UT Neutral Citation Number: [2024] UKUT 00393 (IAC)

Castro (Appendix EU, "deportation order")

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Heard at Field House

THE IMMIGRATION ACTS

Heard on 24 September 2024
Promulgated on 29 October 2024

Before

UPPER TRIBUNAL JUDGE JACKSON
UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Jose Paulo Castro
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Z Malik KC of Counsel, instructed by the Government Legal Department
For the Respondent: Mr R Khubber of Counsel, instructed by Turpin Miller LLP

1. *The definition of "deportation order" in paragraph (b) of Annex 1 to Appendix EU of the Immigration Rules must be read as follows (emphasis added):*
   "(b) an order made under section 5(1) of the Immigration Act 1971 by virtue of section 3(5) or section 3(6) of that Act in respect of:
   (i) conduct committed after the specified date; ***and/or***
   (ii) conduct committed by the person before the specified date, where the Secretary of State has decided that the deportation order is justified on the grounds of public policy, public security or public health in accordance with regulation 27 of the EEA Regulations, irrespective of whether the EEA Regulations apply to the person (except that in regulation 27 for "with a right of permanent residence under regulation 15" and "has a right of permanent residence

under regulation 15" read "who, but for the making of the deportation order, meets the requirements of paragraph EU11, EU11A or EU 12 of Appendix EU to the Immigration Rules"; and for "an EEA decision" read "a deportation decision"); or"

2. *The time period of the conduct relied upon by the Respondent will dictate whether BOTH sub-paragraph (i) **and** (ii) will apply (if conduct committed both before and after the specified date is relied upon) or whether paragraph (i) or (ii) will apply (if only conduct committed EITHER before or after the specified date is relied upon).*

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judges Loke and Rai promulgated on 7 February 2024, in which the Tribunal allowed Mr Castro's appeal against two decisions, (i) the decision to make a deportation order and refuse his human rights claim, and (ii) the decision to refuse his application under the EU Settlement Scheme. Although the decisions bear different dates and are referred to in other documents by different dates, it is not in dispute that these are typographical errors and both decisions were made on 18 October 2021. For ease we continue to refer to the parties as they were before the First-tier Tribunal, with Mr Castro as the Appellant and the Secretary of State as the Respondent.

Immigration history

2. The Appellant is a national of Portugal, born on 26 October 1992 who entered the United Kingdom initially in January 2014 as a young adult. He has a number of criminal convictions in the United Kingdom between 2016 and 2022, which are set out below as part of his history in the United Kingdom.

3. On 17 May 2016, the Appellant was convicted of six offences of criminal damage and one of possession of a knife in a public place (offences committed on various dates in March 2016), for which he was sentenced on 7 June 2016 to a community order with a rehabilitation requirement; together with a victim surcharge of £60 for one of the offences.

4. The Appellant made an application for status under the EU Settlement Scheme (the "EUSS") on 31 October 2019. That application was rejected on 2 June 2020 because he had not provided a required identity document.

5. On 24 September 2020, the Appellant was convicted of one offence of criminal damage and of assault of an emergency worker, for which he received a fine of £80 and had to pay costs, a victim surcharge and a fine. The Appellant was also the subject of a restraining order – protection from harassment.

6. 2 October 2020, the Appellant was convicted of harassment (breach of restraining order) for which he was sentenced on 5 November 2020 to a period of imprisonment of 16 weeks.

7. On 22 October 2020, the Appellant was convicted of exposure, with a sentence of imprisonment of 16 weeks given on 5 November 2020 (consecutive to the above sentence given on the same date) and he was required to sign the Sex Offenders Register for seven years.

8. The Respondent sent a warning letter to the Appellant on 26 November 2020 as to his future conduct and the possibility of consideration of deportation action should he come to the

adverse attention of the Home Office again; but confirming that no further action would be taken at that point.

9. On 15 April 2021, the Appellant was convicted of one offence of criminal damage, two offences of assaulting an emergency worker, one offence of harassment and one public order offence. In total he was sentenced to imprisonment for a period of 26 weeks (with individual sentences ranging from 14 days to 18 weeks, some to be served consecutively).

