Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001637
EA/50137/2021; DA/00055/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 October 2022	**On 27 November 2022**

Before

THE HONOURABLE MRS JUSTICE LANG DBE
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE ALLEN

Between

BRUNO MIGUEL FURTADO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Tobin instructed by Arona St James Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Portugal. He appealed to the First-tier Tribunal against the respondent's decision of 20 January 2021 to deport him on grounds of public policy in accordance with the Immigration (European Economic Area) Regulations 2016.

2. The judge dismissed his appeal but subsequently the appellant sought and was granted permission to appeal to the Upper Tribunal.

The First-tier hearing

3. The appellant stated that he had come to the United Kingdom in May 2014 and enrolled on a three month course, following which he had a number of jobs.

4. On 18 June 2020 he was convicted on a guilty plea of possession with intent to supply a controlled class A drug (heroin) and possession with intent to supply a controlled class A drug (crack cocaine) and was sentenced to twenty months' imprisonment. It is as a consequence of these convictions that the respondent decided to make the decision under challenge.

5. The judge identified the first issue to be determined as being the level of protection against deportation which applied to the appellant.

6. She noted evidence that he had been on a course at Lambeth College between 29 September and 19 December 2014. There was however no documentation to corroborate his claim to have been in the United Kingdom until a set of pay slips covering the period 27 May 2016 to 19 August 2016.

7. The judge then identified a gap until a set of monthly pay slips was provided which covered the period 28 February 2019 to 31 August 2019 and there was thereafter a pay slip dated 30 January 2020. A P60 was submitted which showed that the appellant had earned £3,299.48 in the 2019/2010 tax year.

8. A contract of employment showed that the appellant was employed by Beth's Gourmet starting on 1 June 2020 and subject to a three month probationary period. He was imprisoned on 18 June of that year. A pay slip dated 1 July 2020 showed that he had earned £68.45 in the previous month.

9. In his oral evidence the appellant said that he had not claimed jobseeker's allowance between 2014 and 2016. He submitted no documentary evidence, such as a lease or a utility bill, to cover that period. The judge found that there was no evidence to show that he was in the United Kingdom between the end of his course in December 2014 and his first pay slip in May 2016.

10. The judge examined the pay slips submitted and noted they showed two different national insurance numbers. This had been noted in correspondence between the appellant's representative and HMRC which included a statement that one of the numbers did not refer to the appellant.

11. There was a letter from HMRC dated 25 January 2022 concerning the appellant's national insurance contributions. The schedule at Part A of the letter covered the tax years 2014/2015 to 2019/2020. The judge found that this did not establish to the necessary standard that the appellant

was resident in the United Kingdom during those years because it was a statement of voluntary sums to paid in order to obtain "qualifying years" for the purposes of benefits, for example, state pension.

12. In his witness statement which he confirmed in oral evidence, the appellant said he returned to Portugal for four months in 2017. The judge found that there was no documentary evidence to show that he was resident in the United Kingdom between the date of the last pay slip in August 2016 and the pay slip in February 2019.

13. In bringing these matters together the judge concluded that the appellant had not shown to the required standard that he had been in the United Kingdom exercising treaty rights for a continuous period of five years and because he had not acquired permanent residence he was only entitled to the basic level of protection provided by Regulation 27(1) of the EEA Regulations under which an EEA national may be deported on "grounds of public policy, public security or public health".

14. The judge went on to consider the issue of risk. It was clear from regulation 27(5) of the EEA Regulations that it was necessary for the respondent to show that the appellant represented a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". The judge noted that in the decision letter the respondent considered that the appellant had a propensity to reoffend and posed a genuine, present and sufficiently serious threat to the public as to justify his deportation on grounds of public policy. The judge set out the circumstances of the index offences, noting that the appellant was said by the sentencing judge to have been motivated by financial advantage. Had he not pleaded guilty the sentence would have been 30 months but that was reduced to twenty months with credit for his guilty pleas.

15. The judge considered that the supply of class A drugs was a serious offence whose consequences had a severe and negative impact on society. She noted that the appellant did not undertake any courses while he was in prison. He had said that these were not available. An email from his supervising probation officer dated 2 November 2021 was submitted, which stated that he was assessed as low risk of serious harm. The judge observed that that assessment did not include an assessment of the likelihood of reoffending, although she noted that an earlier OASys Report stated that the appellant's risk of reoffending was low.

16. The judge went on to consider that the threat posed by the appellant was nevertheless realistic because his previous offences were motivated by financial considerations and he had not submitted any evidence of recent employment or income. Thus, in the absence of a regular income, whether from employment or benefits, the threat that he would reoffend currently existed because he needed money to support himself. The trigger for his offending had been financial and the risk of him reoffending remained a realistic possibility because there was no evidence that he had undertaken any rehabilitation programmes. She also found that there was

no evidence that his lifestyle and circumstances had changed since his release from prison because he was still unemployed and living with his mother and partner, neither of whom was able to prevent his previous offending.

17. The judge found therefore that the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of society, namely the prevention of social harm and the protection of the public from the consequences of drug use and its associated criminality. She found that his deportation was justified on grounds of public policy.

