Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00094/2019 (P)

THE IMMIGRATION ACTS

Decided under rule 34
On 13 November 2020

Decision & Reasons Promulgated
On 18 November 2020

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

WILSON VENANCIO AZEVEDO

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. This decision has been made on the papers, under Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008, in accordance with the agreement of the parties at a remote hearing on 1 July 2020.

2. The appellant is a citizen of Portugal born on 4 November 1993. He claims to have arrived in the United Kingdom on 22 July 2011 at the age of 17 years, although there is no evidence of his date of entry. He arrived with his mother and was issued with an EEA registration certificate as her dependant on 21 December 2012.

3. The appellant first came to the adverse attention of the authorities on 30 December 2013 when he was arrested under the Theft Act and Police Act and was given a caution for shoplifting and resisting/obstructing a police constable. Between 8 June 2015 and 15 February 2018 he received two convictions for ten offences, including eight theft offences,

one offence relating to police/courts/prisons and one drugs offence. On 8 June 2015 he was convicted of possessing a controlled drug class A and given a fine of £50; on 5 September 2017 he was convicted on two counts of burglary and theft-dwelling, attempted burglary with intent to steal, two counts of handling stolen goods, three counts of burglary with intent to steal and failing to surrender to custody; and on 15 February 2018 he was sentenced to a total consecutive period of imprisonment of three years and one month.

4. On 28 January 2019 the respondent made a decision to deport the appellant pursuant to regulation 23(6)(b) and regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

5. In making that decision, the respondent did not accept that the evidence produced by the appellant was sufficient to demonstrate that he had been residing in and exercising treaty rights in the UK in accordance with the 2016 regulations for a continuous period of five years and therefore did not accept that he had acquired a permanent right of residence. The respondent noted that the circumstances of the appellant's offence involved burglary of his neighbour's flat when his neighbour had gone out and two other burglaries whilst the householders were in the premises. The respondent observed that the appellant's criminal offences were committed for monetary gain and considered that he was likely to revert to re-offending if he did not find employment. The respondent considered that the appellant represented a genuine, present and sufficiently serious threat to the public to justify his deportation on grounds of public policy. The respondent did not accept that the appellant was socially and culturally integrated in the UK and considered that there were no very significant obstacles to his integration into Portugal. Although he had sickle cell anaemia, an inherited condition, and required a blood transfusion every six to eight weeks, he could continue with his treatment in Portugal. There was no evidence that the appellant had undertaken any rehabilitative work whilst in custody and it was considered that his deportation would not prejudice the prospects of his rehabilitation. The decision to deport him was considered to be proportionate and in accordance with the EEA Regulations.

6. The respondent went on to consider Article 8 and concluded that the appellant could not meet the requirements for the exceptions to deportation in paragraph 399(a) or (b) or paragraph 399A of the immigration rules and that there were no very compelling circumstances outweighing the public interest in his deportation for the purposes of paragraph 398. The respondent concluded that the appellant's deportation would not breach his Article 8 rights under the ECHR. The respondent also certified the appellant's case under regulation 33 on the basis that his deportation during the appeals process would not be unlawful under section 6 of the Human Rights Act 1998 and would not give rise to serious irreversible harm.

7. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal on 31 October 2019 by First-tier Tribunal Judge Housego. The judge accepted that the appellant had acquired a permanent right of residence in the UK, but found that he was a persistent offender whose offences had caused serious harm and who was a

danger to society. He dismissed the appeal under the EEA Regulations and on Article 8 human rights grounds.

8. The appellant was granted permission to appeal Judge Housego's decision to the Upper Tribunal and, at an error of law hearing on 1 July 2020, conducted remotely by way of Skype for Business, Ms Cunha, on behalf of the Secretary of State, relied upon a further Rule 24 response from Mr Jarvis conceding that the judge had made material errors of law in his decision. It was accepted by the respondent that the judge had erred by conflating matters under the EEA Regulations with Article 8 matters, contrary to relevant caselaw, and had made errors in his references to previous offending and to the dates of offences, such that the decision had to be set aside. Both parties confirmed that they were content for the decision to be re-made on the evidence before the First-tier Tribunal and by way of written submissions, without a further hearing. Ms Cunha had no objection to the appellant obtaining and producing a current report from his probation officer.

9. I therefore set aside Judge Housego's decision and made directions for the service of skeleton arguments and bundles, for the re-making of the decision. In accordance with those directions, the appellant's representatives made written submissions and produced a supplementary bundle containing an OASys report and a medical report. The respondent has not, however, provided any submissions or skeleton argument.

10. The matter has now come back to me to re-make the decision in the appeal. The time limit for the filing of the respondent's skeleton argument has passed by a significant period of time and despite the respondent being given further opportunities to respond to the directions and to the evidence filed by the appellant, there has still been no response. I see no reason why matters should be delayed further by the respondent's continued failure to comply with my directions, although it would have been helpful to have submissions from both parties. In any event I have the appellant's written submissions and supplementary bundle, together with the bundle of documents before the First-tier Tribunal which contains skeleton arguments from both parties.

11. The respondent did not make any challenge to Judge Housego's finding that the appellant had acquired a permanent right of residence in the UK and it is therefore accepted that the relevant level of protection afforded to the appellant under the EEA Regulations 2016 is that of "serious grounds" in Regulation 27(3), namely that: "*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*".

