



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-000546
First-tier Tribunal No:
EA/51531/2021
IA/07355/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 April 2023

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

AHMED KAMBI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms. K McCarthy, Counsel, instructed by Turpin Miller
For the Respondent: Mrs. A Nolan, Senior Presenting Officer

Heard at Field House on 26 January 2023

DECISION AND REASONS

Introduction

1. The appellant is a national of the Netherlands. The respondent seeks to remove him from the United Kingdom on grounds of public policy in accordance with regulation 23(6)(b) and regulation 27 of the Immigration (European Economic Area) Regulations 2016, consequent to his having been sentenced to twenty-eight (28) months imprisonment in 2020. It was common ground between the parties that the 2016 Regulations, as saved, apply.

2. The appellant was initially successful on appeal before the First-tier Tribunal with Judge Pears allowing his appeal by a decision dated 28 February 2022. The respondent was granted permission to appeal and by a decision sent to the parties on 18 July 2022 the Upper Tribunal (Thornton J, UTJ O'Callaghan) allowed the appeal to the extent that the decision of the First-tier Tribunal was set aside. The findings of fact made at [49]-[52], [54] and [56] of the First-tier Tribunal decision were preserved as was the finding concerning the securing of permanent residence at [58].

Background

3. The appellant is a national of the Netherlands and aged twenty-six. He has five siblings; the youngest is presently aged eight.
4. He entered the United Kingdom with his parents and siblings in 2000 when aged three years and seven months old. He attended primary and secondary school in this country before attending Sixth Form college.
5. He travelled to the Netherlands for the only time in 2015, staying for five days. He is unable to speak Dutch.
6. Having attended Notting Hill Carnival together in the summer of 2015, the appellant's best friend was stabbed to death on his way home following an argument conducted on Twitter. The friend and his assailants had not met before the attack. One man was convicted of murder and sentenced to serve a minimum term of nineteen years, and two others were convicted of manslaughter on 13 May 2016 at Reading Crown Court. The sentences of the latter two were increased by the Court of Appeal in 2016 from nine to fifteen years: *R v. Huggins, R v. Clarke* [2016] EWCA Crim 1715, [2017] 1 Cr App R (S) 21.
7. The appellant and his friend were expecting to attend the University of Hertfordshire together. The appellant suffered with mental health concerns consequent to the loss. He commenced a law degree at the University of Hertfordshire in September 2015 but dropped out in May 2016 because he was unable to secure funding.
8. A second friend was stabbed to death in 2017.
9. The appellant was stabbed in 2018. He required surgery. No arrests were made. The appellant experienced further deterioration in his mental health, with concern that the people who stabbed him remain at large.
10. His brother was stabbed later the same year.
11. In September 2018, the appellant commenced an undergraduate degree course at the University of Salford but dropped out at the end of the first term due to mental health struggles and returned to the family home.
12. His personal behaviour declined with attendant growing conflict with his family, and after an argument with his father in 2019 he was required to

leave the family home. He moved into a property, associated himself with pro-criminal individuals and began to deal drugs.

Convictions

13. On 30 August 2019, the appellant was convicted of driving a motor vehicle with excess alcohol. He was fined £250.
14. In respect of the index offence, the appellant was arrested by police on 11 February 2020 and on the following day pleaded guilty at Berkshire Magistrates Court to:

- i) Possession of a class A drug (heroin) with intent to supply
- ii) Possession of a class A drug (cocaine) with intent to supply

15. On 24 April 2020 the appellant was sentenced by HHJ Campbell at Reading Crown Court to 28 months' imprisonment on each count, concurrent. By her sentencing remarks, HHJ Campbell observed, *inter alia*:

'You, in effect, were stopped in a car which didn't belong to you with your friend ... When you were searched by the police back at the police station 31 wraps of class A drugs were found in your anus.

It is right to say that two mobile telephones were also found in the car and by your basis of plea you accept, I think, that, in fact, you were in possession of three mobile phones.

You have entered a guilty plea on a basis which has been put before the court; that is, that you admit possession of those class A drugs with intent to supply, the street value, you say, of the 31 bags that you had on you was £310, and that you were selling to friends only.

