Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00063/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 April 2017	**On 12 May 2017**

Before
UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NEVILLE FRANZ DELCARDO WHYTE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S. Whitwell, Home Office Presenting Officer
For the Respondent: Ms C. M. Fielden, Counsel instructed by Greenland Lawyers LLP

DECISION AND REASONS

1. I annex to this determination the reasons why I considered the First-tier Tribunal had made an error of law in its decision and why the decision had to be re-made. I shall refer to Mr Whyte as 'the appellant', as he was before the First-tier Tribunal.

2. The appellant is a citizen of Jamaica who was born on 11 May 1984. He entered the United Kingdom as a visitor on 30 July 2001 when he was just 17 years old. He was granted one month's leave to enter. On 13 August 2001 he submitted an application to leave to remain as a student. It was refused on 19 October 2001 and his unsuccessful appeal was dismissed on 2 January 2003. This had, of course permitted the appellant to remain in the United Kingdom while the appeal process continued but he did so with no underlying right to remain. The fact that he applied for student

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leave so soon after his arrival (some 14 days later) strongly suggests that he was never a genuine visitor. Nevertheless, the conclusion of his appeal in January 2003 ended any period of lawful presence and thereafter he has remained without leave. As we shall later see, he remained in the United Kingdom and worked unlawfully.

3. Ms Kowacka is a Polish citizen who was born on 25 February 1987. She is 30 years old. She entered the United Kingdom, she told me, on 9 June 2006, aged 19. She met the appellant, then aged 23, in July 2006 and they entered into a relationship which resulted in the birth of [N] on [ ] 2007. [N] is now aged 9.

4. It may appear that the determination loses sight of [N] but that is only because the evidential and legal implications of her presence have proved complex. She remains the primary consideration of this determination. This is not a mechanistic invocation of s. 55 of the Borders, Citizenship and Immigration Act 2009 under which both the Secretary of State and the Tribunal are placed under a duty to make arrangements for ensuring that immigration, asylum, and nationality functions are discharged having regard to the need to safeguard and promote the welfare of children in the United Kingdom. Rather, [N] becomes the driving force behind the appellant's arguments on proportionality. For the reasons that follow, neither the appellant nor Ms Kowacka can lay claim to a compelling case that the appellant's removal is disproportionate. Instead, it is [N] who becomes the focus of the proportionality exercise; after all, she is the innocent victim of these events and whilst her best interests are not the only or, indeed, the paramount consideration, they remain in the forefront of my mind.

5. According to paragraph 5 of the determination of the First-tier Tribunal Judge ('the determination'), Ms Kowacka had told the authorities in the course of the appellant's earlier application for a residence card that the relationship had not subsisted since [N] was born in 2007. The same is recorded in the decision letters. Ms Kowacka made no express denial of what she is alleged to have told the authorities either in her statement or in her evidence. The couple may well have kept in touch. I am not satisfied they were living together. There was apparently no satisfactory evidence of cohabitation. However, it seems probable that the appellant was visited by Ms Kowacka and [N] while he was in prison. It appears he joined her after his release from prison on 18 December 2013. I am, however satisfied that the couple married on 30 May 2014 and, since that time, have enjoyed a genuine and durable relationship with each other. [N] has, of course, been part of the household.

6. On 3 July 2012 the appellant was convicted of an offence of wounding with intent to do grievous bodily harm, the event having taken place on 22 February 2012. He was sentenced to 3 years' imprisonment and an additional four months' imprisonment for an associated offence of an assault occasioning actual bodily harm. Pursuant to s. 32(5) of the UK Borders Act 2007 the appellant was subject to automatic deportation subject to the exceptions contained within s. 33 of the 2007 Act and, in particular, that his removal would violate his human rights.

7. A deportation order was signed against the appellant on 14 June 2013 on which reliance was placed by the Secretary of State on paragraphs 398, 399 and 399A of the Immigration Rules to the effect that deportation was lawful. The appellant lodged an appeal against that decision on 10 July 2013 which was scheduled to be heard on 30 September 2013 but adjourned in order to permit the appellant to make an application based upon what he claimed was his durable relationship with Ms Kowacka. In due course, on 22 October 2013 such an application was indeed made based upon his being an unmarried partner of a Union citizen exercising Treaty rights. That application was refused on 29 November 2013. It was presumably at this stage that Ms Kowacka told the authorities that the relationship had not subsisted since [N] was born in 2007. The refusal was not challenged by the appellant by way of an onward appeal or in judicial review proceedings.

