Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00285/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th September 2020	**On 1 October 2020**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

MICHAEL [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Aitken, instructed by UK Migration Lawyer Ltd
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Zimbabwe born on 23 September 1996. He appeals against the Respondent's decision to deport him under the Immigration (EEA) Regulations 2016.

2. The Appellant arrived in the UK on 19 August 2007 at the age of 10 having been granted an EEA family permit as a family member of his mother, Mrs Mimi [S], who is an Irish national. The Appellant lived with his mother, father and sister in the UK until his father died in 2018. The Appellant obtained permanent residence and was issued with a permanent residence card on 7 October 2013.

3. The Appellant has three convictions for six offences. He pleaded guilty to all counts:

   (i) 15 July 2013: Possessing a knife in a public place and resisting or obstructing a constable on 27 June 2013. Sentenced to a referral order for six months.

   (ii) 29 July 2016: Supplying class A drugs (heroin and cocaine) between 27 November 2015 and 3 December 2015. Sentenced to a 24 months suspended sentence in a Young Offenders Institution suspended for 24 months, an unpaid work requirement of 250 hours and a supervision requirement.

   (iii) 26 February 2018: Section 20 wounding / inflicting grievous bodily harm on 10 September 2017. Sentenced to 30 months' imprisonment plus a consecutive term of 12 months for committing a further offence during the operational period of a suspended sentence.

4. The Appellant was sentenced to a term of imprisonment of 42 months and therefore served 21 months in custody. He was released from prison on licence on 25 August 2018. His licence expires on 25 August 2021.

5. On 15 March 2018, the Appellant was informed of the Respondent's intention to make a deportation order. On 16 May 2019, the Respondent served the Appellant with a deportation order pursuant to Regulations 23(6)(b) and 27 of the 2016 Regulations. The Appellant appealed against this decision and his appeal was heard by First-tier Tribunal Judge Malcolm on 29 October 2019. Judge Malcolm allowed the Appellant's appeal for the reasons given in his decision promulgated on 13 November 2019.

6. The Respondent appealed on the ground that the judge had erred in law in his consideration of whether the Appellant constituted a genuine, present and sufficiently serious threat and in finding that the Appellant was socially and culturally integrated in the UK.

7. The decision of the First-tier Tribunal was set aside by Upper Tribunal Judge Rintoul in a decision promulgated on 28 February 2020. Upper Tribunal Judge Rintoul stated at paragraph 17:

> "The decision will need to be remade. In doing so, I consider that certain facts will need to be preserved. The following facts cannot be preserved. First, that he is socially and culturally integrated into life in the United Kingdom and second that he does not constitute a genuine, present and sufficiently serious threat. There will then also need to be a re-assessment if that test is met of proportionality."

8. The issues in this appeal are whether the Appellant's presence in the UK constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and, if so, whether the Respondent's decision to deport the Appellant complies with the principle of proportionality. Given what is stated at paragraph 7 above, the First-tier Tribunal judge's finding, that the Appellant did not have any relatives in Zimbabwe to support him on return, is preserved.

Evidence

9. The Appellant gave evidence relying on his witness statement dated 29 October 2019 as evidence-in-chief. He confirmed the date of his release from prison and the date his licence expired. He had been living with his mum since his release on 25 August 2019. He did not have a full-time job and was working for the council through an agency 'doing the bins'. He was hoping to get a full-time job with the council at some point in the future. He had been working on and off with this agency since January. Before January he worked for Argos from November to January as a driver's mate through the same agency. He had also worked in a warehouse picking and packing in July 2019 through a different agency.

10. Mr Aitken asked about his current use of cannabis and the Appellant stated he did not do it at all now. He had participated in one-to-one sessions with his probation officer and had learnt from his mistakes. None of his friends smoked cannabis. It was just a phase he went through at the time. He was asked about the impact of the deportation decision. He said he could not imagine life outside the UK. There were no jobs in Zimbabwe and he did not know how to live there. He had been in England since his arrival. He was asked about the risk of reoffending and stated that he was more mature now. He was busy trying to build a future, his friends were getting serious and he was scared at the moment because he did not know what was going to happen to him. He had not been in trouble with the police since his release from prison and he had just been a family man.

