IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000465

First-tier Tribunal No: DA/00730/2018

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 8 November 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

Heraldo Alves Te
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms E Fitzsimons of Counsel, instructed by Wilson Solicitors LLP
For the Respondent: Ms A Ahmed, Home Office Presenting Officer

Heard at Royal Courts of Justice on 4 September 2023

DECISION AND REASONS

1. The Appellant is a citizen of Portugal. His date of birth is 10 September 1995. In a decision dated 28 July 2022 a panel comprising the Honourable Mr Justice Morris and Upper Tribunal Judge McWilliam found an error of law in the decision of the First-tier Tribunal (Judge Shakespeare) to allow the Appellant's appeal against the decision of the SSHD on 7 December 2017 to deport the him pursuant to Regulations 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016 ("EEA Regulations").

2. The error of law decision reads as follows:-

> 30. We heard oral submissions from the parties. Ms Gilmour appeared via video link and Miss Fitzsimons attended in person. We had the benefit of Miss Fitzsimons' response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Procedure Rules').

31. At the start of the hearing and in response to our directions, we asked the parties to identify the relevant decision (with reference to Reg 27(1)). Both parties agreed that it was the 7 December 2017 decision and not the decision of 18 May 2021 which is a supplementary decision. The parties agreed that the judge erred at [69] when identifying the latter as the relevant decision. We also note that at the hearing before the First-tier Tribunal Miss Fitzsimons correctly identified the relevant decision. It is regrettable that the judge did not proceed on the correct basis. It is not clear which decision the Home Office Presenting Officer before the First-tier Tribunal indicated was the relevant decision. We note that the judge was not assisted by the supplementary decision because when assessing integrative links the decision maker took into account criminality and imprisonment that post dated the relevant decision. This may have led the judge down the wrong path. We went onto hear submissions concerning whether the error was material to the outcome.

32. Miss Fitzsimons submitted that the error was not material. She drew to our attention that the judge attached weight to immaterial matters, namely serious offences committed by the Appellant that postdate the relevant decision (offences of supplying class A drugs for which the Appellant was sentenced to 45 months). These are the most serious offences committed by the Appellant throughout his criminal history. The thrust of Miss Fitzsimons' submission was that the fact that they were taken into account by the judge offsets (at the very least) the judge's consideration of the Appellant's post relevant decision family life (at [83] and [84]).

33. Ms Gilmour drew our attention to [80] to [83] which she submitted are problematic. The matters taken into account by the judge are not material to the assessment of whether integrative links have been broken at the time of the relevant decision.

34. We find that the error is material. The upshot of it is that the focus of the judge was on the position in May 2021. She should have been focused on integrative links at the time of the relevant decision, namely 7 December 2017. She took into account immaterial matters. She attached weight to the Appellant's relationship with his partner and their child born in 2019 (see [83]). This supported integrative links at that time, but not at the date of the relevant decision. They were not factors present in the Appellant's life in 2017 or before and they are not material to the issue of integrative links as they pertain to the level of protection afforded to the Appellant.

35. Moreover, the judge at [84] attached weight to the maintenance of family ties in the United Kingdom 'during his period of imprisonment'. She heard evidence from family members and found them to be credible, which she was entitled to do. She accepted that they had not been able to visit the Appellant in prison because of COVID Regulations. Their witness statements are brief. It is not clear whether the judge's reference to 'period of imprisonment' refers to the sentence the Appellant was serving at the date of the hearing or time he has spent in prison generally since 2014. We take into account that COVID restrictions were not an issue before 2020. We take into

account what the Court of Appeal said in Hussein [2020] EWCA Civ 156 at [37] about whether a person is visited in custody being of little importance.

36. While we do not find that the decision is irrational, we find that the judge failed to consider the issue of integrative links as at December 2017 and that her finding that integrative links had remained intact is inadequately reasoned. The judge was entitled to attach limited weight to the 2017 OASys report when considering the risk presented by the Appellant at the date of the hearing. However, it may well be relevant to the assessment of whether links had been broken at the relevant date. We are not able to conclude that had the judge considered integrative links at 2017 she would have reached the same decision because she took into account later more serious offences in 2020. The Appellant's evidence of family life was not as strong in 2017. Moreover the OASys assessment might well also have to be weighed as it pertains to the circumstances in 2017.

