IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2024-000886

First-tier Tribunal No:
EA/51588/2021
IA/06442/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29th May 2024

Before

UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADILSON DOS SANTOS
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms E Lanlehin, Counsel, Crystal Chambers

Heard at Field House on 22 April 2024

DECISION AND REASONS

Although the Secretary of State is the appellant in this appeal before the Upper Tribunal, for ease of reference we will hereafter refer to the parties as they were before the First-tier Tribunal.

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Cameron promulgated on 19 February 2024 (the 'Decision'). By the

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Decision, Judge Cameron allowed the appellant's appeal against the decision of the respondent made on 23 March 2021 to deport him to Portugal pursuant to Regulation 27 of the Immigration (European Economic Area) Regulations 2016.

Relevant Background

2. The appellant is a citizen of Portugal, whose date of birth is 12 June 1994. The appellant has resided in the UK since at least 28 April 1998, at which date there is documentary evidence of him attending a primary school in the UK.

3. The appellant has a history of criminal offending, which culminated with the appellant being convicted on 22 September 2016 at Snaresbrook Crown Court of possessing a prohibited weapon; possessing ammunition without a certificate; possessing a controlled Class A drug (heroin); and possessing a controlled Class B drug (cannabis). On 21 October 2016 at the same Court, the appellant was sentenced to a total of 9 years in prison and ordered to pay a victim surcharge of £170.

4. Having regard to the appellant's history of offending and the remarks made by the Sentencing Judge, and taking the view that his deportation to Portugal would not prejudice the prospects of his rehabilitation, the respondent was satisfied that the appellant posed a genuine, present and sufficiently serious threat to the interests of public policy such that his deportation was justified under Regulation 27.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. The appellant's appeal came before Judge Cameron sitting at Taylor House on 27 October 2023. Both parties were legally represented, with Ms Lanlehin appearing on behalf of the appellant.

6. The evidence before Judge Cameron included a decision by the Parole Board dated 19 June 2023 in which they set out the evidence, both written and oral, which led them to conclude that the appellant could be released back into the community on licence.

7. The Parole Board noted that the appellant was aged 22 when he was sentenced on 21 October 2016, and that the sentence expiry date was 7 September 2025. He had been released automatically on 19 March 2021; his licence had been revoked on 2 September 2022; and he had been returned to custody on 17 September 2022.

8. The third-party witnesses at the hearing before the Parole Board were Ria Hoxha, the appellant's current Prison Offender Manager (POM), and Gary Bartlett, the appellant's previous Community Offender Manager (COM).

9. In section 2, it was recorded that the appellant's licence was revoked on 2 September 2022, as he had effectively disengaged from supervision and could not be contacted. He had failed to attend a probation appointment on 31 August 2022 and had failed to comply with an instruction for a temporary tag to be fitted. He was not allowed to work because of his unresolved immigration status, and there was an inevitable concern that he might revert to criminal behaviour to fund himself.

10. The appellant had first caused concern after release by visiting a known criminal associate in custody. He had initially been residing with an aunt and appeared to be stable for a time, although that accommodation arrangement appeared to break down due to the financial strain placed upon his aunt by the appellant residing there.

11. Since recall, the appellant had reported that he had been stressed at the time of recall. He was struggling to find somewhere to live, and he had just discovered that his girlfriend was pregnant. He accepted that he had not prioritised supervision or compliance with monitoring. There was, however, no evidence to implicate the appellant in any further offending.

12. The appellant's initial custodial contact after recall was problematic. However, following a transfer to HMP Highpoint, his custodial contact appeared to stabilise and he achieved enhanced IEP status and gained employment as a Wing Cleaner within the prison.

13. In her evidence, the POM said that she had been involved in the appellant's case since November 2022. There had been no evidence or suggestion of substance misuse, and therefore only one drug test had been completed, giving a negative result. He appeared to genuinely sustain positive conduct in custody for most of his sentence. His last proven adjudication dated back to August 2020. She considered that the appellant had shown a positive level of engagement of late. He had the motivation of being a father in the community, and he had avoided re-offending when last released. On that basis, she assessed that his risk should be manageable in the community.