11. In cross-examination, he was referred to the letter from the Prison and Probation Service dated 10 September 2020 submitted at the hearing. Mr Tufan asked why it had taken so long to get the document given the decision to set aside the appeal in February 2020. The Appellant stated he had a new probation officer and he had requested the document quite a while ago during lockdown. His previous probation officer Lynn was not sure she could do it. He asked his current probation officer Millie to contact her and get this document.

12. The Appellant confirmed there was no written evidence from the agency to show that he was working and he did not know how to get documentary evidence. Mr Tufan asked: 'When was the last time you smoked cannabis?' The Appellant replied: "About a year ago, not too sure, eight months ago, seven or eight months ago." He confirmed that he still drank alcohol with friends and family at home. He drank with his mum and his two friends Samuel and Jack. His sister had moved out of the family home.

13. The Appellant had previously worked for Hermes before his term of imprisonment, possibly in 2016. He was not working at the time he committed the section 20 offence and had worked for Hermes for about two or three months. He had done jobs for his friend Sam, painting and decorating. There had also been agency work at TNT warehouse doing nightshifts.

14. In response to questions from me, he said he could not get permanent employment at the moment because he had to go to probation appointments and to sign on every two weeks. It was hard to get a full-time job because of Covid 19 and his previous convictions. He was looking for employment with a company rather than an agency. I asked him about his sessions with the probation officer and he confirmed that they were one-to-one sessions with Lynn. There had been four sessions. He was not too sure in which months they had taken place. They had happened since he was released and he may have done a session before the hearing before Judge Malcolm. In re-examination, he confirmed that he drinks at home or at Sam's house at weekends and shares beers with his friends.

15. Mrs [S], the Appellant's mother, was called to give evidence. She relied on her witness statement dated 29 October as evidence-in-chief. She could not remember the exact date of the Appellant's release because she was not good with dates, but agreed that it was August 2019. The Appellant had been living with her since then. Her partner had recently moved in. The Appellant's behaviour had been really good since his release because he wanted to work and he was more positive and more confident about himself and so desperate to achieve goals. She was asked what impact the Appellant's deportation would have on her and she replied, "Massive. I love him. He is my son and his dad passed away and he is still dealing with that. It is hard for me and his sister." The Appellant gets on well with his sister. They love each other and they lean towards each other.

16. In cross-examination, Mrs [S] said that her partner had been living with her for just over a month. Previously, he had his own flat and they had just moved in together. Mr Tufan asked, "When was the last time the Appellant smoked cannabis?" She replied, "I do not know when the last time was but I know he is not smoking it now." She has not seen him smoking and she could not smell it. Mrs [S] confirmed that the Appellant has a few drinks at weekends at home with her and one or two friends who were good people: Dray, Sam and Jack, also known as Sheps. The Appellant had been living at home when he committed the crime and she accepted that nobody can control another person, but the Appellant himself had changed. He had grown up a lot since he committed the offence and was very regretful. He wanted to be a new person and had changed so much. He was mostly at home and keeping good company. She stated that the Appellant works through an agency. He wanted to study but the Home Office would not let him. He helps her at home and he watches TV and listens to music. He worked for the council 'doing the bins'. He had also worked for Argos as a driver's mate and doing warehouse work. There was no re-examination.

Submissions

17. Mr Tufan submitted the Appellant had several previous convictions and his offending behaviour had escalated. He referred me to Regulation 27(5) and (6) and submitted that the Appellant represented a genuine, present and sufficiently serious threat. His past conduct established this and the

threat did not have to be imminent. Mr Tufan submitted that someone committing these crimes in his teenage years could not be deemed to have integrated. The Appellant had not abided by the laws of this country, he had a patchy work record and no academic record. There was no documentary evidence of his work record and I was entitled to take into account a lack of evidence that the Appellant ought to have been able to produce if his account could be relied upon. The Appellant was not integrated.

18. Mr Tufan referred me to Schedule 1 and submitted that member states have a wide discretion to define their own standards of public policy. Applying paragraph 3, the Appellant had received a custodial sentence and was a persistent offender, therefore there was a greater likelihood he was a threat to one of the fundamental interests of society. The Appellant's offending behaviour brought him within this category. Mr Tufan relied on paragraph 7 (f), (g) and (h). The Appellant's conduct had caused public offence, he had an issue with drugs and he was a persistent offender. The fact that he had not offended on licence should not go in his favour because this was normal behaviour expected of residents in the UK.

