IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2024-000089

First-tier Tribunal Nos:
HU/00987/2022
EU/53216/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 13th of September 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FABIO ABUDU MALO INDIAI
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms C Newton, Senior Home Office Presenting Officer
For the Respondent: Mr L Garrett, Counsel instructed by BPA Associates Limited

Heard at Field House on 20 August 2024

Although the Secretary of State is the appellant in these proceedings before the Upper Tribunal, for ease of reference I will refer to the parties as they were in the First-tier Tribunal

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal from the decision of First-tier Tribunal Judge R. Short promulgated on 14 December

2023 ("the Decision") whereby she allowed on human rights grounds the appellant's appeal against the decision to deport him to Portugal as a foreign criminal.

Relevant Background

2. In the Decision, Judge Short decided two appeals. The first appeal (which has a reference of EU/53216/2023) related to an EU Settlement Scheme application by the appellant on 28 October 2020, which was refused by the Home Office on the same date. The appellant's appeal against that decision was made late, but by a decision of 17 May 2023 the Tribunal agreed to extend time. As appears below, Judge Short decided the EUSS appeal in favour of the Secretary of State, and there is no cross-appeal against this decision by the appellant.

3. The second appeal (which has a reference of HU/00987/2022) was brought by the appellant in respect of the decision of the Home Office date 13 June 2022 to make a deportation order against him under the Immigration Act 1971 ("the HR appeal").

The Hearing before, and the Decision of, the First-Tier Tribunal

4. The two appeals were joined by directions issued on 11 May 2023, and a substantive hearing of the conjoined appeals took place before Judge Short sitting at Columbus House, Newport, on 31 August 2023 and 6 December 2023. Both parties were legally represented.

5. As recorded by the Judge at para [11], the appellant himself and five witnesses provided witness statements and gave oral evidence to the Tribunal, and were cross-examined. The appellant's mother submitted a witness statement and gave oral evidence on 6 December 2023.

6. Having previously set out the agreed facts at para [6], at para [13] the Judge set out the findings of fact which she had considered had been established from the oral and written evidence.

7. The Judge then turned to address the EUSS appeal. The Secretary of State's case was that the appellant was not entitled to rely on the 2016 Regulations because he could not demonstrate that he was either legally residing in the UK as at 30 December 2020, or that he was a permanent resident of the UK. Conversely, Mr Brown for the appellant submitted that the appellant was able to rely on the 2016 Regulations because he was permanently resident in the UK from 2019 at the latest, and therefore he was lawfully residing in the UK on 31 December 2020.

8. The Judge went on to conclude that the appellant had not established permanent residence in the UK by 31 December 2020, and therefore he could not fulfil the 10-year continuous residence requirement at Regulation 27(4). The Judge observed that the appellant did not make any serious contentions that he should be treated as legally residing in the UK other

than on the basis of permanent residence. The burden of proof was on him to demonstrate that there was another basis on which he could bring himself within the 2016 Regulations, and the Judge found that he had not discharged this burden. He had not shown that he was working for a continuous qualifying period in the UK, and so he was not settled in the UK. The Judge found that the appellant did not raise any other bases on which he could be treated as legally residing in the UK for the purposes of the 2016 Regulations which may have allowed him to rely at least on the "*basic*" protection from deportation at Regulation 27(5). The Judge said that she was constrained to find that there was no other basis on which he could be treated as legally residing in the UK under the 2016 Regulations. Therefore, he could not rely on any provisions of the European regime to offer him protection from deportation. She held that the appellant was a foreign criminal for the purposes of the UK legislation.

9. The Judge then turned to address the appellant's human rights appeal.

10. At para [37] the Judge directed herself that the appellant was a foreign criminal who had been sentenced to a period of imprisonment of at least 4 years, and therefore he faced automatic deportation on the statutory assumption that this was in the public interest unless he could establish that there were very compelling circumstances why the deportation should not occur. Those very compelling circumstances must be over and above (i) the fact of the appellant's lawful residence in the UK for most of his life; (ii) his social and cultural integration into the UK; and (iii) "*any*" (sic) significant obstacles to his reintegration into Portugal, the country of his birth.

11. The Judge set out the appellant's submissions on private life and proportionality, at paras [38] to [43] and the Secretary of State's submissions on private life and proportionality at paras [44] to [48]. The Judge gave her reasons for finding in the appellant's favour on the human rights appeal at paras [49] to [54].

