IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003330
On appeal from:
DA/00189/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 02 May 2024

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

D P
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Alex Everett, a Senior Home Office Presenting Officer
For the Respondent: Mr Bob Quee, solicitor with Quee & Mayanja Solicitors

Heard at Field House on 29 April 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant has been granted anonymity, and is to be referred to in these proceedings by the initials D P. No-one shall publish or reveal any information, including the name or address of the claimant, likely to lead members of the public to identify the claimant.

Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 8 June 2020 to deport him to his country of origin as a foreign criminal. The claimant is a citizen of Brazil.

2. **Mode of hearing.** The hearing today took place face to face.

3. For the reasons set out in this decision, I have come to the conclusion that the Secretary of State's appeal falls to be dismissed and the decision of the First-tier Tribunal upheld.

Background

4. The claimant has lived in the UK since 11 April 2015.

5. The claimant came here previously on 12 July 2005, age 9, with his mother as a visitor and was subsequently granted leave to remain from 17 October 2005 to 31 August 2007 as the dependant child of his student mother. No further leave was granted thereafter. On 12 February 2012, now aged 16, the claimant's mother sent him back to Brazil, where he remained until 11 April 2015. He had the misfortune to be mugged and stabbed during his time in Brazil.

6. The claimant's father has never been in the picture. On 6 October 2012, the claimant's mother married an Italian citizen (and thus an EEA national). On 11 April 2015, the claimant's mother went to Brazil and brought the claimant back to the UK with her. He was 19 years old.

7. The claimant was granted an EU residence card on 8 October 2015, valid until 8 October 2020, as the extended family member of an EEA national, his stepfather. The claimant began working for Tesco in 2015, but in 2018 he was made redundant. On 3 August 2016, the claimant's mother and her new husband had a son together.

8. In April 2018, the claimant started a relationship with a British citizen. He was then living in a shared house in West London, with three other men. His new partner was not aware of his drug-related activities and was very upset and distressed when she learned about his conviction, but she stood by him and the relationship continues.

9. The claimant pleaded with his British citizen partner to forgive him and promised to reform. She gave him a chance, and visited him regularly in prison, twice a month at least. She supported him 'wholeheartedly' and her unchallenged evidence was that he had 'an extremely tight relationship' with his mother, stepfather, and younger brother. They had a son together on 22 June 2021, who is now almost three years old. The claimant is very involved in the life of his son, and of his step-brother. He has a job, and supports his partner and son financially and practically.

The index offence

10. On 13 June 2018 the claimant was convicted of a very serious offence, supplying crack cocaine and heroin, using 15-year-old boys as runners. That is his only conviction.

11. The claimant was arrested with another man, and both were charged with supplying drugs to undercover police officers, as part of Operation Malvolio, which aimed to tackle the supply of Class A drugs in West London and gang violence in the lead up to the Notting Hill Carnival.

12. The claimant was sentenced on 14 August 2018: the drugs and his mobile phone were forfeited and were destroyed; £610 cash was also seized. The claimant received a 4-year prison sentence and was ordered to pay a victim surcharge of £170.

13. A Criminal Behaviour Order of the same date prohibited the claimant for 5 years from:

    (i) having in his possession or control, in any place in England and Wales, more than one mobile phone or SIM card, such card to be registered with his service provider or on the National Property Register at www.immobilise.com;

    (ii) entering the postcodes of W10, W11 or W2 during the Saturday, Sunday and Monday of the Notting Hill Carnival each year; and from

    (iii) associating in any way in a public place, or a place to which the public has access, within England and Wales, with 31 named men, 10 of whom were minors.

    The Criminal Behaviour Order remained in force until 14 August 2023.

14. The sentencing remarks of Mr Justice Johnson were concise but telling:

> "[D P], you fall to be sentenced for being concerned in the supply of Class A drugs on the streets of West London. It is accepted that this is at least a significant role and, in my judgment, this is a bad case, and the reason it is a bad case, is that you were involved in using 15-year-old boys to act as runners. I am not persuaded that you are a leading role candidate, because you are 22 and while you have been in this country for some years, you are otherwise unconvicted, but nevertheless, this is a serious offence.
>
> You are entitled to credit for your guilty plea, all the sentences will be concurrent, the ancillary orders that I have already mentioned will be made and the sentence is one of four years' imprisonment. You will have to pay the statutory surcharge."

15. While in prison, the claimant undertook a number of courses: he completed a Cannabis Awareness Workbook; the Mentors in Violence Prevention Programme; an OCR Level 2 Award in IT User Skills; was awarded Active IQ Level 2 Certificates in Fitness Instructing (GYM) and in Instructing Studio Cycling; and acquired a number of skills relevant to the BICSc Cleaning Professional's Skills Suite.

16. On 2 July 2019, an OASys report was completed, prior to his release from criminal detention into immigration detention. The officer assessed the index offence as financially motivated. The claimant continued to deny having committed the index offence. He said he had never supplied drugs, was not part of an organised group, and did not associate with criminals. He claimed to have pleaded guilty only to avoid a much longer sentence. The report concluded that the claimant represented a 17% risk of proven reoffending over a 2-year period, with a 13% risk of proven non-violent reoffending and 11% risk of proven violent-type reoffending. This risk was considered as Low under all three categories.