37. The judge found that integrative links had not been broken, the Appellant was entitled to a higher degree of protection, and that there were no imperative grounds and thus could not be deported. She then at [101] went on to hold that even if there had been imperative grounds to deport (still assuming a higher degree of protection), then even then the decision to deport was not proportionate. In the Appellant's Rule 24 response it is submitted that this finding is adequately reasoned. We do not accept that it is an adequately reasoned decision that is capable of saving the judge's overall decision. It is not possible to say that if the judge had considered integration as at the correct date and had found that links had been broken by periods in custody and that the Appellant was entitled to the lower level of protection (serious grounds) that she would necessarily have reached the same decision on proportionality. Integration is the underpinning of the free movement regime and a weighty matter when assessing proportionality. We are not able to speculate what weight the judge would have attached to the integrative links had she found that they had been broken by imprisonment in the overall assessment of proportionality, whatever the level of protection she found applied to the Appellant.

38. We find that the making of the decision concerned involved the making of an error on a point of law. We set aside the decision of the judge to allow the Appellant's appeal pursuant to s.12 (2) (a) of the Tribunals, Courts and Enforcement Act 2007.

Directions

39. We observe that the judge made positive findings in respect of the strength of the Appellant's family life and credibility of the Appellant and witnesses. Moreover, the judge found that, as of 2014, the Appellant had developed strong integrative links to the United Kingdom. The judge had the benefit of hearing oral evidence. Our provisional view is that the findings at [83] (and maybe [84]) [98], [103] and [104] may be material to the assessment of risk and proportionality. There is no obvious reason to go behind them when remaking. Circumstances may change by the date of the resumed

hearing, but our provisional view is that the findings are not tainted by the error we have identified and represent the position at the date of the hearing in October 2021. Unless there is a change in circumstances, it may not in our view be necessary to re-hear evidence from the Appellant and his family although we would expect the Appellant to update his evidence with a witness statement. In the light of these observations and contrary to the indication we gave at the hearing on 19 July 2022 our provisional view, on reflection, is the that the matter should be retained in the Upper Tribunal.

40. **We allow the parties <u>14 days</u> from the date of sending this decision to make submissions (with reference to the Practice Statement of the Immigration and Asylum Chambers of the First-tier and Upper Tribunal on 25 September 2012), in default of which the matter will be relisted in the Upper Tribunal."**

<u>The Decision of the First-tier Tribunal</u>

3. There are paragraphs on which the Appellant relied, as follows:-

"83. I also take into account the fact that in the period between custodial sentences he formed a relationship with a British citizen, [A], further strengthening his integrative links with the UK. This relationship resulted in a daughter, born on 11 December 2019. Although the relationship with [A] has since broken down I found the Appellant's evidence that he is committed to his daughter genuine and credible, and therefore I accept that he wants to rebuild a relationship with his daughter if he is released from custody.

84. I also accept that he has maintained his family ties in the UK during his period of imprisonment. Although his family have not visited him in prison both his brothers have said, entirely reasonably, that this is due to covid restrictions rather than a conscious choice on his family's part and that they are in contact with him over the phone. I found both brothers to be credible witnesses. [H] in particular gave a convincing and sincere account of his relationship with the Appellant."

98. However, weighing against this is the change in the Appellant's circumstances and his attempts to rehabilitate himself, which in my view reduce the level of risk he poses. His offending has to date largely been financially motivated and he has been influenced by his associates. He says he is no longer in touch with those associates and accepts that he has made mistakes. He has undertaken educational courses in prison with the intention of finding a job if he is released. I am prepared to accept that the birth of his daughter, and his commitment to being part of her life, means that circumstances have changed since his previous offending and that he is sincere in his desire not to return to criminality. He also has the support of his family, which was not necessarily the case prior to 2015 and the arrival of his mother in the UK. His mother has regular visits with her granddaughter, indicating a level of family contact and connection. I accept [H] is determined and sincere in his intention to be a positive influence on his brother if he is released from custody."

> 103. Furthermore, his family are all in the UK. [The Appellant's mother] explained that her parents are dead, her sister lives in Germany and the Appellant has no family left in Portugal. I accept that he has not returned to Portugal for any significant period of time since he came to the UK. I also accept that English is his primary language and that he cannot read or write Portuguese. As such I accept that he has no meaningful societal ties in Portugal."
>
> 104. I am also mindful of the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to consider the best interests of the Appellant's daughter. Ms Martin sought to argue that the Appellant had been in custody since the child was around 9 months old, there had been no prison visits and the relationship was therefore limited at best. She argued that the child is at an age where her father's removal will not affect her significantly. The daughter is in the care of her mother, and will be brought up in the UK, and contact can be maintained through electronic communication. I accept that the daughter is still very young, and the Appellant has been absent for much of her life to date. However, if the Appellant is deported that would deprive her of the chance to develop and maintain the relationship with her father, who is committed to doing so, in the same country. Social media is no substitute for face to face contact as a child grows up, and therefore I factor this in to the overall proportionality assessment."

