Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2022-000216
DA/00089/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th June 2022	**On 28th September 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AJ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Ms L Hirst, Counsel instructed by The Aire Centre

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall proceed hereinafter to describe the parties as they were before the First-tier Tribunal, which is Mr AJ as the appellant.

2. In a decision promulgated on 13th October 2021 First-tier Tribunal Judge S Aziz allowed the appellant's appeal against the Secretary of State's decision to make a deportation order under Regulations 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") on 16th October 2020.

3. The appellant is a citizen of Portugal and was born on 1st June 1993. There is no official record of when the appellant entered the United Kingdom and although the appellant states that he arrived in March 2014 he re-entered in 2016. His criminal history is set out at [5], [6], [7] and [8] of the decision. On 11th July 2018 he was sentenced at Walsall and Aldridge Magistrates' Court to four months' imprisonment and was made subject to a sexual harm prevention order for five years for two offences of stalking. On 9th December 2019 (two weeks after he had successfully challenged in the First-tier Tribunal a previous decision to remove him from the United Kingdom) he was sentenced at Wolverhampton Crown Court to two years and three months' imprisonment for breaching the sexual harm prevention order. Following this conviction the respondent again sought to remove the appellant, which generated the decision currently under challenge.

4. The Secretary of State's challenge was made on three grounds.

Ground 1

Failing to give adequate reasons for findings on a material matter: proportionality Regulation 27(5) of the EEA Regulations 2016

5. The Secretary of State submitted that at [97] the judge found that the appellant's deportation would be disproportionate despite the fact that the appellant was found to pose a continuing risk to women [95]. This finding was made on the basis that the appellant had the support of his family and the state in the United Kingdom [96].

6. However, at [38] and [82] it is acknowledged that the appellant's family were unable to prevent his re-offending and at [96] it is noted that he now currently lives in a bail hostel and receives visits from his family. The judge failed to make a finding as to what support the appellant received from his family and in the absence of such finding it is submitted that the judge failed to give adequate reasons as to why the appellant's deportation was proportionate.

7. The judge had made a finding that the appellant would be unable to live independently in Portugal without family support [89], however, the judge had failed to note that the appellant had previously lived in Portugal without his family in 2015 to 2016 and the appellant's family provided financial support during this time. There was no finding that this financial support may not continue. While the previous residence in Portugal was described as a 'failed experiment' because the appellant did not engage in any meaningful activity once he had finished his training course, there was no evidence that he became destitute, nor that he had offended in Portugal.

8. Further, the judge had failed to make a finding that the appellant would not receive any support from the state in Portugal. At [91] it is suggested that some state support might be available and there was no evidence to suggest otherwise. At [44] it was noted that the appellant had received

support for his learning difficulty in Portugal in the past and there was no evidence that such support would not be available on his return.

9. Overall, the judge had failed to give adequate reasons for finding that the appellant's deportation to Portugal would be disproportionate under the EEA Regulations.

Ground 2

10. The judge failed to give adequate reasons for findings on a material matter: Article 3 ECHR. At [99] the judge found that the appellant would become destitute on return to Portugal. The appellant was not destitute when he lived there previously without his family and there was no reason why he should become destitute now in light of the lack of consideration as to the support available from the family and from the Portuguese state. Indeed, the appellant's family may travel to Portugal with him in order to assist with his integration. There was a failure to give adequate reasons as to why the appellant's Article 3 rights would be breached.

Ground 3

11. At [99] the judge also found that the appellant's Article 8 rights would be breached as it would be unduly harsh, and he would be left destitute. It is submitted that the judge's errors in respect of the EEA Regulations and Article 3 had infected his findings in relation to Article 8. In any event, Article 8 had no application in an appeal under the Regulations (see **Badewa (ss 117A-D and EEA Regulations) [2015] UKUT 00329**).