8. The substantive hearing against the appellant's deportation decision was still outstanding. That decision was adjourned until 24 June 2014. At the hearing the appellant presented a marriage certificate showing that on 13 May 2014, a month before, the appellant had married Ms Kowacka. The appeal was, accordingly, adjourned to permit the Secretary of State to reconsider the case in light of his marriage. Thereafter, the appeal moved away from a deportation appeal to which the appellant had responded by raising its human rights claim and had moved into the territory of the Immigration (European Economic Area) Regulations 2006 (2006 No 1003). From then on, the appeal had these two separate strands within it; the EEA appeal and the deportation appeal.

9. The decision made by the Secretary of State on 18 June 2013 was limited to a consideration of the appellant's human rights claim following the application of the automatic deportation provisions in the 2007 Act. The decision recorded that [N] was born in the United Kingdom and consideration was given to the deportation of a parent of a *British* child, see page 5 of 14 of the 18 June 2013 decision letter.

10. Later, a further decision was made on 26 January 2016. This is the formal decision by the respondent under the 2006 Regulations, the EEA decision. A subsequent decision was made on 4 March 2016 apparently resolving the same issue. Nothing turns on how these two decisions came to be made. In paragraph 13 of the 26 January 2016 decision, [N] is recorded as being of British Polish and Jamaican citizenship. The same is recorded in paragraph 13 of the March 2016 decision. Accordingly, the consideration of the appellant's human rights and his EEA rights were viewed through the prism of [N] as a British child.

11. I raised my concerns with the parties at the error of law hearing. The appellant's case was being advanced on the basis that he had a permanent right of residence based upon his relationship with a Union citizen who also enjoyed such a right. If Ms Kowacka had settled status, [N] born in the United Kingdom would have derived her British nationality through her mother's status. This would suggest that Ms Kowacka did, indeed, enjoy a right to permanent residence. However, I was not content to find Ms Kowacka's status established by a bare inference. In particular, I

could not fathom how [N], born in June 2007, could derive her British citizenship from the settled status of her mother's permanent right of residence when Ms Kowacka had only arrived in the United Kingdom in the course of the previous June. I, therefore, made a direction following the hearing on 21 December 2016 in the following terms:

> "Mr Whyte ('the appellant') is to file and serve a skeleton argument setting out the circumstances that give rise to his wife's right to remain in the United Kingdom. Insofar as those rights are derived from her status as an EEA national, those rights are to be explained. The skeleton argument is to set out the basis of the appellant's rights under EU law, if any, derived from (i) those of his wife and (ii) those of his daughter. Finally, the skeleton argument is to set out all relevant statutory provisions relied upon, or relevant, directly or indirectly, including those contained within the Immigration Rules. The skeleton argument is to be served and filed within 21 days from receipt of these directions."

I also directed that the Secretary of State was to file and serve a response, if so advised, 21 days thereafter. The appeal was to be set down for a resumed hearing on the First Available Date after 24 March 2017.

12. It was in these circumstances that the appeal came before me on 27 April 2017.

13. There had been no compliance with my directions by the appellant. The case was opened by Ms Fielden on the basis that she had *not* been instructed to draft the skeleton argument that was to be produced in January 2017. I was served with a skeleton on the morning of the hearing but it did not address my directions. In particular, my concerns over the status of Ms Kowacka and [N] were not addressed. Ms Fielden raised the prospect of seeking an adjournment. I permitted her between 11.00 and 11.30 to take further instructions. In order to attempt to retrieve the situation, Mr Whitwell very reluctantly agreed to make the concession that Ms Kowacka had a permanent right of residence, inferred from [N]'s status as a United Kingdom citizen.

14. The appellant gave evidence followed by Ms Kowacka. Her evidence-in-chief and in cross-examination did not touch on the subject or her, or her daughter's, immigration status. In the course of my questions I asked the question which had been hanging in the air since December, namely, how did [N] acquire British nationality? Ms Kowacka responded that [N] was *not* a British citizen. Nor did she enjoy Jamaican nationality. She was Polish.

15. The three witness statements from the appellant, Ms Kowacka and the appellant's maternal aunt make no direct reference to [N] being a Polish citizen, although identifying the nationality, in each case, of the deponent. I have considered whether this was a mere oversight.

16. I am satisfied that, had my directions been complied with, this would have forced the draftsman of the skeleton argument to make enquiries about the nationality of [N]. The purpose of the answers I required had been explained in detail in my reasons for

finding the error on a point of law, annexed to this determination. This is no room for any misunderstanding.

