Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00806/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
By Skype for Business	**On 26 November 2021**
On 19 May 2021	

Before

UPPER TRIBUNAL JUDGE OWENS

Between

JOELSON GOMES BALDE
(ANONYMITY DIRECTION NOT MADE)

appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Dhanji, Counsel instructed by Vestra Lawyers
For the Respondent: Ms Cunha, Home Office Presenting Officer

DECISION AND REASONS

Appellant's immigration history and History of the appeal

1. Mr Balde is a citizen of Portugal, born on 14 December 1995. He is currently 25 years old.

2. He entered the United Kingdom in approximately 2009 or 2010 aged 14. He initially lived with an uncle and aunt in Peterborough for approximately a year. He then

moved to live with an aunt in Newham in late 2011/early 2012. Although JGB was studying in the UK at school, then college and working part-time, he did not apply for an EEA residence card.

3. Between 26 September 2011 and 18 June 2017, Mr Balde accrued 8 convictions for 16 criminal offences. On 4 August 2017 he was convicted of two counts of supplying class A drugs at Snaresbrook Crown Court, for which he was sentenced to a total period of 38 months' imprisonment, ordered to pay £170 victim surcharge and made the subject of a Criminal Behaviour Order for five years.

4. As a result of this conviction on 7 September 2017, the Secretary of State served on him a Notice that he may be liable to deportation pursuant to the Immigration (Economic Area) Regulations 2016 ("the EEA Regulations"). On 3 October 2018 the Secretary of State requested more information in respect of his child. JGB did not respond with information or representations as to why he should not be deported and did not respond to the request for further information.

5. On 13 November 2018 the Secretary of State decided to deport Mr Balde from the UK on the basis that his removal was justified on the basis of grounds of public policy, public security and public health because he poses a genuine, present and sufficiently serious threat to the interests of public policy if were allowed to remain in the UK and his deportation is justified under Regulation 27 of the EEA Regulations. The decision was also certified under Regulation 33 of the EEA Regulations.

6. The appeal against the deportation decision was allowed on EEA grounds by First-tier Tribunal Judge Scott-Baker on 11 December 2019. Subsequently, I set aside the decision allowing the appeal on the basis that there had been a material error of law for the reasons given in the decision dated 21 March 2021 appended to this decision at Annex A.

7. At [12] and [13] of the error of law decision, I explained why I retained jurisdiction of the appeal notwithstanding the revocation of the Immigration (European Economic Area) Regulations 2016. This is further reinforced in Geci (EEA Regulations: transitional provisions; appeal rights) [2021] UKUT 000285 (IAC).

8. The appeal was adjourned for re-making before the Upper Tribunal with no findings preserved.

Decision under appeal

9. The decision to which this appeal relates is a decision made on 13 November 2018 to deport the appellant from the UK. In a supplementary refusal letter dated 7 March 2019 the Secretary of State noted that Mr Balde had entered the UK at the age of about 15, had not provided any evidence that he had been exercising Treaty Rights in the UK for a continuous period of five years nor that he had acquired a right of permanent residence in the UK.

10. Consideration was given to whether his deportation was justified on the grounds of public policy or security. The Secretary of State considered the principles in Regulation 27(5) and schedule 1 of the EEA Regulations 2016. It was considered that Mr Balde had committed a crime which was sufficiently serious to warrant his deportation. The supply of drugs has a wide impact on the health and the morals of the community at large and his offences were representative of a willingness to gain profit from the source of a negative impact on the community. The offender manager had found that he posed a low risk of harm to the public but a low to medium risk of reoffending.

11. Mr Balde's criminal history indicated a repeated pattern of anti-social behaviour. He had not shown any remorse for his behaviour, nor for the time and public funds spent on his offending. His convictions for repeated acquisitive crime demonstrated that he could not support himself in the UK without offending and that he had a propensity to reoffend. The sentencing judge considered that he posed a continuing risk of reoffending which is why a five-year Criminal Behaviour Order was imposed restricting his freedom of movement, association and communication. JGB did not provide any evidence of courses undertaken when he was in custody.

12. The Secretary of State also considered the issue of proportionality. The appellant was aged 23 in good health and had spent his formative years in Portugal. He was familiar with the language and had completed his primary education in Portugal. There would be no language or cultural barriers. The Secretary of State considered that JGB could be rehabilitated in Portugal. In respect of Article 8 ECHR there would be no very significant obstacles to the appellant integrating himself to Portugal. It was not accepted that it would be unduly harsh for his unnamed partner to live in Portugal with JGB.

Summary of the appellant's case

13. It is the assertion of Mr Balde that his deportation from the United Kingdom as a result of the decision would breach his rights under the EU Treaties. The appellant accepts that drug dealing would be sufficiently serious and affects one of the fundamental interests in society, but he does not pose a genuine and present threat. Additionally, his expulsion from the UK would be disproportionate because he has family life with his current partner and child and very close bonds to his younger brother who is his only immediate family member in the UK.

14. Mr Dhanji conceded at the outset of his submissions that if the appellant could not succeed under EU Treaties, he would not be able to succeed under Article 8 ECHR in any event.

Evidence before the Tribunal

15. The evidence before me consisted of a three appellant's bundles which included inter alia a skeleton argument, and the witness statements of the appellant, his partner and his brother. The appellant served the relevant rule 15A notices in respect of the new

evidence which I accept was not available at the previous hearing because the material related to events which post-dated that hearing.

16. I also had before me the respondent's bundle which included the trial record sheet, judge's sentencing remarks dated 18 August 2017, a risk of harm and reoffending assessment dated 14 November 2018 from the prison offender manager as well as the decision under appeal.

17. The appellant provided an initial OASys assessment completed on 27 March 2019 and a second OASys assessment dated 19 October 2019.

18. I have considered all the evidence before me even if not specifically mentioned.

Manner of the hearing

19. The hearing was conducted by Skype for Business because of the Covid 19 pandemic. Neither party objected to the hearing being conducted in this manner. The parties all confirmed that they could see and hear each other and despite there being some minor connectivity issues, the hearing proceeded smoothly. Neither party complained of any unfairness and I am satisfied that both parties were able to participate in the appeal and put their case.

20. The appellant, his partner and his brother gave oral evidence, his partner through a court appointed Portuguese interpreter whom she confirmed she understood. The oral evidence is set out in the record of proceedings.

Evidence of the appellant

21. The evidence of the appellant from his written statements and oral evidence is as follows:

22. He was born in Guinea-Bissau but relocated to Portugal with his family at the age of two. Prior to coming to the UK, he lived in Portugal with his grandmother and younger brother. He never knew his father and his mother left him with his grandmother. He moved to the UK in order to explore a footballing career and after arriving in the UK he lived with an aunt and uncle in Peterborough, attended school studying towards his GSCE exams and played for Peterborough under 16's in a semi-professional capacity. After about ten months he moved to live with his aunt and cousin in Newham. About the same time his younger brother moved to the UK and also lived with his aunt. He lived with his aunt for about 3 or 4 years and during that time he was in education at Newham College studying an Access programme, Walthamstow College studying English as a Second language and then East Ham college where he was studying business. He also worked as a cleaner and in a gym.