The Appellant's Background

4. The Appellant came to the UK in 2005 at the age of 10. He committed a number of offences before his 18th birthday, all of which resulted in non-custodial sentences. On 10 June 2014, aged 18 he was convicted by the Crown Court on five counts of robbery. These offences were committed in 2013 before he reached adulthood. He was sentenced to a twelve month detention and training order (DTO) on each count to be served concurrently. This was the Appellant's first custodial sentence.

5. On 1 December 2014 he was issued with a warning letter from the SSHD indicating that no further action would be taken in respect of his immigration status at that time, but that, if he committed further offences, the SSHD may seek to deport him.

6. The Appellant's criminality continued into adulthood. On 27 May 2015, aged 19, he was convicted by the Crown Court of robbery. He was sentenced to six months' imprisonment in a young offenders institution.

7. On 11 June 2015, the SSHD sent the Appellant another warning letter in the same terms as the previous one.

8. On 31 May 2016 the Appellant was convicted by the Magistrates' Court of burglary of a dwelling with intent to steal. He was sentenced to eight weeks' imprisonment, which was suspended for twelve months.

9. On 2 October 2017, the Appellant was convicted by the Crown Court of affray and criminal damage. He was sentenced to fourteen months' imprisonment. He was also made subject to a restraining order for five years. He was ordered to pay a victim surcharge and he received a further sentence of four weeks'

imprisonment for breach of a suspended sentence. He received in total a sentence of fourteen months and four weeks' imprisonment. These are the offences that triggered the SSHD's decision to deport the Appellant.

10. The Appellant was issued with a notice of liability to deportation on 24 November 2017. A deportation order was signed on 7 December 2017. The Appellant was served with the signed deportation order on 14 December 2017, which was certified under Reg 33 of the EEA Regulations. The SSHD served a supplementary letter on 9 November 2018, in which it was accepted that the Appellant has permanent residence. The certification was lifted enabling the Appellant to appeal against the decision in country.

11. While his appeal was pending, on 9 October 2020, the Appellant was convicted by the Crown Court of supplying a class A drug, namely heroin and supply of crack cocaine. He was sentenced to 45 months' imprisonment on each count to run concurrently. The SSHD sent a supplementary letter to the Appellant on 18 May 2021.

The Legal Framework

12. **"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 a right of permanent residence under regulation 15 and who 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.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010(2); or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

(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.)."

13. There are a few principles of law concerning the determination of the level of protection against expulsion which are not contentious and can be summarised as follows:-

(i) Prison interrupts continuous residence for the purpose of acquiring permanent residence and periods spent residing in accordance with the Regulations before and after prison cannot be aggregated: C-400/12 SSHD v MG [2014] 1 WLR 2441.

(ii) Ten years' residence is calculated counting backwards from the date of the decision to deport and must be "in principle" continuous: SSHD v MG: Supra and C-316/16 B v Landbardon-Vertenberg [2009] QB 126.

(iii) Periods in prison in principle weaken integrative links but a holistic assessment must be made: C-378/12 Onuekwere [2014] 1 WLR 2420.

(iv) Periods of imprisonment do not count positively towards calculating ten years' residence.

(v) A sentence of imprisonment includes periods of detention in young offenders institutions: SSHD v Viscu [2019] EWCA Civ 1052; [2019] 1 WLR 5376.

(vi) There must be an assessment of circumstances when the question of expulsion arises: C-146/Tsakouridis 23 November 2010.

14. In SSHD v Viscu, when approaching how to assess whether integration had been broken, Underhill LJ (giving judgment for the court) at paragraph 51 identified the following relevant considerations:

> "51. What is clear from *Vomero and B* (particularly at [70] and [72]-[75] in the passages I quoted above), is that the overall assessment will take account of all relevant factors, including the nature and circumstances of the offending (which may be of particular relevance where the offending took place when the individual was a minor) and the behaviour of the offender whilst in custody (which again in the case of a minor may be an indicator that integrating links have not been broken). Likewise one would expect the overall assessment to take into account what is in the best interests of a child in accordance with the United Kingdom's obligations under international law. It was not suggested that compliance with those obligations required the blanket availability of enhanced protection where the expulsion decision is taken when the person concerned is an adult."

15. In Viscu it was acknowledged, at paragraph 50, that young offenders may well be distinguishable from adult offenders, in terms of their integration in society:

> "50. I accept that there is force in Ms Dubinsky's submission that, in the case of a child or young offender, it may be that the offending is less indicative of a rejection of societal values and the nature and purpose of detention is less disruptive of integration than in the case of adult offender. However those are all matters which can and should be taken into account in the overall assessment of the situation of the offender, which of course has yet to take place in the present case. Furthermore, since in the case of a minor under the age of 18 at the

time of an exclusion decision, regulation 27(4)(b) (reflecting Article 28(3)(b) of the Directive) confers enhanced protection in any event, save where the expulsion decision is in the best interests of the child concerned, it is not necessary to adopt the narrow definition of imprisonment under regulation 3 for which Mr Briddock and Ms Dubinsky contended in order to protect the best interests of the child concerned."

