Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00562/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 December 2021	**On 6 January 2022**

Before

UPPER TRIBUNAL JUDGE MCWILLIAM
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

MR LUIS CRISTO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H. Broachwalla, Counsel instructed by Burton & Burton Solicitors
For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

INTRODUCTION

1. The Appellant is a national of Portugal, born on 10 May 1992. On 2 September 2019 the Secretary of State made a 'decision to make a Deportation Order' against the Appellant. In response the Appellant has exercised his right to appeal this decision by reference to reg. 36 and Schedule 2 of the 2016 EEA Regulations ("hereafter the Regulations")

as preserved by The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309).

THE PROCEDURAL HISTORY

2. The appeal to the First-tier Tribunal was initially dismissed by First-tier Judge Ennals on 28 January 2020. Subsequently the Appellant applied for permission to appeal to the First-tier Tribunal which was refused by FtJ Bulpitt on 23 March 2020; the application was renewed to the Upper Tribunal directly and permission was granted by Upper Tribunal Judge Blundell on 5 August 2020.

3. By way of a decision dated 18 January 2021, Upper Tribunal Judge Perkins concluded that the First-tier Tribunal had materially erred in law on the basis that the relevant Judge had not shown that he had understood that the burden was upon the Secretary of State to show that the Appellant constituted a genuine, present and sufficiently serious threat to the fundamental interests of the UK (see [6]).

4. Judge Perkins concluded that the First-tier decision should be set aside in its entirety and reheard in the Upper Tribunal. It is the remaking of the decision that came before us on 13 December 2021.

THE APPELLANT'S IMMIGRATION AND CRIMINAL HISTORY

5. The date on which the Appellant entered the United Kingdom is a matter in dispute between the parties and so we say no more about that at this stage, but what is not in dispute is that the Appellant was issued with an EEA Residence Permit on the basis of his dependency upon his mother, Ms Etelvina de Assuncao dos Santos, valid from 26 May 2005 until 26 May 2010.

6. On 28 March 2007, the Appellant was convicted of three counts of robbery and sentenced to a 12 month referral order.

7. On 19 December 2007, the Appellant was convicted of ABH and sentenced to a supervision order (young offenders) for 12 months.

8. On 22 January 2009, the Appellant was convicted of making a false representation in order to make gain for himself or another and/or cause loss to another/expose another to risk and he was sentenced to a referral order of 20 hours.

9. On 4 January 2010, the Appellant was convicted of resisting or obstructing a constable and was fined £35 and ordered to pay a victim surcharge of £15.

10. At some point at the beginning of 2010 until the summer of that year the Appellant was held on remand at High Down prison on the basis of an allegation of rape which was ultimately not pursued.

11. On 18 March 2013, now as an adult, the Appellant was convicted of four counts of robbery and four counts of possessing a firearm when committing the offence for which he was sentenced to a total of 15 years imprisonment.

12. On 11 April 2017, the Appellant was served with a notice of liability to deportation under the Regulations, which was later followed by the decision to make a Deportation Order on 2 September 2019. The Deportation Order itself was signed on the same date.

13. The Appellant was released from his sentence of imprisonment on 3 July 2020 (he remains on licence until 2 January 2028) but was transferred into detention on the basis of his ongoing immigration proceedings. The Appellant was released from immigration detention at some point in September 2020.

THE SPECIFICS OF THE ARMED ROBBERY CONVICTIONS (2013)

14. At this juncture we consider it important to summarise some of the key findings made by His Honour Judge James in the sentencing remarks dated 17 May 2013.

15. In the sentencing remarks the Judge commented that "*[t]he offences were, in my judgement, of the utmost gravity, involving as they did assaults and threats to kill staff, the use of an imitation firearm and on occasions the restraint of your victims. The offences were obviously planned and involved you travelling a significant distance to target vulnerable commercial enterprises. Significant sums were stolen and much of the money appears to have been spent almost immediately on high value luxury goods and designer clothing.*"

16. The sentencing Judge also characterised the four separate robbery offences committed by the Appellant (three of which were committed with the help of an accomplice) as "*terrifying ordeals*" in which multiple victims were subjected to "*extreme threats and gratuitous violence*" and that these robberies were "*planned and… carried out with ruthless aggression*". The Judge goes on to state that the Appellant's victims "*were all vulnerable*" and that this was no doubt why they were targeted by the Appellant.

17. It is also recorded that the Appellant's victims included innocent members of the public and at least two pregnant women who were subjected to physical violence. The transcript also records that some of the Appellant's victims had a gun put to their heads and that they were not only threatened directly with being shot if they did not comply with

the Appellant's demands, but on occasions were struck with the butt of a firearm whilst others had their hands restrained with duct tape.