17. The respondent's error (whether derived from inadvertence, misinformation or negligence) must have been well-known to the appellant. Its significance as a factor in favour of the appellant's case cannot have been overlooked. It is central to the First-tier Tribunal Judge's thinking; see, for example, the opening words of paragraph 14 of the determination:

    "It is accepted that his daughter is a British citizen because she was born in the United Kingdom to a person who had legal residence here."

    (As a matter of law, the latter does not flow from the former.)

18. It may well be that the appellant felt that he had no obligation to disabuse the respondent of her mistake but he must have known it *was* a mistake, a mistake repeated in the three decision letters and repeated again in the determination. In the field of litigation, perhaps, he felt that the respondent's mistake was fair game as long as he avoided the *lie direct*. I make no finding whether the draftsman of the witness statements avoided telling a truth that may have seemed adverse to his client's interests but a professional's duty of candour goes beyond the lie direct. I absolve Ms Fielden from all blame. It was apparent that she was as surprised as me with the development.

19. This was a regrettable event. It required all of the previous decisions to be re-cast. In the event, however, it is not determinative because, as I shall demonstrate, the appeal was bound to fail for quite different reasons.

20. First, it is plain to me that the appellant never acquired a permanent right of residence, nor could he as a matter of law.

21. Even assuming that the appellant and Ms Kowacka were able to establish a relationship from the birth of [N] in June 2007, the appellant was arrested on 22 February 2012 and was, apparently detained. He was described as having spent 130 days in custody by 3 July 2012 when he was convicted and sentenced. He could not, therefore, establish an appropriate five-year period of residence between June 2007 and February 2012.

22. However, we know that his application for a residence card failed. One of the reasons attributed for its failure was the appellant's inability to produce persuasive evidence that the relationship existed. The second was Ms Kowacka's telling the authorities that the relationship had not subsisted since her child was born in 2007.

23. Furthermore, she told me in evidence;

    "It was hard to prove we were living together. We were unable to find accommodation for the three of us to live together."

24. The appellant was in prison from 22 February 2012 to 18 December 2013 (determination, paragraph 18). As O*nuekwere v UK* [2014] EUECJ C-378/12 (16 January 2014) makes clear, the period spent in prison prevents the acquisition of rights derived from residence in the United Kingdom.

25. Even if the appellant has been cohabiting with Ms Kowacka since 18 December 2013 and even if Ms Kowacka has been exercising Treaty rights during this period, the time is insufficient for him to acquire a permanent right of residence. The couple were only married on 13 May 2014 at which time he fell within the definition of a family member pursuant to reg. 7 (1) (a) of the 2006 Regulations. It does not assist the appellant to establish that he was an extended family member in accordance with reg. 8 (5) that he was in a durable relationship with Ms Kowacka.

26. Furthermore, Ms Kowacka has not herself established she was exercising Treaty rights during the relevant period. She gave evidence that she was working part-time and not necessarily continuously. She described herself as a student but has failed to produce the evidence of insurance required in order to be a qualified person as a student pursuant to the requirements of reg. 4(1)(d)(ii) of the 2006 Regulations. No written material was adduced sufficient to establish she was exercising Treaty rights. She produced a photocopy of a document which, if valid, establishes her registration but this does not amount to an acknowledgment of a permanent right of residence.

27. A permanent right of residence arises in accordance with reg. 15(1)(b) in the following circumstances,

> "A family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these regulations for a continuous period of five years."

28. The appellant has only been a 'family member' of Ms Kowacka (as defined) since their marriage on 30 May 2014. Even if he has resided in the United Kingdom pursuant to a durable relationship with her, (and therefore in accordance with the Regulations) the relationship can only have commenced upon his release from prison on 18 December 2013. Accordingly he does not qualify as a person entitled to a permanent right of residence.

29. The immediate impact of this finding is in relation to the limitations imposed upon the removal of those individuals entitled to benefit from their status as EEA nationals or a family member of one. Removal of an EEA national or a family member of one is permitted under reg. 19(3) in accordance with regulation 21.

30. Regulation 21 provides:

> '(1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> ...

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.'

The appellant does not benefit from this second level of protection. Instead, he benefits only to the extent that removal must be justified in his case on public policy grounds. This also required it to be established:

'(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and

sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of

general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.'

