**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00113/2019

**THE IMMIGRATION ACTS**

| **Heard at The Royal Courts of Justice** | **Decision & Reasons Promulgated** |
|---|---|
| **On 2 September 2019** | **On 11 September 2019** |

**Before**

**UPPER TRIBUNAL JUDGE BLUM**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**FRANCISCO PEREIRA**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Mr T Lindsey, Senior Home Office Presenting Officer
For the Respondent: Mr W Rees, Counsel, instructed by RH Solicitors

**DECISION AND REASONS**

1. The Secretary of State for the Home Department (hereafter Appellant) appeals against the decision of Judge of the First-tier Tribunal Malcolm (the judge) who, in a decision promulgated on 27 June 2019, allowed the appeal of Mr Pereira (hereafter Respondent) against the Appellant's decision of 6 February 2019 to make a deportation order pursuant to the Immigration (European Economic Area) Regulations 2016 (The 2016 Regulations).

**Background**

2. The Respondent is a national of Portugal, born on 25 February 1988. He maintains that he entered the UK on 23 August 2014. Prior to this he had been living in India. He has never resided in Portugal. Upon entering the UK the Respondent resided with family and, in November 2014, commenced working in a warehouse. He was issued with an EEA Registration Certificate on 17 August 2015.

3. On 19 June 2018 the Respondent was convicted of offences concerning attempted sexual activity with a female child under 16 and being an adult attempting to meet a girl under 16 years of age following grooming. On 24 September 2018 he was sentenced to 15 months in imprisonment, disqualified from working with children and vulnerable adults, and became subject to a Sexual Harm Prevention Order to run for 10 years.

4. On 5 August 2018 the Respondent was served with a notice of liability to deportation and on 3 October 2018 the Secretary of State notified the Respondent that she intended to make a deportation order against him on grounds of public policy in accordance with Regulation 23(6)(b) and Regulation 27 of the 2016 Regulations. On 6 February 2019 the Secretary of State decided to make a deportation order. The Respondent exercised his right of appeal against this decision pursuant to Regulation 36 of the 2016 Regulations.

**The decision of the First-tier Tribunal**

5. At the hearing before the First-tier Tribunal on 4 June 2016 the Respondent was represented by Mr Rees, who also represented the Respondent before me. The judge was in possession of a bundle of documents prepared by the Secretary of State that included the Sentencing Judge's Sentencing Remarks and the decision under appeal. The bundle of documents prepared by the Respondent's legal representatives included a statement from him, statements from his maternal uncle, maternal aunt and maternal cousins (all dated 27 February 2019), a letter from his parents, a National Offender Management Service (NOMS) Initial Single Sentencing Plan (ISSP) review dated 6 March 2019, an OASys Assessment dated 13 May 2019, some medical documents relating to the Respondent's vascular veins medical condition, and a range of documents relating to his employment in the UK and that of his family members. The judge heard oral evidence from the Respondent given via a Hindi interpreter, and oral evidence from the Respondent's maternal uncle and maternal cousin.

6. Having summarised the submissions from both representatives the judge set out his findings. At [122] the judge accepted that the Respondent's family resident in the UK were keen to assist him in his rehabilitation. The judge did not regard their evidence that they would ensure that the Respondent had no access to computers or phones as indicating that they were concerned that he

would reoffend but more as a precautionary measure to ensure he was not placed in the position where he could possibly reoffend. The judge noted the family were shocked at the commission of the offences and considered that this was out of character for the Respondent.

7. At [128] the judge stated that the threat identified in Regulation 27(5)(c) of the 2016 Regulations did not need to be imminent but had to represent genuine, present and sufficiently serious threat taking into account the past conduct of the person. The judge stated,

> Albeit that the risk of reoffending has been categorised as low the risk of harm is medium and taking into account the past conduct of the [Respondent], I consider that his conduct does meet the test of a genuine, present and sufficiently serious threat. I accept however that this is mitigated by the professional support which has been put in place and the support which he has from his family.