23. He then lived independently from about 2015 until his imprisonment in 2017. Whilst in prison he was visited regularly by his brother and his cousin. He was not in trouble in prison. He worked in the prison including in the gym, in industrial cleaning and in healthcare and completed some certificates.

24. Since leaving prison, he has been living with his cousin at his bail address which is a one-bedroom flat. His cousin works for Rolex and is one of his financial condition supporters.

25. He did not pass any GCSE's in the UK and he does not have any qualifications apart from a certificate to demonstrate that he completed the Learner Access Programme and Entry level numeracy and ESOL at Waltham Forest College. After leaving prison he had a placement with Network Rail but Network Rail was not prepared to fund his training after they learned of his immigration status as they did not want to risk investing in an individual who might subsequently be deported.

26. He remains very close to his younger brother who now lives with his own partner and child. He is also close to his aunt and his young nephew now aged 12 who he has known since he was born. He also has a strong relationship with his cousin with whom he lives. He is provided with accommodation and food by his cousin. His brother who works as a carpenter provides him with financial support.

27. The appellant has no ongoing connection with Portugal. His bother is now in the UK and is working. His grandmother with whom he lived in Portugal died after he arrived in the UK and his mother has returned to Guinea Bissau. His close immediate relatives are all in the UK.

28. He was released from custody on licence in February 2019. He regrets his previous criminal behaviour which took place mostly when he was a teenager. His licence expired on 5 September 2020. Since being released from prison, he has not been convicted of any further offences. The experience of prison made him realise the impact of his behaviour on his own life and that of his family and made him to decide to change his lifestyle and associates. He no longer has contact with his previous associates.

29. He is still subject to a Criminal Behaviour Order which expires in 2022. The conditions of the order prevent him from entering E15, associating with named individuals and not having more than one mobile phone. There is no formal breach of the conditions of the order.

30. He is subject to immigration bail and has not breached the conditions of his immigration bail which are to reside with his cousin and report regularly.

31. Since leaving prison he has found it difficult to find work. The planned placement with Network Rail fell through because his immigration status acted as a barrier. In March 2020 there was a national lockdown and it was difficult to find employment. There were then further lockdowns over the period from summer 2020 until the date of the appeal hearing in May 2021. During this time, he has gained qualifications as a personal trainer and since the gyms have opened has trained some individuals for cash. He has not done on-line training. If he is permitted to remain in the UK, he would like to pursue the Network Rail placement.

32. He is in a relationship with a Portuguese national with whom he has a baby born on 31 August 2020. He entered into this relationship in May 2019 after coming out of prison. His partner has leave to remain under the EU Settlement Scheme valid until 7 December 2024. His child was aged 9 months as at the date of the appeal hearing and is also Portuguese. His partner works as a chef although she was on maternity leave at the date of the hearing (and also not working because of the closure of hospitality locations). He would like to live with his partner in the future but is currently prevented from doing so because of his bail conditions. He spends a lot of time with his partner helping her with the baby. His brother purchases items for the child. He also spends his time reading.

Submissions

33. Ms Cunha emphasised the seriousness of drug dealing and the harm it causes society. She submitted that the appellant has not been rehabilitated. He is lazy, does not work and wants to earn easy money which would motivate him to offend again. She also submitted that he could return to live in Portugal with his partner and child. Her submission is that the imposition of the Criminal Behaviour Order indicates the level of risk posed by the appellant and the seriousness of harm that would be caused if he were to reoffend.

34. Mr Dhanji relied on his skeleton argument. He submitted that the appellant is not a present and genuine threat. He conceded that if the threat materialised it would be sufficiently serious and would affect one of the fundamental interests of society. His submission was that the appellant was considered to be at low risk of reoffending in 2019. He has not committed any criminal offences for five years since 2017 and has not been in trouble since he has been released on licence in February 2019. He has not breached his licence conditions. He has not breached his Criminal Behaviour Order and he has not breached his immigration conditions. This is in marked contrast to the past when the appellant carried out offences on a regular basis and breached the conditions of his community order and offended regularly.

The Law

35. The EEA Regulations were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. However, some provisions remain. The Citizens' Rights Restriction Regulations are designed to apply the "old" law in relation to deportation of those previously covered by the EEA Regulations where the conduct complained of took place prior to 31 December 2020 and retain the provisions of Regulation 23 and Regulation 27 subject to some amendments.

36. The relevant ground of appeal is now whether the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.

37. The provisions of the TFEU including the legislation made under that which includes Directive 2004/38/EC ("the Directive") are preserved by the Withdrawal Agreement and thus is applicable in this appeal.

38. I must therefore have regard to Article 27 of the Directive and Regulations 23 and 27 of the EEA Regulations as amended.

EU Treaties – Directive 2004/28/EC

Article 27 - Protection against expulsion

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

Regulation 23 Exclusion and Removal from the UK

(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—

(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27; or

(7) A person must not be removed under paragraph (6)—

(b) if that person has leave to remain in the United Kingdom under the 1971 Act unless that person's removal is justified on the grounds of public policy, public security or public health in accordance with regulation 27.

Decisions taken on grounds of public policy, public security and public health

27.- (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(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.).

39. I must also have regard to Schedule 1 to the Regulations which provide a list of the fundamental interests of society in the UK. These include maintaining public order, preventing social harm, protecting the public, combating the effects of persistent offending, removing an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action; tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs, protecting the rights and freedoms of others, particularly from exploitation and trafficking and protecting the public.

40. It is for the respondent to justify the expulsion of the appellant and the relevant date is the date of the hearing in accordance with Arranz (EEA Regulations – deportation -test) [2017] UKUT 00294 (IAC).

41. The decision to expel must be taken on the personal conduct of the appellant only. The personal conduct must represent a genuine, present and sufficiently serious

threat affecting one of the fundamental interests of society. The threat need not be immediate. Focus should be on the propensity of the individual to re-offend rather than issues of deterrence or public revulsion, which have no part to play in assessment save in exceptionally serious cases: SSHD v Straszewski and Kersys [2015] EWCA Civ 1245.

42. I also refer to Essa (EEA; rehabilitation/integration) [2013] UKUT 316 where it was stated;

> "We observe that for any deportation of an EEA national or family member of such a national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. In such a case if there is acceptable evidence of rehabilitation, the prospects of future rehabilitation do not enter the balance save possibly as further protective factors to ensure that the rehabilitation remains durable".

43. If the appellant does not pose a genuine, present and sufficiently serious threat that is the end of the matter. If, however the appellant does pose a threat, the decision maker must then to go on to consider the proportionality of the removal taking into account that the deportation must be both proportionate and necessary for the public policy objective sought, the containment of the threat and also must not impose an excessive burden on the individual deportee as well as the appellant's own individual circumstances.

Issue 1 -level of protection

44. It is agreed that the appellant has the lowest level of protection because he has not acquired permanent residence in the UK.