31. Much time had been spent in the First-tier Tribunal analysing the appellant's account of the events of 22 February 2012. It is enough to consider (i) the offence; (ii) the sentence and (iii) the sentencing judge's remarks. The principal offence was wounding with intent to cause grievous bodily harm. Nothing more. Nothing less. The sentence for this offence was three years imprisonment. Neither more, nor less. The sentencing remarks went as follows:

"You are a young man, a young father, who has never been in trouble before, has never been arrested before and it is a tragedy that you are in this court to be sentenced for a very serious offence … So far as categorisation of this offence under the sentencing Guidelines, I take into account what has been said by the Crown as to the level of injury for this category, and unpleasant though it was, happily there was no damage to [the victim's] tendons. It was a single blow. It was delivered in a situation which has been rumbling for months between neighbours and it is a great shame that the residents of each flat could not have behaved in a different way. What has not been advanced in mitigation, which I consider a very important part of the mitigation, this incident started when [your neighbour] banged on the door and engaged your partner in what was undoubtedly some form of violence. I do not consider that there is a significant degree of premeditation, though obviously there is a degree of weapon being used. Against that, looking at the guidelines, the factors reducing the seriousness, there is an impeccable character, the fact that it was a single blow, exemplary conduct life [sic], as witnessed by Mr Hepburn who gave evidence on your

> behalf, and the fact that this was an isolated incident … I will keep the sentence as low as I can."

32. In an immigration appeal, a judge should be wary of going behind the offence, the sentence and the judge's remarks. The First-tier Tribunal Judge recorded the incident in paragraph 21 in these terms,

> "… The appellant said he ran to help his wife and picked up a knife in the kitchen. The man was trying to get into the house and the neighbour's mother was trying to stop the man coming in. The appellant came out with the knife and pushed the man and the neighbour's mother out of the house. He said he made no contact with the man but the neighbour's mother had been standing in front of him and he pushed her and the man to the wall. He said it all happened in seconds and his partner pulled him back inside the house. He had not struck a blow but the man had a cut on his hand and the mother had two cuts in her back."

33. It is apparent from the judge's sentencing remarks (and I do not intend to diminish the effect of the mitigating circumstances) that the victim of wounding with intent to cause grievous bodily harm was 'the man'. On the account given by the appellant to the judge, the appellant was entirely guiltless of any offence, were the account given to the judge to have been true. His account was tested by a jury. His account was rejected.

34. Although in paragraph 33 of the determination, the First-tier Tribunal Judge quoted the passages to which I have referred above, she comments that the appellant did not seek to play down the gravity of the offence. I emphatically disagree with that characterisation of his approach to the offending. He did indeed seek to play down the offence. On his account, no offence took place and the jury got it wrong. In my judgment she was over persuaded by the appellant's account saying in paragraph 33

> "His reaction was more than the law allows ..."

35. On any view, that is not a proper classification of wounding with intent to cause grievous bodily harm.

36. A proper assessment of the offence (albeit a single offence) skews both the seriousness of the offending but, more important still, skews the judicial assessment of the appellant's attitude towards the offending. In the NOMS1 report, following an interview with the appellant on 15 May 2013 (a full 15 months after the offence), its compiler expressed the risk of serious harm as medium. The following comments were made:

> "Index Offence appears to have been uncharacteristic. No previous convictions. Insists offence committed in self-defence although this is not accepted by Court."

37. Hence, a few months before his release, the appellant was still maintaining that he was innocent.

38. Ms Fielden commenced her submissions by stating that she was hampered by the respondent's refusal to provide the OASys report, the report was produced to her by her own solicitors. The OASys report is not the property of the Secretary of State. A considerable amount of time was spent studying the report. It is noted that Ms Kowacka was also involved in the February 2012 incident but only received a community sentence thereby marking a distinct gulf between the appellant's actions and those of his wife.

39. On page 11 of 52 of the OASys report, the appellant's employment history is described. He told his interviewer that he went to work in a school kitchen as a chef for approximately 12 months before moving on to TNT Mail Company as a mail sorter. He was employed there for four years before working in the construction business as a labourer for a further six years. It was during this employment that he was arrested. He later described his work at 5.2 to 5.6 as earning around £300 a week as a labourer in the construction business, adding that he and his partner managed well financially prior to his arrest. He confirmed that he had no debts and had some savings.

40. This description of his working life is at odds with The First-tier Tribunal Judge's understanding of the position recorded in paragraph 31

> "He has not worked as he has not been allowed to …"

41. I do not think that we should be surprised that a person who has been in the United Kingdom illegally since 2002 or thereabouts has found work for himself in order to make ends meet, even if such work was illegal. Nevertheless, it is another instance of the appellant's selectivity about events and his careful manipulation of history in order to place him in as good a light as possible. It is also an example of how the First-tier Tribunal Judge was influenced by this process. The appellant told one account of his past when it suited him to do so (that is, saying he did not work in the context of an immigration appeal when he knew that working was not allowed under the Immigration Rules); yet telling another account in the context of the OASys report when a history of a hard-working individual without financial worries better suited the image he wished to create.