12. A Rule 24 notice was filed, noting that permission had been granted by UT Judge Macleman on 15th March 2022 on the narrow basis that: "The grounds arguably rise above disagreement in contending that at [91] and [99] there are no reasons why the appellant's circumstances in Portugal would be different in respect of either state or family support, so as to render him destitute."

13. It was submitted by the appellant's representatives that the grounds did not identify an error of law but took issue with the factual findings on the evidence which included detailed expert evidence from clinicians as to the impact of the respondent's learning disability on his ability to live independently. The evidence, particularly the expert evidence, was not contested by the Secretary of State and no contradictory evidence adduced.

14. This was the Secretary of State's second attempt to remove AJ from the UK and the First-tier Tribunal correctly treated the previous determination as the starting point. That appeal had been allowed.

15. The evidence before the judge in this appeal included reports from Dr Livia Pontes, a clinical psychologist, and Dr Nuwan Galappathie, a forensic psychiatrist. Both experts had provided evidence in previous proceedings concerning and provided updated evidence. Their expertise was not

challenged. The judge accepted that AJ had a learning disability and suffered from moderate depression and that his removal to Portugal would cause serious deterioration in his mental health and he would not be able to live independently and there was a link between his cognitive ability and his offending behaviour [89]. It was accepted that the respondent's entire family lived in the UK, and he did not have any family ties to Portugal. AJ's previous residence in Portugal, where he had lived with friends, was found to have been a "failed experiment" in independent living [94].

16. The previous 2019 First-tier Tribunal findings included that the respondent would not be able to enter the labour market and was not an independent adult and could not learn new tasks. There was a significant limitation in his ability to function in a wider society and meet his own needs. Indeed, the Secretary of State had now accepted the respondent's vulnerability in the context of safeguarding measures put in place prior to his release from immigration detention.

17. Those findings were supported by the expert evidence before this Tribunal. The appellant was not able to comprehend written information in Portuguese and his mental and physical health would be severely affected and he would be at risk of abuse and exploitation.

18. The existence of state financial support in Portugal, as an EU country, was not in issue in the appeal but whether the appellant, an adult with a learning difficulty who had never lived independently, would be able to access that support was also relevant.

19. The Secretary of State's grounds were misleading in suggesting he had previously lived independently in Portugal. He had never lived by himself as an adult either in Portugal or in the UK.

20. The burden on the Secretary of State was to demonstrate that the respondent's removal from the UK was proportionate in EU law terms (see **Tsakouridis [2011] CMLR 11**), that is that removal was necessary and the least intrusive means of achieving a legitimate aim. It was not open to her to seek to revisit the findings made by the First-tier Tribunal.

21. AJ was a highly vulnerable adult with a learning disability.

The hearing

22. At the hearing before me Ms Everett acknowledged that there was a considerable overlap within the grounds of the Secretary of State in terms of what was being argued. Ground 1 referred to a lack of reasoning by the First-tier Tribunal on support from the family and by that, Ms Everett concluded that what was meant in the grounds was financial support. She observed that the appellant was now in a bail hostel. In terms of family life she accepted that the family were clearly involved in his life. She submitted, however, that the situations in the UK and Portugal were

equivalent. The difference was that the family was not there. She accepted that AJ's previous residence in Portugal was described as a failed experiment. He was not integrated into British society, and it was noted that he could not live independently in the UK either. Essentially, the grounds from the Secretary of State argued a lack of reasoning. Portugal and the UK were remarkably similar, and the difference was the existence of his family here, who had a contributing role in his life, but they could not prevent his offending and he is still supported by the state.

23. Ms Hirst accepted that the appellant no longer lived with his parents, but he was not living independently. The judge was obliged to treat the previous Tribunal decision as a starting point in line with **Devaseelan** and it was open to the Tribunal to find that he would be destitute should he be removed to Portugal. The reasoning was clear and detailed and there were no grounds for disturbing the decision. The appellant was released from detention on bail on 23rd June 2021, having been sentenced on 9th December 2019. He was released from prison in early January 2021. It was submitted that the family visited him daily. The learning disability evidence was clear.