10. The Respondent served the Appellant with a stage one deportation notice on 2 May 2021 (albeit the document itself is dated 27 April 2021). The letter begins with a recitation of the Appellant's criminal offences, starting with his conviction on 15 April 2021 and then listing previous convictions between 2016 and 2020 in chronological order. The letter expressly states as follows:

> *"The Secretary of State has deemed your deportation to be conducive to the public good and accordingly it is in the public interest that you be removed from the United Kingdom without delay. Therefore, the Secretary of State has decided to make a deportation order against you under section 5(1) of the Immigration Act 1971."*

11. In part 2 of the decision, the Respondent states:

> *"You have been convicted of criminal offences as set out in part 1 of this letter. The Secretary of State deems your deportation to be conducive to the public good under section 3(5)(a) of the Immigration Act 1971 as set out in part 1 of this letter. In this part you will find details of various additional considerations that were taken into account as part of this decision."*

12. The additional factor then referred to is the Appellant's immigration history, that he arrived in the United Kingdom in 2014. A note then followed as to his liability to detention and next steps.

13. In response to this letter, the Appellant made representations against deportation based on family life and mental health issues on 13 May 2021.

14. The Appellant made a further application for status under the EUSS on 25 July 2021.

15. On 18 October 2021, the Respondent made the two decisions which are the subject of this appeal, the refusal of the Appellant's human rights claim in the context of deportation and the refusal of his EUSS application. We return below to the detailed reasons for each decision.

16. On 13 July 2022, the Appellant was convicted of one offence of failing to comply with notification requirements under the Sexual Offences Act 2003 and two offences of battery; for which he was sentenced in total to imprisonment for 24 weeks (the two sentences of 8 weeks each for battery to be served concurrently) and two orders for compensation of £250 each.

17. On 1 September 2022, the Appellant was convicted of assault (committed on 4 July 2022) for which he was sentenced to four weeks imprisonment and ordered to pay compensation of £100.

18. On 23 September 2022, the Appellant was convicted of criminal damage (offence committed on 28 May 2022), for which he was sentenced to six weeks imprisonment and ordered to pay compensation of £150.

19. The Appellant was deported to Portugal on 20 October 2022 following an unsuccessful attempt to challenge the certification of his claim under Regulation 16 of the Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020 and certification of his human rights claims as clearly unfounded pursuant to section 94(1) of the Nationality, Immigration and Asylum Act 2002. The certification elements do not raise any ongoing issues in the context of the present appeals and therefore the detail is not referred to in this decision.

Decision to refuse the Appellant's human rights claim

20. In the decision made on 18 October 2021, the Respondent set out the Appellant's history and circumstances in the United Kingdom, as well as his representations against deportation, which included family life with his mother and siblings in the United Kingdom, all of whom have settled status under the EUSS. It was not suggested that any of these relationships could meet the family life exception to deportation. Reference is made back to the decision to deport sent to the Appellant on 2 May 2021 (albeit the letter referred to is dated 27 April 2021) and the criminal offences listed therein, followed be a conclusion that the Respondent deems the Appellant's deportation to be conducive to the public good under section 3(5)(a) of the Immigration Act 1971.

21. The Respondent stated that: *"Your deportation is conducive to the public good and in the public interest because you are a persistent offender. This is because you have received 5 convictions for 16 offences between 17 May 2016 and 15 April 2021."* and went on to list the details of all of those offences.

22. In terms of private life, the Respondent did not accept that the Appellant met all of the requirements in paragraph 399A of the Immigration Rules for this exception to deportation to apply. The Appellant had not been lawfully resident in the United Kingdom for most of his life; the nature of his offending did not demonstrate social and cultural integration in the United Kingdom and there were no very significant obstacles to his reintegration in Portugal. In particular, it was noted that the Appellant spoke Portuguese, had his father there, could maintain contact with other family from there and would be able to engage with available mental health services there.

23. Overall, there were also no very compelling circumstances to outweigh the public interest in the Appellant's deportation and the human rights claim was therefore refused (and separately certified as clearly unfounded).

Decision to refuse the Appellant's EUSS application

24. The Respondent refused the Appellant's EUSS application on the basis that he did not meet the suitability grounds under rule EU15 as he was the subject of a deportation order (without specifying the specific provision applicable, whether paragraph (b)(i) or (ii) of the definition of deportation order). The decision states as follows:

> ***"Public policy, public security or public health consideration***
>
> *When a decision to make a deportation order has been made on non-conducive grounds in respect of conduct committed before 23:00 on 31 December 2020, your application for leave under the EU Settlement Scheme can only be refused on grounds of suitability under rule EU15 where the decision to make a deportation order is justified on the grounds of public policy, public security or public health in accordance with regulation 27 of the EEA Regulations 2016 (as saved), irrespective of whether the EEA Regulations apply to you."*

25. The decision continues with an assessment of threat pursuant to regulation 27(5) of the EEA Regulations; including a list of the Appellant's convictions from 2016 to 2021, the view that the Appellant posed a high risk of re-offending and a high risk of serious harm to the public, known adults, children and staff; with the Appellant being subject to the MAPPA level 1 and on the Sex Offenders Register for seven years. The Respondent concluded that the Appellant has a propensity to re-offend and that he presented a genuine, present and sufficiently serious threat to the public, with deportation justified on grounds of public policy.

