Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00383/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 6 December 2018	**On 20 February 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

SFRT
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, SFRT, was born in 1985 and is a male citizen of Portugal. By a decision promulgated on 21 August 2018, Upper Tribunal Judge Hanson found that the First-tier Tribunal (Judge Ince) had erred in law such that his decision fell to be set aside. His reasons for reaching that decision were as follows:

> "1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Ince ("the Judge") who allowed this appeal against an order for SFRT's deportation from the United Kingdom pursuant to Regulation 27 Immigration (European Economic Area) Regulations 2016.

Background

2. SFRT is a citizen of Portugal born on 3 March 1985. He appeared in person before the Judge who in the decision under challenge sets out a number of pages of legal provisions before setting out findings of fact from [46] of the decision under challenge.

3. The Judge notes in [49] that the conviction which led to the deportation decision is serious being two counts of cultivation of a Class B drug for which SFRT was sentenced to 3 ¼ years' imprisonment and that such is capable of representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The Judge finds at the time SFRT committed the offence and was sentenced his conduct satisfied the requirements of Regulation 27(5). The Judge goes on to remind himself, however, that the question before the First-tier Tribunal was whether it now represents a current threat which is "genuine and present".

4. The Judge refers to an OASYS report at [50] in the following terms:

> 50. I find that the OASYS report indicates that the Appellant has, at the very least, begun his rehabilitation. The reservation expressed in the report relates to the fact that at the time of committing the offences he did not consider the effect of such on others, be they the potential victims of his criminality or his family. However, the report went on to confirm that he now understood those consequences. His evidence before me confirmed this impression and gave clear insight into the reasons for this development. When he commenced his offending his experiences of "family" were negative and he had felt rejected; however, his subsequent experiences of JL, her children and their child made him feel wanted and loved and he therefore understood the consequences of his offending, not only in relation to his new family but also in relation to the potential victims of his actions in cultivating cannabis. I am therefore led to the conclusion that he is a reformed character, has rehabilitated himself and that the risk of him reoffending is significantly low.

5. At [52] the Judge finds that due to SFRT's newfound insight the threat potentially posed by him is neither "genuine" nor "present".

6. The Judge goes on to consider the proportionality of the decision noting SFRT's circumstances and lack of any impediment to him returning to Portugal before writing at [56]:

> 56. Were that all that could be taken into account, I would have no hesitation in concluding that the Appellant should be deported. However, there is the fact that he has, since his arrest, developed a strong family life. The Respondent conceded in her refusal letter that she was satisfied that the relationship between the Appellant and JL was genuine and subsisting and that it was developed at a time when he had a right to be here. In addition, I find that, having heard and seen more evidence on the subject than the decision maker had before her/him, I am satisfied that the Appellant has a close and parental relationship with all three children. The letters from the two oldest children testify as to the reliance they place upon him and to the fact that they regard him as a father figure and, in B's case, the only father figure he has had. That dependency was developed

whilst he was on bail and continued during his imprisonment with them visiting him several times.

7. The Judge goes on to find the disruption to family life would not be in the best interests of the children and that the proportionality of the decision falls more in the appellant's favour "but perhaps not sufficiently, by itself, to justify allowing the appeal".

8. What appears to be the determinative factor so far as the Judge is concerned is set out [60] which is the finding that SFRT is a reformed character who has rehabilitated himself and poses little risk of reoffending as a result of which the scales tip in his favour sufficient to conclude that his deportation would not be proportionate.

9. The Secretary of State sought permission to appeal which was granted by a Designated Judge of the Upper Tribunal on the basis it is said the grounds of appeal are arguable as the Judge's conclusions are not easy to follow and appear to have been excessively influenced by an OASY's report rather than an application of the relevant EEA Regulations.

Error of law

10. It was submitted on the Secretary of States behalf that the Judge erred in law as the only reason given for finding in SFRT's favour is that he is now a reformed and rehabilitated character, a conclusion stemming from the OASY's report, whereas that report does not determine the issue.

11. The Secretary of State argues that the report is flawed as is based on information provided by SFRT, who has chosen to omit information which may have led to a different conclusion, for example at section 2.12 not recording that SFRT had a previous drug offence for which he was convicted whilst he was in the Portuguese army which distorts the finding at 2.14 that there has been no escalation in the seriousness of his offending and at 4.4 that this shows the discipline received while serving in the army, which the Secretary States claims was not the case. It is said the report also contains conflicts referring to a statement by SFRT recording at [9] of the decision under challenge that he was brought up by his grandmother whereas at 6.3 of the report it is claimed it was his mother. The Secretary and State also challenges an anomaly at section 11 of the report which records SFRT is not an impulsive individual (despite allegedly accepting a £20,000 loan from some Russians he had just met in a pub) and that his current offence of cultivating cannabis was pre-planned and thought out, or he was threatened at gunpoint to do so, that he cannot stand violence yet joined the army and claims he was recruited to serve five years, including within special forces.

12. The grounds argue had the author of the report been aware of SFRT's true history and previous drug-related offending the propensity to reoffend might have been considered higher and different conclusions reached. Even if the offence leading to the deportation decision was the first UK-based offence there was clearly an offence of a similar nature on a previous occasion.