16. In Tsakouridis the CJEU (Grand Chamber) held:

"40. It follows from the wording and scheme of Article 28 of Directive 2004/38, as explained in paragraphs 24 to 28 above, that by subjecting all expulsion measures in the cases referred to in Article 28(3) of that directive to the existence of 'imperative grounds' of public security, a concept which is considerably stricter than that of 'serious grounds' within the meaning of Article 28(2), the European Union legislature clearly intended to limit measures based on Article 28(3) to 'exceptional circumstances', as set out in recital 24 in the preamble to that directive.

41. The concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words 'imperative reasons'."

"43. As regards public security, the Court has held that this covers both a Member State's internal and its external security (see, inter alia, Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 17; Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 17; Case C-423/98 *Albore* [2000] ECR I-5965, paragraph 18; and Case C-186/01 *Dory* [2003] ECR I-2479, paragraph 32).

44. The Court has also held that a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (see, inter alia, Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraphs 34 and 35; Case C-70/94 *Werner* [1995] ECR I-3189, paragraph 27; *Albore*, paragraph 22; and Case C-398/98 *Commission* v *Greece* [2001] ECR I-7915, paragraph 29)."

"49. Consequently, an expulsion measure must be based on an individual examination of the specific case (see, inter alia, *Metock and Others*, paragraph 74), and can be justified on imperative grounds of public security within the meaning of Article 28(3) of Directive 2004/38 only if, having regard to the exceptional seriousness of the threat, such a measure is necessary for the protection of the interests it aims to secure, provided that that objective cannot be attained by less strict means, having regard to the length of residence of the Union citizen in the host Member State and in particular to the serious negative consequences such a measure may have for Union citizens who have become genuinely integrated into the host Member State."

17. In VP (Italy) v SSHD [2010] EWCA Civ 806 the Court of Appeal at paragraph 17 endorsed LG (Italy) v SSHD [2008] EWCA Civ [2008], and held that imperative grounds of public security required not only a serious matter of public policy but "an actual risk to public security so compelling that it justified an exceptional course of removing someone who had become integrated by many years' residence in the host state".

The evidence

18. I had before me an Appellant's bundle comprising of 119 pages and a Respondent's bundle comprising 340 pages. The Appellant had also filed an additional witness statement on 30 August 2023. I have taken into account the more recent evidence, but also the witness statements that were before the First-tier Tribunal. There are statements from the Appellant's family members, including his parents dating back to 2018 and statements from his siblings of the same date. There are more recent witness statements from family members in 2021. There was also a witness statement from the Appellant's solicitor Siobhan Foulner of 29 August 2023. Ms Fitzsimons relied on a skeleton argument comprising 41 paragraphs of 3 September 2023. The Appellant gave oral evidence before me and I heard full submissions from both representatives.

The comments of the sentencing judge in respect of the trigger offences

19. On 5 October 2017 at Cambridge Crown Court, the Appellant was convicted of affray and of destroying or damaging property and breaching a suspended sentence. The judge's sentencing comments read as follows:-

> "These events stem from the 2nd of April this year, when there was a violent attack on domestic premises in this city, where a number of young men burst into someone's house; rocks were thrown at the building and at people; bottles were thrown; the victims, Mrs Redacted and Mr Redacted, I've heard their statements read to the court; there is evidence in respect of Da'Silva and Alveste (sic) having a weapon; the photographs show the damage to the property. The defendants were interviewed and made no comment…
>
> … Mr Alveste, now aged 22, you have a significant record; five offence (sic) of robbery in 2014; one in 2015; 2016, burglary, a suspended sentence - eight weeks suspended with unpaid work;
>
> … Mr Alveste, in respect of the affray, my starting point is 16 months' imprisonment; I reduce that to reflect your plea to 12 months' imprisonment; aggravated by reason of your prior convictions, 14 months. In respect of the suspended sentence order, I implement that consecutively to the extent of four weeks…"

The comments of the sentencing judge in respect of the offences that post-date the deportaion decision

20. In relation to the offences involving drugs on 9 October 2020 the Appellant was convicted and the sentencing comments are as follows:-

> "It involves getting yourself involved in organised dealing for money, at the behest of a crime gang. You are 25, … … You have a significant number of convictions, but nothing for drugs apply.

> Looking at your record in the round, there are no grounds to mitigate the sentence, and it would be entirely proper to make an argument that your sentence should be increased because of your criminal convictions.
>
> The guidance suggests category 3, a significant role, with a starting point of four-and-a-half years. This is rather more serious, but, reflecting your age, it seems to me an appropriate starting point: five years. Giving you credit for your plea, the sentence is 45 months' imprisonment. That's the order of the court."