It is also right to say in the pre-sentence report, part of the reason why you continued to sell class A drugs, it is said by you, is because you had got into financial difficulties, as many people do, and resorted to selling class A drugs and at one stage, as part of that enterprise, had, in fact, had £3,000 worth of drugs stolen from you. That, perhaps, is an indication of the kind of enterprise you had been running, certainly in the past, in that you were put in trust of that amount of drugs.

'... I take into account in mitigation that you are an intelligent young man and it is a great pity, in my view, that rather than perhaps resorting to other more legitimate means to deal with your financial difficulties you resorted to selling class A drugs. You started at university, you were made homeless by your family and, as a result, a friend encouraged you to start dealing drugs.'

16. The Crown's case was that the appellant was acting as a runner for a county line drug operation in Slough.
17. Whilst serving his custodial sentence, the appellant received two adjudications, firstly in June 2020 and then in August 2020. The former

related to an assault on a prisoner, and the second resulted from the appellant acting as a look-out when a prisoner was assaulted.

Deportation proceedings

18. On 15 April 2021, the appellant was released on immigration bail and his licence expired on 12 June 2022. Since his release he secured employment through two recruitment firms but subsequently experienced difficulties in securing his 'share code' from the respondent to prove his status to employers.
19. The respondent's decision to make a deportation order is dated 19 April 2021. She considered that the appellant had not acquired a permanent right of residence and so, despite lawfully residing in this country for over twenty years, he did not qualify for 'imperative grounds' protection in respect of deportation.
20. An OASys assessment completed on 2 September 2020, whilst the appellant was in prison, identified him as medium risk to the public in the community, and low risk to children, known adult and staff.
21. In respect of 'attitude', the assessment details at section 12, *inter alia*:

'12.9 During interviews, [the appellant] has not regularly expressed or excused criminal behaviour. He shows a clear understanding of many of the issues linked to his offending and criminal sub-cultures in general but does appear to lack the ability or motivation to understand issues and connections around violence.

...

[The appellant] appears very motivated to address his offending behaviour in connection with his index offence, however does not appear to have an interest in addressing his behaviour and attitudes relating to violence.'
22. Emily Brady, Offender Manager, details by a letter dated 22 October 2021, written some six months after the appellant's release into the community, that the appellant was a medium risk to the public. The identified risk was to members of the public who were involved in gang affiliations, or where there is outstanding grievance between the appellant and the individual where the appellant perceives them to be a threat. Ms. Brady identified the risk as being managed, with the appellant seeking to move away from negative associates. The appellant is recorded as confirming that he does not have an urge to carry a knife with him.

Upper Tribunal Decision - 18 July 2022

23. The Upper Tribunal set aside the decision of the First-tier Tribunal on two grounds, firstly that the First-tier Tribunal misdirected itself in respect of the imperative grounds test by commencing the examination of ten years

residence from the date of the appellant's entry into this country, rather than backwards from the date of the respondent's decision, as established by the CJEU in Case C-400/12 *Secretary of State for the Home Department v MG (Portugal)* EU:C:2014:9 [2014] 1 W.L.R. 2441. Additionally, it was concluded that the First-tier Tribunal provided inadequate reasons when concluding that the appellant did not represent a genuine, present and sufficiently serious threat.

24. The respondent's challenge to the finding that the appellant enjoyed permanent residence was dismissed.

25. Various findings of fact made by the First-tier Tribunal were preserved:

'49. The appellant was born in the Netherlands [in 1997].

50. I find that the appellant arrived in the UK in 2000 at the age of 3 as his 'red book' confirms and as is stated by his mother and not seriously disputed by the respondent. I find that he lived and was educated in Bristol and Slough thereafter. He has lived continuously in the UK since 2000 and with his family that entire time save for the period he moved out in 2019 prior to his offence and of course for the period of his detention.

51. I find that although the appellant's parents' earnings have been lower in some years than in others, and appear to have been affected by the appellant's father's transition from employed to self-employed status after around 2011, his parents have at all times been workers, work-seekers, self-employed or the direct family member of the other. There have been no financial years in which either his father or [his] mother were not working or work-seekers and no period when income was at such a level that they failed to meet the requirements of regulation 6 and be qualified persons.