19. Mr Tufan referred to Straszewski [2015] EWCA Civ 1245 and submitted that this was a case under the 2006 Regulations. The 2016 Regulations introduced Schedule 1 and referred to the considerable discretion of member states. The appellant had succeeded in Straszewski even though he had been sentenced to a term of imprisonment of 43 months for robbery and wounding. He was a man of good character and was assessed at low risk of further offending and low risk of serious harm. This case could be distinguished on its facts. The Respondent had shown that Regulation 27(5) and (6) applied in this case and the Appellant was a genuine, present and sufficiently serious threat.

20. In relation to proportionality, Mr Tufan submitted that, taking into account Schedule 1 and the factors mentioned in the Appellant's favour, it could not be said that the Appellant's deportation was disproportionate. Balancing the factors in favour of the Appellant against the possible harm he posed to the public the Appellant should be deported.

21. Mr Aitken relied on his skeleton argument and the letter dated 10 September 2020 from the Appellant's probation officer Lungile Delami (Millie) submitted at the hearing. He submitted the Appellant did not represent a genuine, present and sufficiently serious threat for the following reasons.

22. The Appellant's three convictions for six offences did not justify deportation notwithstanding that section 20 wounding / inflicting bodily harm was a serious offence reflected in the sentence passed on the Appellant. The Appellant was not a persistent offender. The Appellant had pleaded guilty to each offence and his convictions were not enough to establish a threat.

23. Mr Aitken submitted that, although the Appellant was assessed as at a medium risk of serious harm, he had addressed his offending behaviour and accepted responsibility for his actions. He had shown remorse and had accepted that he had made mistakes and was naive. The Appellant was aware of the impact of his convictions. It was clear that the Appellant had been associating with the wrong crowd and there was evidence in the OASys Assessment which demonstrated that he was easily led. The sentencing judge gave the Appellant credit for his guilty plea and also that he had completed 250 hours of unpaid work attached to the suspended sentence. The judge took into account the Appellant's immaturity and the room for improvement given his young age. This was the Appellant's first period of imprisonment and he had been working whilst in prison.

24. Mr Aitken referred me to a letter from the prison officer at page 96 of the Appellant's bundle which stated:

> "From Michael's early days starting in the workshop Michael was more of a follower with his peers and at times could be easily led. This did not mean misbehaving, more so, working at a slow pace and did not really understand the need to work faster to produce more. Over time Michael would sometimes work on his own or in smaller groups with better workers. Michael could then appreciate how his work was improving and that others had dragged him down.
>
> Since those times Michael's self-esteem has increased, as well as being more conscientious with the quality of his work and the amount produced."

25. Mr Aitken submitted, that the Appellant had been mixing with the wrong crowd and that had led to him committing the offences. Since then he had matured and realised that he had to turn his life around and needed to work. It had been hard to get employment given his criminal record and the global pandemic. It was evident from the Appellant's evidence that he was trying very hard to obtain stable employment.

26. The risk of reoffending was now low. The Probation Office stated in the letter of 10 September 2020:

> "I have assessed Mr [S] as medium risk of harm to the public, his risk of reconviction/reoffending as low, this takes into consideration, the static factors, which cannot be changed, such as the age of his first conviction, and being male. The dynamic factors, which include all his stable factors, such as family, accommodation is also a large indicator which would have an impact on his stability. I would also like to highlight the fact that he had not come to the attention of the police throughout his licence period whilst in the community."

27. Mr Aitken submitted the Appellant had done his best to find employment and had not committed any offences for over a year. The Appellant had realised he could not carry on as he had been. His cannabis use had led to the commission of the offences and the Appellant had accepted before Judge Malcolm that he was still smoking. He had now stopped after

attending the '1-1 empathy work' course with his previous probation officer. The Appellant had also been a full-time carer of his father, who had died whilst he was on remand, which had caused the Appellant to question his behaviour.

28. The Appellant's previous offences were committed whilst he was a juvenile and this was his only period of imprisonment. Mr Aitken referred to the OASys Assessment (at J39 of the Respondent's bundle) and submitted the risk of potential harm to the public was reduced because the Appellant had stable accommodation, employment, he had curbed his drug use, limited his alcohol consumption and he was now mixing with the right sort of people. The term of imprisonment and the threat of deportation had brought him to his senses and he posed no risk of harm to the public at the present time.