The Appellant's evidence

21. The Appellant provided a recent witness statement to update the witness statement that was before Judge Shakespeare, dated 15 June 2021. His evidence is that he was released from prison on 25 August 2023 following having been recalled in January 2023. He was recalled on charges of being concerned in the supply of controlled drugs (class A) and being in possession of two mobile phones in contravention of a criminal behaviour order.

22. He expanded on this is oral evidence. The Appellant accepted that he breached the conditions of the criminal behaviour order. He was sentenced to one day in custody on 6 April 2023 following a guilty plea. He explained that he was in Cambridge with his ex-partner and he saw an old friend whilst he was eating in a restaurant. He gave the Appellant his mobile phone in order for the Appellant to enter his telephone number into it. He left the Appellant with the phone telephone for a short time. When they finished eating they walked to the car and the Appellant still had the phone in his pocket. The police stopped them and the Appellant was searched and found with two phones on him. He pleaded not guilty to the drug offences and the CPS subsequently dropped the case.

23. The Appellant was released in August 2022. He was recalled in January 2023. the criminal charges were dropped in February or March 2023. He was then placed in immigration detention and released on 25 August 2023 following a successful bail application. However,

24. The Appellant accepted that he has committed a lot of offences. His ex-partner was in court. He accepted that he committed offences for financial gain when he was younger. He said he was now not in contact with the wrong crowd. He accepted in cross examination that he was content for the old friend with the mobile to have his number.

25. The Appellant found having been recalled difficult. He was not given a chance to move forward or to make any improvements in his life. Moreover, he felt guilty for what he had put his family through. Before the Appellant was recalled, he had been out of prison since August 2022. During that time his father wanted him to work and he had a job lined up for him, however the Appellant was unable to pursue this because he does not have a right to work. His father is frustrated with him because the Appellant is an adult and he should be working and contributing to the family.

26. The Appellant wants to work. He wants to be able to pay for things and to help his mother. Before he was recalled he used to go and visit his mother and siblings every week in London. He used to talk to his probation officer about not being able to help his father and the guilt that he felt as a result. The probation

officer gave him food vouchers for a foodbank so that he could obtain a few items for his family. He tried to help around the house. He learnt to cook in prison.

27. The Appellant's ex-partner, A, reached out to the Appellant at the end of 2022 because her sister had died and she wanted the Appellant's support. She is the mother of the Appellant's daughter born at the end of 2019. She was 9 months old when he first went to prison. The Appellant did not see his daughter following his release in 2022 because the Social Services' view was that he should not see her. This is because the Appellant had previously been charged with a sexual offence although the charges were subsequently dropped. A has never had a problem with the Appellant seeing his daughter but it was important to respect the Social Services' conditions. The Appellant's evidence is that he was a "changed man" and there are currently no restrictions on him being allowed to see his daughter. However, he accepted that he had not seen her since she was a few months old. He said that he needed to get a job before resuming contact with her. He did not know who was looking after her on the day of the hearing.

28. The Appellant wants to get his life back on a straight line and he wants to have a routine and to be able to work and see his daughter. He lives with the constant fear that he will be deported to Portugal. He has no idea what he would do or how he could cope. He does not have anyone there. His family is in the UK. He has not been there since he was aged 10. His brother has also visited in 2017, but the Appellant does not know with whom he stayed. His mother came to the UK in 2015 and he accepted that it was probable that his mother has family friends there

The Respondent's submissions

29. Ms Ahmed made submissions. She relied on the Reasons for Refusal Letter of 7 December 2017 and the supplementary letter of 18 May 2021.

30. The SSHD's case is that the Appellant has received ten convictions for twenty offences and is a persistent offender. His offending is escalating in seriousness. Moreover he has been warned by the SSHD on two occasions that deportation would be considered again should he continue to offend however this has not acted as a deterrent. There remains a serious risk of harm to the public.

31. The OASys assessment, prepared on 29 August 2017, concluded that the Appellant posed a medium risk of harm to the public and a high risk of reoffending. Since the report the Appellant has reoffending on several occasions.

32. It is accepted by the SSHD that the Appellant has been resident in the United Kingdom in accordance with the 2016 Regulations for a period of five years, taking into account HMRC records which showed that his father had been exercising treaty rights since 2004 and therefore it is accepted the Appellant has a permanent right of residence and that he has continued residence in the United Kingdom for a period of ten years. However, although it is accepted that he has resided in the United Kingdom for at least ten years, with reference to the recitals 23 and 24 Free Movement Directive and the decision of the CJEU in the case of Tsakouridis, the Appellant's integrative links have been broken by the sentence of imprisonment on 2 April 2017. He is not entitled to the highest level of protection.

