Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00412/2019

THE IMMIGRATION ACTS

Heard at Birmingham Justice Centre	**Decision & Reasons Promulgated**
On 19th October 2021	**On 16th November 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GABRIEL FILIPE BARROS LUIS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Bates, Senior Home Office Presenting Officer
For the Respondent: Mr Gabriel Luis, in person

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Gabriel Filipe Barros Luis. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Luis as the appellant, and the Secretary of State as the respondent.

2. The respondent appeals the decision of First-tier Tribunal Judge Watson promulgated on 9th December 2019 allowing the appellant's appeal under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") against the respondent's decision to make a deportation order.

3. At the conclusion of the hearing before me, I informed the parties that I am satisfied the decision of Judge Watson is tainted by a material error of law and must be set aside. I informed the parties that I would set out the reasons for my decision in writing. This I now do.

Background

4. The appellant is a national of Portugal. He claims to have arrived in the UK when he was 1, in 2003, with his parents. He claims that he has resided in the UK since 2003.

5. Between 24th April 2011 and 24th August 2017, the appellant amassed fourteen convictions for twenty-five offences which include robbery, burglary, drugs offences, offences of violence and other offences of dishonesty. On 11th May 2016, a letter was sent by the respondent to the appellant following a conviction on 2nd June 2015 at St Albans Crown Court for which the appellant was sentenced to a one-year and four-month term of imprisonment. The appellant was reminded that a person who would otherwise be entitled to reside in the UK under the Immigration (European Economic Area) Regulations may be removed from the UK, but the respondent had decided to take no further action on that occasion. The appellant was warned that if he commits any further offences, the respondent may seek to pursue his deportation. That did not prevent the appellant from committing further offences. On 22nd September 2017 he was sentenced at Worcester Crown Court for two counts of assault by beating, one count of putting a person in fear of violence and one count of failing to surrender to custody. He received a

total sentence of fifteen months imprisonment and was made the subject of a restraining order.

6. As a result of those convictions and the sentence imposed, the appellant was issued with a notice of liability to deportation and after considering representations made by the appellant, the respondent reached a decision to make a deportation order. The appellant's appeal against that decision was allowed by FtT Judge Watson. Judge Watson found the appellant has been in the UK continuously for a period in excess of 10 years and had acquired a permanent right of residence. Judge Watson concluded that the appellant therefore benefits from the enhanced protection set out in Regulation 27(4) of the EEA Regulations 2016 and that the respondent's decision was not justified on imperative grounds of public security.

7. The respondent advances three grounds of appeal. First, in concluding that the appellant has established a permanent right of residence, Judge Watson erroneously found that the appellant has been exercising treaty rights as the family member of his mother, notwithstanding a lack of any evidence to corroborate his claim that his mother had exercised treaty rights in the UK, during a relevant five-year period. Second, and related to the first ground, the respondent claims Judge Watson erred in finding the appellant is entitled to benefit from the enhanced protection available to those who have a permanent right of residence and in any event, failed to carry out an overall assessment of the appellant's situation when determining whether he has resided in the UK for a continuous period of at least 10 years prior to the respondent's decision, including the strength of the integrative links forged prior to his detention, the nature of the offence that resulted in the sentence of imprisonment and the circumstances in which that offence was committed. The respondent claims Judge Watson simply relied upon the appellant's presence in the UK for a period of 10 years. Third, the respondent claims that in finding in the alternative, that the appellant's personal conduct does not represent a genuine, present and sufficiently

serious threat affecting one of the fundamental interests of society, Judge Watson gives inadequate reasons and fails to have regard to the considerations referred to in Schedule 1 of the EEA Regulations 2016. The respondent claims Judge Watson failed to refer to or engage with the OASys report that concluded the appellant constitutes a medium risk of serious harm and high risk of reoffending.

8. Permission to appeal was granted by First-tier Tribunal Judge Grant on 2nd January 2020. Judge Grant considered it arguable that Judge Watson failed to engage with the evidence before him and gave inadequate reasons for finding that the appellant meets the permanent residence requirement of the EEA Regulations 2016.