52. I find in accordance with the table at paragraph 22 of the appellant's counsel's skeleton argument (as supported by the documents in the respondent's bundle) that the appellant's father had acquired permanent residence by 6 October 2006 and 10 years' residence by 6 October 2011. I find in accordance with the table at paragraph 23 of the appellant's counsel's skeleton argument (as supported by the documents in the respondent's bundle) that his mother acquired permanent residence by 6 October 2006 and 10 years' residence by 6 October 2011.

...

54. I find that he was sentenced to more than 12 months and less than 4 years imprisonment. I find that whilst the appellant was convicted of two offences, and they were serious offences and resulted in immediate custodial sentences, they were his first custodial sentences. He pleaded guilty and accepted his involvement.

...

56. I accept what he has said as confirmed by other members of his family about the effect on him of the death of his friend and the attack upon him so that his mental health was adversely affected.

...

58. In conclusion I find that the appellant has shown that he has a right of permanent residence under regulation 15 ...'

Evidence

26. The appellant attended the hearing along with his father, Mr. Mohammed Ali Kambi, and his sister, Ms. Iman Ali.
27. The appellant relied upon a consolidated bundle running to 178 pages and a supplementary bundle running to 4 pages. The respondent's bundle runs to 119 pages.
28. The appellant adopted his witness statements, dated 23 March 2021 and 3 November 2022. In answer to questions from Ms. McCarthy, he confirmed that in respect of his first prison adjudication he was punched by a prisoner in the exercise yard and returned with a plug extension socket which he used to hit his assailant. In respect of the second adjudication, he accepted that he had acknowledged to the prison authorities that he acted as a look-out. The penalties for both adjudications were suspended for 14 days. As for his future, he wishes to work but is presently unable to consequent to his appeal. His aim is to move in with his sister, save money from employment, and then return to studying at university. He has been accepted on a course to study building surveying but has to await the successful conclusion of his appeal before he can commence his course. In respect of his relationship with his father, he stated that it was 'the best it has been for a long time.'
29. In cross-examination the appellant confirmed that he spent some months travelling back and forth to see his grandmother in Kenya between 2012 and 2013, when aged 15 and 16, otherwise he has only been outside of the country for holidays. Turning to the stabbing of his friends, he denied that they were related to gang affiliation.
30. In relation to Mrs. Nolan's question concerning the stabbing of friends, I note the facts recorded by the Court of Appeal in *R v. Huggins, R v. Clarke* establishing that the murder in 2015 was not related to gang affiliation.
31. In answer to further questions from Mrs. Nolan the appellant denied that he had been in gang-related fights or neighbourhood disputes. As a young man, issues arose, but he was not involved in violence and not been arrested for violent crimes. When his friends died, he did not retaliate. He was a witness for the prosecution in one of the cases. As for his time in prison, he explained that he had time to reflect but had not been able to attend rehabilitative courses because of lockdown which commenced the month after he entered prison. He was given cell-work, undertaken during

23-hour lockdown, and was one of the few prisoners permitted to work. As for his family, he has always enjoyed a close relationship with them save for his father with whom matters were strained before he was required to leave home in 2019. He had too much pride to request help from other family members in securing accommodation, even though he was desperate for a roof over his head. He regularly asks himself the question why he did not turn to his wider family, including cousins and second cousins. He considers it was because he was immature, and not in a good place mentally, coupled with pride. He felt at the time that he would be grovelling if he went back to his parents, and he was uncomfortable with his wider family seeing him in his then state. He now considers his response to be naïve.

32. Iman Ali adopted her statements dated 2 November 2021 and 3 November 2022. She was not cross-examined.
33. Mr. Mohammed Ali Kambi gave evidence through an interpreter. He adopted his witness statements dated 22 February 2022 and 10 October 2022. In answer to questions from Ms. McCarthy he explained that relations were now good between him and the appellant. He confirmed the appellant's wish to work, and his hope to attend university this September. Mr Kambi did not believe that the appellant would commit further offences, as he had changed since being in prison, and wishes to build his future. The appellant helps the family at home, taking the younger children to school.
34. In answer to questions from Mrs. Nolan, Mr. Kambi accepted that he did not know about the appellant's actions prior to his conviction. He was aware of general problems in the locality, with children of others fighting and having problems at home. He wanted the appellant not to stay on the streets and to come home early.
35. Filed with the Tribunal were witness statements from the appellant's mother, Mrs. Hodan Ibrahim, dated 25 November 2021 and 3 November 2022, and from his sister, Ms. Nura Kambi, dated 31 October 2022.