Issue 2 – Genuine and present and sufficiently serious threat affecting one of the fundamental interests in society

Sufficiently serious threat

45. It is accepted by the appellant that drug dealing is a sufficiently serious threat in accordance with Tsakouridis C-145/09 in which it is said that drug addiction represents a serious evil for the individual and is a social and economic danger to society. It is also not in doubt that protecting the public by tackling drug dealing which causes harm to society as a whole is in the fundamental interests of society (in accordance with schedule 1) and that the offences of the appellant have an effect on those interests. I take into account and give weight to the fact that drug dealing is particularly heinous and insidious crime because it causes misery to individuals and their families through addiction and can lead to further violence and crime as well as

the exploitation of individuals involved. The threat if it were to materialise would cause serious harm.

Genuine and present threat

46. The issue in this appeal is whether the appellant represents a genuine and present threat. It is important to assess the likelihood of reoffending in terms of whether the appellant has a propensity to reoffend, whether there is an unacceptably high risk of re-offending as well as the seriousness of the harm should the re-offending occur. The threat does not need to be imminent. In assessing whether the appellant has a propensity to re-offend I must look at all relevant factors including his history of offending, the pattern of offending, other factors that demonstrate that he does not abide by the law, the factors behind his previous offending, what he has done to address those factors, his current circumstances and current behaviour as well as his wider circumstances. I must have regard to the views expressed in the OASys reports by the offender manager as this is weighty evidence. I note and take into account that the original decision to deport was made in November 2018 when the appellant was in prison and that the supplementary reasons for refusal letter is dated March 2019 when the appellant had just been released on licence. When making this assessment I now have the benefit of hindsight because over 2 years have elapsed since his release.

History of offending

47. I start with the appellant's history of offending. It is manifest that the appellant started offending in his mid-teens within a year or so after arriving in the UK.

48. On 26 September 2011, aged 15 the appellant was convicted at Peterborough Juvenile Court of two counts of handling stolen goods and sentenced to a six-month referral order and costs of £100.

49. On 8 October 2012 he was convicted at East London Juvenile Court of robbery and sentenced to a Youth Rehabilitation order for nine months subject to a supervision requirement, activity requirement for 15 days, programme requirement for eight days and ordered to pay £100 compensation.

50. On 8 August 2014 he was convicted at East London Magistrates Court of two counts of theft/shoplifting, battery and failing to surrender to custody at an appointed time. He was sentenced to a community order, unpaid requirement for 80 hours and ordered to pay £35 compensation, £60 victim surcharge and £85 costs.

51. On 17 September 2014 he was convicted at East London Magistrates Court of failure to comply with the requirements of a community order and 28 hours of unpaid work to run consecutively and ordered to pay £60 costs.

52. On 5 May 2017 he was convicted at East London Magistrates Court of possessing a class B controlled drug (cannabis/ Cannabis resin) and sentenced to £61 fine, £85 costs and £30 victim surcharge.

53. On 8 May 2017 he was convicted at East London Magistrates Court of using a vehicle whilst uninsured, possessing a controlled drug calls B and class A and his driving licence was endorsed with six penalty points, he was ordered to pay £85 costs £30 victim surcharge £400 fine and forfeiture and destruction of drugs.

54. On 4 August 217 he was convicted at Snaresbrook Crown Court of two counts of supplying class A drugs and sentenced to 38 months imprisonment, ordered to pay £170 victim surcharge made the subject of a criminal behaviour order for five year and the destruction of the drugs was ordered.

55. The last conviction was as a result of a covert operation by police who received information that the appellant and others were concerned in drug dealing in the Stratford area. From October 2016 the police used covert methods to identify the appellant as a drugs dealer. On 16 March 2017 an undercover officer placed a call to one of the appellant's co-defendants and the appellant then met with the police officer selling cocaine. He again met and sold cocaine to a police officer on 28 March 2017 and 30 March 2017. He was arrested on 5 July 2017. This was manifestly very serious offending.

Sentencing Remarks

56. The judge's sentencing remarks from Her Honour Judge Canavan QC dated 18 August 2017 were that the appellant had engaged in the very serious crime of dealing class A drugs which causes general harm in society. There was nothing in the sentencing remarks to indicate that the appellant received a higher sentence for being an organiser or ringleader. Her comment is that the appellant is intelligent and not a fool and chose to become involved in drug dealing. He was not coerced into this activity. The appellant was given 25% credit for an early guilty plea.

Nature and pattern of offending

57. I find that the offending started when the appellant was aged 14 or so in 2011 and carried on for a period of 6 years until the last offences which took place when he was aged 21. During those years his offending escalated from more minor offences such as shoplifting and possession of cannabis to dealing Class A drugs. The offences in 2017 are all related to drugs and by 2017 on his own admission he was part of a group of young men who were involved in the supply of class A drugs. The offences became progressively serious. There is also a clear pattern of the appellant failing to take advantage of referral orders, youth rehabilitation orders and community orders to address his offending. Indeed, his offences included failing to surrender to custody and failure to comply with the requirements of a community order. These breaches demonstrate his propensity to disregard the law and his casual attitude to the conditions imposed upon him. His failure to pay court fines is also evidence of this.

58. The appellant demonstrated a clear disregard for abiding by the law or thinking about consequences for wider society as a whole or the consequences of his behaviour for himself or his family. By 2017 his offending was posing a serious harm

to society in general by drug dealing with the associated misery of drug addiction, crime and violence. I find that his focus was primarily on his anti-social peers and the associated lifestyle. The appellant did not realise the seriousness of his offending and seemingly thought he could continue offending without any consequences for himself.

OASys reports – risk of reoffending

59. I give the OASys reports great weight as they were prepared by trained professionals independently of these proceedings with the specific aim of identifying risk factors. The first report was carried out by Ms Grainger a Prison Offender Manager on 14 November 2018. Her view was that his risk of reoffending using the OGR assessment is 27% within 1 year and 43% within 2 years. She places him in the "low-medium risk" of re-offending.

60. She further states that his risk of serious harm is listed on the National Probation Service as low risk of serious harm which is the assessment by his offender manager. She agrees that he is at low risk of serious harm. She also reiterates that the appellant is not subject to MAPPA and his only violent crime was committed in 2014. Her assessment is however hampered by the fact that no full OASys assessment had been carried out at that time.

61. A full OASys report was carried out in March 2019 around the time of the appellant's release date. This report indicates that the appellant accepted the CPS version of events and accepts responsibility for the offence (2.1). However, the report also indicates that the appellant was likely to have downplayed his role as the CPS documents indicated that the appellant was involved in co-ordinating the meets and his associates. It is recorded that the appellant recognises the impact of his offending on the wider community. The offence indicated a form of organised crime but there was no evidence of gang involvement.

62. One of the appellant's motivations for offending was for financial gain. He stated that he owed money to "an elder". It is evident that it as a teenager and young adult that he was also motivated by a desire to earn easy money and lead an extravagant lifestyle. Interestingly in the OASys report it is said that a lack of employment did not contribute to the appellant's motivation to offend as he was in employment when the offences took place (4.10). However, lack of financial management was indicated as a motivating factor. Prior to his arrest the appellant had large outgoings on materialistic items such as eating out and clothes. He had purchased a car. He also had little financial responsibility. There was some confused evidence in relation to the car. The appellant and his brother both stated that the car actually belonged to his cousin and that he had told probation this. I do not think this discrepancy is particularly relevant. I accept what is written in the probation report. In any event the appellant enjoyed driving a relatively expensive car which speaks to his lifestyle.