8. The judge then went on to consider the requirements of Regulation 27(6) of the 2016 Regulations. At [131] the judge noted that the Respondent had never lived in Portugal, that he had no family members there, but he was not familiar with the language and had no knowledge whatsoever of life in that country. At [132] the judge stated,

> The [Respondent] has very limited knowledge of English and has not integrated into life into the UK however, the links which the [Respondent] has with the country of origin have to be considered and it is clear from the evidence in this case that the [Respondent] has no links whatsoever with the country to which the [Appellant] seeks to return him.

9. At [133] the judge acknowledged the health issues raised by the Respondent but noted the absence of any detailed information and consequently placed no particular emphasis on his health. At [134] the judge stated,

> The [Respondent], since coming to the UK, has lived with family and whilst there was some evidence that his family would continue to support him in Portugal the [Respondent] clearly requires the support of his family in the UK if he is to continue with his rehabilitation.

10. At [135] the judge stated,

> I consider that to return the [Respondent] to Portugal would cast him adrift in a country with which he has no links whatsoever. The [Respondent] has not integrated into life in the UK and I consider that he would face extreme difficulties in establishing a life for himself in Portugal which is a country that he has never visited, as suggested by Mr Rees, he would have no friends, no support and his employment prospects would be poor.

11. The judge, at [136], concluded that, although the Respondent did represent a genuine, present and sufficiently serious threat, his lack of ties with Portugal

led to a finding that his deportation would be disproportionate. The appeal was allowed.

**The challenge to the judge's decision**

12. The written grounds of appeal contend that the judge failed to give adequate reasons why the deportation decision would be disproportionate. The grounds focus on the Respondent's age at the date of the judge's decision (31 years old) and the judge's finding that the Respondent spoke only limited English and had not integrated into life in the UK, and question why the Respondent would need looking after by his family. The written grounds focus on the Respondent's claimed medical needs even though the judge placed no particular emphasis on his health. The fact that the Respondent does not speak Portuguese did not preclude him from finding employment and his family were willing to continue to support him in Portugal. The grounds note the length of the Respondent's residence in the UK and conclude that the judge's decision was perverse.

13. At the 'error of law' hearing Mr Lindsey relied on the written grounds but refocused the attack on the judge's decision with reference to the issue of rehabilitation. Although rehabilitation had not been mentioned anywhere in the grounds Mr Lindsey submitted that it had been sufficiently pleaded by reference to the challenge to the judge's proportionality assessment. In reliance on **SSHD v Dumliauskas & Ors** [2015] EWCA Civ 145 Mr Lindsey submitted that the judge placed unlawful weight on the issue of the Respondent's rehabilitation given that the Respondent did not have permanent residence and was not integrated into life in the UK. The question of rehabilitation was said to have been an "essential plank" of the judge's reasoning. Had the error of law not been made the judge may well have reached a different conclusion in respect of the proportionality of the Appellant's decision.

14. Mr Rees accepted that the judge's decision could have been clearer and submitted that the judge had been wrong to find that the Respondent's conduct constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Mr Rees emphasised the judge's finding that the Respondent had never lived in Portugal and had no knowledge of the Portuguese language or life in that country. The judge was entitled to find that the Respondent would have no support at all and would be cast adrift. Mr Rees indicated that, although he had drawn the judge's attention to the decision in **Essa, R (On the Application Of) v Upper Tribunal (Immigration & Asylum Chamber) & Anor** [2012] EWCA Civ 1718, he did not cite **Dumliauskas**. Mr Rees submitted that the support provided by the Respondent's family in the UK meant that any threat posed by him was minimised and the Respondent would also be subject to heavy supervision as a consequence of the Crown Court's order.