33. The Appellant first went into custodial detention on 12 June 2014 and since then has spent 1,139 days either on remand, serving a custodial sentence or in

immigration detention, which amounts to three years, one month and twelve days.

34. The Appellant's deportation is justified on serious grounds of public policy or public security.

35. The Appellant is not in a relationship and there is no evidence that he has been allowed contact with his child and indeed he has not seen her for some time.

36. In the alternative, Ms Ahmed submitted that if he is entitled to the highest level of protection this would not assist him, taking into account the nature of the crimes and the Appellant's persistent criminality which should be considered cumulatively. His offending affects vulnerable people in society. The Appellant's offending has escalated. He was released six months prior to the hearing. The Appellant's family have been unable to prevent him from offending. There is sufficient evidence to depart from the finding at paragraph 83 of Judge Shakespeare's decision as he has not resumed contact with his daughter.

37. The OASys Report assesses the Appellant to be at medium risk, however this predates the drug offences. The Appellant has never lived with his mother in the UK. There is no reason to preserve the finding at paragraph 104 of Judge Shakespeare's evidence, bearing in mind the lack of evidence.

38. The Appellant is aged 27 and he is relatively healthy. He has diabetes but he can be treated for this in Portugal. There is no reason why he cannot remain in contact with his family in Portugal where he has social and cultural ties.

The Appellant's submissions

39. Ms Fitzsimons made submissions. She said that the Appellant had ten years' continuous residence prior to incarceration. She relied on the case of Viscu. She relied on her skeleton argument and the positive findings made by the First-tier Tribunal and submitted that there was no material change in the Appellant's circumstances and that the Tribunal should apply paragraph 83, 84, 98, 103 and 104 of the decision of the FTT. She submitted that the Appellant is entitled to imperative grounds of protection.

40. The Respondent accepts that the Appellant has residence in the UK in accordance with EEA Regulation of 2016, but does not accept that he is sufficiently integrated into the UK. The Appellant's first period of custody followed a conviction for robbery on 10 June 2014, for which he was sentenced to a twelve months' DTO. The Appellant was 17 years old at the date of the offence on 21 July 2013.

41. By 2017 the Appellant had been living in the UK since 2005 and therefore for a total period of twelve years. This residence was lawful and in accordance with EEA Regulations, permanent residence is a strong indicator of integration. Throughout the period of the offences, the Appellant's immediate family were in the UK. When the Appellant moved to the UK in 2005 he lived with his father and stepmother until 2015. In 2015 the Appellant's mother moved to the UK with the Appellant's brothers. He had wider family living in the UK, aunts, uncles and cousins.

42. The Appellant attended school and college in the UK. In 2012 – 2014 he obtained a variety of qualifications, as a result in his education here in the UK,

including a level 1 and 2 award in sportsmanship; BTEC level 2 certificate workskills; level 1 in personal and social development; level 3 in mathematics and English; IT level 2 credits. He has only been back to Portugal once in this period for one visit when he was age 14 and then only for a week. The Appellant had strong family and social links in the period prior to and during his detention and imprisonment.

43. The Appellant's offending in this period included periods of repeat offending, with the exception of the 2017 offences. Two of the relevant custodial sentences were dealt with was child specific sentences; namely, the twelve month DTO and the six months' imprisonment in a young offenders institute. Ms Fitzsimons relied on Viscu and the approach in the sentencing council's guideline, "sentencing children and young people".

44. Ms Fitzsimons referred to the OASys report, which in her view supports the view that the Appellant's offending is explicable by reference to disruptions in adolescence and the offending was, in the main, financially motivated and due to negative peer associations; the parts of the report which she relied on are as follows:

(i) "Mr Alves Te pleaded to guilty to the offence which indicates he accepts a level of responsibility for the offence. During the interview he acknowledged some responsibility for his behaviour, but blame on the 'gang' involved, as stated, he would not have stolen the bicycle if he was in fear of his safety."
"It is my assessment he presents a pattern of financially motivated offending which is intrinsically linked to his lifestyle and associations and deficits in his thinking skills. During his interview he recognised previous behaviour has been problematic indicated prior to this current offence he was attempting to make changes to his life however he has again found himself in a similar situation."

(ii) "He does feel elements of peer pressure due to his friends but he can do it and is part of the group … if Mr Alves Te were to gain employment or disassociate certain peers, this will reduce the risk."

(iii) "He had difficulty engaging with mainstream education and presented with problematic behaviour. As a result he transferred to a referral unit. He informed me that he has been diagnosed with dyslexia and has some difficulty reading and writing. Mr Alves Te acknowledges he had not an employment history indicating he is seeking employment prior to being remanded into custody."