17. In July 2020, the claimant was released on licence and on immigration bail, to live with his mother and stepfather. The claimant has not re-offended and no longer lives in the part of London, or in the circumstances, where he was living when arrested.

18. On 12 October 2018, Quee and Mayanja Solicitors wrote, putting themselves on the record and expressing the claimant's regret for his actions.

International protection claim

19. Following service of a stage 1 deportation letter, the claimant made an asylum claim. On 8 October 2019, he withdrew his protection claim, ticking the box on the withdrawal form which confirmed his recognition that 'as a result, arrangements will be made for my removal/voluntary supervised departure'.

EEA deportation decision

20. On 8 June 2020, the Secretary of State decided to make an EEA deportation order pursuant to Regulation 27(5)(c) of the Immigration (European Economic Area) Regulations 2016 (as saved). The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

21. The First-tier Judge allowed the appeal. The claimant produced witness statements from his partner, her mother and grandmother, her aunt, his mother and his stepfather. The Secretary of State did not cross-examine any of those witnesses. The Presenting Officer relied on the decision letter and made no further submissions. Mr Quee, for the claimant, made detailed submissions.

22. The First-tier Judge did not consider that the Secretary of State had discharged the burden upon him of showing that the claimant still represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct and that the threat does not need to be imminent.

Permission to appeal

23. The Secretary of State appealed to the Upper Tribunal, in effect seeking to advance the arguments which could and should have been made at the hearing below. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Pickup who considered that:

> "6. At [39] of the decision, the judge appears to have concentrated on whether the threat posed by the appellant was genuine, present, *and* sufficiently serious. It is at least arguable that the balancing exercise was too heavily weighted in the appellant's favour and gave insufficient weight to the very serious nature of the appellant's offending and that there remains at least some risk of reoffending. It is also arguable that the assessment of integration was flawed, given the offending behaviour and period of imprisonment. … "

Rule 24 Reply

24. On Friday 26 April 2024, the claimant's solicitors filed a Rule 24 Reply, out of time but with an application for extension of time. His solicitors stated that they had only become aware of the grant of permission a month earlier, on 26 March 2024, and had received notice of hearing on 5 April 2024. Their ability to respond had been hampered by needing to get instructions, and also by the death of a family member of Mr Quee, which had, to a certain extent, inhibited a timely reply.

25. The Rule 24 Reply is no more than a bare joinder of issue, but it imports by reference a skeleton argument, also late, but with more extensive argument.

26. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

27. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal. I have had regard to Mr Quee's skeleton argument and to the oral arguments before me today.

28. Ms Everett acknowledged that the failure of the Home Office Presenting Officer to cross-examine the claimant or his witnesses, or indeed to make any oral argument beyond adopting the decision letter, was a difficulty for her. However, she argued that even if the witness statements were accepted in full, as they had to be, given the failure to cross-examine, that

was not sufficient to outweigh the public interest in this case. Being sorry was not enough: the claimant had committed a very serious crime, with financial motivation, and performed a significant role in the crime. His societal integration was broken in 2018 and he was released only in 2020. That was not very long to demonstrate integration.

29. For the claimant, Mr Quee argued that although *Essa* was not mentioned in the decision, the Judge had applied the correct test. The Judge had set out the relevant EEA Regulations in her decision and the Tribunal should be slow to conclude that she had not had regard to them. The claimant had now been back in the community for four years and five months, during which time he had conducted himself appropriately. He had a new partner, whom he had met just before going to prison. It was a steady relationship, and they had a child together. All of this had contributed to his reintegration.

30. Given the lack of challenge from the Home Office at the hearing, the Judge had been entitled to reach the conclusion which she did.

31. I reserved my decision, which I now give.

Conclusions

32. The claimant was resident in the UK as an EEA extended family member from October 2015. On 8 June 2020, when the decision under challenge was made, he had not completed 5 years in that status and he did not have a permanent right of residence.

33. The First-tier Judge set out the legal framework under the 2016 EEA Regulations, as saved, at [16]-[26] of her decision, noting at [27] that the burden of proof lies on the Secretary of State to show that a person represents a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' (see Regulation 27(5)(c)).

34. The First-tier Judge's self-direction at [36] is unimpeachable. At [37]-[49], the Judge considered the factual matrix with care. The Judge considered that the claimant had turned his life around and was now a responsible member of society, with a young family and close links to his extended family members.

35. In these proceedings, the presenting officer made no real attempt to discharge that burden at first instance. He did not cross-examine the witnesses or make any submissions, simply relying on the decision letter. The conclusion reached at [49]-[50] was unarguably open to the First-tier Judge on the evidence and arguments before her.

> "49. Taking into account the evidence in the appeal, on the balance of probabilities, I am satisfied that while the Appellant was convicted of a very serious crime, the Secretary of State has failed to discharge the burden of proof upon her to demonstrate that the Appellant represents a genuine, present, and sufficiently serious threat affecting one of the fundamental

> interests of society, taking into account that past conduct and that the threat does not need to be imminent.
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> 50. I therefore allow the Appellant's appeal on the basis that his removal is not justified on grounds of public policy, public security or public health in accordance with regulation 27."

36. I therefore uphold the decision of the First-tier Judge and dismiss the Secretary of State's appeal.

Notice of Decision

37. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law.
I do not set aside the decision but order that it shall stand.

Judith Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber
Dated: 30 April 2024