18. The judge then went on to consider the proportionality of removal. This was necessary in order to assess whether the individual circumstances of the appellant outweighed the fundamental interests of society.

19. Since he had come to the United Kingdom when he was aged 20 and was now 27 he had spent the majority of his life in Portugal where he was familiar with the language as well as the social and cultural norms and had an elder brother who was married and lived in Portugal.

20. The appellant had said that Ms Ticiana Mendes was his partner. She said that she had met the appellant in Portugal in 2016 and they had been in a relationship since then. She had come to the United Kingdom in August 2019 and now had pre-settled status under the EUSS.

21. The judge assessed the evidence as to the relationship. She noted that although the couple claimed to be in a relationship there was no evidence to corroborate their time together as partners such as photographs. Ms Mendes had submitted an early scan pregnancy report together with various letters concerning the pregnancy and these confirmed that she had suffered a miscarriage. While the judge accepted that Ms Mendes had been pregnant there was no evidence that the appellant was the father. There was a letter of 5 July 2021 following antenatal screening stating that the baby was at risk of sickle cell disease because “both you and the baby’s father are carriers of the sickle cell gene”, but the father was not named in any of the documentation and there were no test results or GP letters confirming that the appellant had sickle cell disease or was otherwise unwell. The judge also noted that one of the letters was submitted to a person whose name was entirely different from that of the appellant or his claimed partner.

22. The judge concluded that she gave little weight to the claimed relationship between the couple because there was no independent corroborating documentary evidence. She went on to say that moreover she found the fact that Ms Mendes had pre-settled status did not advance the appellant’s case because her legal status in the United Kingdom would not prevent her from travelling to or resettling in Portugal.

23. The judge went on to say that she found very little evidence of integration into United Kingdom society except for the appellant’s ability to speak

English and evidence that he had been employed from time to time for relatively short periods. He lived with his mother and Ms Mendes who were both Portuguese. He had supportive evidence from a friend who is his martial arts coach, Mr Boado, who had known him for three years. This was, in the judge's view, not enough to show that the appellant was socially and culturally integrated in the United Kingdom, noting that apart from Mr Boado no other English friends or acquaintances had come forward to give evidence on his behalf. Evidence of his claim to attend church and Bible Studies with his coach was considered as was his health. The judge concluded that the proposed deportation was proportionate.

24. She went on to consider Article 8 of the ECHR and found that there were not sufficiently strong factors in the appellant's favour to outweigh the public interest. His appeal was dismissed on that basis also.

25. In her submissions Ms Tobin adopted and developed the points made in the grounds of appeal. The first ground was an argument that the judge had erred in assessing the evidence with regard to the level of protection. It was argued that the national insurance evidence was clearly cogent evidence as to the contributions that the appellant had made between 2014 and 2020. Ms Tobin attached particular weight to the point that the appellant's mother had made a written statement and was also available to give oral evidence and had further corroborated that the appellant had been in the United Kingdom since 2014 and had been working. This, it was argued, was a significant error. The judge had said at paragraph 15 of her decision that there was no evidence to demonstrate the appellant was in the United Kingdom between the end of his course in December 2014 and his first pay slip in May 2016. In the Rule 24 response it was said that the issues in the mother's statement were not in dispute so it was a material error of law to overlook her evidence and this went to the question of the appellant's activities in the United Kingdom and there had been a failure also to place weight on the NIC contributions.

26. The second ground concerned the assessment of risk and the level of protection accordingly. It was argued that the judge's conclusions at paragraphs 26 and 27 in particular were flawed. The judge had failed to attach any or any appropriate weight to the fact that the appellant had been complying with the terms of his probation, had been classed as being at low risk of reoffending and had pleaded guilty and accepted responsibility for the offence. As regards the issue of working, the appellant's evidence was that he was not permitted to work and there was also a letter confirming there was a job open for him as soon as he completed his sentence. It had also been his evidence that there were no rehabilitation courses offered to him in prison. Nevertheless, the judge's basis for concluding as she did was that there was no evidence that the appellant was working, there was no evidence that he had undertaken rehabilitation courses and there was no evidence that his lifestyle had changed since release from prison. In fact the appellant had the job offer after the offences had been committed. The judge had used the existence of the deportation proceedings against the appellant. It was remarkable

that he had obtained a job after the offence and the arrest and it showed his willingness and intent to take employment. He had also sought advice from his solicitor to have restrictions on work lifted. He had got the reference letter and an offer of employment. There was also the evidence that he and his partner intended to start a family and that was relevant to the risk of reoffending and the prospects of rehabilitation.

27. As regards ground 3 it was argued that the proportionality evaluation was materially flawed. The judge had found there was no independent corroborating documentary evidence about the relationship, but it could be seen from the letter at page 45 of the bundle that the appellant was referred to as his partner's next of kin and he was named as her partner. As to the argument that might be put that she could, as the judge found, go back to Portugal with him, if the relationship were accepted a more detailed assessment of her circumstances was needed, including a proper consideration of the impact of his deportation on her.