63. In the opinion of the report writer another major motivation for the appellant was the influence of negative peers. It is said that the appellant was easily led. The appellant himself attributes his offending to peer pressure. The report writer's view is that the

appellant's attachment to his peers was to have a sense of belonging because of the absence of family. The negative peers were living in the Stratford area.

64. The OASys report suggests that the appellant may have been taken advantage of because of his lack of family which resulted in a need for belonging, paired with a limited knowledge of English and a desire to overcompensate by taking part in risky behaviour. There was no indication that the appellant himself had dug of alcohol misuse issues.

65. The report also identifies that the appellant did not at the time of the offending realise its seriousness and did not realise the consequences or what would happen if he were convicted. This is one factor which is identified as leading to a risk of reoffending.

66. Dealing illegal substances also indicated a level of risk-taking behaviour and poor thinking and decision-making skills. In the initial assessment he was identified with having significant problems with recognising problems, awareness of consequences and problem-solving skills.

67. The overall OVP score (ie risk of violent offending) was considered to be low in March 2019. The report concludes that there is a medium risk of serious harm on the basis that the offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances for example failure to take medication, loss of accommodation, relationship breakdown drug or alcohol misuses.

68. The appellant was not referred to MAPPA. Overall, his OGP (dynamic probability assessment of proven non-violent offending) is said to be 22% in Year 1 and 34%in Year 2 with a medium risk of reoffending in that category posing a medium risk of serious harm and a low risk of general (static assessment) and violent offending.

69. A second report was commissioned in October 2019 presumably as a precursor to his licence coming to an end and with a view to assessing what further support, he needed. The risk of offending was the same as in the earlier report. The respondent places a great deal of reliance on this factor as evidence that the risk of the appellant offending has not decreased.

70. I note and take into account however that the second report took place only five months after the first report and was in very similar terms. The review confirms that since his release the appellant has been complying with the terms of his licence, was positive about probation and had been engaging well. There had been no breaches, he had attended all of his appointments, that he had undertaken courses but needed help with communication. The appellant was described as still very motivated to change his behaviour, engaged with all activities including taking further gym training courses and undertaking voluntary work. It is noted that there was no intelligence of any association with previous negative peers. Apart from having a second phone (which was his previous phone returned to him by the police) the appellant had complied with all of the terms of his Criminal Behaviour Order. He disposed of the phone when the issue was discussed with him. The report is positive

but the writer states that they will not change the risk assessment scores because not enough time has elapsed since the appellant has been in the community. There was some concern that the appellant had not found work, but the overall tenor of the report is that the appellant was doing well although he needed to continue to work on his decision making and thinking skills.

71. I find that in October 2019 the appellant was found to have the same risk as in March 2019 which are set out above. There was a medium risk of serious harm although he was still assessed as unlikely to cause harm unless there was a change of circumstances.

72. There is no further assessment of risk of reoffending by probation services, but given that the appellant has remained on the same path of rehabilitation and has not offended in the intervening 18 months, has undertaken further work on thinking and problem solving and given and that his circumstances have not changed in any negative way and remain stable, I am satisfied that he been assessed again the risk of reoffending would have reduced.

73. I also accept that the imposition of the Criminal Behaviour Order does indicate the seriousness of the appellant's offending and the need to prevent further serious harm by monitoring the appellant. It is evidence that the courts believed that there was a risk that he would reoffend and that measures needed to be put in place to reduce that risk.

Motivation to change and Regret

74. The experience of being in prison undoubtedly motivated a change in the appellant's behaviour. The experience of being incarcerated with other serious criminals was clearly unpleasant for the appellant and something he does not wish to ever replicate. I find that until he went to prison the appellant did not appreciate that there might be consequences for his behaviour, and his prison sentence came as a shock to him. I find that the appellant was motivated whilst in prison to change his behaviour and get out of prison as early as possible. He describes working whilst in prison, carrying out a gym training course and obtaining "trusted status" which meant he had the opportunity to train other prisoners and move around the prison. This was a status accorded to few prisoners. There is supporting evidence of this from the OASys report in which it is recorded that he completed courses in cleaning, gym instructor level 2/3, food safety and health care. I am satisfied that this is an accurate description of the appellant's time in prison. There is also an absence of evidence of any adjudications or additional days served due to poor behaviour or fights. It is said that during his time in prison there was no evidence of failing to comply with prison rules.

75. This indicates that the appellant engaged well in prison. It is recorded that he was motivated to gain qualifications in order to find future employment and this does not sit well with Ms Cunha's submission that he is "lazy".

76. The appellant did not ever claim that he was not guilty of his offences. He is consistently described through both OASys reports as highly motivated to address his offending behaviour and self-reports as that he is "definitely not" likely to reoffend in the future as he wants to get on with his life. I accept that the appellant was strongly motivated to address his offending behaviour and that this is reinforced by the lack of subsequent convictions.

77. I also find that the appellant sincerely now regrets his criminal past and has realised the impact of his actions on society as a whole, his family and himself. His work for the Troan charity involved talking to other young people about his experiences.

Behaviour since release

78. The last offences took place in July 2017, five years ago. The appellant was in custody until February 2019 and has been in the community since then for a period of two years and three months by the date of the hearing. After being released he was on licence until 5 September 2020. His licence has expired although he is able to contact probation if he wishes to. He is still subject to the Criminal Behaviour Order which expires on 18 August 2022.

79. There have been no further offences in the period since his release from custody in February 2019 for a period of two years and two months. I find that the appellant has abided by the terms of his licence. Initially he would sometimes arrive late for probation appointments but once the consequences had been explained to him, he attended all subsequent appointments on time. He attended all of his appointments and engaged in all of the programmes put forward. He is said to have a positive attitude towards probation. There have been no reported breaches. He has abided by the terms of his Criminal Behaviour Order by not entering E15 nor associating with the named individuals. He was said to have a second phone for a short period as his old phone was returned to him by the police, but he got rid of it. He has further abided by the terms of his immigration bail residing at his bail address and reporting as required.

80. The most compelling evidence of a change is the complete reversal of the previous pattern of frequent and escalating offending and failure to abide by conditions. I find that the appellant has matured since his incarceration. At that time, he was 21, he is now a man of 25 with a child of his own.

Dealing with factors associated with the risk of re-offending –

Association with peers

81. The biggest motivating factor for offending identified by probation services was his past links with negative peers. His risk of re-offending was directly linked to his involvement with his previous associates. All of his previous offending was when he has been in the company of peer. The report identifies a risk to the appellant if he returns to the Stratford area and regains links with previous associates. Probation services indicated in March 2019 that removing the appellant from his peers and

previous lifestyle might not be as easy as the appellant thought. The appellant himself identified at that time that the biggest problems for him were mixing with bad company, going to places which cause him trouble and making good decisions. The appellant indicated at that time a very strong desire not to reoffend and is recorded as being very motivated to engage with the Risk Management Plan. He is also described as capable and ready to change his behaviour.

82. The report identifies that the greatest risk to the appellant would be if he had no support network, returned to the Manor Park area, has no money and relies on illegal means to live in the community loses motivation to address his offending lifestyle and to address his offending behaviour.

