JR/6603/2018

Field House,
Breams Buildings
London
EC4A 1WR

Heard on: 10th December 2019

Upper Tribunal
Immigration and Asylum Chamber

BEFORE

UPPER TRIBUNAL JUDGE KEITH

Between

The Queen (on the application of Leontino Mendes Da Pino Da Silva)

Applicant

v

Secretary of State for the Home Department

Respondent

The applicant did not attend and was not represented.
Mrs J Gray, instructed by the Government Legal Department appeared on behalf of the Respondent.

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APPLICATION FOR JUDICIAL REVIEW
JUDGMENT

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The application

(1) This is the approved written record of the judgment which was given

orally at the end of the hearing on 10 December 2019.

(2) The applicant is a citizen of Portugal. He applied on 5 October 2018 for judicial review of, and interim relief from, the respondent's decision of 14 August 2018, (the 'Decision') to certify pursuant to regulation 33 of the Immigration (EEA) Regulations 2016 (the 'Regulations') that his removal to Portugal, pending the outcome of his appeal under the Regulations, would not be unlawful under section 6 of the Human Rights Act 1998. To put matters in context, he had submitted an out-of-time appeal against his deportation on 3 October 2018 to the First-tier Tribunal (the 'FtT'), in response to a notice of deportation arrangements having been issued, in which he was notified of his intended removal on 8 October 2018.

(3) The applicant claimed that the Decision breached his rights under articles 6 and 8 of the European Convention on Human Rights ('ECHR') and was 'Wednesbury' unreasonable, on the basis that while he had not made any representations in response to the respondent's letter of 13 July 2018 that she intended to make a deportation order, he had been without legal representation at the time of certification and his circumstances had changed since then, including his appeal to the FtT. Referring to the authority of R (Kiarie and Byndloss) v SSHD [2017] UKSC 42, certification would significantly adversely affect the procedural protection of his rights under article 8 of the ECHR, as one of his main challenges in his FtT appeal would be on the basis of the lack of his propensity to reoffend and whether he represented a genuine, present and sufficiently serious threat. The applicant wished to instruct a forensic psychologist or psychiatrist to produce an expert report on the risk of his reoffending.

(4) The applicant also argued that he would have limited ability to maintain contact with, and instruct, his legal representatives, as he had no accommodation or employment to return to in Portugal and was currently without funds. He had not lived in Portugal for 19 years, since he was 22 years old. He would be unable to secure further documentary evidence supporting his claimed continuous residence in the UK. His solicitor provided a witness statement outlining these difficulties. The respondent had yet to take into account his representations as to why he should not be removed prior to the final determination of his appeal in the FtT, when he had now raised specific concerns and had provided evidence as to why he should not be removed.

(5) Finally, the respondent had not considered whether the applicant's removal was justified as proportionate, as it was bound to do so.

(6) In response to the applicant's application, the respondent issued a supplementary letter on 11 October 2018, maintaining her decision. In the letter, the respondent noted, but did not accept, the applicant's assertions of continuous residence and having been issued with a permanent residence card; and regarded certification of the applicant's removal as proportionate. The respondent did so, noting that the applicant was 41 years old; was in good health and whilst he claimed to have two children and a sister-in-law living in the UK, had not provided any details to substantiate any family life. His social and cultural integration was impaired by his prolific criminal offending, which demonstrated a failure to integrate into UK society. He was a Portuguese national, who was able to speak Portuguese and it was reasonable to expect that he would have family, friends or acquaintances who remained in Portugal who could assist him on his return. In addition, Portugal had a welfare system, if the applicant required financial support to prevent destitution and there was no reason to suppose that he could not obtain work. There was also no evidence of the applicant's rehabilitation. Indeed, as a postscript, following the applicant's application and his release from detention on 14 February 2019, on 15 February 2019 he was arrested for a sexual offence (exposure) and a public order offence after police were called to a South London primary school. He was convicted of the threatening behaviour charge and sentenced to a 12-month community order but was not charged for the alleged sexual offence.