13. It was also argued that SFRT was only released from custody in December 2017 and that insufficient time had passed for him to demonstrate that he was a fully reformed character. At the hearing, it emerged that licence conditions still

apply until the end of 2019, making it highly unlikely SFRT will be anything other than a model citizen; if only to avoid having to return to prison.

14. The Judge arguably fails to give adequate reasoning for how family life which existed throughout a period of considerable separation, as a result of imprisonment, is sufficient to dissuade SFRT from committing further offences. There is clearly the element of a desire for financial gain and the report sets out this was a planned exercise to enable SFRT to obtain money. The consequences of the cultivation and supply of cannabis must be known to SFRT, yet the Judge fails to provide adequate reasons for how his testimony of being a reformed character was sufficient to tip the balance in his favour or to examine what may happen if SFRT is unable to secure work to fund his lifestyle.

15. SFRT also started his criminality within three months of arrival in the UK and then spent the majority of his time either in prison or custody. The respondent disputes the finding SFRT's partner will be unable to seek employment in Portugal. She is a Polish national who has travelled and settled in the UK who could exercise rights of free movements to Portugal with the children who have only been in the UK for a limited time and would not be unable to adapt to life in Portugal.

16. SFRT was asked at the hearing why he had failed to mention his previous convictions for drug-related offences in Portugal to the Probation Officer preparing the report and he failed to provide a satisfactory explanation. He claimed he was only driving the car when the Portuguese offence was committed but accepts that he was convicted; although claims he was not charged until after he completed his national service with the Portuguese army. SFRT claims that he was young when he committed the offence and accepted his involvement in it and claims he has learnt his lesson and that he and his partner need him to be in the United Kingdom.

17. Having considered the evidence and decision and having heard submissions from both parties I am satisfied that the Judge has erred in law in a manner material to the decision to allow the appeal for the reasons set out in the Secretary States grounds and the grant of permission to appeal.

18. I am not satisfied SFRT forgot he had been convicted of a drug-related offence in Portugal and I find his failure to tell the Probation Officer preparing the OASYS report of this conviction is indicative of a deliberate act by him to attempt to minimise the consequences of his offending behaviour. The report asked a specific question of SFRT regarding offence at 2.12 relating to a pattern of offending where the author of the report writes:

> "[SFRT] has no recorded convictions against him in the United Kingdom, however during his presentence report interview he was open and honest in discussing that he has a number of previous convictions in Portugal from when he was younger. He was unable to be specific in their type and number, however disclosed that they were of an acquisitive nature including theft and robbery. This disclosure may evidence a pattern of behaviour that is linked to [SFRT's] finances. His disclosure in relation to an offence of robbery would suggest that current offences are not deemed an escalation in seriousness.

19. There is no evidence the author of the report undertook any enquiries with the authorities in Portugal to establish the details of the offences committed in that country. Had the author of the report done so, the previous drug-related offences would have been revealed.

20. I find the Judge has erred in law in a manner material to decision to allow the appeal. I set aside that decision.

21. The appellant's immigration history and offending behaviour shall be preserved findings. SFRT referred to the fact he has a supervising Probation Officer and may care to consider whether that individual will be willing to provide a report which may assist the Tribunal in assessing the matter on the next occasion. In such a report the opinion of the author might be provided in relation to the risk of reoffending in light of all the offences for which SFRT has been convicted, including the drug-related conviction in Portugal.

22. The following directions shall apply to the next hearing of this appeal:

i. List for a Resumed Hearing before Upper Tribunal Judge Hanson on the first available date after 1 September 2018. Time estimate three hours.

ii. The appellant shall, no later than 14 days before the date of the next hearing provide an up-to-date statement setting out details of his history, specific details of all offences committed by him in Portugal, dates of such convictions, and sentences received, details of his family life within the United Kingdom, and his reasons why he should not be deported as a result of his offending in the United Kingdom. The appellant's partner must also provide a statement setting out her position in relation to the family composition and family life enjoyed in the United Kingdom and the impact upon her the children if the appellant were to be deported. The statements must be signed and dated and shall stand as the evidence in chief of the maker who shall be cross-examined by the attending Presenting Officer on the basis of the case presented by the appellant and his witness.

iii. The respondent shall provide any further information he intends to rely upon, including information that may be obtained from Portugal in relation to the appellant's previous offences, no later than 14 days before the date of the next hearing.

iv. Any letter provided by the appellant's Probation Officer in support of his case must be provided to both the tribunal and the Presenting Officer no later than 14 days before the date of the next hearing. If, following receipt of any such letter, the Presenting Officer requires the attendance of the Probation Officer at the hearing notice must be given to the appellant and the Probation Officer directly to ensure appropriate arrangements may be made.

v. A Portuguese and Polish interpreter may be required. The appellant shall contact the listing team at Field House to confirm his interpreter requirements upon receipt of these directions.

Decision

23. The First-tier Judge materially erred in law. I set aside the decision of the original Judge. The appeal shall be listed for a further hearing before the Upper

Tribunal to allow that tribunal to substitute a decision to either allow or dismiss the appeal."