Submissions

36. Mrs. Nolan submitted that the appellant did not possess integrative links prior to going to prison, and alternatively that they were broken upon his being imprisoned. She accepted that the appellant had mental health concerns when attending university, and consequently dropping out. However, he had spent time in Kenya with his grandmother. She relied upon the OASys assessment, identifying the appellant's attitude towards violence and his two prison adjudications. It was stated that the appellant remained a genuine present threat, as evidenced by his medium risk assessment.
37. Mrs. Nolan accepted on behalf of the respondent that the appellant was not a member of a gang. However, his custodial sentence was a rejection

of societal values: *Hussein v. Secretary of State for the Home Department* [2020] EWCA Civ 156, [2020] 2 CMLR 24, at [38], per Bean LJ:

'38. On this issue, I consider that the conclusions of the FTT Judge were ones which he was fully entitled to reach. He rightly accepted that the criminal convictions and periods of imprisonment do not automatically disqualify an individual from enhanced protection, but they do have a negative effect. As Flaux LJ said in *Viscu*, a custodial sentence is in general indicative of a rejection of societal values and thus of a severing of integrative links with the host state. Repeated offending attracting a series of custodial sentences of more than trivial length is even more indicative of the same thing. These propositions are not inconsistent with the principle that an EEA national cannot be deported on the basis of criminal offending simply to deter others.'

38. She acknowledged [37] of the same judgment:

'37. The question of whether periods in custody break the integrative links between the offender and the host state is in my view a much narrower question than that of whether there are imperative grounds of public security, or serious grounds of public policy or security, justifying deportation, let alone the question of whether deportation can be challenged on ECHR Article 8 grounds. I note the wording used by the CJEU in paragraph 83 of *Vomero*. The aspects of the case that must be taken into account in deciding whether, notwithstanding the detention, the integrative links with the host State have not been broken include "the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed and the conduct of the person concerned throughout the period of detention". Except for the first, all these listed factors focus on the offending and the custodial sentence. Whether the offender was visited regularly or at all while in custody seems to me of little if any importance in the overall assessment.'

39. I note that the judgment in *Hussein* was set aside without a hearing, and the appellant's appeal allowed to the extent that it be remitted back to the Upper Tribunal, by an order of the Supreme Court dated 8 August 2022.

40. Ms. McCarthy submitted that the appellant did not hold pro-criminal attitudes, and the only instance of himself acting violently was in relation to his first prison adjudication. Nor does he have pro-criminal ideation, as confirmed by the OASys assessment. He was immature and in a poor place personally. He lost his closest friend and struggled with his loss which resulted in a marked mental health decline, coupled with him being unable to proceed on his planned professional path through attending university. Time has passed, and his maturity has significantly grown. He accepts that he made poor choices and is exhibiting good insight into his previous behaviour. He acknowledges the adverse impact pride had upon several of

his decisions. His integrative links had not been broken by his time in prison and he has now been in the community for some two years and has not re-offended. He does not constitute a genuine, present or sufficiently serious threat, as evidenced by his father's reference to his change in attitude.

Discussion

Appeal rights saved

41. The 2016 Regulations were revoked by paragraph 2(2) of Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 with effect from 31 December 2020, at the conclusion of the implementation period for the United Kingdom's withdrawal from the European Union.
42. The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 make provision for certain provisions of the 2016 Regulations to continue to apply, notwithstanding their revocation, in relation to appeals against EEA decisions that were taken before commencement day, that is the day upon which the 2016 Regulations were revoked: see Schedule 3, paragraph 5(1)(c). The appellant's appeal falls into this cohort. For such appeals, certain provisions of the 2016 Regulations continue to apply, with the specified modifications, in accordance with paragraph 6 of Schedule 3.