Analysis

24. The judge set out the law and his reasoning from [50] onwards. The relevant parts of Regulation 27 of the EEA Regulations are as follows:

> **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.
>
> (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 ten years prior to the relevant decision; or
>
> (b)is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(**1**).
>
> (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.

25. I am minded that I should exercise judicial restraint when revisiting the decision of a First-tier Tribunal. The judge acknowledged that the starting point was the previous decision and set out some of the findings therein at [81]. The judge rightly acknowledged that the appellant had now been convicted of a much more serious offence for which he was given a lengthy custodial sentence and the judge was clearly aware that only the lowest level of protection under the EEA Regulations was available to the appellant; the EEA decision was made on the grounds that the appellant constituted a genuine, present and sufficiently serious threat with reference to Regulation 27 of the EEA Regulations. It appeared that the previous decision had been made on the basis that the appellant was not living in the UK in accordance with the Regulations rather than in relation to deportation. Nonetheless the judge remarked that he needed to take into account factors highlighted at Regulation 27(5), and Regulation 27(6) in relation to the proportionality exercise and set those out. The judge set out at [81] that he had taken into account the totality of the appellant's

offending and that there had been a further conviction for a more serious offence.

26. At [82] the judge realistically stated that he was not persuaded by the mother and sister's evidence that they were able to exert a proper and effective level of control over the appellant and that there were other measures which needed to be put into place. It is evident that the judge did find the appellant a continuing risk and if he had not done so there would have been no need to proceed to the consideration of the proportionality element.

27. Nonetheless the judge at [83] identified the relevance of the evidence from the two experts who had provided further updates which had been helpful. The judge clearly identified at [84] that the appellant had a global intellectual deficiency and that since imprisonment his general mental health had deteriorated. The limits of the appellant's self-help skills were explored at [84] when the judge recorded the evidence of Dr Livia Pontes. She opined that the appellant "*will need continuous support from his family in order to manage his daily activities, protect his physical and mental health and be safe from exploitation"*.

28. Similarly, at [84] the Addendum Psychiatric Report of Dr Galappathie confirmed that the appellant's prognosis would depend on "*whether he can remain within the UK, has <u>the support of his family</u> and access to the treatment that he requires*" [my underlining]. Dr Galappathie added that "*Mr J is unlikely to be able to live alone or in shared accommodation in the UK without the support of his family*" and that "*Mr J's behaviour can be safely managed in the community provided that he has appropriate structure and support and interventions to help reduce his risk of offending further*".

29. In assessing proportionality various factors should be considered in accordance with Regulation 27(5) and that is what the judge confirmed that he did at [87]. Indeed, the judge canvassed a range of factors in accordance with the Regulation, noting the appellant's learning disability, his moderate depression and that removal to Portugal would cause serious deterioration in his mental health. That evidence was not contested or disputed by the Secretary of State and nor was the fact that the entire family resided in the United Kingdom. The judge accepted that the appellant had no family ties in Portugal. That fact does not appear to have been challenged.

30. In terms of the appellant being able to live independently should he return to Portugal, the judge accepted, on the basis of the expert evidence, that he would not be able to support himself through work and indeed, the judge accepted, rather than ignoring the state support from Portugal, that there may be some level of state support available in Portugal but there was no "*family support structure within Portugal that would provide him with any form of financial assistance*". The Secretary of State did not produce any evidence in relation to the support that the appellant might

receive in Portugal, but I conclude, from the terms and reasoning within the judge's decision, that the judge's approach to family support extended not only to financial support but also emotional support. To be clear it was not merely financial support which was required.

31. The judge fairly balanced that the appellant was not integrated into British society. AJ speaks Portuguese but cannot read it and his criminal offending had clearly undermined any cultural integration.

32. At [94] the judge accepted that the appellant did not live independently in Portugal because he noted it was a 'failed experiment'. Indeed, the evidence suggested that the appellant stayed with family friends. Ms Everett appeared to accept that this was indeed a failed experiment.