29. In relation to proportionality, Mr Aitken referred me to his skeleton argument and asked me to consider his age, state of health, family and economic situation and the factors listed at Regulation 27(6). The Appellant had been reprimanded and warned in 2010 and 2012 but his criminal offences were not determinative of whether he was socially and culturally integrated. I should also take into account that the Appellant had attended school and college and obtained qualifications. The Appellant had no family in Zimbabwe and that was a finding of fact preserved from the previous hearing. It was clear from paragraph 17 of Judge Rintoul's decision that the error of law did not affect the judge's finding in that respect. Although the Appellant was at medium risk of serious harm, he was in the lower percentile of that category and, weighing all factors, it would be disproportionate to deport the Appellant. Mr Aitken submitted I should allow the appeal.

Conclusions and Reasons

30. In coming to the following conclusions, I have taken into account the documents in the Respondent's bundle (Annexes AA, A to M6), the deportation decision dated 16 May 2019 and the Appellant's bundle of 96 pages (including witness statements).

31. The Appellant has acquired the right of permanent residence in the UK, therefore his deportation can only be justified on serious grounds of public policy and public security: Regulation 27(3) of the 2016 Regulations. The burden of proof is on the Respondent.

32. Regulation 27(5) and (6) state:

> "(5) The public policy and public security requirements of the United Kingdom include restricting right 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 of 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 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 conviction, provided the grounds of specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with the person's country of origin."

33. Paragraph 3 of Schedule 1 of the 2016 Regulations states:

> "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."

34. The fundamental interests of society engaged in this case are set out at paragraphs 7(f), (g) and (j) protecting the public. The Appellant has six convictions including two convictions for drug offences and one conviction for section 20 wounding / inflicting grievous bodily harm.

<u>Genuine, present and sufficiently serious threat</u>

35. The OASys Assessment dated 8 March 2019 found that the Appellant represented a medium risk of serious harm and a medium risk of reoffending based on the Appellant's potential to do harm to the public by supplying illegal substances, engaging in violent conduct and the use or threat of use of a weapon. The risk of serious harm referred to in the OASys Assessment is defined as follows: "A risk which is life-threatening

and/or traumatic and from which recovery whether physical or psychological can be expected to be difficult or impossible."

36. The Respondent concluded at paragraph 38 of the decision to deport that, in the absence of evidence of any improvement in the Appellant's personal circumstances since his conviction, there was a possibility that the Appellant may re-associate with his negative peers and revert to reoffending, thereby posing a risk of harm.

37. In her letter dated 10 September 2020, the Appellant's new probation officer reassessed the Appellant's risk of reoffending as 'low', although he is still at medium risk of serious harm to the public. This assessment is based on the same factors which existed prior to the OASys Assessment of March 2019. The difference is that the Appellant has attended '1-1 empathy work' with his previous probation officer as a result of which the Appellant has stopped smoking cannabis.

38. I asked the Appellant about the '1-1 empathy work' sessions and he was unable to tell me when they had taken place. He believed there had been four sessions and was unsure whether he had attended one of those sessions before the First-tier Tribunal hearing on 29 October 2019. His current probation officer, Millie, states:

> "Initially upon release Mr [S] did smoke cannabis however after completing 1-1 empathy work and gaining a full understanding of the offence and the impact it had on the victim, Mr [S] abstained from smoking cannabis because he realised that this would implicate possible reoffending. He only drinks alcohol within the home environment under the supervision of more mature peers."

39. There is very little detail about the nature of '1-1 empathy work', the number of sessions or their content. It is very difficult to place much reliance on how effective they have been given the Appellant's lack of knowledge and the lack of detail in the letter from his probation officer. The Appellant and his mother maintain that he has stopped smoking cannabis but there is very little other evidence to suggest that he has.

40. The Appellant's offending is serious and applying paragraph 3 of Schedule 1 he has three convictions for six offences which have escalated over five or six years. The sentence of 42 months' imprisonment is a substantial one and relevant to whether he represents a genuine, present and sufficiently serious threat. I appreciate that both the Appellant and his mother state that he is a reformed character and he is 'no longer mixing with the wrong crowd'. He continues to drink alcohol with his mother and friends at home. I place little weight on the Appellant's assertion that he has reformed without any other evidence to indicate that he has permanently removed the negative influences in his life.