45. Ms Fitzsimons relies on there being no concerns about the Appellant's conduct whilst in prison.

46. Ms Fitzimons submitted that there are no imperative grounds to justify expulsion. There is no threat to public security. The CJEU has been clear in reiterating that expulsion can only be justified on imperative grounds of public security owing to the exceptional seriousness of the threat or because it is particularly serious. It is only if the threshold is met that the Tribunal must consider the additional factors that require weighing in the balance against the seriousness of that threat. It is clear from case law that only very serious offences suffice to reach the entry threshold. Even having regard to the post

index offences, it is submitted there would not be imperative grounds of public security to justify the Appellant's exclusion.

47. The SSHD case in the supplementary letter is not that the Appellant's exclusion would be justified on imperative grounds; it is that he does not qualify for imperative grounds. The SSHD makes her case, in the supplementary letter on the basis of serious grounds of public policy/public security. Ms Fitzsimons says that this tacit acceptance that the SSHD could not discharge the burden should imperative grounds apply.

48. In any event, there are no serious grounds to justify expulsion, previous convictions alone are not sufficient grounds for deportation and the Tribunal is invited that this alone is not sufficient evidence to discharge the SSHD burden. The evidence shows that the Appellant is not a genuine, present and subsisting threat to the interests of society. The most serious conviction is from 2020. The Appellant's involvement was according to the sentencing judge as a result "getting yourself involved in organised dealing for money, at the behest of a crime gang". This was the Appellant's first and only conviction for drug supply. The Appellant has accepted responsibility for his offending and pleaded guilty. The only risk assessment that the SSHD has put forward is the 2018 OASys Report in relation to a burglary offence. That assessment identified financial motivation, peer pressure, peer influences being relevant to the risk of offending. The Appellant actively wanted to be able to undertake pro-social employment but has not been able to.

49. The effect of becoming a parent must not be overstated in terms of the Appellant's maturity and outlook, especially having regard to the fact that the mother of their child and former partner was recently regarded by probation is a good influence.

50. The Appellant's deportation, in any event, is not proportionate for the following reasons:

(1) He came to the UK as a child age 10.

(2) The Appellant has resided in the UK since 2005 for a total period of eighteen years, which is more than half his life.

(3) The strength and status of the Appellant's residence in the UK.

(4) Experiences leading to the underlying offending (a destructed childhood, separated parents and a move to the UK from Portugal at the age of 10 and having to move schools frequently due to his father's work, his family having to struggle financially, his mother and siblings re-joined him in the UK in 2015, the Appellant struggled in mainstream school).

(5) The Appellant's health, he has type 1 diabetes.

(6) The Appellant is socially and culturally integrated into the UK. It would be wholly artificial to suggest that a person who migrated at the age of 10, whose entire family unit is here and who has had a significant relationship with a British citizen resulting in a child who is not integrated here.

(7) Links with Portugal. The Appellant does not have any meaningful ties to Portugal, where he left as a child.

(8) The Appellant has not engaged in serious offending since 2020.

(9) The impact on deportation on the Appellant's relationship with his child.

51. The Appellant's deportation would breach his rights under Article 8. The Appellant relies on Maslov v Austria [2008] EWCHR 1638/08 and the Respondent's own published policy, public policy, public security or public health decisions which recognises at page 26 that if a person has a lawfully spent all or the major part of their childhood or youth in the UK then the level of offending needs to be serious in order for the deportation to be proportionate.

Conclusions

52. I have taken into account the comments of the panel in the error of law decision as well as all the evidence in this case. The Appellant's PNC discloses a lengthy period of criminality. He came to the UK in 2005. He was aged ten at the time. He became an adult in 2013. He started to commit crimes as a minor in 2011. He has a number of offences showing on his record when he was a child. He was convicted in 2014 of four offences of robbery which were committed when he was a minor and which gave rise to his first custodial sentence. He had been in the UK less than 10 years when he committed these offences; however, he was a young person at this time.

53. The Appellant's offending continued. He received a non-custodial sentence for robbery before he reached age 18. He committed an offence burglary of a dwelling in 2016 for which he received a suspended sentence. Before the deportation order, on 2 April 2017, when the Appellant was aged 21 he committed offences of affray, criminal damage and he breached the previously imposed suspended sentence. He received a sentence of 14 months imprisonment. It was these offences that triggered the deportation order.