42. In the report, the appellant stated that he had been with his partner for approximately 7 years (which I do not accept) and that she visits him every week and that they maintain contact by telephone (which I accept). In the section entitled 'Thinking and Behaviour', the appellant provided a much more thoughtful and responsible account of his actions. The passage reads:

> "[The appellant] acknowledges that his actions specifically on getting the meat cleaver from the kitchen was an impulsive move. He describes being scared, angry and confused when he saw the male victim with a knife and did not think twice about getting the cleaver in order to defend himself and use it to make threats. [The appellant] stated that in general he was quite a passive person who does not have a

problem with anger or temper as a whole. However he accepted that his behaviour was different on the day in question.
… [The appellant] added that he did think of the consequences of his behaviour to an extent as he stated that it was his intention to use the meat cleaver as a threat but not to use it to harm anyone. To his credit, [the appellant] accepted that this was a lapse in his thinking behaviour and agreed that this was an area that needed addressing."

43. Given what I have already said about the appellant's awareness of saying what he knows people want to hear, I am sure the appellant knew that the compiler of the OASys report was eager to hear that the incident was '*a lapse in his thinking behaviour and agreed that this was an area that needed addressing*'. Indeed, it fed neatly into page 44 of the report where in answer to the question: *How much is the offender motivated to address offending?*, the response is

"*Very motivated.*"

(Precisely the result that most benefitted the appellant.)

44. The OASys report records that by April 2013, the appellant enjoyed enhanced status and that his behaviour and conduct while in custody had been good. As we saw above, he acknowledged that he was required to address his offending behaviour through appropriate offending behaviour courses and stated that he was more than willing to do so. The assessment of risk is summarised in section 10, page 37 of 52 onwards. The risk is described as a risk to the general public. It was said to be a risk by way of the threat or use of violence and at its greatest when either he or his partner were threatened or under attack. The threat existed but might be combated or reduced by completing offending behaviour courses. The appellant has the potential to cause serious harm but it is unlikely unless there is a change in circumstances. Using these methods of assessment, the applicant was assessed as representing a medium risk to the public when in the community. A medium risk of serious harm is described as in circumstances where there are identifiable indicators of serious harm.

45. Hence, there is an important correlation between the established risk of harm and its antidote, offending behaviour courses. The work indicated to increase the offender's motivation was a Victim Awareness course and an Assertiveness and Decision Making course. He was referred to the Victim Awareness programme. Although he produced a certificate that he had successfully attended the Assertiveness and Decision Making course, there was *no* similar certificate relating to Victim Awareness. Whatever the appellant's profession that he was very motivated to complete this, it has not, as far as I am aware, materialised. If so, the appellant has again pulled the wool over the report writer's eyes.

46. Ms Fielden relied upon a submission that the appellant does not represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society. This was a single offence committed in the context of a neighbour dispute which had been developing over a number of months and which was initiated by his

neighbours who were about to be evicted as a result of their poor behaviour. There has been no further offending. These are powerful considerations. However, the evidence identifies two separate areas of legitimate concern. First, the appellant's defence (which amounted to a justification for his conduct) was rejected by the jury. This is reflected in the lengthy prison sentence. Second, the appellant continued to maintain this defence well after the original conviction and throughout the course of the appeal process. Insofar as the judge did not identify his evidence as being a contradiction (in which event I would have expected her to have made an express finding that the account was rejected), the judge was misled. Although, in the OASys report, the appellant was much more realistic about his offending, I am not satisfied that this is genuine, given his track-record. Accordingly, I find that the appellant is capable of presenting events (or indeed permitting events to be presented by others) in a way which is most convenient to him regardless of whether it is the truth.

47. I can identify a variety of instances where the appellant's claim is not supported by the evidence. First, there has been no evidence to explain Ms Kowacka's assertion made prior to his imprisonment that the relationship had not subsisted since the birth of [N]. Secondly, I am satisfied that the appellant worked unlawfully (albeit unsurprisingly) and was content that the First-tier Tribunal Judge was not made aware of it. Third, the appellant undoubtedly knew that the Secretary of State was in error in treating [N] as a British citizen. Fourth, I am satisfied that he would like the Tribunal to believe that what happened in the incident on 22 February 2012 was benign, notwithstanding the plain and obvious fact of his conviction and sentence. Fifth, he has provided a favourable gloss on his efforts to address his offending without submitting the evidence that he was sufficiently motivated to do so by completing a victim's awareness course.