18. Unsurprisingly those who did provide further statements to the court described these events as "*life changing*" and many have suffered long-term anxiety and adverse impacts on their ability to sleep, their confidence and their ability to work and make a living.

19. The Judge also noted that neither the Appellant nor his accomplice admitted their guilt immediately but only did so after they had become aware of the weight of the scientific and circumstantial evidence which the police had obtained against them. The Judge also concluded that the Appellant had endeavoured to minimise his actions and had initially not shown genuine remorse. In the context of deciding whether or not the Appellant should face an indeterminate sentence of imprisonment, the Judge concluded that the Appellant constituted a significant risk of causing serious harm by reason of the commission of further specified offences but took into account that the Appellant was at that time a young man and that he was likely to mature by the time he was released from prison.

20. The Judge properly recognised that the length of the custodial sentence given to the Appellant would help safeguard the public from the Appellant committing further offences.

THE APPEAL HEARING

21. The appeal hearing was conducted in person at the Upper Tribunal at Field House. The Appellant, his mother, his sister (Miss Neyller de Assuncao de Cristo) all gave evidence in English. We should add that initially we were told that the Appellant's mother preferred to give evidence using a Portuguese interpreter but this had not been communicated to the Tribunal. After some discussion Mr Broachwalla indicated that he was content for the Appellant's mother to give oral evidence in English as long as questions were simplified as best as possible and rephrased if necessary.

22. At no point during the hearing did Mr Broachwalla or any of the witnesses indicate that the Appellant's mother was fundamentally unable to understand the questions being asked or unable to properly express her answers to those questions and we are satisfied that, although English was clearly not Ms Dos Santos's primary language, that she was nonetheless able to understand and give the evidence that she wished to.

23. After the witnesses were cross-examined and asked supplementary questions, we heard oral submissions from both representatives which we have kept our own note of and at the end of the hearing we formally reserved our judgment.

FINDINGS AND REASONS

24. In coming to our conclusions, we have borne in mind that the hearing before us was a complete remaking of the statutory appeal and we have had very careful regard to the Home Office bundle which runs to 80 pages; the Appellant's consolidated appeal bundle of 201 PDF pages; the note agreed by both representatives as to the accepted facts and matters which were still in dispute between the parties and Mr Broachwalla's skeleton argument dated 12 December 2021.

25. In making our decision we have sought to apply the balance of probabilities and looked at the evidence through the prism of the date of the hearing.

26. We have sought to break down the relevant legal and factual themes into three sections:

a. What the appropriate level of protection is (regs. 27(1), (3) & (4))?

b. Whether or not the Appellant is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (reg. 27(5)(c))?

c. Whether or not the decision to deport is a proportionate one taking into account considerations such as the Appellant's age, state of health, family and economic situation, length of residence in the United Kingdom, social and cultural integration into the United Kingdom and the extent of the Appellant's links with Portugal (regs. 27(5)(a) & (6))?

THE APPROPRIATE LEVEL OF PROTECTION - REGS. 27(1), (3) & (4)

The date of the Appellant's entry into the UK

27. We certainly agree with Mr Whitwell that the Appellant's evidence about when he first entered the United Kingdom has, over the years, been extremely varied: at the First-tier Tribunal the Appellant claimed that he entered the UK at the age of about five or six (which would put that entry at about 1997 or 1998); alternatively he told the author of the OASys report that he had entered in the year 2000 and before us, gave the specific date of 24 July 2004.

28. When the Appellant was asked about how he could now be so confident about the precise date on which he entered the United Kingdom he said that he didn't in fact know the date but that the year

was 2004 and that he knew it was 2004 because his family had told him that.

29. We should state we think it somewhat unwise that the Appellant should specify a date in his witness statement when it was his oral evidence that he simply did not know the date, however, having heard the Appellant's sister's oral evidence, we are satisfied that the Appellant has established that he entered the United Kingdom in 2004.

30. Miss De Cristo, told us that in fact the date was 24 June 2004 and that she knew this because she had always used that date when completing relevant paperwork in the past. Overall, we have concluded that the Appellant's sister is a sincere witness and we are prepared to accept that the date on which the Appellant entered the United Kingdom was 24 June 2004.

31. In reaching that conclusion we also take into account that the Appellant's evidence about his entry date has moved later in time rather than earlier which we, overall, accept is an indication that he has tried to give credible evidence about this.