12. At para [52] the Judge said that against the serious nature of the offence, she had taken account of the fact that the appellant had a strong private life in the UK, both with his immediate family and his partner, and that he had spent a significant part of his adult life in the UK. In her view, while these factors indicated the exceptions at s.117C(4) would apply to him, they did not indicate any compelling circumstances over and above those exceptions.

13. At para [53] the Judge said that, however, there were in her view at least two additional factors which needed to be taken into account in the appellant's case. The first was his mother's mental health, and the impact which the incarceration of her son had on her mental health, and the likely impact of his deportation - particularly given her reliance upon him for day-to-day support. The second was the circumstances surrounding the commission of the offences in May 2020: the death of the appellant's father; the loss of his job; the breakdown of his relationship; and the

impact of the Covid pandemic. These could be described as an unfortunate combination of circumstances which left the appellant in a particularly vulnerable position. There had been no suggestion that this set of circumstances was likely to re-occur. The appellant was now in a settled relationship and had a full-time job. The consistent evidence from his family members and friends was that his behaviour had changed significantly since his incarceration.

14. At para [54] the Judge concluded that these two additional factors, alongside the existence of the factors which were relevant for s.117C(4), provided *"compelling circumstances*" sufficiently strong to outweigh any public interest in the appellant's deportation.

The Secretary of State's Grounds of Appeal

15. The Secretary of State's grounds of appeal were settled by a member of the Specialist Appeals Team. The Specialist Appeal Team advanced a single ground of appeal which was that the Judge had made a material misdirection of law at para [54] of the Decision. The Judge had failed to note that the relevant threshold was "*very compelling circumstances*". Also, there was no finding that the exceptions set out at s117C(4) and (5) were made out. In order to find that there were very compelling circumstances over and above the exceptions set out at s117(4) or (5), there should first be a finding that either exception was met.

16. In addition, the Judge had failed to take into consideration the appellant's earlier offending, which could be seen to contribute to a pattern of offending, rather than a one-off incident triggered by a particularly stressful series of events. In respect of the mental health of the appellant's mother, while this would be upsetting for the appellant, the decline in her mental health was triggered by his own actions, and the Judge had failed to take this into account. It was further submitted that no reasons had been given as to why the appellant's mother could not live with the appellant in Portugal. In any event, there was no finding that the ties between the appellant and his mother reached the threshold of additional emotional ties over and above those expected between an adult and their parent, as set out in *Kugathas -v- Secretary of State for the Home Department* [2003] EWCA Civ 31.

17. The Judge further failed to have regard to the relevant thresholds required to demonstrate that the very compelling circumstances threshold was met. As set out in *Garzon* [2018] EWCA Civ 1225, at [28], and in *Hesham Ali* [2016] UKSC 60, at [38], where the statutory exceptions have not been met, great weight should generally be given to the public interest in the deportation of such offenders, and that it can only be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed.

The Rule 24 Response

18. In the Rule 24 response dated 8 February 2024, Mr Brown of Counsel opposed the appeal on the ground that the Judge had not made a material misdirection of law under sections 117C (4) to (6) of the Nationality, Immigration and Asylum Act 2022. The Judge had directed herself to the appropriate legal test at paras [7](e), [37], [38], and [49] of the Decision. The Judge had considered the nature, length and seriousness of the offending at paras [50] and [51] of her decision. The mention of the "*compelling circumstances*" test under s117C(4) at para [54] was not a material misdirection as to the law, as the appropriate legislation had already been identified.

19. The very compelling circumstances test required a full proportionality assessment to be carried out, weighing the interference with the rights of the potential deportee and his family to a private life under Article 8 ECHR against the public interest. It was submitted that Judge Short had undertaken a full proportionality assessment, and so she had not erred in law.

The Hearing in the Upper Tribunal

20. The hearing before me was a hybrid one, with the parties appearing remotely on the Cloud video platform, whereas I was physically present in a Court room at Field House.

21. On behalf of the Secretary of State, Ms Newton relied upon the grounds of appeal. She submitted that the Judge had wrongly directed herself to a lower threshold than was required.

22. On behalf of the appellant, Mr Garrett developed the Rule 24 response at some length. I also invited him to address me on the question of the forum in which the decision should be remade if an error of law was made out.