Imperative grounds of protection

43. By virtue of regulation 23(6) of the 2016 Regulations an EEA national who has entered the United Kingdom may be removed if the respondent has decided that such removal is justified on the grounds of public policy, public security or public health in accordance with regulation 27.
44. I note Schedule 1 of the 2016 Regulations.
45. The Citizens Directive contains protection against expulsion where an individual has long residence in the host state. The present hierarchy of levels of protection, based on criteria of increasing stringency, is identifiable as:
 - (1) A general criterion that removal may be justified 'on the grounds of public interest, public security or public health';
 - (2) a more specific criterion, applicable to those with permanent rights of residence, that they may not be removed 'except on serious grounds of public policy or public security';
 - (3) the most stringent criterion, applicable to a person 'who has resided in the United Kingdom for a continuous period of at least

ten years prior to the relevant decision’, who may not be removed except on ‘imperative grounds of public security’.

46. Imperative grounds of public security have been interpreted in *MG and VC (EEA Regulations 2006; “conducive” deportation) Ireland* [2006] UKAIT 00053, [2006] Imm AR 619, at [34], as meaning something more than the ordinary risk to society arising from the commission of further offences by a convicted criminal.
47. With the earlier finding of Judge Pears that the appellant secured permanent residence in October 2006 having been preserved, Ms. McCarthy identified the appellant as falling into tier (3) or upper tier protection, Mrs. Nolan contended that the appellant enjoyed tier (2) protection.

Breaking of integrative links?

48. The CJEU has established that the question of whether the required continuity is broken during the requisite period by imprisonment depends on whether integrative links with the host State have been broken. In *Joined Cases C-316/16 and C-424/16 B v. Land Baden-Wurtemberg and Vomero v. Secretary of State for the Home Department* EU:C:2018:256, [2019] Q.B. 126 the CJEU set out four factors to guide the assessment, at [72]-[74], namely
 - i. The relative solidity of the integrative links, at para. 72
 - ii. The nature and circumstances of the offence and its commission, at para. 73
 - iii. The behaviour and attitude of the individual during imprisonment, at para. 74
 - iv. The prospects of rehabilitation in the host State, at para. 75
49. In respect of (i) above, I note the observation at para. 72 of the judgment, ‘the more those integrative links with that State are solid—including from a social, cultural and family perspective to the point where, for example, the person concerned is genuinely rooted in the society of that State, as found by the referring court in the main proceedings—the lower the probability that a period of detention could have resulted in those links being broken.’
50. The relevant ten-year period runs up the date of the respondent’s decision of 19 April 2021. The appellant was aged 24 on this date. He was released on his conditional release date of 12 April 2021, having served fourteen months of his twenty-eight months sentence.

51. By means of her decision letter dated April 2021, the respondent did not accept that the appellant had secured permanent residence and did not address the breaking of integrative links in the alternative. Mrs. Nolan relied primarily upon the sentence of imprisonment and the appellant's prior absence from the United Kingdom to stay with his grandmother in Kenya.
52. On the positive side of the assessment are that the appellant arrived in this country at the age of three years and seven months of age. He progressed through fourteen years of schooling in this country, before unsuccessful efforts on two occasions to secure an undergraduate degree. I accept that he speaks English and not Dutch, evidencing his roots to this country. Such roots are further deepened by his close family residing with him throughout most of his twenty years in this country at the time of the respondent's decision.
53. I note that the appellant left this country for unspecified periods of time when aged 15 and 16 to visit his grandmother in Kenya. Whilst concluding that there were absences arising, I do not find that he spent an entire year in Kenya as detailed in the OASys assessment. I accept the appellant's evidence on this issue, namely that he made more than one trip during this time, as he subsequently sat and passed several GSCEs when aged 16, and proceeded onto Sixth Form, which establishes to the relevant standard that he did not drop out of the educational system for a year. Consequently, I accept that the entry placed into the OASys assessment was a misunderstanding as to the information supplied by the appellant in interview. I find that his journeys to Kenya did not break his continuity of residence, with it being his intention on each occasion to return to this country and continue with his education.
54. The criminal offences for which he was convicted in 2020 were serious, relating to the supply of prohibited drugs. This was not his first conviction, though the offence in 2019 was punished by a fine. I am satisfied that the author of the OASys assessment had access to the Crown Court papers, and so find that the appellant was engaged as a 'runner' in county line drugs supply, which provides misery to those who purchase drugs. The appellant's engagement with crime was relatively short-term, from a time after he was required to leave the family home in 2019 to his arrest on 11 February 2020. When considering the entirety of the evidence presented, including his schooling and his two efforts to undertake university studies, I am satisfied that the appellant was pro-social up until he left the family home in 2019, when at some point thereafter he engaged in criminality. Whilst not mitigation for his offending, I accept the appellant's evidence, confirmed by relatives, that he underwent significant mental health deterioration after the murder of his best friend in 2015 and as a result of his own stabbing in 2018. I find that the appellant had increased insight as to his mental health whilst imprisoned, with the OASys noting that he was aware that should he feel the need for support he could speak to staff and listeners to seek a referral to the mental health team.