28. In his submissions Mr Clarke argued, with regard to ground 1, that there was no materiality to the mother's evidence since it was so vague with regard to the appellant working, simply saying that he had started studying, working and training in the United Kingdom. There was no specificity to her evidence and also she had only moved to London in 2017. The judge had considered the evidence meticulously and came to sound findings.

29. As regards the issue of risk, it was the case that, though the appellant had not been able to attend rehabilitation courses or to work, the issue was one of risk rather than the unfortunate fact that these possibilities of diminishing risk had not been available. It was open to the judge, in particular in light of what had been said by the sentencing judge, to attach weight to the fact that the previous offences were motivated by financial considerations and the appellant had not submitted any evidence of recent employment or income. The findings in this regard also were entirely sound.

30. As regards ground 3 this was something of a misunderstanding as to the judge's reasoning. The judge had not found that the couple were not in a relationship but had given the relationship little weight, at paragraph 33, in the absence of independent corroborating documentary evidence. There was the point that Ms Tobin had drawn attention to in the letter in the bundle, but there was not a finding of no relationship and it was clear from paragraph 33 that the judge had considered the matter in the alternative and that Ms Mendes would not be prevented from travelling to or resettling in Portugal and therefore remaining with the appellant.

31. By way of reply Ms Tobin argued first with regard to ground 1 that though there were gaps in the evidence the judge had to form her own assessment and there was the unchallenged evidence of a witness. As regards ground 2 the appellant had got a job after arrest and charge and had a pay slip to prove this and also the job offer which although it was

eighteen months old had to be seen in the context of the fact that he could not be required to apply for jobs if he was not allowed to work. As regards ground 3, the judge's finding that little weight was to be attached to the claimed relationship had to be seen in context as not accepting the relationship's existence. The evidence was there and the assessment was flawed. Had it been accepted it would have been given more weight. She asked that the appeal be allowed and remitted for a full rehearing in the First-tier Tribunal.

32. We reserved our decision.

33. As regards ground 1, Ms Tobin, we consider quite rightly, did not spend much time on the argument about the documentary evidence in the form of the pay slips and letters from the tax authorities. It is abundantly clear from the judge's analysis of the evidence at paragraphs 12 to 18 of her decision that there were significant gaps in the appellant's employment history such that it could not be properly concluded that he had resided in the United Kingdom in accordance with the 2016 Regulations for a continuous period of five years.

34. In our view the evidence of his mother adds little, if anything to that, and had little probative value. It is relevant to note that she has only lived in London since 2017 and therefore not during the earlier time when the appellant was in the United Kingdom. As regards work, she said no more than that "he started studying, working and training ..." . The fact that he was able to help by donating a portion of the income he received from working for charity takes matters no further in our view. The evidence is far too vague to enable a proper finding to be made, either on its own or in combination with the other evidence, that the appellant had resided in the United Kingdom in accordance with the Regulations for a continuous period of five years. Ground 1 is therefore not made out.

35. As regards ground 2, again the judge assessed matters thoroughly and carefully. It was fully open to her to attach the weight she did to the remark by the sentencing judge that the appellant was motivated by financial advantage and to note that his financial situation was essentially the same as it had been previously. As Mr Clarke argued, the issue is essentially one of risk rather than the fact that the appellant had not been able to undertake any courses while in prison and is unable to work, under the terms of his bail conditions. The work he has been offered is ten hours a week on a zero contract.. The reality of the situation is that he would be essentially in the same precarious financial position as he was at the time when the offences were committed, and it was fully open to the judge to attach the weight she did to that point. She properly bore in mind the email from the probation officer and from the earlier OASys Report as to the low risk of serious harm and the low risk of reoffending, but in finding there was no evidence that his lifestyle and circumstances had changed since his release from prison she evaluated the evidence as a whole and came to a proper conclusion as to risk.

36. As regards the issue of proportionality which is argued in ground 3, the judge gave little weight to the claimed relationship between the appellant and Ms Mendes. She noted at paragraph 27 that he was living with his mother and partner which is not in our view contradictory because the judge's main concern was that the evidence did not show that the appellant was the father of Ms Mendes' baby. It is not clear whether the document from the maternity unit, at page 45 of the bundle, which refers to the appellant as Ms Mendes' partner and her next of kin, was put to the judge, though it clearly was before her. But in any event, we consider that what is of particular materiality in this regard is the judge's finding that the fact that Ms Mendes' having pre-settled status does not advance the appellant's case because her legal status in the United Kingdom would not prevent her from travelling to or resettling in Portugal. Though it was argued by Ms Tobin that a proper evaluation of the evidence would require consideration of the impact on Ms Mendes of the appellant's deportation, there is nothing in the grounds of appeal to indicate that she would experience any particular difficulty, and we see nothing in her witness statement to suggest difficulties beyond the difficult unemployment situation in Portugal and the fact that she is studying for a degree in the United Kingdom.

37. We therefore consider that no material error has been identified in the judge's decision and her evaluation of proportionality and that was the only element of the proportionality evaluation with which issue was taken.

38. Bringing these matters together therefore, we consider that no error of law in the judge's decision has been identified and as a consequence the appeal is dismissed.

No anonymity direction is made.

Signed Date 21st October 2022

Upper Tribunal Judge Allen