondent concluded that it was proportionate to deport the appellant; treatment for schizophrenia was available in Portugal and neither his level of integration to the UK nor his family ties rendered that course disproportionate: [42]-[49]. The respondent did not accept that the appellant's rehabilitation would be prejudiced by his deportation to Portugal: [50]-[55]. In the circumstances, the respondent concluded that the appellant should be deported from the UK under the Immigration (EEA) Regulations 2016: [56]. The remainder of the letter concerned Article 8 ECHR, on which basis the appeal was not allowed by the FtT and need not be considered herein.

The Appeal to the First-tier Tribunal

10. The appellant appealed to the FtT. His appeal was heard by Judge Carolyn Scott ("the judge"), sitting remotely on 24 February 2021. The appellant was represented by Mr Walsh, as he is before me, the respondent was represented by a Presenting Officer (not Mr Bates). The judge heard evidence from the appellant, his mother and his sister. She heard submissions from the advocates before reserving her decision.

11. The judge's reserved decision is carefully structured and cogently reasoned. She set out the background and the evidence before her at [1]-[9] and the legal framework, including relevant authority, at [10]-[18]. She gave a self direction regarding the assessment of credibility at [19]. At [20], she stated that she had found the appellant, his mother and his sister to be credible witnesses. She went on to find, for reasons that she gave at [21], that the appellant had not acquired a right to

reside permanently in the UK. There is no cross appeal or respondent's notice in respect of that finding.

12. At [22]-[28], the judge found that the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of the UK. She reached that conclusion after consideration of disparate pieces of evidence and evaluation of Mr Walsh's submissions, with which she disagreed at [26]. The judge found there to be a risk that the appellant could stop taking his mental health medication, which would be likely to lead to a relapse of his paranoid schizophrenia, which 'could result in serious harm to others': [27]. Again, there is not said by the appellant that there is anything wrong in law with these findings.

13. At [29]-[46], the judge considered whether the appellant's deportation would comply with the principle of proportionality. In doing so, she balanced what she described as the 'strong public interest' in the appellant's deportation against the remaining factors in regulation 27(6) of the EEA Regulations. She therefore had regard to his age, state of health, family and economic situation, length of residence in the UK, social and cultural integration and the impact on his rehabilitation were he to be deported to Portugal. In each respect, she made detailed findings, most of which (with the exception of social and cultural integration) militated against the appellants' deportation. At [47], the judge drew the threads of her decision together in the following paragraph:

> "I have weighed all of the evidence in the round. I find that in the circumstances of this appellant, notwithstanding that he represents a genuine, present and sufficiently serious threat to the public to justify his deportation on the grounds of public policy, it would not be proportionate to deport him. I make this finding for the following reasons:
>
> (a) The appellant's criminal conduct is largely as a result of his Paranoid Schizophrenia;
>
> (b) The appellant has taken significant steps to control his Paranoid Schizophrenia so as to best avoid a relapse;
>
> (c) The appellant has a significant support network, both from a medical perspective and familial perspective. I find that deporting the appellant would fracture this support network, and is likely to result in a relapse of his Paranoid Schizophrenia;
>
> (d) Whilst the appellant's father lives in Portugal, I find that he would not be able to assist the appellant on his return to Portugal, for the reasons previously identified. There is no other real family support the appellant could call on in Portugal;

(e) The appellant has spent the majority of his life in the UK, and all of his adulthood. He has not been in education since the age of 15, and very limited work experience. I find it likely that if returned to Portugal he would not be able to gain meaningful employment such as to support himself."

The Appeal to the Upper Tribunal

14. The single ground of appeal advanced by the respondent is said to be that the judge failed to give adequate reasons for findings on material matters. The particulars of the ground are as follows:

 (i) the judge's exploration of the appellant's ability to receive support from his family in Portugal was inadequate. The respondent notes in that connection that the appellant has been in contact with his extended family via Facebook and that he has received financial support from his grandmother.

 (ii) the judge failed to give adequate reasons for concluding that the appellant would be unable to secure employment, given that he has enjoyed some work in the UK. The respondent notes in this connection that the appellant spent his formative years in the country and that he continued to speak the language.

 (iii) the judge failed to consider whether the appellant's mother might relocate to Portugal with him so as to assist with his integration and access to mental health services, if necessary for a short period.