26. The Appellant's deportation was considered to be proportionate having regard to the factors in regulation 27(5) of the EEA Regulations and that deportation would not prejudice the Appellant's prospects of rehabilitation. Overall, the Respondent considered that the Appellant's deportation was justified on grounds of public policy in accordance with regulation 23(6)(b), irrespective of whether the EEA Regulations (as saved) applied to him. There was no express consideration of the length of the Appellant's residence in the United Kingdom or whether there were serious grounds of public policy applicable.

First-tier Tribunal decision

27. Judges Loke and Rai allowed both appeals in a decision promulgated on 7 February 2024. In relation to the EUSS appeal, the following findings were made. First, it was found that the specific decision made by the Respondent in this case, which referred to conduct committed before 23:00 on 31 December 2020 (the "specified date") and that as such an application under the EUSS could only be refused on suitability grounds where the decision to make a deportation order is justified on grounds of public policy, public security or public health in accordance with regulation 27 of the Immigration (European Economic Area) Regulations 2016 (as saved, the "EEA Regulations") was one which fell within paragraph (b)(ii) of the definition of 'deportation order' in Annex 1 to Appendix EU.

28. Secondly, the Appellant was to be treated as a person with a right to permanent residence under regulation 15 of the EEA Regulations if he was able to show that he was a relevant EEA citizen with a continuous qualifying period of five years residence without a supervening event (with reference to the various definitions applicable in Annex 1 to Appendix EU).

29. Thirdly, on the facts, it was found that the Appellant was continuously resident in the United Kingdom between 2014 and 2019 on the basis of some evidence of work and mental health treatment (including periods as a hospital in-patient and being detained in hospital following criminal offences). As such, the Appellant benefitted from the enhanced protection against deportation and there needed to be serious grounds of public policy, public security or public health to justify his deportation.

30. Fourthly, further to undertaking the assessment under regulation 27 of the EEA Regulations, the First-tier Tribunal found that the Appellant continues to pose not only a genuine threat of reoffending, but a high risk of reoffending; that he was by the time of the hearing no longer a persistent offender (although he was between 2020 and 2022) and that the offences themselves were not at the higher end of the scale nor have they escalated in seriousness. Overall, the First-tier Tribunal concluded that having regard to the Appellant's offending and the nature and risk of future offending, that he did not pose a sufficiently serious risk such that there were not serious grounds to believe that he posed a threat to public policy or security.

31. The First-tier Tribunal therefore found that the Respondent's deportation order was not justified under regulation 27 of the EEA Regulations and as such, the definition of deportation

order in paragraph (b)(ii) of the Annex to Appendix EU was not met and the Appellant's application under the EUSS did not fail on suitability grounds.

32. In addition, the Appellant's human rights appeal was allowed on the basis that in light of the findings above, it could not be said that the Appellant's deportation was in accordance with the law as he met the requirements set out in Appendix EU. Therefore, the Appellant's removal would not be in accordance with the law, nor could it be said to be in the public interest and as such would breach Article 8 of the European Convention on Human Rights.

The appeal

33. The Respondent initially sought permission to appeal on the basis that the First-tier Tribunal erred in law on the following four grounds:

    (i) that the First-tier Tribunal adopted a legally flawed approach to the construction of the provisions in Appendix EU to the Immigration Rules; specifically (i) that the interpretation given had the effect that a person had enhanced protection as an EEA national offender after the United Kingdom's withdrawal from the European Union where he would not have had the same protection before, which can not have been intended by the Respondent nor required by the EU Withdrawal Agreement; and (ii) the phrase 'deportation order' was mis-read, as the conduct relied upon included offending after the specified date, that was sufficient to conclude that the deportation order satisfied the definition in paragraph (b)(i) for 'deportation order' in Annex 1 to Appendix EU. The provision in (b)(ii) being expressly in the alternative.

    (ii) that the First-tier Tribunal erred in finding that the Appellant had five years' continuous residence in the United Kingdom in circumstances where the Appellant himself did not positively assert his continuity of residence without absences during the relevant time.