The Appellant's length of residence and the 2006 EEA Regulations

32. When the Appellant entered the United Kingdom in June 2004 he had just turned 12 years of age and we have the uncontested evidence from the HMRC (dated 17 November 2020) that the Appellant's mother was working and paying tax from the tax year 2003/04 consistently through until the last financial year captured by this letter of 2019/20.

33. The Secretary of State has not argued that the Appellant's mother's earnings during any of these years was marginal and we of course also take into account that the Secretary of State accepted that the Appellant was residing within the requirements of the 2000 EEA Regulations when the EEA Residence Permit was issued on 26 May 2005.

34. Therefore, looking at the period running from 24 June 2004 until 23 June 2009, it is our view that the Appellant was the direct descendant (under the age of 21) of an EEA national (his mother) exercising her treaty rights in the United Kingdom for a continuous five-year period as per the requirements in regs. 7(i)(b)(i) & 15(1)(a) of the 2006 EEA Regulations.

35. We have ultimately concluded that the Appellant takes the benefit of the second level of protection, **serious grounds of public policy** (reg. 27(3)).

36. We should note that the Appellant does not argue that he should take the benefit of level 3 protection (imperative grounds of public security (reg. 27(4)).

DOES THE APPELLANT CONSTITUTE A GENUINE, PRESENT AND SUFFICIENTLY SERIOUS THREAT IN THE UNITED KINGDOM?

37. In deciding this aspect of the appeal, we have applied the approach as described by the Court of Appeal in Kamki v The Secretary of State for the Home Department [2017] EWCA Civ 1715. We have therefore proceeded on the basis that the burden is upon the Secretary of State to show that the Appellant is a genuine, present and sufficiently serious threat.

38. In explaining our conclusions on this important aspect of the appeal, we have sought to break our findings down into sections. These sections should not be read as an indication of the order in which the Tribunal came to its conclusions.

The Appellant's 'late' guilty plea

39. Mr Whitwell asserted the Appellant had not given credible evidence in his witness statement, at paragraph 13, when he claimed to have pleaded guilty to the 2012 offences straightaway and that this was contradicted by the sentencing remarks from 17 May 2013 (see A5 of the Home Office bundle).

40. In our view there is an element of confusion in this part of Mr Whitwell's argument. The Appellant has correctly said that he accepted his guilt at a plea hearing and that there was no trial, however we also note that the sentencing Judge records that the Appellant's admission was not immediately forthcoming and only emerged because of the weight of the scientific and circumstantial evidence provided by the police (at A5.)

The Appellant's insight into his offending

41. Before dealing with the competing submissions of the parties on this point, we should formally record that we have found the expert witness report by Dr Nikhil Khisty (dated 31 August 2021) to be an extremely balanced and well written report in respect of the nuanced issues relevant to the Appellant's conduct and risk of reoffending.

42. By way of background, Dr Khisty is a consultant forensic psychiatrist and medical director of Cygnet Hospital in Bury; he is also approved by the Secretary of State under section 12(2) of the Mental Health Act 1983 as having special experience in the diagnosis and treatment of mental disorders and is therefore an approved clinician for the purposes of that Act.

43. We formally find that Dr Khisty has quite appropriately directed himself to where he does have expertise in issues raised in his instructions and where he does not (for instance para. 7.37 of the report).

44. Turning then to para. 7.22, Dr Khisty records that the Appellant was "*unable to recall any details of his previous offences including his convictions for armed robbery at the age of 15. Recalling the index offence, Mr Cristo said that he and acquaintance had been convicted of armed robberies. He said that he had stolen money from businesses. When I asked him, Mr Cristo said that he had used an imitation firearm. He did not give me any further details of the offence or the physical violence that was inflicted on the victims. He made no reference of the substantial amount of money that was robbed from the businesses or the actual and threatened violence committed during the robberies*."

45. The Dr goes on to note that, *"[h]is inability to recollect previous offences limits assessing his insight into them (and therefore increases the risks of violence in the future)*." Dr Khisty also records that although the Appellant did not deny his role, his limited recollection/account of the offences in 2012 indicated "*some minimisation on his part.*"

46. Dr Khisty has also highlighted the December 2016 review (part of the 2020 OASys report) which records that the Appellant was minimising his involvement in the 2012 offences suggesting that he had some pro-criminal attitudes and that the cavalier manner in which the robberies took place suggested deficits in the Appellant's attitude towards community and society (see para. 5.14 of the Dr's report).

47. It is also recorded that the Appellant maintained his claim that he was coerced into committing the offences so that he could repay a drug related debt but that this explanation was queried by the probation service by reference to the sentencing remarks of His Honour Judge James.