83. The evidence is that the appellant has managed to sever ties with his previous associates. It is his own evidence and that of his cousin with whom he lives as well as in the OASys reports. The most significant evidence for this is the lack of any breaches of his Criminal Behaviour Order which indicates that he has been able to stay away from previous associates. The probation service receives regular intelligence from the police, and I am satisfied that the police would be aware if the appellant were returning to his old area and making contact with old associates and would inform probation. The appellant has managed to find other relationships to fill the void, importantly relationships with his family and partner. The absence of ongoing ties with his previous criminal peers strong significantly reduces the risk of re-offending and it can no co-incidence that the reason that there are no further offences are because of this change in associates.

84. The biggest motivation that the appellant has to stay away from his previous criminal associates and lifestyle is the desire not to go back to prison and a deeper understanding about consequences of actions on family and society as a whole. I also find that the threat of deportation and fear of being separated from his family is another motivation. Although the Criminal Behaviour Order may act as a deterrent, I find that if the appellant wanted to reoffend, he would have done so notwithstanding the Criminal Behaviour Order. His primary motivation is not to return to prison and to get on and make something of his life.

Thinking skills

85. A factor identified by probation as reducing the risk of reoffending is the appellant addressing his offending behaviour and dealing with deficits in consequential thinking. It is said in March 2019 that he requires a thinking skills programme. After leaving prison and whilst on licence the appellant was in regular contact with his probation officer and carried out work on his thinking skills. The conditions of the appellant's licence were to have weekly meetings with his offender manager focusing on risk factors and how they linked to his offending and ways of avoiding future offending situations. The OASys report records that all of these visits were carried out and the appellant engaged well.

86. In October 2019 he is recorded as having completed a problem solving and assertive communication course although after the courses the appellant disclosed that he had

some problem with communication which made it harder for him to solve problems. The plan was to conduct more one to one work with the appellant in these areas. The appellant's oral evidence is that he has carried out exercises in problem solving, positive thinking, dealing with situations and control. I find that the appellant has undertaken work to address his deficits in consequential thinking. The fact that he arranged to pay off his court fines, attended all of his probation appointments and made sure he attended on time after being told of the consequences of being late indicates that he has more understanding of the consequences of his actions and is more responsible.

Family support

87. One of the factors identified as reducing the risk of reoffending is family support, financial security and stable accommodation.

88. The appellant states in his witness statement that at the time the offence was committed he was living separately from his family, although in the OASys report he claims to have been living with his brother in the Stratford area. At that time his brother would have been aged about 18. I prefer the evidence that the appellant gave to his offender manager at the time as it is more contemporaneous, and I find that he was living with his brother although given his lifestyle it is likely that he also that he stayed with his peers frequently.

89. Prior to 2017 his family was not able to prevent him from offending. The difference between the period leading up to the time when he went to prison was that at that time, he was aged 20 and he was living with his younger brother who was only 18 and presumably not able to influence him. The appellant's primary focus at that time appears to have been his peers and his criminal associates.

90. The appellant is very lucky to have a loving family including his brother and cousin who supported him through his time in custody paying regular visits to him. His cousin offered his home as a bail address and has been providing him with stable accommodation and food since 2019. The appellant is supported financially by his brother. I find that the appellant is older and more mature and that he has shifted his focus to his family now. His cousin and brother are both working and engaged in society. I find that their increased involvement and presence in his life are strong factors to prevent him from reoffending. The OASys report describes his cousin as being "pro-social" and continuing to encourage the appellant to engage with probation and live a legitimate lifestyle. I find that a desire not to let his family down, his understanding of the sacrifices his cousin and brother have made for him and his desire not to return to prison are strong motivating factors for him not to reoffend. I also find that his relationship and the presence of his child are supportive factors.

Employment/Constructive use of time

91. Employment and a constructive use of time are identified as factors which will reduce the risk of reoffending. The probation services expressed some concern in October 2019 that the appellant had not found work. The appellant did not complete

the Network Rail course and I accept his explanation for this. It is understandable that a company would not want to invest in someone who might not be able to work after expensive training.

92. Ms Cunha's submission is that the appellant is lazy does not want to work, wants easy money and will reoffend because of this, however this is not consistent with the description of the appellant in the probation report as being highly motivated to complete courses and find work. The appellant believes that he has the right to work. Neither representative could enlighten me on whether this is in fact the case. He has made some attempts to find employment in construction through contacts but was unsuccessful. The appellant has been out of prison since March 2019. In the October 2019 report it is recorded that he had been completing gym courses and had carried out all those activities recommend to him. By March 2020 the UK was in lockdown. I am satisfied that in the context of the pandemic when work was scarce and in the context of not having documents confirming his right to work post Brexit that it has been difficult for the appellant to obtain work and that his failure to gain employment has mainly been due to factors beyond his control. He has been training individuals for cash at the gym. I am satisfied that were the appellant to have evidence of his immigration status and permission to work, he would take immediate steps to obtain lawful work and would work to support himself. He has worked in the past and would like to earn money.

93. The appellant has found other ways to use his time. Firstly, he had a high level of contact with probation and immigration services. He had completed level 3 Diploma in Personal Training with Genesis fitness by October 2019 and has now completed level 4 and 5 diplomas. Secondly the appellant has carried out some work for the Troan charity involving assisting in providing essentials for homeless people in East London. He reported to the probation officer in October 2019 that he was assisting the charity four days a week on Wednesdays, Thursday, Saturday and Sunday. This evidence is supported by a letter from Troan charity dated 20 October 2019 confirming the appellant's involvement and I accept that he carried out work for the charity. He would assist homeless people at stations by providing them with food and clothes. He also gave some talks to other young people about his experiences. The Youth Project Manager spoke how many young people responded exceptionally well to the motivational speeches. The appellant's evidence was that this charity work ceased altogether after the pandemic in March 2020 because it involved going out in public. He is no longer carrying out charity work. However, he now has a partner and young baby to occupy himself with. I accept that he sees his partner on a daily basis and that he also spends time training and reading.

94. I find that the appellant is using his time constructively and that this is a factor which reduces his risk of reoffending.

95. In summary, I find that the appellant has addressed those factors which would put him at risk of reoffending. He is not associating with criminal or negative peers, he has strong family support, he has undertaken thinking and decision-making courses, he has recognised the affect of his offending, he is highly motivated to change, he has

made constructive use of his time and he has demonstrated that he is rehabilitated by positively engaging in every aspect of his licence and Criminal Behaviour order conditions. His behaviour demonstrates that he has become more mature and changed. There are no strong risk factors which indicate that the appellant would engage in offending again. There are no drug, alcohol or mental health issues. The reports stated that he was unlikely to reoffend unless there was a change in his circumstances. I find that there is no such change.

96. Having taken into account all of these factors in the round, including his previous pattern of offending and the seriousness of his offence, his OASys scores, the existence of the Criminal Behaviour Order as well as the fact that he has not offended since being released from prison, his motivation to change, his adherence to conditions, his change in lifestyle and all of the other factors I have set out above, I find that the appellant does not currently have a propensity to offend and that there is not an unacceptably high risk of offending. I find that although the harm is serious, it is unlikely that the appellant will carry out this harm. I therefore find that the personal conduct of the appellant does not represent a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests in society" in accordance with Article 27 of the Directive.