12. The relevant considerations appear in Regulation 27(5) and (6):

> "(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;

(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."

13. Further relevant considerations appear in Schedule 1 to the EEA Regulations.

14. The first question is whether the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

15. Submissions have been made for the appellant asserting, at [17], that he was remorseful and had not been in trouble since his release from prison, that his offences took place over a brief period in 2017, that he was not a persistent offender or career criminal and that the offences were out of character. Further positive submissions are made at [19] to [23] about the appellant's engagement with the probation services, his rehabilitation and his integration into the community. However, there is an unfortunate lack of supporting evidence to that effect. I have had regard to the certificates of achievement, at section E of the appeal bundle before the First-tier Tribunal, in respect of courses undertaken by the appellant whilst in prison, and to the two supporting letters at pages 233 and 234 of the bundle, for which due credit is given, but there is an absence of evidence of his progress and rehabilitation since his release, despite having been released from immigration detention around December 2019.

16. I now have the benefit of an OASys report, dated 27 July 2020, which provides further information, but there is unfortunately no further supporting evidence from his probation officer as to his progress. The OASys report itself provides little assistance to the appellant, referring at 2.11 to his reluctance to speak about his offences; at 4.10 to the uncertainty that he has been putting in the required effort to find employment; at 8.9 and R8.3.1 to the possibility of being on the edge of relapse in relation to his previous cannabis addiction and to having used the drug since his release; and at R10.6 to him remaining a medium risk to the public. Although it is submitted on the appellant's behalf that his offences took place over a short period of time in 2017, there is limited weight that can be given to that submission, since he remained in prison and detention from that time until a

few months ago. Further, the appellant was referred by the judge who sentenced him in February 2018 as having become a "professional burglar" and Judge Housego, when referring to the appellant as a "persistent offender" recorded his mother's acceptance, at [57], of him being a career criminal living on the proceeds of crime. Other than the record of the appellant's claim to be motivated to change, there is little within the OASys report to inspire confidence that that situation had permanently changed, despite his apology in his statement of 19 October 2019 at [5].

17. I have taken account of the appellant's medical condition, sickle cell anaemia, in the assessment of the risk of re-offending, but note that his previous offences were committed at a time when his condition was no less serious, having suffered a stroke in 2012 and having from that time received regular, six-weekly blood transfusions. A previous medical assessment dated 27 April 2016 (page 220 of the appeal bundle) recommended that he be housed with his family who could look after him. However the medical report of 12 June 2019 at page 199 of the appeal bundle refers to the appellant's own indication that he was experiencing fewer consequences from his stroke and the latest report dated 26 May 2020 at page 45 of the supplementary bundle refers to him not having been seen by the hospital since March 2020 despite being called numerous times. I cannot, therefore, find anything in his medical circumstances to suggest that the risk that he poses to the public has been reduced on that basis.

18. With regard to the appellant's family, in particular his mother and sister, and their role in preventing him from re-offending, it is relevant to note that they were unfortunately not able to prevent him offending in the past. Supporting statements were provided from both for the hearing before the First-tier Tribunal in October 2019, but there is no further evidence from either of them explaining his situation since his release from detention.

19. Having had regard to the nature of the appellant's criminal offending, invading people's homes whilst they were sleeping and stealing from them, and even committing such an offence whilst awaiting trial and on bail, and having considered the sentencing judge's comments on the seriousness of the offending and the length of the sentence given, and taking account of the limited evidence supporting a claim as to remorse, rehabilitation and change, it seems to me that the only conclusion from the evidence is that the appellant continues to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

20. The same considerations apply equally to the assessment of proportionality. The most significant and weighty factors in favour of the appellant are his family ties in the UK, namely his mother and sisters, and his medical condition. However, as I have stated above, the evidence in relation to both is very limited and provides little weight in the balance. There is nothing to suggest that the appellant would not be able to continue his medical treatment in Portugal. Furthermore, whilst the appellant has been away from Portugal for several years, that was the country of his birth and was where he lived for 17 years of his life. The evidence before Judge Housego, as recorded at [53] and [54], was that

he retained family connections there. There is therefore no reason why he could not integrate back into society there and complete his rehabilitation in that country.

21. Accordingly, I have to conclude that the respondent's decision to deport the appellant is in the fundamental interests of society, to protect the public, and is justified on serious grounds of public policy and public security. The decision is in accordance with the EEA Regulations 2016 and the appeal is dismissed on that basis.

22. No separate submissions were made in relation to Article 8 and, indeed, on the findings I have already made above, the appellant cannot succeed on that basis. He does not meet the requirements of paragraphs 399 or 399A of the immigration rules on the basis of family and private life and that was conceded in the skeleton argument before the First-tier Tribunal. There is nothing in the appellant's circumstances which can be considered as very compelling for the purposes of paragraph 398 of the immigration rules. The most compelling feature of the appellant's circumstances is his serious medical condition, as discussed above, but for the reasons already given at [17] above, that is not a sufficiently weighty factor to outweigh the public interest in his deportation. Accordingly the respondent's decision is a proportionate one and the appellant's deportation would not, I conclude, be in breach of his human rights.

DECISION

23. The making of the decision of the First-tier Tribunal involved an error on a point of law requiring it to be set aside. The decision is re-made by dismissing Mr Azevedo's appeal.

Signed: *S Kebede*
Upper Tribunal Judge Kebede Dated: 12 November 2020