48. Inevitably, these considerations feature in the assessment of the risk that he poses. I find the appellant poses a risk sufficient to meet the criteria for his removal notwithstanding his marriage to a Union citizen. This finding is made even if it is established that Ms Kowacka is exercising Treaty rights. The OASys report describes him as a medium risk in the event of the circumstances identified.

49. The decision must be a proportionate one. As reg. 21 requires it is based exclusively on the personal conduct of the appellant. His conduct represents a genuine, present and sufficiently serious threat affecting a fundamental interest of society and considerations of general prevention do not enter into the decision making process. Amongst relevant factors is the appellant's immigration history and the absence of a substantive right to remain as a spouse or in any other capacity known to the Immigration Rules. For the reasons I have given, notwithstanding the presence of his Polish wife and daughter in the United Kingdom, it is proportionate to remove the appellant.

50. This is an appeal which, as I have said, contains two separate elements. The interplay between these two elements has now to be addressed.

51. As with the EU decision, the Article 8 decision must be proportionate. Furthermore, since the Court of Justice endorses the ECHR and has developed its own parallel code on human rights, it is difficult to see that a fissure is likely to develop between proportionality under the Regulations and proportionality under Article 8. As proportionality requires all material factors to be taken into account, the fact that there is the deportation appeal must be a relevant factor in the proportionality balance in the EU appeal. Similarly, proportionality under Article 8 must be capable of taking into account the fact that the appellant has rights under EU law. Even the potential difference between EU law which prevents considerations of general prevention justifying the decision whereas deterrence might properly enter into consideration in a human rights claim may be more illusory rather than real. Under either regime, it cannot be proportionate (or, indeed, just) for an individual to suffer more severely merely *pour encourager les autres* or to deter others if it is isolated from the appellant's own conduct.

52. Any other conclusion might lead to a different outcome between the proportionality balance taking in pursuit of an appeal against deportation engaging broad Article 8 considerations and a proportionality balance conducted using the factors identified under the EEA Regulations. Whilst it is easy to see that, on the basis of different *facts*, a result might be proportionate in one case and disproportionate in another, it is difficult to see how, on the *same* facts, it would be proportionate to remove the appellant pursuant to regulation 19 but not in a deportation appeal.

53. In *Badewa (ss 117A-D and EEA Regulations)* [2015] UKUT 00329 (IAC), the Upper Tribunal properly spoke of the EEA Regulations being a self-contained set of legal rules. The Tribunal noted the differences between them, including the difference I have identified, namely, the difference between the two legal regimes in expulsion and deportation cases. Whereas Article 8 jurisprudence permits decision-makers when weighing matters on the public interest side of the scales to have regard to matters of general prevention or deterrence; in the EEA context, reg. 21(5)(d) material which relate to 'considerations of general prevention do not justify the decision.' The distinction between EEA rights and Article 8 ECHR cases is laid out in the Immigration Directorate Instructions:

> "2.6.1 The Immigration Rules and Part 5A of the 2002 Act do not apply directly to EEA nationals. However, Article 8 applies equally to everyone, regardless of nationality, and to consider Article 8 claims from EEA nationals differently, either more or less generously than claims from non-EEA nationals, would breach the common law principle of fairness. Therefore, decisions in relation to EEA nationals must be taken consistently with Parliament's view of the public interest as set out in primary legislation."

54. The Tribunal summarised its conclusions as requiring a decision maker in relation to ss.117A-D in the context of EEA removal decisions:

(i) First, to decide if a person satisfies requirements of the Immigration (European Economic Area) Regulations 2006. In this context ss.117A-D has no application;
(ii) Second, where a person has raised Article 8 as a ground of appeal, ss.117A-D applies.

55. Whilst the Upper Tribunal in *Badewa* spoke of the approach to adopt in cases such as these, it envisaged that there should rarely be a different outcome.

56. Where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's rights under Article 8, in cases concerning the deportation of foreign criminals, the court or tribunal must have regard to the considerations set out in s. 117B and s. 117C. The latter provides:

> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> ...
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

At the same time as those provisions entered into force amendments were made to the applicable immigration rules. These do not have direct effect in EU cases. They built on previous amendments made in 2012. Those had sought to emphasise the strength of the public interest regarding the desirability of deportation of foreign criminals and also to secure a consistency of approach. Rules 398, 399 and 399A in their amended form provide as follows:

> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 ... and
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
>
> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(b) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(c) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(d) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

57. Paragraph 399A has no relevance to the present case since the appellant has not been lawfully present in the United Kingdom for most of his life.