97. Having made this finding, I do not need to go on to consider further the principles of proportionality and other wider factors.

Notice of Decision

98. The appeal is allowed. The decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.

Signed *R J Owens* Date 25 November 2021

Upper Tribunal Judge Owens

Appendix A

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/00806/2018

THE IMMIGRATION ACTS

Heard at Field House by UK Court Skype
On 4 November 2020

Decision & Reasons Promulgated

……

Before

UPPER TRIBUNAL JUDGE OWENS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JOELSON GOMES BALDE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Melvin, Senior Presenting Officer
For the Respondent: Mr Dhanji, Counsel instructed by Vestra Lawyers

DECISION AND REASONS

Introduction

1. Mr Balde is a Portuguese national born on 14 December 1995. He appeals against the decision of First-tier Tribunal Judge Scott-Baker, sent on 11 December 2019, allowing Mr Balde's appeal against a decision to make a deportation order in

respect of him pursuant to Regulation 27 of the EEA Regulations 2016. Permission to appeal was granted by Resident Judge Phillips on 10 January 2020.

2. The hearing was held remotely. Neither party objected to the hearing being held in this manner. Both parties participated by Skype for Business. I am satisfied that a face-to-face hearing could not be held because it was not practicable and that all of the issues could be determined in a remote hearing. Neither party complained of any unfairness during the hearing.

Background

3. Mr Balde claims to have arrived in the United Kingdom in 2010 at the age of 14 or 15. He attended school and college and has done some casual work. He has been convicted of numerous offences in the UK.

4. It is not in dispute that Mr Balde has not obtained permanent residence in the UK. His brother and cousin also reside in the UK. His mother and aunt have returned to Guinea-Bissau.

The decision of the Secretary of State

5. Mr Balde has 8 convictions for 16 different offences between 2011 and 2017 including handling stolen goods, robbery, theft, shoplifting, battery, failing to surrender to custody, possession of Class A and Class B drugs and using a vehicle whilst uninsured. On 4 August 2017, at Snaresbrook Crown Court Mr Balde was convicted of two counts of supplying a class A drug (cocaine) and one count of being concerned with the supply of a class A drug (cocaine) and he was sentenced to three x 38 months imprisonment as well as a five-year Criminal Behaviour Order. The Secretary of State is of the view that the offence for which Mr Balde has been convicted along with his conduct, poses a genuine, present and sufficiently serious threat to the interest of public policy and that his deportation is justified under Regulation 27 of the EEA Regulations 2016.

6. The Secretary of State considers that the supply of drugs has a wider impact on the community at large and that Mr Balde's offences are representative of his willingness to gain profit from the source of a negative impact on the community. Mr Balde poses a low risk of harm but a low to medium risk of reoffending. There is an established pattern of antisocial behaviour, escalating criminal behaviour and no remorse. Mr Balde cannot demonstrate that he can support himself in the UK without committing crime and he demonstrates a propensity to re-offend. The imposition of a Criminal Behaviour Order restricting his freedom of movement, association and communication indicates that he poses a continuing risk of reoffending.

7. The Secretary of State considers that Mr Balde's deportation from the UK is proportionate and would not breach Article 8 ECHR.

The decision of the First-tier Tribunal

8. The judge allowed the appeal. She took into consideration the offences, the sentencing remarks, the OASys report and Mr Balde's evidence. She found that Mr Balde does not have permanent residence in the UK. The judge considered that Mr Balde's removal from the UK would prejudice his chance of rehabilitation in circumstances where Mr Balde would have no access to licence or control in Portugal. Overall, she found that the conviction and personal conduct of Mr Balde does not represent a genuine, present and sufficiently serious to public security threat such that deportation is proportionate.

The Grounds of Appeal

9. The following grounds of appeal are advanced;

   Ground 1 - Misdirection in law.

   The judge has erred by failing to follow the principles in MC (Essa principles recast) [2015] UKUT 520 (IAC). She has erroneously taken into consideration the prospects of Mr Balde's rehabilitation in Portugal when the caselaw indicates that this is not a weighty consideration when an appellant has not acquired permanent residence. The judge has also erroneously failed to have regard to headnote 9 in MC (Essa) which states that lack of access to a Probation Officer or equivalent should not in general preclude deportation.

   Ground 2 – Failure to take into material matters/Inadequate reasons

   The judge has erred by failing to take into account that the updated OASys report does not show any reduction in the reoffending scores and that the report refers to Mr Balde's pro-criminal attitudes. The judge has erred by failing to consider the harm that would occur if re-offending took place. The judge has further failed to give weight to the fact that Mr Balde is subject to a five-year behavioural order which indicates that he is considered a risk to society.

   Ground 3 – Inadequate reasons/ Speculative findings

   The judge made findings that Mr Balde would have no recourse to accommodation, money or a job in Portugal. In doing so, the judge failed to take into account that Portugal has its own welfare system, that Mr Balde can speak fluent Portuguese, and that his brother has friends in Portugal who can assist him. It is not clear how Schedule 1 of the 2016 Regulations has been applied. The judge's assessment of Mr Balde's integration in the UK fails to take into account the Regulations and established caselaw. The judge has failed to make a definitive finding on whether Mr Balde represents a genuine and present and sufficiently serious threat to public security or public policy.

   Ground 4 – Irrationality

   The judge's findings on the proportionality of deportation are irrational in the light of his numerous convictions, persistent offending, his lack of integrative ties, medium risk of harm and the existence of the Criminal Behaviour Order.

Permission to appeal to the Upper Tribunal

10. Permission was granted by Resident Judge Phillips on the basis that it is arguable that the judge failed to take into account that Mr Balde has not acquired a permanent right of residence and has therefore not followed MC (Essa) when considering the weight to be given to the prospects of rehabilitation in the UK rather than in Portugal.

11. Resident Judge Phillips indicated that the other grounds were weaker but granted permission on all grounds.

Preliminary point regarding jurisdiction

12. The Immigration (European Economic Area) Regulations 2016 have now been revoked by The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 Schedule 1(1) paragraph 2(2) (December 31, 2020. Revocation, however, has effect subject to savings specified in The Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020, Regulation 2 and Schedule 1 and The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 Regulations ("The Transitional Provisions").

13. Schedule 3 paragraph 5 of the Transitional Provisions deals with existing appeal rights and appeals and as this appeal was extant prior to commencement day, I consider that I retain jurisdiction. Regulation 27 of the 2016 Regulations is specified in Schedule 3, paragraph 6 of the Transitional Provisions.

> Existing appeal rights and appeals
>
> **5.**- *(1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply –*
>
> *(a) to any appeal which has been brought under the Immigration (European Economic Area) Regulations 2006 and has not been finally determined before commencement day,*
>
> *(b) to any appeal which has been brought under the EEA Regulations 2016 and has not been finally determined before commencement day,*
>
> *(c) in respect of an EEA decision, within the meaning of the EEA Regulations 2016, taken before commencement day, or*
>
> *(d) in respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which is taken on or after commencement day.*
>
> *(2) For the purposes of paragraph (1) –*
>
> *(a) an appeal is not to be treated as finally determined while a further appeal may be brought and, if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned; and*

(b) an appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom.