 (iv) the judge failed to acknowledge 'that the public interest outweighs appellant's rights under EEA law in view of his offending'

15. Permission was granted by First-tier Tribunal Judge Parkes, who considered it arguable that the proportionality findings were materially flawed for the reasons given in the grounds.

16. A concise response to the grounds of appeal was duly settled by Mr Walsh, who contended in summary that the respondent's grounds represented nothing more than an attempt to challenge findings of fact legitimately reached by the judge.

Submissions

17. Mr Bates submitted that the judge's decision was insufficiently reasoned. She had clearly accepted that the appellant did not have a right to reside permanently in the UK and that he was not socially and culturally integrated in the UK. She had found that

the offence was very serious and that there was a genuine, present and sufficiently serious threat to the fundamental interests of the UK if the appellant remained. The judge had erred in her consideration of whether or not treatment would be available for the appellant's mental health problems; if the appellant was asserting that treatment would be insufficient, the burden was on him to establish that. Mr Bates submitted that the judge had failed to consider MC (Essa principles recast) [2015] UKUT 520 (IAC); [2016] Imm AR 114 and had failed, as a result, to note that the facilities in a state which was a member of the EU were unlikely to be lacking. The judge's conclusions about treatment were wholly lacking.

18. Mr Bates noted that the appellant was in contact with his family members in Portugal via Facebook, including his father and grandmother. Where, Mr Bates asked rhetorically, was the judge's attempt to engage with that evidence and to make findings about the support which might be available to the appellant as a result of it? Mr Bates submitted that the appellant would probably be 'better placed' in Portugal. He had some education in that country and there was no reason to think that he would not be able to find employment there. The judge had found that the appellant was not integrated into the UK so she must have concluded that he was integrated into Portugal.

19. Mr Walsh made two points at the outset. He noted that the respondent set some store in the possibility of the appellant securing support from his father. This overlooked what had been said at the hearing, which was that the appellant's father had placed him in a mental hospital following a disagreement in 2002, when the appellant remained a minor. Secondly, the respondent also overlooked the evidence regarding the appellant's education. The report of Dr Agarwal recorded that the appellant's education in Portugal had petered out when he was fifteen, after spells of truanting and other poor behaviour. He had received no qualifications and had pursued no further education.

20. Mr Walsh submitted that the decision was an impressive and carefully-structured one. It was for the respondent to make out her grounds of appeal and she was in difficulty in that regard. It was to be recalled that proceedings before the FtT are adversarial. The respondent was represented and the evidential points in the grounds of appeal had not been taken by the respondent at the hearing. It was not for the judge to ascertain which avenues the respondent might pursue; that was the role of her advocate, and it was the judge's role to evaluate the cases presented to her.

21. Mr Walsh submitted that the findings adequately explained the ultimate outcome in the case. What the judge was particularly

concerned about – and what was found to render the decision disproportionate – was the rupture which would be caused to the appellant's support network if he was deported. MC (Portugal) was not cited to the judge but she did not, in any event, adopt an approach which was at odds with that (or any) authority. She considered the appellant's circumstances at present and she found that his deportation would impinge on his rehabilitation. There was obviously some treatment available in Portugal but the case was not about that – as the judge fully understood.

22. Mr Walsh noted that the judge was clearly aware of the great public interest which attached to the appellant's deportation. She had made that plain at [30] of her decision.

23. Mr Bates responded by noting that the judge had found the appellant to be a risk in the UK. He submitted there was a wholesale failure on the part of the judge to consider what was likely to happen in the future.

Analysis

24. I agree with the submissions made orally and in writing by Mr Walsh and I find it to be quite clear that the judge did not err in law in determining this appeal as she did. I accept Mr Walsh's submission that the judge's decision is a cogently-reasoned and well-structured one.

25. This is precisely the type of case in which an appellate court should have firmly in mind the words of caution from cases such as UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095, in which Coulson LJ (with whom Floyd LJ agreed) criticised the Upper Tribunal for interfering too readily with a decision at first instance. In doing so, he drew on the following dicta from SSHD v AH (Sudan) [2007] UKHL 49; [2008] 1 AC 678 and R (Jones) v FtT and CICA [2013] UKSC 19; [2013] 2 AC 48:

> "Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."
>
> (per Baroness Hale at [30] of AH (Sudan))
>
> "It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."
>
> (per Lord Hope, at [25] of Jones).