23. After hearing from Ms Newton briefly in reply - both on the error of law question and on the question of future disposal if an error of law was made out - I reserved my decision.

Discussion and Conclusions

24. Before turning to my analysis of this case, I remind myself of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years, including in *Volpi & another v Volpi* [2022] EWCA Civ 464 at [2].

25. If the only defect in the Judge's analysis was her reference at paras [52] and [54] to a *"compelling circumstances*" test as opposed to a "*very compelling circumstances"* test, I might have been persuaded that no material error of law was made out.

26. However, I consider that the problem with the Judge's line of reasoning is not confined to her using the shorthand of compelling circumstances.

27. In the Home Office's decision letter giving reasons for refusing the appellant's human rights claim, it was submitted that there was significant public interest in the appellant's deportation because of his history of criminality (which demonstrated his disregard for the laws of the United Kingdom) and also because he had failed to regularise his stay in the UK after 21 February 2017.

28. The criminality reasons relied upon included the appellant's conviction of robbery on 19 October 2012 at Cardiff Crown Court, for which the appellant was sentenced on 14 March 2013 to 18 months' detention at a Young Offenders' institution.

29. On 21 June 2013 the appellant was convicted of theft by shoplifting and was given a fine of £50 and ordered to pay a victim surcharge of £20.

30. On 8 May 2014 the appellant was convicted of theft by shoplifting and was given a fine of £300, and ordered to pay costs of £85 and a victim surcharge of £30.

31. On 27 August 2014 a decision was made not to pursue deportation (the appellant having succeeded in his appeal on 25 November 2013 against a decision to make a deportation order against him under the EEA Regulations 2006), and the appellant was served instead with a warning letter.

32. The Secretary of State did not accept that the appellant met the private life exception. It was not accepted that he had been lawfully resident in the UK for most of his life. He was aged 27, and he had arrived in the UK on 8 September 2008 aged 14 years. On 7 February 2012 he applied for an EEA registration certificate as a dependant of his step-father, and on 21 February 2012 he was issued with an EEA registration certificate valid until 21 February 2017. He had therefore lived in the UK for just under half of his life, with 8 years and 5 months of lawful leave. There was no evidence that he had been granted any leave to remain in the UK after 21 February 2017, and therefore he had not been lawfully resident in the UK for most of his life.

33. It also was not accepted that he was socially and culturally integrated into the UK. This was because of his conviction on 5 February 2021 at Swansea Crown Court for possession with intent to supply a controlled Class A drug (cocaine), and possession with intent to supply of a controlled Class A drug (MDMA) for which he was sentenced to four years and two months' imprisonment. The Home Office decision letter went on to quote the following remarks from the Sentencing Judge:

> "In respect of Counts 1 and 3 on 2 May (2020), a Saturday, 2020, you were stopped in the High Street in possession of 13.6 grams of cocaine in eight grip

> seal bags, valued at about £800, and no less than 99 tablets of MDMA, 49 of MDMA and 50 of MDMA mixed with Ketamine, valued at between £495 and £999. Incriminating messages were found on your mobile phone indicating drug dealing from 26 April. In the interview with the police on 3 May, you made no comment, and you were released pending examination of the drugs.
>
> Whilst released pending investigation, you rather brazenly committed another offence of possession with intent to supply cocaine when you were seen on 19 May … in possession of nine bags of what was high quality 81% cocaine, a total of 2.87 grams valued at £270. The overall value of the drugs in your possession was between £1,565 and £2,060. You again remained silent in the interview, and you were uncooperative in providing access to the second mobile phone. And that draws me to the conclusion that you knew what you were about, and when you appeared at the Magistrates' Court on 6 January you would have known the extent of your liability for criminality. You could have easily have firmly indicated guilty pleas …"

34. The Home Office decision letter also quoted the Sentencing Judge's remarks that he bore in mind that the appellant had lost his employment, and that all the references he had read clearly showed that there was another side to his character. He remarked that the appellant could have led a more productive life, if he had not involved himself first of all with the use of drugs, which had had the consequences of him now being a drug trafficker.