55. I accept his evidence that through a lack of maturity and pride he did not seek the help and support available to him when he left the family home. However, the OASys assessment identifies increasing maturity and insight whilst in prison. I accept that the appellant was one of the few prisoners permitted to work during the 23-hour lockdown imposed during the pandemic, evidencing a degree of trust being placed in him by the prison authorities. I observe the two adjudications, but the suspension of the imposed penalties identifies the prison authorities placing the underlying breaches of the Prison Rules at the lower level of seriousness. I accept the appellant's contention that there is no other evidence of him acting in a violent manner.
56. Having considered the evidence in the round, I find that the appellant's very strong integrative links with this country were not broken either by his journeys to Kenya or during his fourteen months incarceration and so he was integrated into the United Kingdom during the course of the ten years prior to the respondent's decision on 19 April 2021.

Genuine, present and sufficiently serious risk to the fundamental interests of society?

57. Having established that the appellant is entitled to the highest tier of protection, it is for the respondent to establish that imperative grounds of public security exist and the standard to be applied is the civil standard: *Arranz (EEA Regulations - deportation - test)* [2017] UKUT 00294 (IAC), at [81].
58. Regulation 27(5)(c) of the 2016 Regulations requires that the decision to expel the appellant must be based exclusively on his personal conduct and such conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I am required to be satisfied that the appellant is a present threat to the interests of society, and so his past criminal record is not in itself sufficient: *B (Netherlands) v. Secretary of State for the Home Department* [2008] EWCA Civ 806, [2009] QB 536, at [16].
59. It was not suggested in the respondent's decision that the appellant fell within the exceptional category identified in *R v. Bouchereau* (30/77) [1978] 1 QB 732, to be read in conjunction with *Secretary of State for the Home Department v. Robinson* [2018] EWCA Civ 85, [2018] Imm. A.R. 892 namely that it is 'possible that past conduct alone may constitute such a threat to the requirements of public policy'. Mrs. Nolan properly did not advance reliance upon the principle before me.
60. As confirmed by the Court of Appeal in *Secretary of State for the Home Department v. Straszewski* [2015] EWCA Civ 1245, [2016] 1 WLR 1173, an evaluation is required to be made of the likelihood that the appellant will

offend again and the consequences if he did so. In addition, there is a need for the appellant's conduct to represent a sufficiently serious threat to one of the fundamental interests of society. The risk of future harm is to be balanced against the need to give effect to the right of free movement. Issues of deterrence or public revulsion have no part to play in the assessment. Thus, my focus is to be placed upon the propensity of the appellant to re-offend.