Previous Orders and Judgments

(7) Upper Tribunal Judge Kekić refused permission for the application to proceed to judicial review on the papers, in a decision dated 19 November 2018. She concluded that Kiarie and Byndloss did not assist the applicant, as he had the opportunity to apply to enter the UK for the hearing of his FtT appeal and had not shown any insurmountable obstacles to the preparation of his appeal from Portugal. On 28 November 2018, the applicant renewed his application to an oral hearing which was listed for 8 February 2019. In the meantime, removal directions which had been re-set for 12 January 2019 were cancelled following an interim application by the applicant, which resulted in Upper Tribunal Judge Bruce granting a stay of removal on 7 January 2019.

(8) Whilst the applicant sought to amend the grounds of challenge in the same application for a stay of removal on 7 January 2019, on 8 February 2019, at the renewed permission hearing, the respondent conceded that permission to proceed to judicial review should be granted on the basis of consistency under the respondent's policy, although the respondent subsequently formed the view that the

concession was wrongly extended as it failed to take into account the fact that the applicant's further submissions had been fully considered in the supplementary letter of 11 October 2019, so that any challenge on the basis of consistency with her policy was academic.

(9) As a result of the respondent's concession, Upper Tribunal Judge McGeachy granted permission for the application to proceed to full judicial review on 8 February 2019 and issued standard directions. The applicant was subsequently released from immigration detention on 14 February 2019. His application was initially struck out for non-payment of the continuation fee on 11 March 2019 but reinstated successfully and the respondent was granted an extension to file a detailed defence, which she did so on 7 May 2019.

Further developments – legal representation and the First-tier Tribunal proceedings

(10) The applicant had focused in his grounds on the adverse impact to procedural protection or, put more simply, his ability to prepare his appeal before the FtT, if he were removed. In relation to that, the FtT had granted an extension of time for him to present his appeal and the FtT had conducted a case management hearing on 14 March 2019, which was adjourned so the applicant could obtain a psychological report and HMRC evidence of the exercise of treaty rights. A subsequent case management review hearing, scheduled to take place on 4 July 2019 was adjourned, as neither the applicant nor anyone representing him appeared at that hearing. The applicant's former representatives informed the respondent the day prior to the hearing, on 3 July 2019, they were no longer acting for the appellant in the FtT hearing but provided no clarification in respect of the judicial review application.

(11) The respondent then wrote to the applicant's solicitors in their judicial review capacity on 4 October 2019, also noting that the applicant appeared to have been in breach of his reporting requirements, asking whether they were still instructed in relation to the judicial review proceedings. On 7 October 2019, the applicant's solicitors wrote to the Upper Tribunal indicating that they were without instructions from the applicant and had therefore applied for the legal aid certificate to be discharged; would not be attending the judicial review hearing; and asked to be taken off the record.

(12) The respondent's legal representatives then wrote to the applicant's address directly on 1 November 2019, and as he was now legally unrepresented, prepared a trial bundle for him, in order to assist the Tribunal. Their correspondence was sent by ordinary first-class and recorded delivery post. The recorded delivery package was not

accepted at the applicant's address and a delivery card was left there but was then not collected from the local Post Office. As a consequence, the respondent wrote to the applicant on 14 November 2019, notifying him of the need to collect the trial bundle and asking him to contact them to confirm receipt of correspondence; and to indicate whether he would be preparing a written argument. There was no further response from the applicant and the trial bundle, prepared by the respondent's representatives, was returned by the Post Office. The applicant remained in breach of his reporting requirements on which he had been granted bail.

The applicant's failure to attend this hearing and decision to proceed in his absence

(13) The applicant failed to attend this hearing, without explanation. I was satisfied that the respondent had made significant steps to attempt to contact the applicant and inform him of this hearing, and that his former solicitors would, when informing him that they no longer acted for him, have notified him of the date and time of this hearing. It appears that the applicant has ceased to engage in this application process. While he has provided no explanation for doing so, I was also conscious of the need to consider whether he had been deprived of a fair hearing. I concluded that he had not been so deprived. He was aware of the date and time of this hearing and the respondent had taken significant steps to assist him, beyond her own professional duties to this Tribunal. I concluded that in the circumstances, it was in accordance with the overriding objective that I proceed with this hearing in the applicant's absence.

The basis of the respondent's resistance to the orders sought

(14) On a preliminary point, the respondent noted that the Upper Tribunal had not granted permission to amend the grounds and the respondent took issue with the amendment in light of the risks of a rolling review, as cautioned against by the Court of Appeal (see: R (Tesfay) & Ors v SSHD [2016] EWCA Civ 415). In the alternative, the respondent's defence addressed both the respondent's Decision and the supplementary letter which fell into the third category of responses to 'new materials, ' (see: Caroopen & Ors v SSHD [2016] EWCA Civ 1307).