26. The crux of the judge's reasoning in this case could not be clearer. She reached a carefully reasoned finding that the

appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of the UK, thereby rejecting the submission made by Mr Walsh. The judge was clearly aware of the significance of that finding, which she underlined more than once in her decision. She was however concerned about the effect of deportation on the appellant, who suffers from very serious mental health problems and has a support network comprising family members and medical professionals in this country. She found that there would be an interruption in that package of care and that this would have a detrimental effect on the appellant and his prospects of rehabilitation. Considering the appellant’s length of residence and other relevant matters, the judge concluded that the consequences of deportation were disproportionate to the legitimate aim which the respondent sought to pursue. The respondent can be under no illusions about the basis upon which she was unsuccessful before the FtT and the decision cannot properly be criticised for failing to give adequate reasons.

27. I agree with Mr Walsh’s submission that the respondent’s grounds of appeal actually amount to an attempt to re-argue the case on its merits and to argue points which were not even taken before the FtT. It is clearly established that proceedings before the FtT(IAC) are adversarial: JK (DRC) v SSHD [2007] EWCA Civ 831; [2008] Imm AR 114. The respondent was, as I have said, represented by a Presenting Officer before the FtT. The respondent contends that the judge failed to ‘explore’ in her decision the possibility that the appellant would receive meaningful assistance from his family members in Portugal. The judge is also criticised for supposedly failing to consider whether the appellant’s mother could relocate to Portugal with him, even temporarily, so as to ameliorate the effect on his mental health.

28. Mr Walsh was counsel before the FtT and was able to state that the latter point was simply not pursued by the respondent at the hearing. I have considered the clear and detailed Record of Proceedings from the hearing before the FtT and there is indeed no record of any submission by the Presenting Officer that the appellant’s mother (herself an EEA national) could leave the UK with the appellant, even temporarily. It was not for the judge to ‘explore’ that possibility for herself. She was instead required (or, at the very least, entitled) to focus on the cases advanced by the parties.

29. The respondent’s complaint about the extent of the reasons given by the judge for finding that the appellant would have inadequate family support must be considered in its proper context. The appellant’s father has consistently been said to have mental health problems which are at least as acute as the appellant’s. The appellant and his mother have referred to there

having been physical abuse in the household. Mr Walsh took me to the evidence before the FtT, in which the appellant had stated that his father had made the appellant homeless in 2002 and 2016, apparently as a result of arguments over 5 euros and an apple respectively. As the judge found, the appellant's father is plainly unsuited to providing him with the support he would require in order to adapt to life in Portugal.

30. The Record of Proceedings also details the appellant's evidence about the other family he has in Portugal. An aunt and uncle have not been in contact since 2016, although they wished the appellant a Happy Birthday on Facebook. Everyone else had left Portugal. One grandmother had passed away, the other one (who has sent money to the appellant in the past) now lives in Africa.

31. The judge considered the possibility of the appellant's father assisting him on return and found that he would provide neither emotional nor financial support. On the basis of the evidence before her (which she expressly accepted to be credible), that finding was unsurprising. Her consideration of the position of the appellant's aunts and uncles was brief and unsurprisingly so. The judge noted that the appellant's mother does not maintain a relationship with her siblings. She was aware that the appellant received a birthday message from them. There was nothing more to 'explore' on these facts, and the judge was not required as a matter of law to do anything more than to accept this evidence as being truthful testimony.

32. As for the appellant's grandmother, it is unsurprising that the judge did not consider whether she would be able to assist the appellant on return to Portugal, given that the accepted evidence was that she had relocated to Africa. Unlike the author of the grounds of appeal, therefore, the judge was clearly aware of the evidence which was given before the FtT and clearly explored the evidence to the extent that was required of her.

33. Some submissions were made by Mr Bates before me about the ability of the appellant to receive mental health treatment in Portugal. There was a suggestion that the judge might have reversed the burden of proof in this regard, or that she had overlooked the fact that Portugal is an EU Member State in which suitable treatment is likely to be available. There is absolutely no merit in this submission. Mr Walsh did not argue that treatment would be unavailable. That was noted by the judge at [46] of her decision. Her concern, however, which echoed the submission made to her, was that removal to Portugal would 'interrupt and destabilise the treatment he has already received in the UK for his problems'.