15. I reserved my decision.

**Discussion**

Error of law

16. The written grounds of appeal did not expressly contend that the judge erred in his legal approach to the issue of rehabilitation. The grant of permission similarly made no reference to rehabilitation. The party appealing a decision of the First-tier Tribunal is required to clearly identify all the bases of challenge. It is inappropriate to criticise a judge's decision on a different basis from that upon which permission was sought and granted. Mr Lindsey submits that the written grounds were, in general terms, a challenge to the judge's proportionality assessment and that the issue of rehabilitation was a central element of that assessment. I am persuaded, albeit by the narrowest of margins, that the written grounds can be construed as a general challenge to the judge's proportionality finding and that this does include the issue of rehabilitation. The Secretary of State should however ensure that any future challenge to a decision of the First-tier Tribunal clearly particularises the specific grounds of challenge.

17. In **Dumliauskas** the Court of Appeal considered the Upper Tribunal's approach to rehabilitation in **Vasconcelos** [2013] UKUT 378 (IAC), which concerned a Portuguese national convicted of burglary and theft offences during riots in Manchester. At paragraph 80 the Upper Tribunal stated, in relation to Mr Vasconcelos,

> His future prospects of rehabilitation are uncertain and whatever they are cannot be a weighty factor in the balance given the absence of integration and a right of permanent residence.

18. At [44] Sir Stanley Burnton, giving the judgement of the Court in **Dumliauskas**, expressed his agreement with the Upper Tribunal's approach. Then at [54] Sir Stanley Burnton explained,

> 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.

19. Headnote 10 of **MC (Essa principles recast) Portugal** [2015] UKUT 00520 (IAC), which considered the decision in **Dumliauskas**, reads,

> *In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (Dumliauskas [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide-ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (Dumliauskas at [46] and [54]).*

20. It is apparent from the cases referred to above that, in circumstances where a person is not integrated into the UK and does not have a right of permanent residence, the future prospects of integration cannot be a weighty factor.

21. The judge found, with good reason, that the Respondent was not integrated in the UK. The Respondent had lived in the UK for under 5 years and could speak only limited English. The evidence from the Respondent, his maternal uncle and maternal cousin, referred to his need to remain in the UK to ensure his rehabilitation (see [41], [42], [63] and [71]). In his submissions before the First-tier Tribunal judge Mr Rees submitted that the issue to determine was whether the Respondent was rehabilitated when the process of being rehabilitated (see [91] and [114]).

22. The judge made brief reference at [122] to the keenness of the Respondent's uncle and cousin to support him in his rehabilitation and indicated at [134] that the Respondent "clearly requires the support of his family in the UK if he is to continue with his rehabilitation." The judge made no reference to either **Dumliauskas** or **MC (Portugal)**.

23. It is apparent from the foregoing that the judge did consider the issue of rehabilitation to be a factor in his proportionality assessment under Regulation 27(6) of the 2016 Regulations. Both **Dumliauskas** and **MC (Portugal)** indicate that rehabilitation, in the Respondent's particular circumstances, cannot be a weighty factor as he does not have permanent residence and is not integrated in the UK. Whilst the judge would be entitled to attach some weight to the issue of rehabilitation, this is not apparent from his decision. In the absence of any reference to **Dumliauskas** or **MC (Portugal)** and given the emphasis placed by the judge on the Respondent's rehabilitation, I am satisfied that the judge erred in law by considering the Respondent's rehabilitation as a weighty factor.

24. Mr Rees invited me to set aside the whole of the judge's findings including the finding that the Respondent was a genuine, present and sufficiently serious fact to society. Although this approach was opposed by Mr Lindsey I consider it

appropriate to set aside the whole of the judge's decision. The judge gave no adequate reasons for his conclusion that the Respondent's conduct met the test of a genuine, present and sufficiently serious threat other than by vague reference to his past conduct (see [128]). I proceed to remake the decision having regard to the bundles provided by both parties that were before the First-tier Tribunal and the oral evidence given by the Respondent and the Respondent's family members to the First-tier Tribunal judge.

Remaking the decision

25. Regulation 27 of the 2016 Regulations is headed, 'Decisions taken on grounds of public policy, public security and public health'. Regulations 27(5) & (6) read,

> (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.