35. The Secretary of State did not accept that the appellant was socially and culturally integrated into the UK. The Secretary of State's reasoning was that criminal behaviour was not indicative of integration as it showed scant regard for the laws of the country and for the values and social norms of the UK. The fact that he continued to re-offend, without being deterred by previous convictions and a warning letter served on him on 27 August 2014, indicated that he had a lack of regard for the law, and lack of remorse for his offending behaviour, and a lack of understanding of the negative impact his offending behaviour had on others.

36. It was also not accepted that there would be very significant obstacles to his integration into the country to which it was proposed to deport him. This was because there was no language barrier, as he spoke Portuguese as well as English. He had spent the first 14 years of life living in Portugal, with the family members with whom he had entered the UK in 2008. If it was the case that his sister no longer resided in Portugal (as had been found by the Judge who had allowed his appeal in the determination promulgated on 25 November 2013), he would be able to live independently, or his family in the UK could support him financially until he was in a position to live independently of others. There was no evidence to show that he was now estranged from his country of origin to the extent that there would be very significant obstacles to his re-integration into that country. The various qualifications and employment experiences in tourism and digital marketing management that he had obtained whilst in the UK could be used to establish himself in the county of return.

37. Although it was accepted that he had family ties in the UK with parents and two siblings, there was no evidence of further dependency beyond normal emotional ties. It was also considered that he could maintain his relationship with his parents and siblings by way of modern forms of communication, or by them visiting him in Portugal.

38. Despite referencing the Secretary of State's case on the private life exception at paras [44] to [46], the Judge did not make any clear findings on the three separate limbs of the private life exception one way or the other.

39. At para [52] the Judge implies that the private life exception is met, but the only reason given is that the appellant has a strong private life in the UK. This is clearly not a sufficient reason.

40. At para [54] the Judge takes a different tack, which is to imply that the private life exception is met in part (without specifying which part); and that the fact that it is met in part coupled with the additional factors discussed in para [53] means that cumulatively the required threshold is reached for the appellant's human rights claim to outweigh the public interest in deportation.

41. But the problem remains that, aside from having impliedly found in the Secretary of State's favour on the first limb of the exception – her findings on the EUSS appeal importing that the appellant has not been lawfully resident in the UK for more than half his life – the Judge has not engaged with the Secretary of State's case as to why the other two limbs of the private life exception are not met and, conversely, has wholly failed to explain the basis upon which she impliedly finds that the private life exception is partially met.

42. The other fundamental error is that the Judge appears to have considered the public interest through the lens of a prospective deportation under the EEA Regulations 2016, where the dominant consideration is the risk of reoffending and hence the present threat of harm that the prospective deportee poses to the public.

43. The appeal skeleton argument (ASA) settled by Counsel for the appellant recognised that the public interest in deterrence was a relevant consideration in a proportionality assessment involving a foreign criminal, but submitted that it was irrelevant to the present case, as the appellant enjoyed the protection of the EEA Regulations 2016.

44. Although the Judge held that the EEA Regulations 2016 did not apply, the competing public interest arguments of the parties which she rehearsed in the HR appeal were exclusively orientated towards the risk of reoffending. The Judge did not purport to remind herself of the Secretary of State's case on the public interest as set out above, and the Judge did not direct herself that in a full proportionality assessment other facets of the public interest

are engaged beyond the seriousness of the index offence and the risk of reoffending.

45. In addition, at a critical juncture in her line of reasoning, the Judge misdirected herself as to the threshold that is required to be met for the proportionality balance to tip in the appellant's favour, which is very compelling circumstances.

46. The upshot is that the Decision on the HR appeal is vitiated by a material error of law such that it is unsafe and must be set aside in its entirety.

47. I have carefully considered the venue of any rehearing, taking into account the submissions of the representatives. Applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), I have considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statement.

48. I bear in mind that neither party challenges the findings of fact made in the EUSS appeal and that there is no separate error of law challenge by the Secretary of State to the findings of fact made by the Judge at para [13] of the Decision.

49. However, I consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and I therefore remit the appeal to the First-tier Tribunal for a complete rehearing, with none of the findings of fact relating to the HR appeal being preserved.

Notice of Decision

The decision of the First-tier Tribunal on the human rights appeal contains an error of law, and accordingly the decision is set aside in its entirety, with none of the findings of fact at paras [13] and [52] to [54] being preserved.

The human rights appeal is remitted to the First-tier Tribunal at Newport for a fresh hearing before any Judge apart from Judge Short.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
3 September 2024