48. In relation to the Appellant's suggestion that he acted under duress because of his drug habit at the time in 2012, we note that the report suggests variably that the Appellant was using £2000 per week of cocaine (para. 6.22) and/or £200 per week (para. 7.8). In his oral evidence the Appellant suggested that both sums were correct.

49. When asked by the Tribunal if he had mentioned the debts to a drug dealer and the assertion of duress to the sentencing Judge in 2013, the Appellant stated that he did not tell the Judge, but he told his solicitor who advised him not to say anything.

50. We are unclear if the reference in the sentencing remarks (at A8) to the Appellant abandoning a self-serving account given to the author of the presentence report (which we do not have) is a reference to the Appellant abandoning his assertion that he was acting under duress, but nonetheless we conclude that binding authority is clear that we should not reappraise the Appellant's offending behaviour so as to inflate or diminish the criminal court's assessment, as per Secretary of State for the Home Department v HK (Turkey) [2010] EWCA Civ 583:

> *"34. I agree in particular that the primary measure of the offending behaviour is the sentence, viewed where appropriate in the context of the sentencing remarks. It is not for either the Home Secretary or the Tribunal to reappraise the offending behaviour so as to either inflate or diminish the judicial evaluation of it. That is a function of, if anyone, the Court of Appeal. This is not, of course, to say that matters which were relevant to sentence – the likelihood of reoffending, for example - may not also be relevant to deportation."*

51. We therefore proceed on the basis that the Appellant's suggestion that he operated under duress was not put to the sentencing Judge and we conclude that we have not received any good reason why the Appellant would not have advanced such a mitigating circumstance, separate from the fact that we are not empowered to revisit the offending behaviour as relevant to the Appellant's criminal sentence.

52. We have also taken note of the fact that the sentencing remarks show that much of the money stolen by the Appellant and his accomplice was spent "*almost immediately on high-value luxury goods and designer clothing*" which does not sit well with a claim that this was money owed to another person.

53. We also note that the Appellant told Dr Khisty that there was no planning involved in the armed robbery offences in December 2012 (see para. 5.18 of the report), yet this is entirely contrary to the conclusion of the sentencing Judge (at A2) in which the Judge concludes that the "*offences were obviously planned*" and involved the Appellant travelling a significant distance to target vulnerable commercial enterprises.

54. Furthermore, in coming to our conclusion we have taken into account the Appellant's evidence in his witness statement that he accepts that his actions were wrong and that he completed a 'Victim Empathy Course' whilst in prison. We do however also note that some of the Appellant's language at paragraph 16 of the witness statement seems to echo the concerns of the expert consultant psychiatrist, for instance the Appellant says that he realised that he "*probably caused a lot of mental health issues*" for his victims and that he "*may*" also have made them feel unsafe to leave their house. We conclude that it must be plainly obvious to the Appellant that his actions did, without any

sensible doubt, cause mental health issues and fear, yet that this is not his evidence.

55. We have, overall, concluded that the Appellant does continue to minimise his actions as was noted by Judge James in 2013 and that he has not gained full insight into the underlying reason for his extremely violent behaviour, nor full insight into the consequences of such behaviour upon other people.

The Appellant's other offending behaviour

56. Whilst we accept that the Appellant has not offended since his release from immigration detention in September 2020, we nonetheless must also consider the Appellant's conduct prior to the armed robberies which he carried out in 2012. As we have already laid out earlier in this decision, the Appellant has previously been convicted of robbery offences, assault occasioning actual bodily harm and the making of false representations.

57. It is plain to us then that the Appellant has, since a young age, been involved in criminal conduct which plainly escalated to an extreme level during his offences in December 2012. We note of course that previous criminal convictions do not in themselves justify a conclusion that the Appellant constitutes a genuine, present and sufficiently serious threat (reg. 27(5)(e)) and that the Appellant was a minor when the earlier offences took place, but nonetheless the Appellant's previous conduct, is still relevant to our ultimate assessment under reg. 27(5)(c) as it shows a pattern of behaviour and anti-social attitude.

The Appellant's behaviour in prison

58. During cross-examination, the Appellant accepted Mr Whitwell's assertion that he had received four adjudications whilst in prison, namely: 1) possession of pornographic material in contravention of prison regulations; 2) three warnings for leaving his cell flap covering on when it shouldn't have been; 3) inappropriate behaviour with a teaching member of staff in the prison; 4) a proven adjudication at HMP Dovegate in 2019 relating to the Appellant being observed standing over a prisoner with a clenched fist, that the prisoner was observed to have injuries to his face and that an assault had taken place, albeit the Appellant disputed that an act of violence had occurred.