    (iii) that the First-tier Tribunal erred in finding that the Appellant was no longer a persistent offender and/or the threat posed by him was not sufficiently serious in circumstances where (i) there was a factual error in the gap between the last offence in September 2022 and the date of hearing in January 2024 (which was sixteen months and not two years as relied upon by the First-tier Tribunal); (ii) where the approach taken was contrary to that in Chege ("is a persistent offender") [2016] UKUT 187 (IAC), which did not require a person to continue to offend up to the date of decision to be considered a persistent offender; and (iii) where the First-tier Tribunal failed to properly consider the seriousness of offending by limiting itself to considerations of individual offences and whether there was public revulsion, without considering the frequency of offending and propensity to reoffend. The ground also asserts the First-tier Tribunal erred in finding there was no escalation in seriousness of offending because committing a crime following an earlier conviction is itself an escalation and results in increased sentences following each conviction.

    (iv) that the First-tier Tribunal erred in allowing the appeal on human rights grounds as this aspect of the decision was entirely based upon the conclusions under Appendix EU and the EEA Regulations; which for the reasons in grounds one to three were wrong in law.

34. There was no dispute that permission was expressly granted by the First-tier Tribunal on grounds one, three and four; but disagreement between the parties as to whether permission had also been granted on ground two. Prior to the hearing, the Respondent asserted that permission had been granted on all grounds, and in the alternative, sought an extension of

time for a renewed application for permission to appeal on the second ground to the Upper Tribunal.

35. At the hearing we gave a preliminary indication that the First-tier Tribunal's grant of permission was clear, that permission had expressly been granted on limited grounds (one, three and four) and refused on the second ground on the basis that it did not identify any arguable error of law. We also indicated that we were not minded to grant an extension of time for what was now a very late application for permission to appeal without any good reason for the delay, particularly where the ground appeared to have little arguable merit. At the hearing, Mr Malik KC did not pursue the application for an extension of time or the application for permission to appeal and for the avoidance of doubt, we formally refuse both. It was open to the First-tier Tribunal to find that the Appellant had resided continuously in the United Kingdom between 2014 and 2019 in circumstances where the Appellant had not specifically declared that he had not had any relevant absences during that time. The First-tier Tribunal considered all of the evidence of residence in the round, including of employment, access to health services and detention and reached a conclusion which was unarguably lawfully and rationally open to it on that evidence. The appeal has therefore proceeded on the basis of grounds one, three and four only, which we address in turn below.

36. We are grateful to Counsel for their helpful skeleton arguments and oral submissions on the remaining grounds, which we refer to in summary below.

Findings and reasons

Ground one – interpretation and construction of Appendix EU

37. So far as relevant to this appeal, Appendix EU sets out the requirements for indefinite leave to remain in EU11 for a relevant EEA citizen, which in condition 3 are that the applicant has also completed a continuous qualifying period of five years without any supervening event occurring.

38. Paragraph EU15 sets out the suitability requirements, so far as relevant, as follows:

> *(1) An application made under this Appendix will be refused on grounds of suitability where any of the following apply at the date of decision:*
>
> *(a) The applicant is subject to a deportation order or to a decision to make a deportation order; or*
>
> *(b) …*
>
> *(2) An application made under this Appendix will be refused on grounds of suitability where the Secretary of State deems the applicant's presence in the UK is not conducive to the public good because of conduct committed after the specified date.*
>
> *(3) …*

39. Whilst Mr Malik KC suggested that it would have been open to the Respondent to refuse the Appellant's application under paragraph EU15(2) on the basis that she deemed his presence not to be conducive to the public good because of conduct after the specified date; it was accepted that this was not the basis relied upon in the decision letter.

40. Annex 1 to Appendix EU contains definitions of terms set out in the main rules, which so far as relevant include:

deportation order

as the case may be:

(a) an order made under section 5(1) of the Immigration Act 1971 by virtue of regulation 32(3) of the EEA Regulations; or

(b) an order made under section 5(1) of the Immigration Act 1971 by virtue of section 3(5) or section 3(6) of that Act in respect of:

(i) conduct committed after the specified date; or

(ii) conduct committed by the person before the specified date, where the Secretary of State has decided that the deportation order is justified on the grounds of public policy, public security or public health in accordance with regulation 27 of the EEA Regulations, irrespective of whether the EEA Regulations apply to the person (except that in regulation 27 for "with a right of permanent residence under regulation 15" and "has a right of permanent residence under regulation 15" read "who, but for the making of the deportation order, meets the requirements of paragraph EU11, EU11A or EU 12 of Appendix EU to the Immigration Rules"; and for "an EEA decision" read "a deportation decision"); or

(c) …

in addition, for the avoidance of doubt, (b) includes a deportation order made under the Immigration Act 1971 in accordance with section 32 of the UK Borders Act 2007;

...