(3) The revocation of the EEA Regulations 2016 does not affect the application of the Immigration (European Economic Area) Regulations 2006 to an appeal that falls within paragraph 3(1) of Schedule 4 to the EEA Regulations 2016.

Discussions and Conclusions

Ground 1 -Material misdirection in law.

Submissions

14. Mr Melvin relied on the skeleton argument filed by the Secretary of State on 20 February 2020 as well as the grounds of appeal. It is asserted that at [88] to [89] and at [98] the judge places considerable weight on the issue of rehabilitation in considering the overall proportionality of the decision to issue a deportation order.

15. It is agreed that Mr Balde has not been exercising Treaty rights in the UK and that he has not acquired permanent residence in the UK. There is a clear finding to this effect by the judge at [77] and [78].

16. It is asserted that judge when considering the proportionality of removal has placed excessive weight on the lack of support Mr Balde would receive in Portugal and has assessed the difficulties he would face in rehabilitation in Portugal in contrast to the support he would receive in the UK.

17. Mr Dhanji's assertion is that the judge has made a finding that Mr Balde does not present a genuine, present and sufficiently serious threat and that the decision can be upheld on that basis alone since the consideration of the relative prospects of rehabilitation is only relevant to the proportionality exercise and does not bite if the judge makes such a finding. He relies on headnote of MC(Essa) in this respect.

18. Mr Dhanji also submitted in the rule 24 response and at the hearing that Mr Balde's lack of prospects of rehabilitation in Portugal was not the only factor considered by the judge when finding that Mr Balde does not pose a genuine, present and sufficiently serious threat to the interest of public policy and that the judge has not attached substantial weight to this factor. This was just one factor considered alongside a holistic assessment of all the factors.

Analysis

19. The judge sets out meticulously the reasons for the Secretary of State's decision, the evidence before her as well as Mr Balde's evidence and that of his brother. She also records in detail the submissions from both parties and the offences.

20. The judge then makes findings of fact from [77] to [80] in relation to Mr Balde's family, living circumstances and offending behaviour.

21. The judge then turns to the applicability of the law at [81] onwards and correctly sets out relevant matters in respect of the evaluation of Regulation 27(5). At [85] she states;

> "In Essa the Tribunal found that what was likely to be valuable to a judge in the immigration jurisdiction who is considering risk factors is the extent of any progress made by a person during the sentence and licence period and any material shift in the OASys assessment of that person".

22. At [87] the judge states;

> "Further in the case 30-77 ECR Bouchereau, the European Court of Justice held that the existence of a previous criminal conviction can only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy".

23. At [88] she states;

> "The personal conduct must represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society taking into account past conduct of the individual and that the threat does not need to be imminent. Clearly if the appellant were to engage with drug dealing of Class A drugs again this would represent a sufficiently serious threat affecting one of the fundamental interests of society. The issue however is as to whether now the appellant does represent a genuine and present threat. The appellant has indeed committed offences in the past some of which were when he was a minor and it is clear that he has been influenced by association with his peers and encouraged to deal in drugs for financial reasons. He was funding his lifestyle through crime and in part he accepts that this was wrong. He has now completed half of his sentence of 38 months and is now on licence until 2020. He is also subject to a Criminal Behaviour Order which was not before me in evidence, which restricts his association with his previous peer group but both of which are important factors".

24. It is manifest from this paragraph that the judge has identified that the first crucial issue she has to determine, is whether Mr Balde does represent a genuine and present and sufficiently serious threat affecting one of the fundamental interests in society. Throughout the decision, she identifies evidence which is relevant to this issue including the assessment of risk in the OSASys report, the views of the offender manager about the reasons for Mr Balde's offending and his attitude to his offences, Mr Balde's current living circumstances including his current family ties, training and voluntary work. She also considers the number of offences, the escalation of offending and the harm caused by the appellant's drug dealing. The judge devotes several paragraphs analysing the situation Mr Balde would face in Portugal vis a vis the UK and the prospects of his rehabilitation in Portugal against the prospects of his rehabilitation in the UK.

25. At [99] the judge concludes her decision by stating;

> "I do not find under Regulation 27(5) that the personal conduct of the appellant represents a genuine, present and sufficiently serious threat to find that deportation is disproportionate".

26. In MC(Essa), the Upper Tribunal considers and expands upon the "Essa" principles in the light of the decision in the Court Appeal case of SSHD v Dumliauskas & Ors [2015] EWCA Civ 145.

27. It is clear from the headnote in MC(Essa) that in deciding whether an EEA national should be deported from the UK a staged approach is necessary.

28. Headnote 2 states;

> "*It is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (regulation 21(5)(c)) that it becomes relevant to consider whether the decision is proportionate taking into account all the considerations identified in regulation 21(5)-(6)".*

29. It is manifest from this, that the initial task of the judge is to evaluate whether the personal conduct of person is concerned is found to represent a genuine, present and sufficiently serious threat first, before going on to consider other matters such as the proportionality of the decision and the age, state of health, family and economic situation of the person, the person's length of residence in the UK, social and cultural integration in the UK and the extent of the person's links with his country of origin. The second exercise will only be relevant if the individual is found to represent the requisite threat. This is indeed how Mr Dhanji framed the issues in the appeal in his original skeleton argument which was before the First-tier Tribunal in which he stated;

> "It is submitted that in determining this appeal the following issues fall to be determined by this Tribunal
>
> i. Does the appellant represent a genuine, present and sufficiently serious threat to society? If not his appeal should be allowed.
>
> ii. If so would the appellant's deportation be disproportionate in all the circumstances? If it would his appeal should succeed.

30. Secondly, according to headnote 6 of MC (Essa);

> "such prospects of rehabilitation are a factor to be taken into account in the proportionality exercise required by 21(5) and (6)".

31. I set out headnotes 8, 9 and 10 of MC (Essa) for clarity.

> *8. Gauging such prospects requires assessing the relative prospects of rehabilitation in the host Member State as compared with those in the Member State of origin, but, in the absence of evidence, it is not to be assumed that prospects are materially different in that other Member State (Dumliauskas [46], [52]-[53] and [59]).*
>
> *9. Matters that are relevant when examining the prospects of the rehabilitation of offenders include family ties and responsibilities, accommodation, education,*

training, employment, active membership of a community and the like (Essa (2013) at [34]). However, lack of access to a Probation Officer or equivalent in the other Member State should not, in general, preclude deportation (Dumliauskas [55])

10. *In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (Dumliauskas [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide-ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (Dumliauskas at [46] and [54]).*

32. Having identified at [88] that the issue for her to determine is whether Mr Balde presents a genuine, present and sufficiently serious threat, the judge immediately goes on at [89] to consider the issue of rehabilitation and the relative prospects of rehabilitation in Portugal vis a vis the UK.

33. At [89] she states;

> "I am not persuaded on this evidence that removal from the United Kingdom would not prejudice the appellant' chance of rehabilitation. There is no evidence before me that the appellant would be subject to any form of licence or control in Portugal which would assist him in rehabilitation. Such services appear on the evidence to be only available in the UK".