59. Whilst we observe that the Appellant's behaviour in prison was described during the December 2016 review as in general good (the OASys report (completed 14 March 2019)) the adjudications relevant to inappropriate kissing of the staff member and the proven adjudication in respect of the assault occurred after this.

60. We therefore conclude that the Appellant's behaviour has not been entirely without criticism whilst in prison and that we agree with Dr Khisty (at para. 7.24), that these behaviours indicate challenges in supervising the Appellant and risks of "*subverting security*" which are relevant to an increased risk of violence and reoffending in the future.

The Appellant's risk of reoffending

61. As we have already mentioned there is an OASys report (dated 14 July 2020 but based partly on a review completed on 14 March 2019) amongst the evidence in this case. We of course recognise that such a report is an expert opinion to be taken into account with all of the other evidence before us, as per Vasconcelos (risk- rehabilitation) [2013] UKUT 00378 (IAC) at [41].

62. Within the report are a number of different discrete assessments of the Appellant's risk of future offending. We note the following:

a. OGRS 3 (Offender Group Reconviction Score v.3 - low risk):
i. A 22% risk of general offending within one year;
ii. A 37% risk of general offending within two years.

b. OVP (OASys Violence Predictor score – low risk):
i. A 15% OVP score within one year;
ii. A 26% OVP score within two years.

c. OGP (OASys General Predictor score - medium risk (see PDF page 103 of the Appellant's bundle)):
i. 22% within one year;
ii. 34% within two years.

63. In respect of the risk of harm, the author has concluded that the risk is an indiscriminate one and that this includes risk to members of the public of being robbed, being physically assaulted, intimidation and threats.

64. The author notes that the risk is likely to be imminent if the Appellant continues his associations with other antisocial peers especially in the Lambeth area and/or is in need of finances. Other relevant factors are given as: *Substance misuse; Relapsing into previous lifestyle; Association with negative influences/drug users; Distorted beliefs and not considering the long term impact of his actions; Familial breakdown*.

65. At R10.6 of the OASys report, the author concludes that there is a **medium risk of serious harm to the general public** - the definition of medium risk of serious harm is given as "*there are identifiable indicators of risk of serious harm. 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 misuse."

66. As we have said, the OASys report is just one of the parts of the evidence before us and so we have also looked very carefully at Dr Khisty's 2021 assessment of the Appellant.

67. At para. 7.19 of the report, the doctor expresses a lack of clarity over whether or not the Appellant was under the influence of psychoactive substances when he committed his offences in 2012.

68. The doctor also concludes at para. 7.20, that the Appellant is not suffering from a major mental disorder such as psychosis, mood disorder or personality disorder. Whilst the doctor also recognises at para. 7.21 that the Appellant is not currently employed (we add that the Appellant would not be allowed to take up employment currently because of his immigration status) and that this is a further factor.

69. At para. 7.24, Dr Khisty also highlights the risk associated with the Appellant's denial of an assault on an inmate in prison and goes on to say that the Appellant "*engaged in violence despite serving a prison sentence for serious offence and furthermore denied it. Denial of violence indicates a higher risk of violence in the future*."

70. At paras. 7.27 to 7.31 of the report, Dr Khisty suggests a number of potential treatments and other forms of risk management in order to reduce the risk of the Appellant reoffending. At para. 7.26, Dr Khisty expressly indicates these outlined interventions would need to be delivered by mental health services (we have a little more to say about this later on).

71. We should also add our assessment of the conclusions of Judge James in the 2013 sentencing remarks. At A7 the Judge indicates that the Appellant is likely to mature considerably by the time he is released. This observation must however be viewed in its context: in this part of the sentencing remarks, the Judge is explaining why he/she decided to impose a determinate sentence and, as a matter of law, it is for the current Tribunal to assess the Appellant's level of risk as at the date of the hearing.

The Appellant's former drug problems

72. At para. 7.27 Dr Khisty highlights the Appellant's history of addiction to cocaine and misuse of cannabis as the most important factor associated with his risk of violence and risk of reoffending. In this part of the assessment the doctor proceeds from the Appellant's account that he committed the offences in order to repay debts to a drug dealer. We should at this stage indicate that we have not accepted this account for the reasons already given but nonetheless consider that Dr

Khisty's assessment of this issue is materially relevant to our overall assessment.

73. At para. 7.28 the doctor concludes that the risk of the Appellant relapsing into using psychoactive substances is a long-term one. He also emphasises that the risk of relapse is higher in the community than prison where psychoactive substances are likely to be available more easily and where there are likely additional stressors in the community which are more complex than in a prison environment.