9. The appellant was unrepresented at the hearing before me. He was provided with a copy of the respondent's grounds of appeal and to assist his understanding of the grounds relied upon by the respondent, Mr Bates summarised the errors the respondent submits, were made by Judge Watson. Mr Bates outlined the three levels of protection available when the respondent considers whether removal is justified on grounds of public policy, public security or public health, as provided for under Regulation 23(6) of the EEA Regulations 2016. Mr Bates submits that here, Judge Watson found the appellant has been in the UK continuously for a period in excess of 10 years. Judge Watson proceeds upon the premise that the appellant has acquired a permanent right of residence, but in doing so, at paragraph [18], Judge Watson fails to give any or any adequate reasons for the conclusion that the appellant has been exercising treaty rights as the family member of an EEA national, his mother, and has gained a permanent right of residence. Judge Watson appears to accept the appellant's bare assertion that his mother has worked at times, and was a jobseeker at times, but there was no evidence that the appellant's mother was a qualified person and was continuously exercising treaty rights for a period of 5 years. He submits the reasoning set out at paragraph [18] is entirely inadequate. Mr Bates submits that in reaching the decision, Judge Watson focused upon the

appellant's simple presence in the UK for a period of 10 years but did not have regard to other relevant factors that weigh against the appellant, such as his integration, and factors such as the periods of imprisonment, when considering whether he has resided in the UK for a continuous period of at least 10 years. Finally, he submits that when considering whether the personal conduct of the appellant represents a genuine present and sufficiently serious threat affecting one of the fundamental interests of society, Judge Watson does not refer to the OASys assessment that was at Appendix K of the respondent's bundle. The report states, at K37, there is a 61% probability of reoffending during year one, increasing to 76% during year two. The report states, at K38, there to be a medium risk to the public and a known adult in the community. Mr Bates submits that although it was open to Judge Watson to depart from the conclusions reached in that report, Judge Watson simply failed to consider the report and its content at all. Furthermore, Judge Watson failed to have regard to any of the factors set out in Schedule 1.

10. Mr Luis, candidly and in my judgement quite properly, acknowledged that there is no reference in the decision of Judge Watson to the content of the probation report. He did not make any submissions regarding the first and second grounds of appeal.

Discussion

11. It is useful to begin with the EEA Regulations 2016. Regulation 23(6)(b) provides that an EEA national who has entered the United Kingdom may be removed if the respondent has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with Regulation 27. Regulation 27 insofar as it is material to this appeal provides:

> 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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> ...

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who-

(a) has resided in the United Kingdom for a continuous period of at least 10 years prior to the relevant decision; or

...

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

...

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

12. To justify interfering with the appellant's rights to free movement and residence in the UK, the respondent must establish the appellant's removal is justified on grounds of public policy and public security. Regulation 27(4) of the EEA Regulations 2016 provided that a deportation decision cannot be taken except on imperative grounds of public security in respect of an EEA national who has a right of permanent residence

under Regulation 15, and who has resided in the UK for a continuous period of at least 10 years prior to the relevant decision.

13. In B v Land Baden-Wurttemberg Case C-316/16 (Joined Cases C-316/16, C-424/16), the Court of Justice held that a prerequisite for the enhanced protection, is that the person has acquired a permanent right of residence. Here, at paragraphs [16] and [17] of the decision, Judge Watson considered the evidence before the Tribunal regarding the appellant's presence in the UK since 2003. There was evidence before the Tribunal regarding the appellant's attendance at Weldon Park Middle School for the period 2002 to 2004 and evidence from Rooks Heath College confirming the appellant transferred from Weldon Park Primary School on 1st September 2004 and remained there until 30th June 2008. There was also evidence in the form of certificates from schools that were consistent with the appellant's claim of being educated entirely in the UK. Judge Watson noted that from 2011 to 2017, the appellant had been convicted on a number of occasions in the UK and that was entirely consistent with his being in the UK during that period. Taking the evidence of the appellant together with the documents before the Tribunal establishing the appellant's presence in the UK since 2002, Judge Watson found the appellant has lived in the UK for a period in excess of 10 years prior to the decision made to deport him. The respondent does not challenge that discrete finding insofar as it goes. At paragraphs [18] and [19], Judge Watson said:

> "18. On the balance of probabilities I find that the appellant has been exercising treaty rights as the family member of an EEA national (his mother) qualified under the regulations and has gained a permanent right of residence. He has been unable to obtain documents from his mother but says that she worked at times, was a jobseeker at times and I accept on the balance of probabilities that she was a qualified person under Regulation 6 for in excess of five years and qualified for permanent residence and that the appellant was a family member of a qualified person.
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> 19. Having made this finding based upon the documents and the oral evidence which were consistent with his claims I conclude that he benefits from enhanced protection set out in Regulation 27(4) – there must be "*imperative grounds of public security".*"

