Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00111/2019

THE IMMIGRATION ACTS

Heard at City Centre Tower, Birmingham	**Decision & Reasons Promulgated**
On 1 August 2019	**On 21 August 2019**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BRUNO MIGUEL DA SILVA SOARES DOS SANTOS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Bates, Senior Home Office Presenting Officer
For the Respondent: Mr Mumin, Counsel, instructed by of UK Migration Lawyers Ltd

DECISION AND REASONS

1. This is an appeal against the decision dated 30 April 2019 of First-tier Tribunal Judge Herwald which allowed the appeal of Mr Dos Santos against a decision dated 11 February 2019 to deport him. The decision to deport Mr Dos Santos was made under Regulation 27 of the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations).

2. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Mr Dos Santos as the appellant, reflecting their positions before the First-tier Tribunal.

3. The appellant is a national of Portugal, born on 7 May 1993. He came to the UK in 1993 when just a few months old.

4. The appellant first came to the attention of the authorities in the UK on 31 January 2006, at the age of 12 years' old, when he was cautioned for being carried in a motor vehicle taken without consent.

5. Between 25 June 2007 and 4 March 2016 the appellant amassed a total of 21 convictions for 50 offences and received various sentences, including custodial sentences. Those offences included:

    - nine offences of theft between 2007 and 2015
    - two public order offences between 2010 and 2012
    - twenty-three offences relating to the police/courts/prisons between 2007 and 2015
    - five drug offences between 2008 and 2016
    - three fire arms/shot gun/offensive weapons offences between 2011 and 2016
    - seven miscellaneous offences between 2008 and 2015
    - one nonrecordable offence in 2012

6. On 25 June 2012 the appellant was sent a warning letter by the respondent concerning his criminal activity. As indicated above, he continued to offend.

7. On 4 March 2016 the appellant was convicted of two counts of conspiring/supplying a class A controlled drug – Heroin and Cocaine and two counts of possessing an offensive weapon in a public place. He was sentenced to a total of seven years' imprisonment.

8. The respondent then commenced deportation action against the appellant. This led to a decision to make a deportation order dated 11 February 2019. The appellant appealed against the decision to make a deportation order. His appeal came before the First-tier Tribunal in Manchester on 16 April 2019.

The Law

9. Regulation 27 of the EEA Regulations states:

> **Decisions taken on grounds of public policy, public security and public health**
>
> **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 a right of permanent residence under regulation 15 and who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 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 CJEU has indicated in **B v Land of Baden-Wurttemberg and Secretary of State for the Home Department v Franco Vomero** (C-316/16 andC-424/16) 17 April 2018 that in order to obtain the "imperative" level of protection provided for in Regulation 27(4), the EEA national must show that he qualifies for permanent residence, that is, can show . The Court set out in paragraph 60:

> "60. A Union citizen who has not acquired the right to reside permanently in the host Member State because he had not satisfied those conditions and who cannot, therefore, rely on the level of protection against expulsion guaranteed by Article 28(2) of Directive 2004/38 cannot, a fortiori, enjoy the considerably enhanced level of protection against expulsion provided for in Article 28(3)(a) of that directive."

11. Regulation 15 of the EEA Regulations sets out how an individual can acquire permanent residence, providing that:

> **15.-** (1) The following persons acquire the right to reside in the United Kingdom permanently—
>
> (a) EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

12. Schedule 1 of the EEA Regulations is also relevant as it sets out factors to be taken into account when considering deportation. Schedule 1 provides:

…

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.

Decision of the First-tier Tribunal

13. Before the First-tier Tribunal, the appellant maintained that he had obtained permanent residence and was integrated, having been in the UK for ten years prior to the deportation decision and that prison had not acted to interrupt his integration. He was therefore entitled to the "imperative" level of protection from expulsion.

14. The First-tier Tribunal addressed this issue in paragraphs 13 to 22 of the decision. In paragraphs 16 and 17, the judge considered the evidence concerning the appellant's education. He had been expelled from school after fighting and had gone to a school for children with behavioural difficulties. He had not obtained any qualifications and appeared to have "dropped out". Nevertheless, having considered a letter from a primary school, a letter from the police referring to a meeting at a secondary school and a letter from a college, the First-tier Tribunal concluded that the appellant had been educated in the UK "albeit relatively unsuccessfully."

