Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00083/2019

THE IMMIGRATION ACTS

Heard at Field House
On 6 November 2019

Decision & Reasons Promulgated
On 22 November 2019

Before

UPPER TRIBUNAL JUDGE PITT
UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAFAEL [D]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Fijawala, Senior Home Office Presenting Officer
For the Respondent: Mr V Ogunbusola, Counsel, instructed by Montas Solicitors

DECISION AND REASONS

1. This is an appeal against the decision dated 27 June 2019 of First-tier Tribunal Judge I Howard which allowed Mr [D]'s appeal against a decision to deport him made under Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations).

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2. For the purposes of this decision we refer to Mr [D] as the appellant and to the Secretary of State for the Home Department as the respondent, reflecting their positions before the First-tier Tribunal.

3. The appellant was born on 4 April 1995 and is a citizen of Portugal. He came to the United Kingdom in 2010 at the age of 15. It is not disputed before us that as he then went into education and his parents were exercising Treaty rights, he acquired the right of permanent residence in line with Regulation 15 in 2015.

4. The appellant was first convicted of an offence on 14 March 2013, the offence being theft by shoplifting. He received a conditional discharge of twelve months.

5. On 27 April 2013 the appellant was cautioned by police for using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence.

6. On 17 November 2015 he was convicted of battery, sexual assault – intentionally touching a female – no penetration and two counts of failing to surrender to custody at an appointed time. He was sentenced to a total of ten weeks' imprisonment and ordered to pay compensation of £50, a victim surcharge of £80 and a criminal courts' charge of £1,000. He was also ordered to sign the sex offenders register for seven years.

7. On 31 May 2018 the appellant was convicted of failure to comply with the sex offender registration notification requirements. He was given a fine of £120 and a victim surcharge of £30.

8. On 9 October 2018 the appellant was convicted of supplying a class B controlled drug – cannabis and possession with intent to supply of a controlled drug of class B – cannabis. On 22 November 2018 he was sentenced to eight months' imprisonment.

9. Following the conviction in 2018 for supplying and possessing cannabis, the respondent commenced deportation action. On 22 December 2018 he was served with a liability to deport notice. He provided a response on 9 January 2019. On 23 January 2019 a notice of a decision to make a deportation order was made and a deportation order was signed. The appellant made representations requesting that the respondent overturn that decision but on 6 February 2019 the respondent maintained the deportation order.

10. The appellant lodged an appeal to the First-tier Tribunal. The appeal was heard by the First-tier Tribunal on 9 April 2019 and, as above, allowed in a decision issued on 27 June 2019. First-tier Tribunal Judge Howard heard evidence from the appellant and his partner, with whom he has a child. Evidence was also given by the appellant's mother and his father.

11. In paragraphs 17 to 23 of his decision in, First-tier Tribunal Judge Howard set out various legal provisions and case law relevant to the deportation of an EEA national. In paragraphs 24 to 25 and 28 to 34 the judge set out his assessment of whether the

appellant could be deported or had the protection provided by the EEA Regulations for someone with permanent residence:

"24. The appellant's antecedent history demonstrates sporadic, but increasingly serious offending. The record also suggests he has resisted all attempts at rehabilitation.

25. It is also the case that more recently he has made genuine and persistent efforts to rehabilitate himself by undertaking whatever courses were available to him while detained. On the evidence before me this represents a sea change in the attitude of the appellant towards his offending. It is further borne out by what has been saud (sic) to me about his attitude to both his partner and their child since his release. He has all the hallmarks of a reformed character. This should perhaps not be surprising as it is one of the principles of sentencing.

…

28. The appellant is entitled to the higher degree of protection afforded to him by Regulation 27(3), namely that a deportation decision cannot be made except on serious grounds of public policy and public security.

