**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00762/2017

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 24 January 2019** | **On 4 February 2019** |

**Before**

**LORD BECKETT**
**SITTING AS AN UPPER TRIBUNAL JUDGE**
**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**MM**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Anonymity**
*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*
Whilst no anonymity direction was made earlier in the proceedings, we now make an anonymity direction because the case involves a child. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

**Representation:**
For the Appellant: Mr A. Berry, Counsel, instructed by Alexander James, Solicitors
For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

## DECISION AND REASONS

1. The appellant is a national of Poland, born 30 April 1973 who appeals against the decision of the First-tier Tribunal to refuse his appeal against deportation in a decision promulgated on 29 August 2018.

2. In 2004 the appellant was living and working in Germany when he was convicted, in absence by a court in Poland, and sentenced to imprisonment for 15 months for an offence of theft committed in 2000. When he had returned to Poland for a funeral in October 2005 he was imprisoned in respect of other offences, but not the 15 month sentence imposed in 2004.

3. After very considerable delay, the Polish authorities sought an extradition warrant which was granted on 12 June 2013, but that order was quashed on appeal by Collins J in the Administrative Court on 23 October 2013 on the basis that it would be oppressive to return the appellant after "appalling and unexplained delays." The decision is reported at [2013] EWHC 3584 (Admin).

4. The High Court found that the summons had been issued in February 2004 and dispatched to the appellant's address in Poland for a hearing in late March 2004 but the appellant failed to collect it, which may have been because he was in Germany at the time. In due course he was extradited from Germany to Poland on other charges in order to serve a sentence in 2005. A competent means of bringing the appellant before the court in respect of his outstanding sentence was not pursued, he was released from Prison in Poland and came to the UK. Thereafter there was an unexplained delay of 6 years before the Polish authorities issued an arrest warrant which failed for procedural reasons within the UK. The warrant was not rendered valid until January 2012 and it was not until June 2013 that the extradition proceedings came before a District Judge who concluded that the appellant must have known of the proceedings and had avoided them deliberately. The High Court was not satisfied that the appellant must have known or that he deliberately absented himself and that the District Judge had erred in this regard. The unexplained delay was quite appalling such that it would be oppressive to return the appellant in the circumstances for a theft valued at £1600.

5. The appellant came to the UK towards the end of 2004 and on 22 November 2004 was issued with an Accession State Worker Registration Scheme certificate which entitled him to seek work in the UK. He left his then wife and their daughter L in Germany. The appellant worked in the UK on building sites, in pubs restaurants and in retail. His daughter L would come to the UK to visit him from 2005 when she was 8 or 9.

6. In 2010 the appellant formed a relationship with his now fiancée, also a Polish national living in the UK, and in 2012 they had a daughter together in the UK. The fiancé has an older child of her own. The fiancée has strong family ties in Poland where she regularly returns to visit family. The appellant's daughter L came to live in the UK in 2013 as an adult. She now lives with the appellant and his fiancée and is a student.

7. On 21 July 2016, at an English Crown Court, he was sentenced to imprisonment for 12 months for five charges of fraudulent evasion of duty payable on cigarettes and tobacco. He was issued with a deportation order on 4 December 2017 pursuant to Regulation 23(6) (b) of the Immigration (European Economic Area) Regulations 2016 that it was justified on the grounds of public policy. He then provided further information to the Secretary of State who considered his case again and on 7 March 2018 again decided to deport the appellant. This is the decision against which he appealed.

8. The Secretary of State accepted that the appellant had been resident in the UK in accordance with EEA Regulations for a continuous period of five years such that he could only be removed on serious grounds of public policy and public security in order to protect the fundamental interests of society.

*The hearing before the FtT*

9. The appellant had provided substantial amounts of paperwork including tax documents, payslips and bills intended to demonstrate that he had been living and working continuously in the UK for ten years. This material was available to the FtT at the hearing of his appeal. The appellant gave evidence as did his adult daughter L and his fiancé who are both Polish nationals.