14. Acquiring the highest level of protection against deportation required the appellant to have acquired a permanent right of residence *(i.e. by exercising treaty rights or as a dependent of his mother who was exercising treaty rights in the UK throughout the relevant five-year period).* The respondent did not accept the appellant has acquired permanent rights of residence because there was no evidence that his parents had been exercising their treaty rights in the UK. The respondent submits the appellant had not provided any evidence that he was dependent on his mother who was exercising treaty rights in the UK throughout a relevant 5-year period, and the finding that the appellant's mother was a qualifying person exercising treaty rights for a five-year period is inadequately reasoned. It is now well established that it is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case provided the Judge explains in clear and brief terms their reasons, so that the parties can understand why they have won or lost. The respondent had stated in the decision dated 29th July 2019, that the appellant had been invited on at least two occasions to provide evidence to support his claim that his parents were exercising treaty rights in the UK via employment etc. The appellant had failed to respond to those requests. Although brevity is to be commended, I accept the submission made by Mr Bates that Judge Watson fails to set out in the decision, the five-year period under consideration, and the dates between which she worked or was a job seeker. I accept the respondent is now none the wiser as to the evidential basis upon which the Judge reached the decision that the appellant's mother had been exercising treaty rights for a five-year period.

15. The respondent also claims that Judge Watson focused upon the simple presence of the appellant in the UK for a period of 10 years prior to the respondent's decision and disregarded other relevant factors such as the periods spent by the appellant in prison during 2015, 2017 and 2018.

16. In B the Court of Justice held the 10-year period of residence must be calculated by counting back from the date of the deportation decision and that period must, in principle, be continuous. Here, the sentences of imprisonment interrupted, in principle, the continuity of the 10 years residence. The judge was required to complete an overall assessment of the situation of the appellant at the time when the question of expulsion arose, and although the periods of imprisonment did not automatically deprive the appellant of enhanced protection, the judge was required to consider the strength of the integrative links the appellant had forged with the UK before his detention, as well as the nature of the offences, the circumstances in which the offences were committed and the behaviour of the appellant during the period of imprisonment. I accept Judge Watson erroneously proceeds upon the premise that the appellant had resided in the UK continuously for more than 10 years and therefore qualifies for the enhanced protection. The position was made clear by the ECJ in B.

17. The 10-year continuous presence in the UK may in principle be interrupted by a term of imprisonment, even where the appellant had resided in the UK for 10 years prior to imprisonment. The First-tier Tribunal was required to undertake an overall assessment to determine whether the integrating links previously forged in the UK had been broken by the periods of imprisonment, and the fact of a 10 year period of residence prior to imprisonment, should be taken into consideration as part of that overall assessment; SSHD v MG [2014] 1 WLR 2441 Furthermore, Judge Watson failed to have regard to the totality of the appellant's offending over a number of years which militate against a finding that the appellant is a law abiding citizen who continues to be integrated into society; Binbuga -v- SSHD [2019] EWCA Civ 551. I am satisfied that here, Judge Watson failed to undertake the overall assessment required and in my judgement, erred when considering whether the appellant is entitled to the enhanced protection in all the circumstances.

18. I have considered whether the errors that are identified in the preceding paragraphs are material to the outcome of the appeal in light of what was said by Judge Watson at paragraphs [21] to [25] of the decision. In my judgement the difficulty with the assessment carried out by Judge Watson is that there is no reference whatsoever to the OASys report that was relied upon by the respondent and that was before the Tribunal. The report sets out the analysis of the risk of reoffending. It would undoubtedly be open to a Judge to depart from the conclusions set out in the report, but there must be some engagement with the report and the conclusions set out in it. The content of the report is relevant to a proper assessment of whether the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It is also clear in my judgement that in reaching the decision, Judge Watson failed to have regard to any of the matters set out in Schedule 1 of the EEA Regulations 2016.

19. In my judgement, the errors of law in the decision of Judge Watson are such that the decision cannot stand and must be set aside.

20. As to disposal, in my judgement the appropriate course is for the matter to be remitted to the First-tier Tribunal for hearing afresh with no findings preserved save that the appellant was present in the UK during the 10 years prior to the respondent's decision. For the avoidance of any doubt, for the reasons I have set out above, simple presence in the UK is not sufficient to establish an entitlement to the enhanced protection claimed by the appellant. Remittal to the First-tier Tribunal will ensure the appellant has a fair and proper opportunity to ensure the First-tier Tribunal has before it all of the evidence required to establish whether he has acquired a permanent right of residence and whether he is entitled to the enhanced protection provided for in Regulation 27(4(a) of the EEA Regulations 2016. It is now clear that that the acquisition of permanent residence is a prerequisite for the entitlement to the enhanced protection. In all the circumstances, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012, I am

satisfied that the nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

21. The appeal is allowed. The decision of F*t*T Judge Watson promulgated on 9th December 2019 is set aside, and I remit the matter for re-hearing in the First-tier Tribunal.

Signed **V. Mandalia** Date 20th October 2021

Upper Tribunal Judge Mandalia