26. Paragraph 3 of Schedule 1 to the 2016 Regulations reads,

> Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

27. Paragraph 5 of the schedule 1 indicates that removal of someone who can provide substantial evidence that they do not constitute a threat is less likely to be proportionate. Paragraph 7 of Schedule 1 identifies various fundamental interests of society. These include maintaining public order, preventing social harm, protecting the public and acting in the best interests of children. I have taken account of all these factors when determining both the fundamental interests of society in this particular case and the nature of the threat posed by the Respondent.

28. The Respondent has been convicted of a serious offence. He had been in conversations on social media with individuals who identified themselves as 12-year-old girls and had arranged to meet these individuals for sexual activity following Internet grooming. The Respondent had in fact made contact with a network who pretended to be two different 12-year-old girls in order to catch paedophiles. The fact that there were no actual girls does not detract from the gravity of his offending, as reflected in a custodial sentence of 15 months imprisonment in respect of 4 different counts.

29. The Respondent has no other convictions and there is nothing to indicate that he has engaged in any criminality in India. In his statement the Respondent accepted that his actions were inappropriate and accepted his culpability. He claims to have complied with the police throughout the investigation and there is nothing in the face of the papers to suggest otherwise. I note that although the Respondent pled Not Guilty in the Magistrate's Court it was accepted by the Sentencing Judge that this was "effectively lawyer-led" and that the Respondent did receive credit for his plea of guilty.

30. In determining whether the Respondent represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society I take account of the Sexual Harm Prevention Order that will run for 10 years. The strict terms of this Order mean that the Respondent can only use an Internet enabled device having notified the Public Protection Unit, which may install Risk Management Software, he cannot delete his Internet history or use any App that destroys messages or any program that may anonymise his identity or prevent a search of his Internet activity. The Respondent is prohibited from working with children and/or vulnerable adults and is prohibited from having contact with or communicating via the Internet with any child or young person who is known or believed to be under the age of 16 or residing in any dwelling with such a person unless he has the express permission of the child's parent/guardian who is aware of his offences. Any breach of the Order could result in a sentence of 5 years imprisonment.

31. In considering whether the Respondent poses, in particular, a 'present' threat I have read the offence description and the Sentencing Remarks in detail. I note in particular view of the Sentencing Judge that "… No future offending is likely." The NOMS ISSP review dated 5 March 2019 summarised the

programmes undertaken by the Respondent during his detention including a Victim Awareness programme and found that the Respondent was at low risk of reoffending but that if he did reoffend the Risk of Harm level was medium. The OASys report dated 13 May 2019 indicated that the Respondent was at low risk of reoffending but that he posed a medium risk of serious harm to children in the community should he reoffend.

32. The Respondent has the support network consisting of his maternal uncle and his maternal aunt and their families, who are aware of the nature of the Respondent's convictions. He will be residing with his maternal aunt and will therefore be under her direct supervision. Both the Respondent's maternal aunt and uncle indicated that they would continue to support him in the future. Both the aunt and uncle indicated that they would not make available any computer/laptops to the Respondent and that he would only be able to make phone calls in their presence.

33. Whilst I am mindful of the medium risk of harm to children posed by the Respondent should he reoffend and the nature of his offending and the length of his sentence, I am satisfied that he does not pose a 'present' threat. I reach this conclusion based on the Probation Service assessments of the Respondent posing only a low danger of reoffending, the strict terms of the Sexual Harm Prevention Order, and the supervision and support that will be provided by the Respondent's family in the UK. I consequently find that public policy does not require the Respondent's deportation as he does not pose a present threat to the fundamental interests of society.

**Notice of Decision**

**The First-tier Tribunal's decision contains an error on a point of law requiring it to be set aside.**
**I remake the decision, allowing Mr Pereira's appeal under the Immigration (European Economic Area) Regulations 2016.**

*D. Blum* 4 September 2019

Signed Date

Upper Tribunal Judge Blum