29. When considering the Court of Appeal's judgment in **Essa**, neither the respondent or the appellant has provided me with an OASys Report or other Probation Service material. The appellant has however provided me with a number of certificates showing the rehabilitative work he has undertaken while in immigration detention. I am satisfied that he has demonstrated to the lower standard of proof that he has undertaken rehabilitative work whilst in custody.

30. I have considered the question of proportionality with reference to Regulation 27(6). Accordingly I am required specifically to consider his age, state of health, family and economic situation, his length of residence in the United Kingdom, and his social and cultural integration.

31. He gave evidence before me in English. All the qualifications he has attained were taken in English. He has worked and has a genuine offer of work in the future. He has established his social and cultural integration. He has been in the UK for ten years. He is 24 years old. In term (sic) of his acquiring skills to prepare him for adult life they have been acquired in the UK and the length of his residence in the context of his life is significant. His economic situation is one of dependence at this moment, but as I have already found there is a genuine offer of work.

32. His family situation requires separate consideration. He is a father and partner. I heard a great deal of evidence from both the appellant and his partner [AK] about the role the appellant plays in the life of his daughter [Z]. The appellant and [AK] met at the beginning of 2015 and they have been together in a relationship since that time. [Z] was born on 24 February 2018. The appellant was present at her birth. He was detained when she was 7 months old. [AK] took her to see him when in immigration detention. The paternal bond was re-established and it has remained unbroken since then. Both spoke of the roles the appellant fulfils in his daughter's life, suffice to say they are all any father would

undertake. [AK] was asked a number of questions about her attitude towards the appellant and his offending. She is aware of all of his past offending and understands the importance of stability in all their lives in mitigating the risk of reoffending. She is committed to providing stability.

33. The appellant is in good health.

34. These are the matters I must consider in assessing the proportionality of deportation. The appellant's offending is significant albeit committed when young. He has sought to rehabilitate himself and established a very strong family life with his child and partner. He has not reoffended and has abided by the terms of his licence and bail. It is the work the appellant has done, both formally while detained and informally in re-establishing himself in the community that permit me to say that the required serious grounds for public security required by Regulation 27(6) are not made out in this case as the appellant has shown himself genuinely to be rehabilitated."

12. The grounds maintain, firstly, that that the decision failed to set out an explicit finding on whether Regulation 27(5)(c) of the EEA Regulations was met, that is, whether the appellant represented "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". The respondent submitted that the fact that the decision went on to assess proportionality suggested that the First-tier Tribunal did find that the appellant represented a sufficient threat, albeit conceding that this might merely show a "belt and braces" approach.

13. Secondly, the grounds argue that the assessment conflated the provisions set out in Regulation 27(5)(c) and Regulation 27(3) and confused matters further by referring in paragraph 34 to Regulation 27(6). The grounds also refer to an unclear approach to Regulation 27(5)(a) and maintain that the confused approach to these provisions "called into question the judgement as a whole" and amounted to an error of law.

14. Regulation 27(3) sets out the "medium" level of protection for someone with permanent residence, requiring there to be "serious grounds" justifying deportation.

15. Regulation 27(5)(a) states that the decision to deport "must comply with the principle of proportionality".

16. Regulation 27(5)(c) provides that:

> "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 have to be imminent."

17. Regulation 27(6) sets out considerations of which account must be taken before deporting an EEA national, such as age, state of health, the appellant's family and economic situation, his length of residence, cultural integration and links with his country of origin.

18. We have set out all of paragraphs 24 to 25 and 28 to 34 of the First-tier Tribunal's decision above as it is our view that, read fairly and as a whole, they show that Judge Howard made sufficiently clear and legally correct findings such that the decision cannot be found to show a material error on a point of law.