74. We are fully prepared to accept the Appellant's evidence that he has abstained from psychoactive substances since he was taken into remand in 2012 and that he has not used cannabis or cocaine since his release in September 2020. We also accept the documentary evidence in the bundle which shows that the Appellant has carried out a number of awareness courses about drug misuse whilst in prison.

75. We do however, overall, remain concerned by the Appellant's current circumstances in the context of assessing the Secretary of State's assertion that the Appellant is a present, genuine and sufficiently serious threat for the reasons we expand upon below.

76. At para. 7.29, Dr Khisty advises that the Appellant should receive regular monitoring and supervision aimed at identifying any early relapse into substance abuse and that the Appellant should be required to give random breath/or urine samples to test for alcohol or other psychoactive substances. The doctor also recommends that the Appellant is compelled by law to abstain from alcohol and drugs and that this could be considered as part of the conditions of his licence.

77. In our assessment of the evidence, we have had regard to the fact that the Appellant said that he was not receiving any random or scheduled drug tests (although he did mention one drug test as part of his track work training a number of weeks before the hearing which he says was negative (albeit that we were not furnished with any documentary evidence about this test or its results.))

78. We have seen in the OASys report that if the Appellant had moved to a specific Approved Premises he would have been subject to regular drug testing but the Appellant was not released to such a specific premises but to the approved accommodation of his mother's house in Walthamstow. The Appellant also confirmed that he is not receiving regular drug testing in his oral evidence.

79. This is of course not determinative of whether or not the Appellant is likely to be able to maintain his abstinence in the long term but we do note that the suggested supervision of the Appellant is not currently being carried out and this conclusion also highlights the challenges which the Appellant faces in maintaining his abstinence.

The Appellant's mental health

80. At para. 7.30, Dr Khisty also advises that the Appellant should receive treatment for his mixed anxiety and depression (which he diagnoses at para. 7.11). We should also again formally note that in assessing this aspect of the risk assessment, the doctor has worked on the basis of the Appellant's evidence that he attempted self-harm and ending his own life whilst in prison (see para. 6.33 of the report). We are more cautious in assessing this evidence on the basis that the OASys report at section 10.8 expressly records that the Appellant had reported no issues with his emotional well-being or mental health either during the review in December 2016 or during the sentence plan review on 25 February 2019.

81. The same section records that the Appellant did mention during a PSR interview that he attempted to harm himself by wrapping cloth tightly around his neck but the author records that it was not possible to authenticate this as the Appellant did not report it to any member of staff.

82. We are therefore not prepared to accept on balance that the Appellant had either seriously attempted to self-harm or kill himself on four or five occasions whilst in prison albeit we certainly accept that he found the transition from his previous lifestyle to the regime of a prison difficult to cope with.

83. However again we nonetheless conclude that Dr Khisty's recommendation is an important aspect of our assessment of the Appellant's current risk to the public. We note that the doctor advises that the Appellant be given structured psychological interventions such as cognitive behavioural therapy and that he should be referred to his GP so that he can access appropriate treatment. We have already noted that at para. 7.26 the doctor proposes that much of the assistance that the Appellant should receive should be given by community mental health services.

84. In this regard we have also referred to the oral evidence of the Appellant and his sister that Miss De Cristo has personally financed four counselling sessions for the Appellant since he was released from prison. The Appellant told the Tribunal that he had ended the counselling because he considered that he had addressed the reasons for that counselling, namely his panic attacks and anxiety and that this ended at some point in 2021.

85. In our judgment we are concerned about the failure of the Appellant to properly engage with the recommendations given by Dr Khisty in his August 2021 report. There is no evidence that the Appellant has engaged with his GP or local mental health services as envisaged by Dr

Khisty as an important factor in reducing the Appellant's risk of reoffending.

86. We also consider that the Appellant's decision to end his private counselling on the basis that he felt he had fully dealt with his panic attacks and anxiety is further evidence of his failure to properly engage with his long-standing and significant inability to control himself, his anger or his use of violence. We consider that this is another example of the Appellant not having sufficient insight into his own behavioural problems, the reasons for his previous extremely serious offending and the impact of his own behaviour on other people.

The Appellant's family circumstances after release

87. We are prepared to accept the evidence that the Appellant now lives away from the Lambeth area (in which he had particular problems) and that he has been given significant support both emotionally and financially by, especially, his mother and sister (Miss De Cristo). We are satisfied that the Appellant's immediate family members are doing their best to try to help the Appellant move on from his previous criminal and antisocial behaviour.

88. We are also content to accept that the Appellant's sister has herself made significant efforts to assist the Appellant by paying for courses which he has carried out since being released in September 2020 and for his four sessions of counselling.

89. As we have already said there is no evidence that the Appellant has been involved in any criminal or antisocial behaviour since his release from prison.