61. Reliance as to the appellant remaining a genuine present threat was primarily placed by the respondent upon the medium risk assessment identified by the OASys assessment and his offender manager's letter, the first being completed in 2020 before he left prison, and the latter being dated October 2021. The risk was directed towards the use of violence, not to drug supply, though I proceed to consider both.
62. The OASys assessment identifies with clarity that the appellant was engaged in addressing the reasons as to why he fell into using and supplying drugs. His financial circumstances having become homeless were identified as the main motivator. The report identifies the appellant's motivation not to return to using and supplying drugs. I accept his evidence that he has been drug free since his arrival in prison, having identified the inappropriateness of self-medicating using cannabis in respect of his mental health concerns. I accept his evidence that whilst imprisoned, and thereafter, he has worked hard to address his bad memories and experiences that have impacted upon him and has proven capable of ably working through them.
63. The focus of the identified risk to members of the public is very much identified as being towards those involved in gang affiliations, or where the appellant perceives someone to be a risk. The respondent accepts that the appellant was not, and is not, a member of a gang. The identifiable risk relates to what was considered to be, in 2020 and 2021, his likely reaction when confronted by a gang member. Whilst not mitigating the identified risk, I observe that the appellant has lost two friends to stabbings, and both he and a brother have been stabbed. In discussions with staff in prison, he identified that retaliation was a valid form of defence, and exhibited a lack of consequential thinking, as well as impulsivity and lacking temper control.
64. However, having listened to his evidence at the hearing, and observing that he represented himself at the error of law hearing before a panel including a High Court Judge with some skill and awareness, I accept that he now exhibits significantly improved maturity and personal insight, particularly as to the use of cannabis and alcohol to self-medicate his mental health concerns. I find that he has provided clear insight into the poor decision-making that led to him self-medicating. I accept that he wants to lead a pro-social life, which includes an intention to move away from his local area with his sister and to attend university in September. I note that he has not been convicted of an offence since leaving custody almost two years ago and resides within the protection of his family unit. I

accept that familial protection will remain if he were to live with his sister and attend university. I also accept that when able to do so, prior to experiencing difficulties with his 'share-code', he was willing and able to work, holding down employment offered by recruitment agencies.

65. I find that the appellant's growing maturity and insight positively impacts upon his attitude to the use of violence when confronted. He understands that the use of knives will cause significant problems to him, and this is an inhibitor. I note that he has resided at home in the community for almost two years and has no convictions for violence.
66. In Case C-67/74 *Bonsignore v v Oberstadtdirektor der Stadt Köln* [1975] 1 CMLR 472 the ECJ observed that a finding that a threat to public security exists implies the existence in the individual concerned of a propensity to act in the same way in the future. I find that the appellant is pro-social, has gained maturity and insight, and does not possess a propensity to engage in criminality, such as drug supply and violence, in the future.
67. Taking all factors into account, including Schedule 1 to the 2016 Regulations, and viewing the evidence in the round, I find that the appellant does not present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Proportionality

68. Consideration of proportionality is only undertaken if the serious threat test has been made out: *MC (Essa principles recast) Portugal* [2015] UKUT 520 (IAC); [2016] Imm AR 114. Having found that the respondent has not made out the test, I turn to proportionality in the alternative. It is a holistic balancing exercise. I observe that the prospects of continuing successful rehabilitation can be relevant to proportionality.
69. Evidence as to risk and proportionality is to be considered at the date of hearing, not at the date of the expulsion decision: *MG (Prison: Article 28(3) (a) of Citizens Directive: Portugal)* [2014] UKUT 392 (IAC), [2014] UKUT 392 (IAC), [2015] Imm AR 128.
70. A decision to deport must be appropriate for securing the objective sought and must not go beyond what is necessary in order to obtain it: Case 55/94 *Gebhardt v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* EU:C:1995:411 [1996] 1 C.M.L.R. 603.
71. The appellant's mental health concerns arising from the death of his best friend, and the severity of a physical attack upon him, were properly not challenged by the respondent. I accept the evidence of his family that they provide him with love, affection and strong support that benefits his mental health. I find that he is engaged in rehabilitation, and in continuing to be pro-social. I accept that his deportation would prejudice his rehabilitation from offending: *Essa v. Upper Tribunal (IAC)* [2012] EWCA Civ 1718, [2013] Imm. A.R. 644. When considering proportionality, I conclude

that the objective of protecting the public can be addressed by permitting the appellant to remain in this country and complete his rehabilitation.

72. I take this opportunity to thank Ms. McCarthy and Mrs. Nolan for their very helpful submissions, and to the appellant's solicitors, Turpin Miller, for the preparation of a helpful bundle.

Notice of Decision

73. The decision of the First-tier Tribunal involved the making of an error on a point of law and was set aside 18 July 2022 pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
74. The decision is remade by the Upper Tribunal and the appeal is allowed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 March 2023