33. The judge noted in particular that what had changed since the appellant had gone to prison was that the authorities had now recognised that the appellant was a vulnerable adult and that his cognitive impairment played a material part in his offending behaviour and since his release measures had been put in place to manage the risks he posed and he was currently residing in a bail hostel. Finally, the judge stated at [96]: "*His condition needs to be managed by his family and by the state, otherwise he will continue to re-offend. This finally seems to be happening.*"

34. It was open to the judge, and there was adequate reasoning, for him to conclude at [97] the following:

> *"97. Looking at all matters in the round, I come to an overall conclusion that on the evidence before this Tribunal that any decision to remove the appellant is disproportionate and not in accordance with the principles detailed at Regulations 27(5),(6). The matters which I have weighed in the appellant's favour carry greater probative force than those I have factored into account on behalf of the respondent. The appeal succeeds under this ground."*

35. The judge set out clearly at [56] that there was a two-stage approach as to whether the appellant's conduct satisfied the applicable public policy criterion and secondly, was the decision a proportionate one in all the circumstances. A wide-ranging and holistic assessment was undertaken by the judge. From [89] onwards the judge set out the range of issues to be addressed including age and state of health, family situation , economic situation, social and cultural integration and links with his country of origin. The judge evidently addressed the relevant issues and gave adequate reasoning. It was not merely the economic position of the appellant but his family support owing to his mental health and vulnerability, evidenced by the medical reports, which was key in the judge's reasoning.

36. In relation to ground 2 and the challenge to Article 3 finding, the judge here is merely reiterating the previous findings of Judge Mill, which as the judge in this instance set out at [69], was extensive. The judge at [69(vii)

(g)], reviewed the evidence and recorded the detailed findings made by Judge Mill in November 2019, which included that should the appellant be returned to Portugal as someone who was vulnerable with learning difficulties and without a support network, would be liable to exploitation and "he would be destitute". The judge evidently considered there was no reason to depart from Judge Mill's previous findings. It was also noted that the respondent accepted in April 2019 that the appellant's vulnerability in the context of safeguarding measures which were put into place prior to his release from immigration detention. The judge noted at [72] that the Secretary of State acknowledged that the first attempt to remove the appellant was unsuccessful because his appeal was granted on human rights grounds. There was no successful challenge to that decision and no evidence put forward to undermine that conclusion whether the appellant has proceeded to commit further offences or not. As such, it was open to the judge in this instance to follow the findings of the previous First-tier Tribunal in relation to **Devaseelan**.

37. In terms of ground 3 it is accepted that proportionality is a requirement of the Regulations and in the light of the findings by Judge Mill open to the judge to allow the appeal both under the EEA Regulations and on human rights grounds. As held in **Badewa**, the correct approach in the context of an EEA removal decision is first to decide whether a person satisfies the requirements of the EEA Regulations and then to consider Article 8 where that has been raised as a ground of appeal, which is the case here.

38. Overall the judge adequately reasoned that in view of the appellant's significant vulnerability and the requirement of his family support in the UK his removal would be disproportionate, and the appeal should be allowed. The judge did not ignore the position in Portugal and that the appellant may receive state support but clearly found his family support system, which was not available in Portugal was critical. Nor did the judge ignore the appellant's subsequent offending and although he was seen to be a continuing risk because of his inability to appreciate his behaviour, the judge found that 'finally' his condition seems to be being managed [96]. The decision was comprehensive, and the legal duty of the judge extends to giving brief reasons on the central issues of contention. The judge more than adequately completed this task and a mere re-working of the decision owing to disagreement is not open to me.

39. I find no arguable error of law in the decision and the decision will stand.

Notice of Decision

The appeal of the Secretary of State is dismissed.

The First-tier Tribunal decision is relation to AJ's appeal remains allowed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Helen Rimington Date 15th August 2022

Upper Tribunal Judge Rimington