14. The COM had held the case prior to the initial release. The appellant was linked to the Customs House Gang, according to police reports. However, recent checks had been completed, and there was no current intelligence linking the appellant to any gang involvement. However, his decision to visit a gang member after release was a concern. He considered that there was clear evidence in the past of the appellant having strong negative associations, whether he was a former gang member or not.

15. In terms of recall, he reported that there had been no significant concerns about how the appellant had been conducting himself for many months after release. There was no evidence of reoffending, and the appellant had been relatively open with his COM, disclosing his relationship, the pregnancy and the issues of having to leave his aunt's address. He did not consider the appellant to be wilfully non-complaint.

16. He considered risk not to be imminent, and warning signs should be apparent before risk escalated. He was able to endorse release, given the appellant's avoidance of offending when last released and his stable presentation of late in custody.

17. After citing the oral evidence given by the appellant, the Panel made their assessment. They found that the protective factors in his case were based around his avoidance of offending over an extended period of time when he was last released; his generally positive engagement with his COM; and some evidence of increased maturity. In considering the written and oral

evidence, the Panel concluded that these were broadly fair and accurate assessments of the appellant's risk. The index offences were of a very serious nature, but the appellant had avoided all forms of offending for the entire and lengthy period that he had spent in the community after release. There was some evidence of a decline of his mental health either side of recall, but he had shown a period of settled and compliant conduct in custody of late. On that basis, the Panel accepted that the appellant did not currently present as posing an imminent risk of causing serious harm.

18. The Panel concluded that the evidence showed that the appellant posed only a minimal risk of causing serious harm, and therefore made a direction for his release.

19. In the Decision, the Judge's findings began at para [40]. The first issue which he addressed was the level of protection to which the appellant was entitled. Whereas Ms Lanlehin submitted that he was entitled to the highest level of protection (as he had resided in the UK for in excess of 10 years), the Judge found that the relevant protection level was serious grounds of public policy. The Judge's reasoning was that the appellant had previously shown a complete disregard for the law, and notwithstanding his young age at the time, he had committed very serious offences and had continued to offend. In his view, this indicated that the appellant had not integrated into the UK's way of life.

20. On the issue of risk, the Judge noted that the appellant was deemed to be of medium risk. The appellant had undertaken a number of courses whilst in prison, and he accepted his evidence that these had had an effect on his thinking, and that he had matured since the offending.

21. He took into account the fact that the appellant currently attended probation regularly but had been unable to obtain employment, given his current status. He took into account that, notwithstanding a problem with his accommodation which had caused his recall, he had been able to stay away from his previous life-style and associates. He further took into account the fact that, although the appellant had not been able to obtain employment because of his current immigration status, he had not reverted back to offending. He gave weight to the evidence of the appellant's partner and the fact that they now had a child. He said he had no reason to doubt the appellant's evidence that this had changed his life.

22. At para [60], the Judge concluded that it could not be said that the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The appellant was not at immediate risk of reoffending, and his current situation indicated that some of the factors that were present at the time of his offending were [not] currently risk factors, and that there were positive preventative factors now in his life. Therefore, the Judge held at at para [61], the decision to deport the appellant did not come within Regulation 27.

The Grounds of Appeal to the Upper Tribunal

23. Samuel Pierce of the Specialist Appeals Team settled the grounds of appeal on behalf of the Secretary of State.

24. Ground 1 was that the FtT Judge had made a mistake as to a material fact which could be established by objective and uncontentious evidence; the Secretary of State was not responsible for the mistake; and where unfairness had resulted from the fact that a mistake was made.

25. The FtT Judge mistakenly found that the appellant had not committed any further criminality since the index offence, and this had infected his overall decision to allow this appeal, making it a material error of law. The FtT Judge had been led to believe by the appellant that he had not offended since his release, but the attached PNC record showed that he was convicted on 17 September 2022 at East London Magistrates Court for possessing a controlled Class B drug (cannabis resin) and that he was fined as a result.