58. In *MM (Uganda) & Anor v Secretary of State for the Home Department (Rev 1)* [2016] EWCA Civ 617 (20 April 2016) the Court of Appeal decided that the level of criminal offending is clearly material in deciding whether it is unduly harsh to separate a child from his parent and its omission inevitably skews the proportionality balance. Were the consideration to be directed exclusively towards the child, the public interest in removing those who commit criminal offences would be emasculated to the extent that no distinction could be made between a minor offender and a serious offender.

59. It is to be recalled (see, above, paragraph 7) that the Secretary of State has already considered the effect of paragraphs 398, 399 and 399A when she was dealing with the deportation appeal at a time when there was no EEA element and the couple were not married. She had concluded that deportation was lawful. That conclusion was not challenged.

60. The consideration is not directed exclusively towards the child and the public interest in removing those who commit criminal offences is a permissible factor to be taken into account when considering whether the effect of the appellant's deportation on the partner or child would be unduly harsh or whether it would be unduly harsh for the child to remain in the UK without the person who is to be deported.

61. Given the level of criminal offending, the risk that the appellant poses and the public interest in removing an individual who have failed to establish a right to remain

under EU law or under the Immigration Rules, it is not unduly harsh for [N] to be separated from her father. I appreciate that this determination has travelled a long way since, in paragraph 5, above, I directed my mind to s. 55 of the 2009 Act but its influence has pervaded it. My reasons for reaching the conclusion that removal is a proportionate response under Article 8 coalesce with my reasons for reaching the same conclusion is relation to reg. 21. I see no discernible difference between the two distinct processes and no reasons justifying a different outcome.

DECISION

1. I allow the appeal of the Secretary of State.
2. The Judge made no error on a point of law and the First-tier Tribunal's determination of the appeal is set aside.
3. I substitute a determination dismissing Mr Whyte's appeal under the Immigration (European Economic Area) Regulations 2006 and under Article 8 on all the grounds advanced.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
9 May 2017

Appendix

DECISION ON FINDING AN ERROR OF LAW

1. The Secretary of State appeals against the determination of First-tier Tribunal Judge Bart-Stewart promulgated on 10 October 2016 in which she allowed the twin appeals put forward by the respondent Mr Neville Franz Delcardo Whyte. For the sake of continuity I shall refer to Mr Whyte as the appellant as he was before the First-tier Tribunal.

2. The appellant is a citizen of Jamaica who was born on 11 May 1984 and his appeal was conducted under the umbrella of Regulation 26 of the Immigration (European Economic Area) Regulations 2006 (2006 No 1003). It arose because the Secretary of State had on 15 May 2015 refused to issue him with a residence card as an acknowledgement of his right to reside in the United Kingdom as the husband or as a partner of an EEA national who was herself exercising Treaty rights. The judge raised the issue of whether the spouse was exercising Treaty rights but then thereafter refers in the course of the determination to the appellant being a partner of an EEA national.

3. I find it difficult to see that there was any consideration given to the status of his wife. We know Miss Kowacka is a Polish national. The appellant married her on 13 May 2014, by which time the appellant had committed the offences for which he was subject to a deportation order. Having only enjoyed the benefits under the Regulations since May 2014, barely 2½ years before, he could not himself have acquired a permanent right of residence in accordance with reg. 15(1)(b). Hence, at best he had acquired the lowest level of protection against removal of the three levels set out in reg. 21, that is, on grounds of public policy or public security (public health not being in issue).

4. The appeal before the First-tier Tribunal Judge was advanced very much on the basis of the appellant being a person entitled to levels of protection from his status as being married to a Polish national. Marriage is not enough. Unfortunately I do not consider that the judge properly went into the status of the partner. It may well be that the partner had a permanent right of residence. I believe that probably to be the case. She arrived in the United Kingdom in 2006. She subsequently gave birth to their daughter and the daughter has got Polish, Jamaican and importantly British citizenship. It seems to me that this could only have arisen because the mother was settled in the United Kingdom. Their daughter derived Polish nationality from her mother, Jamaican nationality from her father, but could only have derived British nationality by reason of her birth in the United Kingdom as a result of the mother being either a British citizen or settled in the United Kingdom. For that reason I think it is probable that she had a permanent right of residence.

5. I am not satisfied for our purposes that it is necessary to consider whether she had been in the United Kingdom for a period in excess of ten years. If she arrived in 2006

and the decision was made in relation to the appellant in January 2016 then it is a moot point as to whether she had been in the country for ten years and attracted the higher protection but it is not of course her protection which is significant in this case: it is the protection that is afforded to her husband Mr Whyte. The third level of protection ('imperative grounds of public security' is not available to appellant as, in accordance with reg. 21(4) is confined to an EEA national. He is not required to work in order to qualify as a spouse. All that is required in his case is that he is married to somebody who is a person who has status in the United Kingdom by reason of her presence.