34. At [90] the judge deals at length with Mr Balde's ties to Portugal, the circumstances in which he would be living in Portugal and his opportunities there and she returns to this issue at [97]. Finally, the judge's conclusion at [98] includes the words;

> "If he were to be returned to Portugal, it follows that the risk would increase".

35. I find that the judge has erred by failing to deal with Regulation 21(5)(c) first as a separate consideration. Instead, she has, in deciding whether Mr Baldes presents a genuine, present and sufficiently serious threat, also taken into account the factors identified in Regulation 21(5) and (6) and specifically the proportionality of his deportation which includes an assessment of Mr Balde's prospects of rehabilitation in Portugal.

36. What is also lacking, is a concrete finding on Mr Balde's propensity to re-offend or whether there is an unacceptably high risk of re-offending and therefore whether he represents a genuine, present and sufficiently serious threat in accordance with Regulation 21(5)(c) which is separate from the proportionality assessment. It is manifest from MC (Essa) that this assessment must be conducted prior to an assessment of the proportionality of the decision. The task of assessing the risk will of course take into account several factors including the individual's history of offending, his attitude to his offences, whether he has undertaken courses or rehabilitative measures, the insight into the offending, factors which might now influence the likelihood of re-offending and importantly the view of the offender manager and conclusions in the OSASys report, as the judge herself identifies. Indeed, the judge does refer to several of these factors throughout the decision but

does not draw them together to make a definitive finding until [99] by which time she has given considerable weight to other factors relating to the proportionality of the decision, including the appellant's prospects of rehabilitation in Portugal. Indeed, the passages from Essa quoted by the judge at [86] clearly refer to the prospect of rehabilitation being relevant to the proportionality of deportation.

37. It is not possible to unpick the reasoning to determine whether the judge would have still found that Mr Balde does not represent a genuine and sufficiently serious threat affecting one of the fundamental interests of society had she not given weight to the prospects of rehabilitation in Portugal nor his situation in Portugal. I am satisfied that the judge has erred in failing to follow MC (Essa) is this respect.

38. I am also satisfied that the judge erred by failing to follow the guidance in Dumliauskas and MC(Essa) in her approach to the prospects of rehabilitation in Portugal.

39. At [53] Sir Stanley Burnton states;

> "However, different considerations apply to questions of evidence and the weight to be given to the prospects of rehabilitation. As to evidence, as a matter of practicality, it is easier for the Secretary of State to obtain evidence as to support services in other Member States. However, in my judgment, in the absence of evidence, it is not to be assumed that medical services and support for, by way of example, reforming drug addicts, are materially different in other Member States from those available here. This is not the occasion to conduct a comparative survey, but it is appropriate to mention, by way of example, that medical services in France are said to be excellent, and that Portugal has been innovative in relation to treating drug addiction".

40. At [54] it is said;

> "Lastly, in agreement with what was said by the Upper Tribunal in *Vasconcelos*, I do not consider that in the case of an offender with no permanent right of residence substantial weight should be given to rehabilitation. I appreciate that all Member States have an interest in reducing criminality, and that deportation merely exports the offender, leaving him free to offend elsewhere. However, the whole point of deportation is to remove from this country someone whose offending renders him a risk to the public."

41. And at [55] it is said;

> "Furthermore, as I mentioned above, a deported offender will not normally have committed an offence within the State of his nationality. There is a real risk of his reoffending, since otherwise the power to deport does not arise. Nonetheless, he will not normally have access to a probation officer or the equivalent. That must have been obvious to the European Parliament and to the Commission when they adopted the Directive. For the lack of such support to preclude deportation is difficult to reconcile with the express power to deport. In my judgment, it should not, in general, do so".

42. These principles are reiterated at Headnotes 8 and 9 of MC (Essa) above and at [38] in MC (Essa) where it is said inter alia,

> "On the logic of the Essa principles as revised by the Court of Appeal in Dumliauskas it is not open to Tribunal re-making the decision in an appeal concerning an EEA national who has not acquired permanent residence to attach substantial weight to the prospects of rehabilitation".

43. The judge gave considerable weight at [89] to the lack of support Mr Balde would receive in Portugal and the fact that his rehabilitation in Portugal would be prejudiced by the lack of these services, which she finds are only available in the UK. She finds that removing Mr Balde to Portugal would prejudice his rehabilitation. The judge clearly erred by failing to follow the guidance above in giving weight to the lack of services in Portugal and failing to recognise that the lack of probation services or other services in the EEA country will not generally preclude deportation.

44. I am also satisfied that the judge has misdirected herself in law by giving excessive weight to the advantage of Mr Balde remaining in the UK. I do not agree with Mr Dhanji that this was one of many factors in a holistic proportionality exercise. This factor was clearly central to the judge's findings on proportionality. The judge referred to it early in the decision which indicates the importance she gave it. She also devoted several paragraphs to the issue and referred to it in several paragraphs. I am satisfied that had the judge not erred by failing to follow the guidance in MC (Essa) and had she not given so much weight to this factor, that she may have reached a different conclusion on the proportionality of the removal on the evidence before her. I find that this error is material to the outcome of the appeal.

45. On this basis, I am satisfied that the decision is vitiated by a material error of law and the decision should be set aside in its entirety.

46. Since I have upheld Ground 1 in finding that there was a material misdirection of law, I do not go onto consider the other grounds.

47. I am mindful that the original appeal was heard in October 2019, 18 months ago and that Mr Balde's situation may have changed considerably in the intervening period and that this will be relevant to the assessment of the risk of reoffending and any potential proportionality exercise. This will necessitate new factual findings.

Disposal

48. The parties were agreed that in the event that I found a material error of law it would be appropriate for the appeal to be adjourned for re-making in the Upper Tribunal and I am in agreement that this is the appropriate course of action because of the complex issues in the appeal.

The Decision

49. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. The decision of the First-tier Tribunal is set aside in its entirety.

50. The appeal is adjourned for re-making in the Upper Tribunal at a date to be fixed.

Directions

51. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed at rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and also at rule 2(2) to 2(4), I have reached the provisional view that it would in this case be appropriate to hear the appeal by means of a **remote hearing** by Skype for Business or other suitable platform, as determined by the Tribunal.

52. I therefore make the following directions:

    i. Mr Balde is to file and serve, **no later than 7 days before the resumed hearing**, a skeleton argument and a legible bundle of up-to-date evidence to address both his current risk of reoffending and current circumstances as well as any evidence in relation to the proportionality of the decision together with the requisite notices.

    ii. Within 7 days of the date of this notice Mr Balde must indicate the number of witnesses he intends to call and if an interpreter is required and if so, in which language.

    iii. The Secretary of State is to file and serve a position statement/skeleton argument no later than 7 days prior to the resumed hearing.

    iv. Liberty for the parties to provide reasons as to why a face-to-face hearing is required in this matter **no later than 7 days after this notice is sent out** (the date of sending is on the covering letter or covering email).

No anonymity direction is made.

Signed *RJ Owens* Date 26 February 2021

Upper Tribunal Judge Owens