41. I take into account that the Appellant has taken steps to address his offending behaviour. The Appellant was 20 years old when he committed the offence of section 20 wounding on 10 September 2017. He has

accepted responsibility for his actions and expressed remorse. The offence was committed while the Appellant was under the influence of drink and drugs and he was naive about the effect of his actions on other people.

42. I accept the Appellant has matured over the past year and has not reoffended. His Honour Judge Parker QC, in his sentence remarks, highlighted the factors that weighed in the Appellant's favour when passing sentence and noted that the Appellant is still young and there is room for him to mature. The Appellant has also obtained various certificates and worked whilst in prison. The Appellant's father died when the Appellant was in prison, which has had a significant effect of him. Notwithstanding, he continued to engage in illegal behaviour on his release. He accepted before Judge Malcolm that he was still smoking cannabis.

43. I am not satisfied that the Appellant's evidence today supports his assertion that he is determined to change his ways and, in doing so, he has removed the negative influences in his life. The evidence was simply too vague and lacking in detail to enable me to come to that conclusion. I accept that the Appellant had an intention to change his ways, but the evidence does not support the conclusion that the Appellant has addressed his offending behaviour to the extent that the risk of reoffending is low.

44. I am not persuaded that the oral evidence today or the letter dated 10 September 2020 reduces the risk of reoffending from medium to low. I find that the Appellant is of medium risk of harm to the public and at medium risk of reoffending as stated in the original OASys Assessment. Taking into account all relevant factors and the Appellant's past conduct, I find that the Appellant is a genuine, present and sufficiently serious threat to the public and the Respondent has shown that there are serious grounds of public policy under Regulation 27(3) of the 2016 Regulations.

Proportionality

45. The factors weighing against the Appellant are that he has committed a very serious offence of malicious wounding. He stabbed the victim twice in the chest and eight times in total. The Appellant was at a house party when the victim had an argument with the Appellant's friend and the Appellant became involved. It was impulsive behaviour under the influence of drugs and alcohol.

46. The seriousness of the offence, the medium risk of reoffending, the medium risk of serious harm, the fact that the offence was committed while the Appellant was subject to a suspended sentence shows that he has little respect for the law. The Appellant accepts that he was still using drugs at the time of his previous hearing in October 2019 and I am not persuaded by his oral evidence that he no longer smokes cannabis. Even if I accept that evidence, the Appellant is still using alcohol.

47. The OASys Assessment states the Appellant is unable to problem-solve and he has not properly addressed his offending behaviour. He has previous convictions and failures to comply with court orders, he has carried a knife in public in 2013 and has used knives in 2018.

48. The Appellant is socially and culturally integrated in the UK to the extent that he has spent his formative years here, attending school and college. His integration is undermined by his criminal behaviour and his period of imprisonment of 21 months. I reduce the weight attached to this factor in assessing factors in favour of the Appellant.

49. I find that factors in favour of the Appellant are that he came to the UK when he was 10 years old and has lived her for 13 years. He cared for his father whilst he was still at a very young age and supported his mother and sister. He was very distressed when his father died while he was in prison. He has a close relationship with his mother and sister and he is currently employed. He has been a victim of racism and felt the need to protect himself. He has no knowledge of Zimbabwe and there are no family relatives to support him. Given the current situation in Zimbabwe it would be it would be very difficult for him to find work. I find that his limited qualifications would be of little assistance because the economic situation is dire and unemployment is high.

50. I accept that the Appellant has taken steps to stop using cannabis and to associate with law-abiding citizens. I accept he intends to turn his life around and make a fresh start by obtaining employment and keeping himself out of trouble. The Appellant has not offended since he was released from prison under licence. He is well aware of the precariousness of his situation and the effect of deportation should he re-offend. Although, I have expressed doubt about the durability of the Appellant's change in behaviour, he is a young man and he has every incentive to continue to improve his future prospects.

51. Weighing all those factors, I conclude that the Appellant's length of residence in the UK, his age when he came to the UK, his level of integration in the UK, his family and economic situation, the lack of links with Zimbabwe and his current intention to turn his life around tip the balance in the Appellant's favour. These matters outweigh the public interest in deportation.

52. I find it would be disproportionate to deport the Appellant. I allow the Appellant's appeal under the 2016 Regulations.

Notice of Decision

The appeal is allowed.

No anonymity direction is made.

J Frances

Signed Date: 28 September 2020
Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award for the reasons given in the decision of 12 November 2019.

J Frances

Signed Date: 28 September 2020
Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email