6. The curious part of the decision is that in paragraph 35 headed '*Refusal to Issue a Residence Card*', the Judge considered the appellant's conviction. She considered that it demonstrated '*very serious behaviour*'. She also considered the personal circumstances pursuant to Regulation 21(6) and the strong family and social ties with the United Kingdom but nowhere does she deal with the issue as to the residence card save that she allows the appeal, thereby entitling the appellant to a residence card without actually dealing with the basis upon which it was to be granted.

7. But there are perhaps other and rather more difficult matters which require the case to be reviewed.

8. The Judge sets out by reference to *Essa* [2012] EWCA Civ 1718 the requirements of the decision maker to consider deportation in the light of a variety of factors. In paragraph 13 she records that there is consideration of *Zambrano - Ruiz Zambrano (European citizenship)* [2011] EUECJ C-34/09 - with regard to the EU citizen child and the Immigration Rules and s. 117C of the Nationality, Immigration and Asylum Act, 2002. Whilst not applying directly, the Rules were used as a guide for the consideration of his Article 8 claim. Paragraphs 398 to 399A of the Rules and s. 117C reflected parliament's view that the public interest requires the deportation of those sentenced to less than four years but at least twelve months' imprisonment unless the exception to deportation is met or unless there are very compelling circumstances over and above those described in the exceptions to deportation. However, and unfortunately, the judge does not then go on to consider whether those principles which were considered in *Essa* were applicable in the appellant's case. Indeed it appears to be only the appellant's personal circumstances and considerations which are afforded prominence under Regulation 21(6) where the judge sets out those personal circumstances in paragraph 37.

9. There is a further problem that arises. It arises in relation to the assessment of risk that is posed. It is quite clear that the circumstances of this offending were and remain crucial to a proper consideration of this matter. It is a single offence. It arises in very extraordinary circumstances. There is no doubt that it was prompted by the victim knocking upon the door of the appellant's house. The Judge asked the appellant to explain what happened. In the course of the appellant's evidence, the Judge recorded that in paragraph 21 of the determination

> "[The appellant] said it all happened in seconds and his partner called him back inside the house. He had not struck a blow but the man had a cut on his hand

and the mother had two cuts in her back. The police arrived within five minutes".

10. That, on its face, was a description of the offence which does not tally with the offence for which he was convicted. The offence for which the appellant received a sentence of three years' imprisonment was one count of wounding with intent to do grievous bodily harm and one count of common assault. One can assume that common assault refers to the cuts on the finger but as far as the offence of grievous bodily harm is concerned, the sentence of three years imprisonment belies the appellant's own description of what occurred. It would have been much better for the Judge not to have engaged in a consideration of what the appellant's version of events was and to have confined herself to the sentencing remarks. She does set out those sentencing remarks at paragraph 33 and makes the important point that the incident was started by the victim who banged on the door and engaged the appellant's partner in what was obviously some form of violence. I entirely accept that this is a proper way of looking at this stage of events. Nevertheless the offence was wounding with intent to do grievous bodily harm and was of such gravity as to demand a sentence of three years' imprisonment. That cannot be overlooked. It was a very serious offence. Was it committed on the mother, who appears to have suffered the most serious injuries?

11. Having said that, these matters have to be looked at in context. The risk of reoffending and the risk posed to society at large have to be set in the context of the facts.

12. The reports that were provided suggested that there was a low risk of reoffending but, were there to be any such reoffending, there would be a medium risk of harm. Those were matters which the judge was required to take into account.

13. In summary, it comes down to this. First, it was essential for the judge to consider the effect of the wife's status as an EEA national who had been in the United Kingdom since 2006 and then to go on to consider the appellant's status derived from that of his wife. The fact that their child, who was then 9 years old, holds British nationality as well as Polish and Jamaican nationality, thereby indicating that she had a settled status in the form of a permanent right of residence, would affect the status of the applicant but his rights based on marriage could only have been acquired since 2014.

14. As importantly, perhaps more importantly, the judge did not consider whether or not there was any relationship to the case and s. 117 of the 2002 Act as inserted by the 2014 Act and the impact upon the appellant of paragraphs 398 to 399A of the Immigration Rules. In those circumstances I consider there was an error of law. The determination of the First-tier Tribunal Judge should be set aside permitting the matter to be remade.