Schedule 1 of the Regulations

90. As per the direction in reg. 27(8), we have also taken into account Schedule 1 to the Regulations which at paragraph 3 indicates that the longer the sentence the greater the likelihood that the Appellant's continued presence in the United Kingdom represents such a genuine, present threat. We should of course make clear that we do not treat this provision as being a simple binary assessment of the length of sentence as being determinative of the question of current threat.

DOES THE APPELLANT CONSTITUTE SUCH A THREAT - CONCLUSION

91. In bringing all of these various elements together in respect of our assessment of whether or not the Appellant is a genuine, present and sufficiently serious threat we should make it clear that we have not considered any of these separate themes to be determinative of our ultimate conclusion.

92. Having considered all of these elements and the entirety of the evidence very carefully, we are of the view that the Appellant is at the very earliest, embryonic stage of his process of adapting back into a normal way of life. Although we accept that the Appellant has been of good behaviour since he has been released from prison and has engaged with a course to obtain a CSCS card in order to work as a labourer and is in the process of carrying out a track work course, we nonetheless conclude overall that the Secretary of State has established that the Appellant does constitute a genuine and present threat.

93. We are of the view that the Appellant has not developed the full insight into his own behaviour or the impact upon others which could seriously reduce his risk of future reoffending. We are also mindful of the fact that the Appellant has not yet instigated the kinds of support mechanisms which have been recommended by Dr Khisty.

94. Whilst the conclusions in the OASys report, which are not determinative of the issues as we have explained, suggest a low risk of violent reoffending in the immediate future we nonetheless note that the percentage assessments are still at the high end of the low range for risk and that this must be combined with the conclusion that there is a medium risk of serious harm to the general public at large.

95. We should also note that the Appellant does not argue that in the circumstances that he is found to be a genuine, present threat that the threat he poses is not sufficiently serious nonetheless we conclude that there is a material risk of reoffending and of violent reoffending which would constitute serious harm to the general public. In applying Schedule 1 to the Regulations and considering the fundamental interests of society as partially defined at paragraph 7, we conclude that such conduct would plainly be contrary to paragraph 7(j) which relates to the protection of the general public.

THE PROPORTIONALITY OF THE DECISION TO DEPORT

96. Having concluded that the Secretary of State has successfully established that the Appellant does constitute a genuine, present and sufficiently serious threat to the general public in the UK we have gone on to consider the proportionality of the decision to deport as required at regs. 27(5)(a) & (6).

97. We have also been guided by the general legal approach to proportionality in the context of European law as described by the Supreme Court in Lumsdon & Ors, R (on the application of) v Legal Services Board [2015] UKSC 41:

> *"33. Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in*

question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, sometimes referred to as proportionality stricto sensu: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately, as in R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa (Case C-331/88) [1990] ECR I-4023."

98. In considering the non-exhaustive factors in reg. 27(6), we make the following findings.

The Appellant's age

99. The Appellant is currently 29 years of age.

The Appellant's state of health

100. He has no current physical health problems and is not currently being treated either through medication or by counselling for any mental health problem.

The Appellant's family circumstances in the UK

101. The Appellant currently lives with his family in Walthamstow in London and is not working (as he is prevented from doing by his immigration status) but has carried out at least two courses since being released from prison relevant to the possibility of finding work either in the construction or in the rail maintenance/construction industries. At the date of the hearing the Appellant had not completed the track work course that he was pursuing, and we did not have before us any corroboratory documentary evidence to support the Appellant's assertion that he would automatically be given a job on completion of that course.

102. We also note the oral evidence that all of the Appellant's siblings are working either in a full-time or part-time capacities in the UK and that they have all, at different times, provided financial support for the Appellant in the UK since his release.

103. We also find that the Appellant resides within a close knit family who have done their best to assist him in moving away from his past criminal behaviours albeit we have concluded that the Appellant still remains a significant risk to the public.

The Appellant's length of residence

104. The Appellant has, on our finding, resided in the United Kingdom continuously since entering in 2004 which means that he has lived for more than half of his life in the UK.

The Appellant's cultural and social integration

105. In respect of his social and cultural integration we note that the Appellant speaks fluent English and that he did attend school and college in the UK. We also of course take note of our own finding that the Appellant had established by 2009 that he had achieved a Permanent Right of Residence as a consequence of him being a direct descendant relative under the age of 21 of his EEA national mother who was exercising treaty rights for the previous five-year period. We also recognise the general principle in European law relating to the importance of a person establishing a permanent right of residence and that this shows a significant degree of integration into the host Member State.