15. In paragraph 18, the judge accepted that the appellant had been in the UK from the age of 3 months old onwards. He identified that if the appellant sought to rely on his years in education to show permanent residence he would need to show that he had held comprehensive sickness insurance. This requirement is set out in Regulation 4(d)(ii) of the EEA Regulations. The First-tier Tribunal found in paragraph 18 of the decision that "there is no evidence of this."

16. In paragraph 19, the First-tier Tribunal found:

> "There is no evidence since attaining adulthood that the Appellant has produced, to show that he was ever living in the United Kingdom. There was no evidence that he has ever worked, for he has conceded

> that he has not. He said he had claimed benefits, but there is no evidence of that."

17. The First-tier Tribunal concluded in paragraph 20 of the decision that the appellant could not show that he had obtained permanent residence:

> "There is insufficient evidence to show that he has been residing in the UK or working continuously for five years in accordance with the 2016 Regulations."

18. In paragraph 21, the First-tier Tribunal concluded that there was insufficient evidence to show that the appellant's mother had worked for five years in accordance with the EEA Regulations. That was so where she had stated at the hearing that she had worked "for a brief period" after coming to the UK, stopped working when the appellant was approximately 4 years' old and had not worked again until 2017.

19. In paragraphs 22 and 23, the First-tier Tribunal went on to find that even though he had not acquired permanent residence, the appellant qualified for the "imperative" level of protection.

20. The First-tier Tribunal went on to consider the provisions of Schedule 1 of the EEA Regulations. In paragraph 26 he found the appellant's offending clearly had a severe and negative impact on society. The sentencing judge had found that the appellant had played a significant role in the drugs offences and had given no thought to the welfare of others. In paragraph 27 the First-tier Tribunal noted that the index offence had involved firearms and that the appellant had previous convictions concerning firearms.

21. In paragraph 32, the First-tier Tribunal found that there were serious grounds of public policy and public security for expelling the appellant.

22. Also in paragraph 32, the First-tier Tribunal found that the Offender Management Assessment at Annex J of the respondent's bundle was adverse to the appellant, showing, for example, that he had lied about putting his criminal past behind him by moving away from the family home. In paragraphs 33 and 34, the First-tier Tribunal found that the appellant "has shown little by way of remorse". In paragraph 36, the judge expressed concern that whilst awaiting sentencing for the index offence the appellant had continued to deny being involved, maintaining that he was in the wrong place at the wrong time. He had also denied other offences from 2013.

23. The First-tier Tribunal concluded in paragraph 37:

> "There is nothing in the evidence I heard, oral or written, before me today, to suggest that any of this is incorrect. The Appellant, it seems to me, may well continue to be a danger to society. He prays in aid today the effect his girlfriend has on him. But he has known her for eleven years. They have, she said, been partners for eleven years, and yet during that period, she has been unable to exert any pressure on

> him to desist from offending, and in particular, to desist from very serious offending."

24. In paragraph 38 the First-tier Tribunal found that the appellant had "an antisocial attitude towards the public and community". Notwithstanding these highly adverse findings concerning remorse, reoffending, and threat posed by the appellant, the Tribunal concluded in paragraph 38 that the "imperative" level of protection set such a high threshold for justification for expulsion that it could not be said that the appellant represented that "imperative" threat and that, as a result, the appeal had to be allowed.

Decision on Error of Law

25. The finding that the appellant could benefit from the "imperative" level of protection is wrong in law. As shown by the extract from Vomero set out above, in order to qualify for the 10 year "imperative" level of protection, the appellant had to show that he had acquired permanent residence. The judge had already provided rational reasons for concluding in paragraph 20 that this appellant had not acquired permanent residence.

26. The basis on which the appeal was allowed, the appellant qualifying for "imperative" level protection, therefore discloses a material misdirection of law. This error of law is sufficiently fundamental for the decision to be set aside to be re-made.

27. The presumption in paragraph 7 of Part 3 of the Senior President's Practice Statement dated 25 September 2012 is that any re-making will take place in the Upper Tribunal. There was nothing before me displacing that presumption and I proceeded to re-make the decision after hearing submissions from the advocates.

28. It is of note that there was no cross-appeal or Rule 24 response from the appellant. Following the guidance provided in the reported case of Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 00216 (IAC), there is therefore no challenge to the findings of the First-tier Tribunal that are unaffected by the error of law and they are preserved.

29. The First-tier Tribunal found at paragraph 20 that the appellant has not acquired permanent residence. He is therefore unable to benefit from either the "imperative" or "serious" levels of protection from expulsion.