26. This might not be deemed a serious offence in isolation, but when it was taken into account that this was a repeat conviction of one of the appellant's index offences and that to be involved in this illicit activity engaged criminal elements within society, this raised a material point with regard to the appellant's rehabilitation and risk to the public that the FtT Judge had failed to address.

27. Ground 2 was that the FtT Judge had failed to provide reasons, or any adequate reasons, for findings on material matters. Principally, it appeared that the appellant's Probation Officer (PO) – Gary Bartlett - had failed to include material information relating to the appellant's repeat offending within his most recent letter dated 25 October 2023, and may have even provided misleading, or at least incomplete, information relating to the appellant's recall to prison. The PO stated that the appellant was recalled in September 2022 due to being out of contact, but the PNC record showed that it was in September 2022 that he was arrested and convicted of the latest offence. This therefore damaged any weight that can be attached to this letter.

28. Furthermore, the Judge failed to address the fact that the appellant was noted within this letter to have attended HMP Sutton after he was first released on licence, in order to visit a "*lifer*" (an inmate being detained indefinitely at His Majesty's pleasure). He had apparently done so with two named gang-members, which was a highly significant event.

29. The FtT Judge found at para [56] that the appellant had stayed away from his previous lifestyle and associates, which was clearly not true.

30. The condition of his licence appeared to be that he should stay away from the East London area, but it was relevant to note that his partner resided in East Ham, and his mother was in Stratford. With Bexley, where he resided, being relatively close to this part of London, it was more than likely - given the above credibility concerns - that he would return to East London and engage with other known associates despite what his PO claimed.

31. Another material fact was that the appellant remained on licence until 26 August 2025, and therefore his propensity to reoffend had not yet been truly tested, due to the risk of him being recalled to prison, which he had

in fact already fallen foul of. Also, the PO letter made reference to a COM who the appellant reported to, yet no evidence had been provided from the COM, who was arguably in a better position to provide a credible opinion on the appellant's rehabilitation. Again, the FtT Judge had failed to factor these points into his overall assessment of the risk that the appellant posed.

The Hearing in the Upper Tribunal

32. For the purposes of the hearing before us, the Secretary of State prepared a composite bundle which included the PNC record referred to in the grounds as being part of the evidence which was placed before the First-tier Tribunal. However, as the PNC record was printed out on 23 February 2024, this was clearly not the case, as Ms Lanlehin confirmed.

33. We explored with Mr Tufan whether the Secretary of State relied upon a specific misrepresentation by the appellant. The answer was 'no'. Mr Tufan submitted that the appellant had breached a duty of candour. He ought to have volunteered the fact that he had been convicted of a further offence on 17 September 2022.

34. Mr Tufan went on to develop Ground 2, and he also raised a further ground, which he submitted was *Robinson* obvious. Although the Judge had set out Schedule 1 to Regulation 27, he submitted that the Judge had not actually applied it in his reasoning.

35. On behalf of the appellant, Ms Lanlehin said that the appellant was aware that he had the conviction referred to in the PNC record, but was not aware that the conviction was not before the Tribunal. The appellant had not made a deliberate or intentional attempt to hide the fact of his conviction. Ms Lanlehin referred us to various passages in the Parole Board decision, and she submitted that it was the Secretary of State's responsibility to bring forward evidence of the conviction for the purposes of the appeal hearing in the First-tier Tribunal.

36. In reply, Mr Tufan submitted that there had been a shared responsibility between the Secretary of State and the appellant to bring forward evidence of the repeat offending. As the appellant shared the responsibility for the mistake, this was, he implied, sufficient to entail that the decision of the First-tier Tribunal should be set aside on grounds of material unfairness.

37. We reserved our decision.

Discussion and Conclusions

38. As to Ground 1, the leading authority on the circumstances when a mistake of fact will give rise to material unfairness is *E&R* [2004] EWCA Civ 49. At para [66] of **E&R**, the Court of Appeal said:

> In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in a statutory context where the parties share an interest in cooperating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as

> to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.