(15) In terms of procedural protection, the High Court in Wandzel v SSHD [2018] EWHC 1371 (Admin) had considered how Kiarie and Byndloss applied to regulation 33 certifications and identified very significant differences between those two cases. In particular, the applicant could apply under regulation 41 for permission to return. The claimant's asserted difficulties in returning to Poland in the case of Wandzel

contrasted starkly with those in Kiarie and Byndloss; there was no reason why the claimant in Wandzel could not make practical arrangements to correspond or communicate with his legal representatives. It is not clear why expert evidence was required on the issue of reoffending and in any event, there were no very significant obstacles to his effective participation in his appeal. In contrast, the appellants in Kiarie and Byndloss had had no notice of deportation and certification and no time to state their case. The claimant in Wandzel had four weeks to prepare his case, which the High Court considered an adequate time.

(16) In the applicant's case, by the time of the Decision, he had failed to provide any reasons why he should not be deported but the respondent had nevertheless proactively considered the issue of procedural protection in the decision. Key to this was his ability to apply for temporary readmission to give evidence.

(17) The applicant's representatives' letter of 3 October 2018, including a witness statement from the applicant's solicitor, asserted the need to gather a detailed witness statement; evidence relating to his exercise treaty rights since 1999; and expert evidence of the risk of reoffending from a forensic psychologist or psychiatrist. The gist of the respondent's response, in the Decision, read together with the supplementary letter was that the applicant had had ample time to prepare his case and could return to the UK to give evidence, a conclusion that the respondent was entitled to reach. Both the Decision and supplementary letter had included a thorough evaluation of the applicant's ability to readjust to life in Portugal; obtain employment and to seek support, if not from family and friends, then from the Portuguese state. The applicant could apply to return to the UK under regulation 41 of the Regulations. He would be returning to Portugal where he lived the first 22 years of his life, in contrast to the practical difficulties identified in Kiarie and Byndloss; he had not provided any evidence of formidable obstacles in terms of matters to be decided by the FtT, beyond those considered and rejected by the High Court in Wandzel. There was no reason that he could not correspond or maintain contact with his instructing solicitors. The factual matrix in Wandzel was almost identical.

(18) The respondent had considered the public interest in the applicant having an effective appeal process and his removal was proportionate, noting his persistent offending, with 12 convictions, for 20 criminal offences between April 1999 and July 2018, including after his release from immigration detention in 2019. In his witness statement explaining why he wished to stay in the UK which had been prepared with his grounds, he claimed that he would not reoffend, but he then

did so at the first opportunity on release, in February 2019. The respondent considered the applicant's assertion to have obtained a permanent residence card, of which she had no record and gave a detailed consideration of the threat posed by the applicant. Considering the proportionality of certification and weighing in the balance the applicant's prolific offending history and reasons why he could return to Portugal, against any limited family and longer-term private life in the UK, the respondent was unarguably entitled to conclude that certification was proportionate and did not breach the applicant's rights under the Human Rights Act 1998.

The Law

(19) Regulation 33 of the Immigration (EEA) Regulations 2016 provides:

"33.—(1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom regulation 32(3) applies, in circumstances where—
(a)P has not appealed against the EEA decision to which regulation 32(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or
(b)P has so appealed but the appeal has not been finally determined.
(2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under section 6 of the Human Rights Act 1998(25) (public authority not to act contrary to Human Rights Convention).
(3) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.
(4) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except—
(a)where the removal decision is based on a previous judicial decision;
(b)where P has had previous access to judicial review; or
(c)where the removal decision is based on imperative grounds of public security.
(5) In this regulation, "finally determined" has the same meaning as in Part 6."

(20) Regulation 41 also provides the applicant the ability to apply for temporary admission, to submit his case in person. Neither party has ever contended that he would be denied temporary admission to

submit his First-tier Tribunal case in person, the appeal of which is scheduled to be heard on 16 January 2020.