41. There was no dispute between the parties as to the correct approach to the issue of interpretation of the Immigration Rules, in accordance with the principles in Mahad v Entry Clearance Officer [2009] UKSC 16, [2010] 2 All ER 535 and Wang v Secretary of State for the Home Department [2023] UKSC 21, [2023] 1 WLR 2125. We follow this well-established approach to interpretation, the dispute in this case being the application of those principles on the facts of this case.

42. In summary, the Respondent's position is that the definition of deportation order is expressly clear that there are two options, in the alternative, relating to conduct before and after the specified date and that where a deportation order refers to conduct in both time periods, it is sufficient that either (i) or (ii) is satisfied for a refusal under paragraph EU15(1)(a) of Appendix EU. Whilst it was accepted that both paragraph (b)(i) and (ii) would be engaged in principle in a deportation decision that relied on conduct before and after the specified date, it was sufficient for one or the other to be met for the purposes of finding a deportation order is in place for a refusal on suitability grounds under paragraph EU15(1) in Appendix EU.

43. On the facts of this appeal, it was therefore sufficient that the deportation decision relied on conduct after the specified date to meet the definition of deportation order in paragraph (b)(i), irrespective of the reliance on conduct prior to the specified date or whether the decision in relation to that was in accordance with regulation 27 of the EEA Regulations (which in any event the Respondent submits was satisfied for the reasons set out below in relation to the third ground of challenge). Mr Malik KC referred to the Respondent's decisions letters which he submitted left no doubt that the conduct after the specified date was relied upon. In particular, one letter begins with reference to the Appellant's convictions in 2021 and all letters refer to the history of offending between 2016 and 2021.

44. In addition, on the matter of construction, Mr Malik KC submitted that the Respondent's approach was entirely consistent with the obvious purpose of the Immigration Rules and the enabling primary legislation behind it. The intention was to abolish rights of free movement to EEA citizens, with power to restrict those rights on the basis of conduct after the specified date which made their presence in the United Kingdom not conducive to the public good.

45. In summary, the Appellant's position is that there was no error of law in the First-tier Tribunal's decision on the interpretation or application of the definition of deportation order or paragraph EU15(1) of Appendix EU. That is because, on the facts of this case, the Respondent has expressly relied on conduct both before and after the specified date to show that the Appellant was a persistent offender. If the Respondent considered that post specified date conduct was alone sufficient, then the decision(s) themselves would not have needed to refer at all to previous conduct, nor undertake the detailed assessment under regulation 27 of the EEA Regulations that she did. The focus of the actual decisions made all point to a deportation order focused on paragraph b(ii) of the definition in Appendix EU.

46. Mr Khubber further relied on the Respondent's actual approach in the decisions under appeal here as being entirely consistent with her own policy as to the correct approach where conduct both before and after the specified date is relied upon. It was however accepted that the policy relied upon before the First-tier Tribunal (which has since been updated further), dated from June 2023 and was therefore not in force at the time of the decisions under appeal in this case. As such, we do not find it of assistance to the issues raised in this appeal to refer to the policy further, beyond noting that the current policy appears to be at odds with the Respondent's general position as to the approach to be taken in circumstances such as of this appeal where there is conduct which falls both before and after the specified date.

47. As a matter of construction, we accept that on its face, the ordinary and natural meaning of a provision which contains two different options, separated by an 'or' is such that satisfaction of one or the other would be sufficient for the definition to be met. However, when considering the specific provision in this appeal, the nature of the definition itself directs to two different factual scenarios which are not themselves mutually exclusive, and as accepted by Mr Malik KC could both be engaged in cases such as the present where there is pre and post specified date conduct committed. Paragraph (b)(i) in the definition of deportation order is directed solely at conduct committed after the specified date, whereas paragraph (b)(ii) is directed solely at conduct committed before the specified date. In a straightforward case where the conduct is solely before, or solely after the specified date, it is clear which of the two options would be applicable and need to be met for a relevant deportation order to be in place and therefore a refusal under paragraph EU15 of Appendix EU.