39. It is not in dispute that the first two requirements are satisfied. As to the third requirement, materiality, we consider that the mistake of fact is material, albeit that it is not as significant as in implied in the grounds of appeal. There is no indication in the surrounding evidence that the appellant's misuse of a Class B drug (cannabis) in September 2022 arose from gang-related activity or association with former gang members. The misuse appears to have coincided with a stressful period in the appellant's life when, as stated in the letter of 25 October 2023, compliance problems were evident after the appellant was asked to leave his aunt's address in Ilford because she could no longer afford to look after him and this event coincided with other factors which adversely affected the appellant's motivation and compliance.

40. However, as to the fourth and final requirement, we are not persuaded that the appellant is responsible for the mistake of fact. On the contrary, we consider that responsibility for the mistake of fact lies squarely with the Home Office.

41. In his appeal statement for the hearing in the First-tier Tribunal, the appellant made no express or implied representation that he had not reoffended since the commission of the index offences which had resulted in him receiving a term of imprisonment of 9 years. We do not consider that the appellant was under a duty to draw attention to his conviction on the same day that he was recalled to prison. We consider that the appellant was entitled to assume that his full criminal record was before the First-tier Tribunal, just as he was entitled to assume that it had been before the Parole Board at his licence hearing in June 2023.

42. The appellant is not to blame for the fact that the dossier prepared for the hearing before the Parole Board did not mention his conviction on the day of his recall to prison, and so, unlike with the matters of concern that did feature in the dossier, the appellant was not given the opportunity to explain the background to his reoffending to the Panel, or to address its potential implications for his future conduct when re-released.

43. We infer from the contents of the Parole Board decision that the reason why the repeat offence of possession of a class B drug was overlooked was because there was not a continuity of cover. Mr Bartlett ceased to be responsible for the appellant after he recommended that the appellant's licence be revoked and the appellant be recalled to prison, and the appellant's new Manager did not take over until November 2022. In addition, the person or persons responsible for compiling the dossier did not check the appellant's PNC record.

44. Although it is understandable that the Secretary of State elected not to look behind the decision of the Parole Board or the letter from the PO (Gary Bartlett) dated 25 October 2023 when preparing a review response

and/or in preparation for the appeal hearing in the First-tier Tribunal, we do not consider that there is a good excuse for the Secretary of State only checking the PNC record after the First-tier Tribunal had promulgated a decision in the appellant's favour, rather than checking the PNC record beforehand. This was a blatant violation of the principle that neither party should treat the hearing in the First-tier Tribunal as a dress rehearsal, rather than the main event. We consider that there was a clear failure to exercise reasonable diligence, and on the particular facts of this case we are not persuaded that the resulting mistake of fact has led to material unfairness. Accordingly, we find that no error of law is made out as put forward in Ground 1.

45. As to Ground 2, we consider that all the points raised under this ground are no more than an expression of disagreement with findings of fact made by the Judge which were reasonably open to him on the evidence before him, for the reasons which he gave.

46. There is no reason to suppose that Mr Bartlett was not telling the truth when he said in his letter of 25 October 2023 that to his knowledge the appellant had not reoffended. As we have explained above, it appears that Mr Bartlett was no longer actively managing the appellant at the time of his conviction on 17 September 2022.

47. The Judge cannot be criticised for basing his findings on the evidence that was before him, rather than basing his findings on speculation as to what the appellant's current COM might say.

48. There is also no merit in the argument that the Judge did not adequately engage with Mr Bartlett's statement that earlier in the licence period he had requested additional licence conditions when he was alerted to the fact that the appellant had visited a serving lifer in HMP Sutton in the company of two other known gang nominals.

49. Mr Bartlett went on to say that a non-association condition and an additional condition not to visit any serving prisoners was added to the licence, and that to his knowledge the appellant had abided by these requirements.

50. This was also a matter that was fully ventilated at the hearing before the Parole Board, including the appellant being asked questions about it during his oral evidence.

51. In conclusion, the Judge gave adequate reasons for finding in the appellant's favour, and no error of law is made out, either on the grounds of material unfairness or on the grounds of inadequate reasoning.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Andrew Monson

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber 19 May 2024