34. There is a tendency in the respondent's written and oral submissions to minimise the appellant's condition and his need for medical supervision and other support. His mother gave evidence before the judge, all of which was accepted as true, that the appellant behaves as though the umbilical cord is still attached. She said that he sometimes telephones her ten times a day and that he panics if she does not answer. She has moved in with him on occasions when his mental health takes a turn for the worse. The evidence in respect of the appellant's treatment was that he is required to take oral medication and a regular depot injection of anti-psychotic medication and that any interruption to that regime brings about very disturbing paranoia. All of this was known to, and appreciated by, the judge and it does no justice to her careful decision to suggest that she reversed the burden or that she failed to consider whether treatment was available in Portugal. As Mr Walsh submitted, her decision was evidently rather more nuanced.

35. I am similarly unimpressed by the respondent's submission that the judge erred in her consideration of whether the appellant would be able to find work. She was evidently aware of the very limited education he had received, as detailed in the report of Dr Agarwal, and the equally limited work experience he has had in the UK. Given his lack familiarity with the labour market in either country and his rather precarious mental health, it was certainly open to the judge to conclude that he would not be able to find employment so as to support himself. No further reasons were required; it is abundantly clear why the judge found as she did on the evidence before her.

36. Mr Bates focussed some criticism on the judge's finding that the appellant's rehabilitation would be compromised by his deportation. The point he took in his oral submissions went far beyond that pleaded at [8] of the grounds, which is a simple complaint that the appellant's mother could help him to adjust to life in Portugal. Mr Bates' submission was that the judge had failed to follow the approach in MC (Portugal). That authority was not cited to the judge or mentioned in the grounds but Mr Walsh was content to meet the point head on, rather than objecting on procedural grounds to it being raised.

37. The judicial headnote to MC (Portugal) runs to ten separate paragraphs and I need not set it out in full. Mr Bates' submissions focussed on the principles summarised in the final three paragraphs of the headnote:

> "(8) Gauging such prospects requires assessing the relative prospects of rehabilitation in the host Member State as compared with those in the Member State of origin, but, in the absence of evidence, it is not to be assumed that

> prospects are materially different in that other Member State (Dumliauskas [46], [52]-[53] and [59]).
>
> (9) Matters that are relevant when examining the prospects of the rehabilitation of offenders include family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like (Essa (2013) at [34]). However, lack of access to a Probation Officer or equivalent in the other Member State should not, in general, preclude deportation (Dumliauskas [55])
>
> (10) In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (Dumliauskas [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide-ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (Dumliauskas at [46] and [54]).

38. The judge did not cite MC (Portugal). She did cite R (Essa) v SSHD [2012] EWCA Civ 1718 and Essa [2013] UKUT 316 (IAC). The approach she adopted was not contrary to that required by MC (Portugal), however. The judge did not assume that the rehabilitative measures available to the appellant in Portugal would be lesser than those available to him in the UK. Instead, at [43], she found that any such courses would be of little use to the appellant 'since the nub of his offending is his Paranoid Schizophrenia'. This was not a decision which turned, therefore, on the absence of access to a Probation Officer or equivalent; it was one in which the judge drew on the relevant matters in (9) of the headnote to MC (Portugal) in concluding that the appellant's well-being and his rehabilitation would be compromised by deportation. I should add that there is nothing in the judge's decision which suggests that she attached anything more than some weight to the impact deportation would have on the appellant's efforts at rehabilitation. There is certainly no reason to think that she treated rehabilitation as a weighty factor, contrary to (10) of the headnote of MC (Portugal).

39. Ultimately, there is clearly no legal error in the judge's decision. Some judges might have concluded that the threat posed by the appellant was sufficient to outweigh the significant public interest in the appellant's deportation. This judge did not. She made detailed and cogent findings of primary fact and balanced the appellant's situation in Portugal against the significant public interest in his deportation. She was entitled to conclude that the appellant's unusual circumstances rendered deportation disproportionate. That was the assessment of the specialist Tribunal and there is no basis upon which it can properly be impugned as erroneous in law.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The respondent's appeal is dismissed. The decision of the FtT shall stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. This direction was first made by the FtT and it shall continue in force due to the risk to the appellant's mental health if he is named in public.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 July 2021