48. In circumstances such as in the present case, where both definitions are potentially engaged, we do not find that it is sufficient, in particular considering the wider context of the EUSS, for only one to be met and therefore the definition must be interpreted to read 'and/or' between paragraphs (b)(i) and (ii). Contrary to Mr Malik KC's submissions that such a reading would lead to absurd results which can not have been intended, we find that anything other than such a reading would do so. Whilst one of the clear intentions of Brexit was to abolish free movement rights and to allow purely domestic regulation of migration after the specified date; that was subject to certain agreed ongoing protections and safeguards in relation to conduct of EEA nationals prior to the specified date, in particular, including those covered by the Withdrawal Agreement.

49. We did not hear submissions on the Withdrawal Agreement (and have not considered it necessary to invite written submissions on this point), however, its impact on deportations of EEA nationals relating to conduct before the specified date has recently been set out in Abdullah & Ors (EEA, deportation appeals, procedure) [2024] UKUT 00066 (IAC) and in the case of Vargova (EU national: post 31 December 2020 offending: deportation), [2024] UKUT 00336 (IAC) (handed down on 26 September 2024). In the latter, the importance of distinguishing between conduct before and conduct after the specified date, with additional safeguards and requirements for cases including (but not limited to) conduct before the specified date, was highlighted.

50. In the present appeals, if it was sufficient for a deportation order, which on the facts relies on both pre and post specified date conduct, to meet the definition in paragraph (b)(i) only in relation to post specified conduct; that would effectively remove all of the wider protections available to EEA nationals in relation to conduct before the specified date and undermine those safeguards set out in the Withdrawal Agreement and elsewhere as part of the EUSS. We do not consider that to have been the likely intention of the Respondent in drafting the definition of deportation order in the Annex to Appendix EU and if there were to be a deliberate departure from the applicable safeguards for EEA nationals in relation to conduct before the specified date simply because there was also conduct after the specified date, we would have expected express provision to be made for such an outcome. For example, for there to have been included an additional sub-paragraph (iii) setting out the requirements where conduct covers both time periods.

51. In addition, we do not consider the interpretation above in any way prejudices the Respondent's ability to refuse EUSS applications on suitability grounds where reliance is placed on conduct committed after the specified date given that in addition to the refusal on the basis of a deportation order in paragraph EU15(1) there is what appears to be an alternative wide ranging provision for refusal in paragraph EU15(2) on the basis that the Respondent deems an applicant's presence in the United Kingdom as not conducive to the public good (again on the basis of conduct committed after the specified date). Mr Malik KC submitted that this was an option open to the Respondent on the facts of this particular appeal and would similarly fulfil what he described as the policy objectives of ending free movement for matters occurring after the specified date.

52. Further, on the facts in this case, we have real difficulty reconciling the Respondent's submitted position as a matter of interpretation of the meaning of deportation order with the approach actually taken in the decisions under appeal. If it really was the case that a deportation order only needed to satisfy paragraph (b)(i) or (ii) even if conduct both before and after the specified date were relied upon, then the almost exclusive focus on the requirements which are set out in paragraph (b)(ii) as to the decision being in accordance with regulation 27 of the EEA Regulations in both the deportation decision and the EUSS decision, but particularly in the latter, would be entirely unnecessary.

53. Specifically, the EUSS decision makes no express reference to which part of the definition is relied upon and could, on the Respondent's case as now presented, need not have gone beyond the first few paragraphs of the decision and simply said that there was a deportation order as defined in paragraph (b)(i) of the Annex to Appendix EU in force and therefore the application is refused under paragraph EU15(1). The focus in the decision letter instead on matters relevant only to conduct prior to the specified date was not set out in the alternative to this. Instead, the Respondent's approach in both decision letters indicates her view, at least at that time, that it was necessary for the definition in paragraph (b)(i) and (ii) to be met where

conduct fell within both sections. That is entirely consistent with the correct approach we have found above within the context of the wider EUSS scheme and EU Withdrawal Agreement.