54. Taking an holistic overall view, I find that the period of imprisonment broke integrative links in the UK. I take into account that he had permanent residence which is indicative of integration and that he has been in the UK since he was a child. He attended school in the UK and has family here. I have taken into account what was said in Viscu about offences committed by minors. On a mathematical basis the Appellant had been here for twelve years at the date of the decision (and nineteen at the date of the hearing). However, by the time of the time of the decision, the Appellant had become a prolific offender. He had committed offences well into adulthood. The trigger offences included a serious affray. The Appellant at the time was a persistent offender (he breached the suspended sentence imposed for burglary) and his criminality was escalating in seriousness. The sentencing judge took into account that the Appellant pleaded guilty; however, they found that the offence was aggravated by his previous offences describing the Appellant's record as significant. The offence of affray was committed with others and involved a violent attack on domestic premises. There was evidence of the Appellant using a weapon. I have taken into account the OASys report which was completed on 29 August 2017 after the burglary. I note that the Appellant was assessed at this time of presenting a medium risk of harm. This was before he committed the trigger offences.

55. The SSHD has the burden of establishing that the Appellant presents a genuine, present and subsisting threat to the interests of society. The Appellant's previous convictions alone are not sufficient grounds to deport. I must consider whether at the date of the hearing the SSHD has discharged the burden. On 15 September

2020 the Appellant committed very serious drugs offences and he received a period of imprisonment of 45 months on each count to run concurrently. The offences committed by the Appellant have escalated in seriousness. The Appellant continued to commit criminal offences despite the notice of deportation. I was concerned that he had been recalled to prison by the time the matter came before me. While he was not convicted of a separate offence, he was found guilty of breaching a behaviour order.

56. After the deportation decision the Appellant continued to offend despite the precariousness of his situation. By this time the Appellant had fathered a child following a relationship with a British citizen. Judge Shakespeare found that the Appellant was committed to his daughter and that he wants to rebuild a relationship with her when released from custody. However, he had not done this by the time that the appeal came before me. I take into account that the mother of the Appellant's child attended the hearing with him. I am satisfied that the Appellant has a relationship with family members who are in the UK. I accept that there is family support for the Appellant. However, he has not developed a relationship with his daughter.

57. The SSHD did not produce up to date assessment of risk of re-offending. However, the 2018 report assessed the Appellant at medium risk of harm and the Appellant has since this time continued to offend. Judge Shakespeare found that overall risk had been reduced; however, since the hearing before the FTT the Appellant has been recalled to prison. The Appellant told Judge Shakespeare that he was no longer in touch with associates; however, the Appellant's description of the incident which lead to him being recalled would suggest otherwise. It is difficult to accept Ms Fitzimons' submissions that prison and these proceedings have had a deterrent effect when the deportation order was made in 2017 and the Appellant committed offences after this and that he was recalled to prison. While I accept that the Appellant has the support of his wider family and that his mother maintains a relationship with his daughter, this has not deterred the Appellant from offending. Despite what the Appellant told Judge Shakespeare about his daughter, his oral evidence before me did not support this. The Appellant has not provided a reasonable explanation why in the absence of a Social Services intervention, he has not reestablished contact with his daughter. The Appellant's evidence in his witness statement concerning his intentions are undermined by his actions. I find that the Appellant is a genuine, present and subsisting threat to the interests of society.

58. When assessing proportionality I take into account that the Appellant has been here lawfully since he was aged 10. He has limited links to Portugal. He has been in the UK most of his life. The social and cultural integrative links that he established here prior to the deportation order have been broken. He has re-established some of these links; however, he has spent a significant period of time in custody. He has a child and relationships with his family. However, this must be considered in the context of his further serious offending leading to a prison sentence and that he was latterly recalled to prison. The Appellant has type 1 diabetes, but there is no evidence he would not be able to receive treatment in Portugal

59. While it is in a child's best interests to have both parents in their lives, the Appellant's evidence before me was not that he has established a relationship with his daughter since his release from prison. The finding of Judge Shakespeare must be considered in this context. I have taken into account that there was

social services intervention at some stage and an order preventing the Appellant from having contact with his child, but it was not the Appellant's evidence that this was extant. While Ms Fitzimons relied on rehabilitation, there is limited evidence of rehabilitation. The level of offending is unarguably serious. While the Appellant has been here for a long time, he has seriously offended relatively recently (three years ago) and has breached a behavioural order this year. He is not in a relationship and he has not resumed contact with his daughter. He has continued to commit offences despite the deportation order. While he has no family in Portugal, he lived there until the age of aged 10 and he will be able to reintegrate. I find that there is very likely to be friends or connections to Portugal. The Appellant's mother came here as recently as 2015. He has ties to the UK as a result of the length of time he has been here, but his social and cultural ties have been undermined by his criminality. There are in my view, serious reasons requiring the Appellant's deportation. The decision is proportionate.

60. The Appellant's appeal is dismissed.

Joanna McWilliam
Judge of the Upper Tribunal
Immigration and Asylum Chamber

2nd November 2023