30. There is also no challenge to the finding in paragraph 32 that there are "serious grounds of public policy and public security for expelling" the appellant. The findings in paragraphs 37 as to his being a danger to society and in paragraph 38 that his history "indicates an antisocial attitude towards the public and community" also stand.

31. It follows, where the appellant cannot benefit even from the "medium" level of protection, that he must be found to represent a genuine, present and sufficiently serious threat affecting a fundamental interest of society. It is impossible to argue otherwise in light of his very serious criminal history and failure to show any substantive acceptance of responsibility or remorse for his offences. The OASys report identifies him as a prolific offender, as having offended with impunity with a "barely acceptable response" to periods of supervision. He had demonstrated "general rule breaking behaviour and an inability to learn from his mistakes". As above, he continued to deny the index offence (and others) even after conviction. He has been found to show a medium risk of causing serious harm to the public.

32. Where that is so, consideration must be given to the proportionality of his deportation.

33. Regulation 27(6) requires consideration of factors such as the age, state of health, family and economic situation of the appellant, his length of residence in the UK, his social and cultural integration and the extent his links with Portugal.

34. The high point of the appellant's case is his long residence in the UK, having come at the age of 3 months, now being 26 years' old. His length of residence in the UK contrasts with his very limited experience of Portugal. The appellant's statement indicated that he had visited the country once, in 2012, since coming to the UK. Also, his immediate and extended family are all in the UK and he has a partner of long-standing here. His mother, siblings, partner and others provided statements setting out that they very much want him to stay in the UK, that he was remorseful and that he had no links with Portugal. The appellant's statement was to the same effect.

35. Against those matters, it is not my view that the appellant can be found to be socially and culturally integrated in the UK. Paragraph 2 of Schedule 1 of the 2016 Regulations sets out that for the appellant to be regarded as integrated there must be a "significant degree of wider, cultural and societal integration" beyond his Portuguese family. Nothing here shows that kind of integration. As above, from the age of 14 onwards this appellant has been a prolific offender. He was expelled from school. He has never worked. The relationship with his girlfriend had no effect on his offending and, as became apparent at the First-tier Tribunal hearing, the partner did not even know of the extent of his criminal history; see paragraph 27. It is not my conclusion that the appellant can be regarded as having formed integrative links in the UK in any way capable of weighing against deportation in light of the threat that he poses.

36. Further, paragraph 4 of Schedule 1 provides that little weight is to be attached to any integration if the alleged integrating links were formed at the same time as the commission of a criminal offence or an act otherwise affecting the fundamental interests of society or the person was in custody. The appellant has been committing ever more serious offences since the age of 14. I am entirely satisfied that this leads to little weight being attached to any of his claims to have formed integrating links in the UK.

37. Also, paragraph 3 of Schedule 1 indicates that where someone 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 the fundamental interests of society". This appellant is a prolific offender who has received a very serious sentence of 7 years' imprisonment. This factor weighs very heavily indeed in favour of expulsion.

38. With regard to paragraph 5 of Schedule 1, as discussed above, the appellant has asserted but not shown in any active or substantive way that he has reformed or rehabilitated. He denied the index offence even after conviction. His witness statement refers to a "lapse in judgement" regarding the index offence. That description is not born out by the facts. It ignores his very long history of offending, some serious. In addition, the nature of the index offence was that he and a group of other young men hired a car to drive to a house that was being used as a base to supply Class A drugs. When it was raided, the police found a cutting room, heroin, cocaine, phenacetin, cash and drug paraphernalia throughout the house. The car contained a combat knife and a baseball bat, amongst other items. It is inappropriate to refer to participating in a serious Class A drugs operation of that nature as a "lapse in judgement". It was a substantial undertaking to become involved in such serious and anti-social crimes. The use of the phrase suggests that the appellant still fails to appreciate the seriousness of his offence or take proper responsibility for it.

39. The appellant is now aged 26. He is healthy. It is not disputed that he speaks Portuguese. It was not suggested that his economic situation in Portugal would be significantly different from the UK where he has always been on benefits. His criminal offending, his inability to show proper remorse, failure to rehabilitate and absence of integrative links in the UK beyond his family circle outweigh by some margin the fact of his knowing little about Portugal, being separated from his family and leaving the country in which he has grown up.

40. For all of these reasons I conclude that it is proportionate for the appellant to be deported and find that the respondent's decision to deport the appellant was made correctly.

Notice of Decision

The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade.

The appeal against deportation under the EEA Regulations 2016 is refused.

Signed:  Date: 15 August 2019
Upper Tribunal Judge Pitt