54. In conclusion therefore, the definition of "deportation order" in paragraph (b) of Annex 1 to Appendix EU of the Immigration Rules must be read as follows (emphasis added):

> *(b) an order made under section 5(1) of the Immigration Act 1971 by virtue of section 3(5) or section 3(6) of that Act in respect of:*
>
> > *(i) conduct committed after the specified date;* ***and/or***
> >
> > *(ii) conduct committed by the person before the specified date, where the Secretary of State has decided that the deportation order is justified on the grounds of public policy, public security or public health in accordance with regulation 27 of the EEA Regulations, irrespective of whether the EEA Regulations apply to the person (except that in regulation 27 for "with a right of permanent residence under regulation 15" and "has a right of permanent residence under regulation 15" read "who, but for the making of the deportation order, meets the requirements of paragraph EU11, EU11A or EU 12 of Appendix EU to the Immigration Rules"; and for "an EEA decision" read "a deportation decision"); or*

55. The time period of the conduct relied upon by the Respondent will dictate whether sub-paragraph (i) and (ii) will apply (if conduct committed both before and after the specified date is relied upon) or whether paragraph (i) or (ii) will apply (if only conduct committed before or after the specified date is relied upon).

56. As a final point in relation to the first ground of appeal, the initial written grounds of appeal also raised a distinct point as to what was said to be the absurd consequence of the Appellant being given the enhanced protection of serious grounds of public policy and public security in circumstances where he had not in fact established permanent residence under the EEA Regulations. This was not however pursued in the Respondent's skeleton argument or orally. For completeness, as the point was not formally withdrawn, we find no error of law in the First-tier Tribunal's decision on this point as set out in paragraphs 17 to 24. We consider that the absurdity referred to is not the result of any issue of ambiguity or construction of Appendix EU to the Immigration Rules but an obvious and natural consequence of the policy and drafting chosen by the Respondent; which is entirely in line with a consistent policy choice within the EUSS to focus only on residence in the United Kingdom and not the fulfilment of conditions for such in accordance with the EEA Regulations. The result is particularly obvious in the definition of deportation order in Annex 1 to Appendix EU, paragraph (b)(ii) which refers to the application of regulation 27 of the EEA Regulations "*irrespective of whether the EEA Regulations apply to the person*". Whilst the result is more generous than would seem to have been required under the EEA Regulations if still in force, or required by the EU Withdrawal Agreement, that is expressly what the provision provides for. This conclusion is also consistent with the decision in Abdullah.

57. For these reasons we find no error of law in the First-tier Tribunal's decision on the first ground of appeal.

Ground three – findings as to 'persistent offender' and as to the seriousness of offences

58. The Respondent's primary position in relation to the third ground of appeal is that the First-tier Tribunal erred in fact as to the period over which the Appellant had not reoffended, referring in more than one place in the decision to this being a period of two years when in fact it was only one year and four months since the last conviction (slightly more since the commission of the latest offence). This factual error infected its assessment of whether the

Appellant was a persistent offender at the date of hearing and consequently, the overall assessment of whether the Appellant presented a genuine, present and sufficiently serious threat to the public and ultimately, if so, whether the decision was proportionate.

59. There were a number of further points relied upon by the Respondent as follows. First, it was submitted that the First-tier Tribunal erred in its application of the principles in Chege ("is a persistent offender") [2016] UKUT 187 (IAC) by proceeding on the basis that the Appellant could only be regarded as a persistent offender if he continued to offend up to the date of hearing and properly applied, it was not open to the First-tier Tribunal to conclude that by the date of hearing the Appellant was no longer a persistent offender.

60. Secondly, that the First-tier Tribunal erred in its assessment of the seriousness of the Appellant's offences by failing to consider the frequency of offending and propensity to commit further crimes, as well as confining the idea of public revulsion to the kind of offending and not its frequency. In any event, public exposure is an offence which would attract public revulsion. Further, Mr Malik KC submitted that the First-tier Tribunal failed to take into account that committing a crime following an earlier conviction is itself an escalation of offending, such that it was not open to the First-tier Tribunal to conclude that there had been no escalation in the seriousness of offending. In particular, Mr Malik KC relied both on logic and common sense as to further offending being an escalation in seriousness, but also on the Sentencing Council Guidelines to show that further offending is a factor which increases the length of sentence for a later sentence. An example is that for assault of an emergency worker, which in the crown court sentencing guidelines, previous convictions are listed as an aggravating factor. However, Mr Malik KC could not demonstrate on this particular Appellant's criminal history that there was a resulting increase in length of sentence given for the subsequent offences pursuant to such guidelines which would in itself be an indicator of escalating seriousness.

61. In summary, the Appellant's position is that although there was a factual error in the length of time relied upon by the First-tier Tribunal without further offending, it was not material to the question of whether the Appellant was a persistent offender at the date of hearing. First, because the actual period was eighteen months from the last offence (rather than last conviction) which was not significantly different to two years; and secondly, because the assessment was more nuanced than just the period of time, also taking into account factors such as the Appellant's deportation and more stable mental health.