106. However, we must also take into account that the Appellant was expelled from at least one school; he did not achieve many qualifications at all (albeit we accept that he did acquire an NVQ level 2 in music production and another qualification in sports science) and was involved in serious antisocial and escalating criminal activity from 2007 (when he was just 15 years of age). His criminal history shows the easy use of violence and a wholesale disregard for the safety and health of other people, especially vulnerable people, which escalated to a particularly serious level in 2012. We have concluded that the Appellant's conduct shows that he had disconnected from normal, law abiding society in the UK and that this reflected in the particularly long sentence of imprisonment.

107. Should we be wrong to conclude that the Appellant is not socially and culturally integrated we add that we would have come to the same overall conclusion on the basis of the Appellant's lack of rehabilitation and the other findings in this decision.

The Appellant's links with Portugal

108. In respect of the Appellant's links with Portugal, we make the following findings:

a. Although the Appellant may not speak Portuguese fluently, our conclusion on all the evidence is that he does speak sufficient Portuguese in order to be able to effectively communicate. In coming to that conclusion we have borne in mind that the Appellant lived in Lisbon, Portugal until the age of 12 before coming to the United Kingdom and that his mother has some

English but is clearly much more comfortable when speaking Portuguese. We therefore consider that the Appellant was brought up in a Portuguese and English-speaking household in the UK.

b. We certainly accept that the Appellant does not have an ingrained family history in Portugal itself. We accept the Appellant's mother's evidence that she migrated with the Appellant's father to Portugal and was therefore the first generation of the family to reside there. However we do also note that the Appellant has an older sister (Ileser) living in Lisbon with her family.

c. We are prepared to accept that there has been some sort of falling out between the older sister and the Appellant's mother such as that there has been no contact between them for some time but we are not prepared to accept that the Appellant himself could not restore sufficient contact with his older sister in order to obtain some assistance/support from her in reintegrating in Portugal.

d. Even if we are wrong in that conclusion, we nonetheless conclude that the Appellant has some frame of personal reference of Portugal albeit when he was a child of Lisbon and we also conclude that his family in the United Kingdom would be able to provide sufficient cumulative financial resources in the first instance to assist the Appellant as he re-integrates into Portugal.

The impact of the interruption to the Appellant's rehabilitation in the United Kingdom

109. In looking at the impact of expulsion upon the Appellant's rehabilitation in the United Kingdom we have been guided by the Court of Appeal's decision in Secretary of State for the Home Department v Dumliauskas & Ors [2015] EWCA Civ 145:

"52. I am bound to accept, on the authority of the judgment of this court in Daha Essa, that the Secretary of State, and therefore the Tribunal, must consider the relative prospects of rehabilitation, in the sense of ceasing to commit crime, when considering whether an offender should be deported. I have to say that but for that authority, I would have said that this was a factor to be considered if raised by the offender, but not otherwise, just as the effect of deportation on the health of an offender need not be considered unless it is made known to the Secretary of State that it is a relevant factor.

53. 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.

54. 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. The Directive recognises that the more serious the risk of reoffending, and the offences that he may commit, the greater the right to interfere with the right of residence. Article 28.3 requires the most serious risk, i.e. "imperative grounds of public security", if a Union citizen has resided in the host Member State for the previous 10 years. Such grounds will normally indicate a greater risk of offending in the country of nationality or elsewhere in the Union. In other words, the greater the risk of reoffending, the greater the right to deport.

55. 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."

110. On the basis of the findings which we have already laid out in this judgment, we do not accept that the Appellant is rehabilitated and we have made clear our view that the Appellant is only at the beginning of such a process.

111. We recognise that the act of deportation would interrupt that embryonic rehabilitative process but we also note that the Appellant does not assert in his skeleton argument that there would be no support from the Portuguese government itself. At paragraph 15(iv & v), Counsel puts the case on the basis that the Appellant would be

seriously impacted by the lack of support structure relating to the fact that he has no family support and no other ties in Portugal.

112. We also note what the Court of Appeal mention in very general terms at [53] about Portugal's innovative attempts to treat drug addiction although probably more importantly to our decision, the Court clarified that it should not be assumed, where neither side has produced relevant evidence, that there would be a lesser degree of support from the relevant Member State in comparison to those available in the UK.

113. We therefore conclude that the Appellant would be able to access governmental or local authority support on return to Portugal.

DECISION

114. We conclude that the deportation action in this case is a proportionate measure in all the circumstances and we therefore dismiss the Appellant's appeal.

Signed  Date 16 December 2021

Deputy Upper Tribunal Judge Jarvis

NOTIFICATION OF APPEAL RIGHTS

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

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

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

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

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

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