2. Following the making of a transfer order, I heard the appeal at Bradford on 6 December 2018. The appellant appeared in person and spoke in English. His partner, JL, also appeared and gave evidence with the assistance of a Polish interpreter. Mrs Pettersen, a Senior Home Office Presenting Officer, appeared for the respondent.

3. The appellant's appeal falls to be considered under paragraph 27 of the Immigration (European Economic Area) Regulations 2016:

> '27 (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
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> (2) A relevant decision may not be taken to serve economic ends.
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> (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.
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> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—
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> (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
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> (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(1).
>
> (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—
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> (a) the decision must comply with the principle of proportionality;
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> (b) the decision must be based exclusively on the personal conduct of the person concerned;
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> (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) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010(2); or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.'

4. The appellant does not enjoy any enhanced form of protection under the 2016 Regulations. He entered the United Kingdom in September 2014. He lives with JL who has two children by previous relationships, DL (born 2006) and BL (born 2007). Both children were born in Poland. The children and JL are Polish citizens. The appellant and JL have a child of their own who is now 3 years old.

5. Details of the appellant's offending in the United Kingdom are set out in Judge Hanson's decision (see above, in particular, [3]). In his evidence to me at the resumed hearing, the appellant told me that he had committed his first offence when living in Portugal aged about 16–17 years old. The offence involved possession of cannabis. He received a two years' suspended sentence and a 500 euro fine for having "stolen something in the street" in 2006. He admitted that he had used drugs in the past when he was "young". He now claims not to use drugs at all. The appellant told me that he would be unable to live in Poland because he could not speak Polish and that he would only obtain "bad work" with a low salary. JL and the children would be unable to travel with him to live in Portugal because the children only speak English and do not speak Portuguese.

6. JL gave evidence in Polish. He was assisted by an interpreter. She came to the United Kingdom in 2014. She told me the children were "scared to go to Poland".

7. Mrs Pettersen produced an email dated 6 December 2018 from Emily Wheeldon who is the temporary offender manager for the appellant. Her email confirms that the appellant had told her or her colleagues that he had "committed the offence [the index offence involving cultivation of cannabis] due to financial restraints". The email states that the appellant is "willing to overlook his lawful obligations and means of acquiring funds to sustain his lifestyle". He was assessed by Ms Wheeldon as a "medium risk of offending". That assessment was based on the fact that the

appellant had committed offences when in Portugal and also "because the index offence indicates a period of offending over a prolonged period of time". The risk would increase if the appellant relapsed into his "problematic drug use". I note the appellant was released from custody in the United Kingdom in December 2017.

8. I find that it is premature for the Tribunal to be able to conclude that he is a reformed character, as he claims, and that he will not reoffend. I did find him evasive regarding his previous offending in Portugal and I am not persuaded that the Tribunal has been given a full picture of that offending. I accept that the appellant lives with JL and the children, one of whom is his own natural child. However, I do not accept that the family life is particularly strong given that a significant proportion of the young lives of these children have been spent whilst the appellant has been in custody. I find also that the appellant commenced criminality in the United Kingdom within three months of his arrival here. I agree with Judge Hanson [18] that the appellant has deliberately sought to conceal previous offending, in particular his drug-related offence in Portugal, in an attempt to minimise the consequences of his offending here in the United Kingdom. He has sought to conceal the true level of his offending from the First-tier Tribunal Judge and also the Probation Service.

9. In the light of my findings, I am not satisfied that the appellant is integrated to any significant degree in British society. The speed with which he committed offences having arrived in this country is, in my opinion, an indication of the attitude he has adopted to the laws and society in general in the United Kingdom.

10. As regards Article 8 ECHR, I am satisfied from the evidence which I have read and that which I heard at the resumed hearing that it would be reasonable to expect the appellant and the children and JL to relocate to either Portugal or Poland. The only obstacles which either adults were able to indicate might exist were connected with the language; the appellant does not speak Polish and JL and the children do not speak Portuguese. I find that those difficulties could be overcome relatively easily and do not indicate a level of hardship which comes close to suggesting that the family need as of necessity to remain living in the United Kingdom to maintain their family life together. Given my findings, the appellant does not succeed in any appeal on Article 8 ECHR grounds.

11. In conclusion, therefore, I find that this appellant is a Portuguese national who is not entitled to any level of enhanced protection under the 2016 Regulations as an EU citizen, who has come to the United Kingdom with a view to offending for profit, committed a serious offence relating to drugs and has not been wholly truthful with either the Tribunal or the probation authorities who, nonetheless, regard him as being at medium risk of reoffending. The obstacles which he and the witness JL have identified which they say would prevent the family from relocating to Portugal or Poland (the country of JL's nationality) are not, in my view, significant obstacles at all and I find that family life may be continued in either of those jurisdictions. In the circumstances, the appellant's appeal is dismissed.

Notice of Decision

12. This appeal is dismissed.

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 their 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.

Signed Date 1 February 2019

Upper Tribunal Judge Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 1 February 2019

Upper Tribunal Judge Lane