Discussion and conclusions

Procedural protection

(21) I have considered Mrs Gray's detailed skeleton argument and oral submissions, which I do not recite in full in these reasons. On the primary challenge about the procedural protection for the applicant to prepare for his FtT hearing, I accept her submission that this is now entirely academic, for the following reasons. He has had since 3 October 2018, over 14 months, with legal representation until 3 July 2019, some 9 months, to obtain relevant HMRC records in relation to permanent residence and any expert report in relation to re-offending. The quality of that evidence is a matter for the FtT hearing the appeal, as to which I make no finding. The point is that having initially brought a challenge, months after the Decision and prior to his imminent removal, on the basis of the need to prepare for his FtT appeal, he has, on any view, been given ample opportunity, both in time and at public expense via legal aid, to do so. He has not identified what, if any, remaining preparation for his hearing has not been carried out, which he could not complete from Portugal, and I conclude that the ground of challenge based on protection of his procedural rights must, given the lengthy passage of time during which he has had legal support, be academic.

Proportionality and consideration of relevant circumstances

(22) The applicant had referred, in general terms, to a failure to consider his personal circumstances. To the extent that this relates to his ability to prepare for his FtT appeal, this is academic, for the reasons set out above.

(23) To the extent that it relates to the consideration of the proportionality of the applicant's interim removal, I accept Mrs Gray's submission that in her supplementary letter, the respondent carried out a careful analysis of the proportionality of the applicant's circumstances. In doing so, she noted, on the one hand, the absence of any evidence of the nature of the relationships between the applicant and his children (one of whom was an adult, having been born in 1999, at the date of the Decision; and the second was aged 17 at the same date, having been born in June 2017). The respondent considered the prolific nature of the applicant's repeat offending, which has escalated in seriousness and which the respondent concluded had impaired any social and cultural integration in the UK, which might otherwise have counted in

the applicant's favour. Against the applicant, and in favour of his interim removal, was the fact of his long-standing, persistent, and recent criminal offending, on which the respondent had based her view that applicant represented a genuine, present and sufficiently serious threat; and his circumstances in Portugal would be such that there would be nothing to prevent him from applying to enter the UK for his hearing, under regulation 41 of the Regulations: he was in good health; was relatively young (41); spoke Portuguese; had lived in Portugal until 22 years' old and had returned on visits; and could work, or seek the assistance of family (even if they did not have space for him to live with them) in Portugal, or the Portuguese state.

(24) In the circumstances, the respondent's analysis of the proportionality of certification was detailed and the conclusion she reached was one which she was unarguably entitled to do so on the evidence before her. She appropriately considered all of the evidence, and the Decision and supplementary letter disclose no arguable error which can be impugned on public law grounds.

Summary of conclusions

18) For the reasons set out above, I conclude that:

a) the challenge on the basis of procedural protection for the applicant is academic;

b) the Decision and supplementary letter of 11 October 2018 were reached following appropriate consideration of the applicant's circumstances; and were not 'Wednesbury' unreasonable or disproportionate.

Decision

19) The application for judicial review is refused on all grounds.

J Keith

Signed: _____

Upper Tribunal Judge Keith

Dated: **10 December 2019**

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JR/6603/2018

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen (on the application of Leontino Mendes Da Pino Da Silva)

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Keith

Having considered all documents lodged and having heard *Mrs J Gray*, instructed by the Government Legal Department on behalf of the respondent at a hearing at Field House, London on 10 December 2019, which the applicant did not attend and at which he was not represented

It is ordered that

(1) The judicial review application is dismissed in accordance with the judgment attached.

(2) I order, therefore, that the judicial review application be dismissed.

(3) The order of Upper Tribunal Judge Bruce dated 7 January 2019, granting a stay on the applicant's removal from the United Kingdom until his application for judicial review is finally determined, is now discharged and ceases to have effect.

Permission to appeal to the Court of Appeal

(4) The applicant has not sought permission to appeal to the Court of Appeal, but

in any event, I considered, and refuse, permission to appeal to the Court of Appeal for the same reasons that I have refused the orders sought for judicial review.

Costs

(5) The applicant shall pay the respondent's reasonable costs, to be assessed if not agreed.

(6) The applicant having had the benefit of cost protection under section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the amount that he is to pay shall be determined on an application by the respondent under regulation 16 of the Civil Legal Aid (Costs) Regulations 2013.

(7) There shall be a detailed assessment of the applicant's costs in accordance with the Civil Legal Aid (Costs) Regulations 2013 and CPR 47.18.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **10 December 2019**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an applicant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).