62. On the First-tier Tribunal's assessment of whether the Appellant posed a threat at the date of hearing, the Appellant's position is that the findings made were rationally open to the First-tier Tribunal to make on the evidence. In particular, the Appellant's criminal history does not show that there was any escalation in the seriousness of offending given that the length of sentences given fluctuated over time, with the longest of 26 weeks' imprisonment in April 2021, which was followed by sentences of 24 weeks, 4 weeks and 6 weeks. Overall, the First-tier Tribunal made a quantitative and qualitative assessment of offending, which specifically did not include any emerging pattern or escalation of sexual offences. The mere fact that further offences were committed did not, per se, increase the seriousness of offending. In considering the evidence as a whole, the First-tier Tribunal were entitled to find that the Respondent had not established that there were serious grounds of public policy or public security to justify the Appellant's deportation.

63. We deal first with the First-tier Tribunal's reliance on there having been no offences committed by the Appellant for a period of two years up to the date of hearing on 10 January 2024. As

accepted by the parties, this was a factual error given that the Appellant's most recent conviction prior to the hearing was on 23 September 2022, a period of some one year and four months and the latest offence being committed on 4 July 2022 (for which he was sentenced in early September 2022), a period of some eighteen months prior to the hearing. Whilst we accept that the period without further offending would not as a matter of principle be determinative of whether the Appellant was a persistent offender, nor would that conclusion necessarily be determinative of whether the Appellant posed a genuine, present and sufficiently serious threat to the public; we find that in this case, it can not be found that the factual error was not material to these further findings given the repeated reliance placed on it in the First-tier Tribunal's decision, particularly given the other indicators that the Appellant continued to pose a risk. That factual error alone is in our view sufficient to undermine the safety of the remaining findings and the decision must be set aside in relation to the assessment of risk and therefore also as to proportionality which follows on from it.

64. We find less merit in the remaining points raised by the Respondent within this ground of appeal which were more akin to disagreement with the consideration of and weight to be attached to various factors considered in the round, particularly as to the seriousness of offending. On the facts, we are not persuaded that the First-tier Tribunal erred in law in finding that there had not been an escalation in the seriousness of offending, albeit the position was a little more nuanced than that presented on behalf of the Appellant when looking at individual sentences for specific offences rather than overall period of sentencing which involved some concurrent and some consecutive sentences, there was a small increase in length of sentence between those given in April 2021 and July 2022, albeit much shorter sentences were given for the final two convictions.

65. We further consider that the submissions made in relation to public revulsion were somewhat of a red herring which were unlikely to be material either way. Whilst this is a factor that could potentially be relevant to the assessment, this is not really one of those cases where it would carry great weight if relevant at all given that the Appellant's offending is not of the type or frequency that would likely engage this concept as against other examples of where it would clearly apply (*SSHD v Robinson* [2018] EWCA Civ 85, [2018] 4 WLR 81 refers, at [71]). That is not to reduce the possible public revulsion against the exposure offence, but to recognise that it remains at the lower end of the scale for this.

66. Theses are in any event matters which will need to be considered in the round when the appeal is remade on this issue and do not detract from the primary finding that the decision on assessment of threat must be set aside due to the factual error which infects the remaining findings and assessment.

Ground four – Article 8

67. There was no dispute between the parties that this final ground of appeal stood or fell with the two grounds already considered above and that if there was an error of law in one or other of them, this ground would also succeed as the reasoning for allowing the appeal on human rights grounds was entirely dependent on the EUSS findings. For these reasons, we find an error of law on this final ground and the decision must be set aside on this ground as well.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

We set aside the decision of the First-tier Tribunal.

Directions

1. The appeal to be listed for a face to face hearing before Judges Jackson and Blundell on the first available date six weeks after this decision has been sent, with a time estimate of 3 hours.

2. Any application to the Respondent for the Appellant to return to the United Kingdom to give evidence in his appeal and/or any application to the Upper Tribunal for the Appellant to give evidence from Portugal to be made within 21 days of the date on which this decision is sent. Any such application should include any request for an interpreter if required.

3. Any further evidence upon which the Appellant wishes to rely to be filed and served no later than 4pm, 14 days before the relisted hearing. If any person intends to give oral evidence, a written statement (or updated written statement) is required to stand as evidence in chief.

4. Any further evidence upon which the Respondent wishes to rely to be filed and served no later than 4pm, 7 days before the relisted hearing.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22nd October 2024