19. When reaching this conclusion we were mindful of the learning of the higher courts of the need for the Upper Tribunal to be cautious in finding fault in the reasoning of the First-tier Tribunal. This has been most recently considered by the Court of Appeal in UT (Sri Lanka) V SSHD [2019] EWCA Civ 1095. In UT (Sri Lanka) the Court of Appeal state, at paragraph 19:

> "… it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in *AH (Sudan) v Secretary of State for the Home Department* at [30]:
>
> > "Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

20. The Court of Appeal went on to state in paragraphs 26 and 27:

> "26. … If an error of law based on inadequate reasoning is to be identified, however, one must venture beyond general, literary criticism of this kind. In *R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19, Lord Hope said (at paragraph 25):
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> > "It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."
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> 27. In *R v Immigration Appeal Tribunal, ex parte Khan* [1983] QB 790 (per Lord Lane CJ at page 794) it was explained that the issues which the tribunal is deciding and the basis on which the tribunal reaches its decision may be set out directly *or by inference*. If a tribunal fails to do this then the decision may be quashed. He continued:
>
> > "The reason is this. A party appearing before a Tribunal is entitled to know, *either expressly stated by it or inferentially stated*, what it is to which the Tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the Tribunal; in other cases it may not. Second, the Appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in others it may not." (emphasis supplied)"

21. After considering the First-tier Tribunal decision and the respondent's grounds in line with this guidance, we were satisfied that the decision shows the basis on which

the appellant met the provisions of the EEA Regulations such that he could not be deported.

22. Certainly, the decision could have set out a more precise finding that a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society at the "serious" level required by Regulation 27(3) was not shown by this appellant. However, it is clear that Judge Howard found that the appellant was at a low risk of reoffending, an important factor when assessing whether there is a genuine, present and sufficiently serious threat. Paragraph 25 shows clearly that it was Judge Howard's view on this point and sets out his reasons. They are not inconsistent with paragraph 24 which merely refers to an earlier period in the appellant's history. The judge also refers in paragraph 29 to his acceptance of the rehabilitative work done by the appellant. In paragraph 34 he sets out again that the appellant has "sought to rehabilitate himself" and that he had not reoffended and complied with conditions since his release from prison. The final sentence of paragraph 34 states that "the required serious grounds … are not made out".

23. Taking these findings together, it was our conclusion that they afforded only one answer to the question of whether the First-tier Tribunal judge found that there were serious grounds of public policy and public security justifying deportation. He did not. It was also our view that, in the context of the clear findings on a significantly changed attitude to reoffending and the appellant having rehabilitated since his last offence it was quite possible that the reference to Regulation 27(6) in the final sentence of paragraph 34 was a typographic error and should have read "Regulation 27(3)". If "Regulation 27(3)" is substituted, the sentence is an entirely clear statement that the judge found that the "serious" grounds threshold was not met.

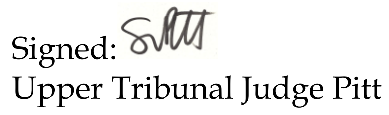
24. Our conclusion is therefore that the First-tier Tribunal judge made a sufficiently clear finding that the evidence did not show that the appellant posed a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society at the "serious" level required for the deportation of someone with permanent residence. Read fairly, the decision shows the respondent that this was the conclusion reached and sets out rational reasons for that conclusion.

25. That being so, there is no need to go on to consider whether the First-tier Tribunal took an irrational or otherwise unlawful approach in the proportionality assessment. That could only be material if the First-tier Tribunal had found that there were "serious" grounds justifying deportation, that being the trigger for the exercise of the power to deport – see Dumliauskas [2015] EWCA Civ 145 at [40] In any event, it is again our view that reading the decision fairly and as a whole, particularly paragraphs 30 to 33, the judge clearly found that deportation would not be proportionate. All of the findings made in those paragraphs are positive for the appellant. That reading is consistent with the conclusion in paragraph 34, albeit, again, the judge could have been more precise.

26. For all of these reasons we did not find that the grounds of appeal showed a material error on a point of law in the decision of the First-tier Tribunal.

Decision

27. The decision of the First-tier Tribunal does not disclose a material error on a point of law and shall stand.

Signed:  Date: 13 November 2019
Upper Tribunal Judge Pitt