*The determination*

10. The numbering of the paragraphs in this determination has gone awry: it proceeds normally with paras 1-55 and then has para 36 which is plainly meant to be para 56; it then has paras 57, 57, before normal numbering resumes from 58-67. For clarity, we shall refer to para 36 on page 8 as para 36 and to para 36 on page 10 as para 56. We shall refer to para 57 when referring to para 57 on page 10 and para 57A when referring to para 57 on page 11.

11. The FtTJ set out her findings in fact between paras 9 and 22 which include those narrated above.

12. At paras 18 and 19 the FtTJ analysed the documentation provided and its implications.

13. At para 20 she noted that since he has been in the UK the appellant has accumulated a number of criminal convictions:

    - February 2011, possession of drugs, unpaid work 100 hours
    - May 2011 assault ABH, unpaid work 100 hours
    - May 2011 failing to provide a specimen of breath for analysis, fined
    - 21 June 2016 - 5 counts of fraudulent evasion of duty, 12 months' imprisonment this being the sentence which prompted the Secretary of State to seek to deport the appellant, imposed in fact on 21 July 2016.
    - 25 November 2016, driving with excess alcohol, fined £180 and disqualified.

14. The FtTJ noted at para 21 the content of an email from the probation officer who supervised the appellant until 20 July 2017. Ms Lauren McDonagh emailed the appellant's solicitors on 2 January 2018 advising them:

> "I can confirm that I was the offender manager for MM between 1/11/2016 and 20/7/2017. He was subject to a CJA–Std Determinate Custody (12 months) for the offence of fraudulent evasion of duty (not drugs/weapons/ammunition) - Customs and Excise Management Act 1979-0023.
>
> I have not had contact with Mr M since 20/07/2017 and therefore my summary of risk is valid only until this date. I am not able to summarise the risk he poses after the above date.
>
> Mr M was assessed as posing a Low Risk of Serious Harm to the public.
>
> Mr M's previous behaviour has demonstrated that he is capable of causing harm to others. He has a conviction for violence against the person but has not repeated this type of behaviour to date. He is currently deemed to be a low risk of harm. Mr M complied well with the terms of his licence and did not demonstrate any concerning behaviours in custody of the community prior to the termination of his licence.
>
> Mr M's risk was not considered to be immediate. Mr M's index offence did not cross the ROSH threshold. There has been no violent incidents for some years and Mr M has demonstrated the ability to control his alcohol misuse and violent behaviours."

15. At para 22 the FtTJ noted the sentencing remarks which disclosed some detail of the appellant's convictions for fraudulent evasion of duty to the extent of a loss of revenue of £140,000 and set out the sentencing judge's view of the social harm involved.

16. In paras 23-29 various provisions and rules relating to asylum are set out. Between paras 30 and 34 various parts of the EEA Regulations are set out and at para 35 there is reference to the case of Essa [2012] EWCA Civ 1718 and the requirement to consider rehabilitation. We note that there is no challenge to the FtTJ's treatment of the issue of rehabilitation.

17. Between paras 36 and 41 is a brief discussion of article 8. Reference is made at para 39 to section 55 of the Borders, Citizenship and Immigration Act 2009 and the child's welfare being a primary consideration. The appellant's submissions are summarised at paras 42 to 48 and the Secretary of State's at 49-55.

18. The FtTJ's reasoning and decision are found at paras 56-67. In para 56 the Polish sentence was discussed; at para 57 the evidence about residence in the UK was assessed; at paras 57A-60 the appropriate test was considered and the conclusion was reached in para 60 that it was met. At paras 61-66 article 8 private and family life considerations were evaluated.

19. At para 67, the FtTJ concluded:

> "In summary therefore, I have found on the facts of his case, and on the balance of probabilities, that the decision to deport the appellant as he is a high risk to public security in the UK to be correct. There are serious grounds of public security and public policy to justify the decision that he is to be deported. I do not consider that the fact that he is at risk of a 15 month prison sentence in Poland, a safe country, to outweigh the public interest in deportation."

*The appellant's five grounds of appeal against the FtT's determination*

20. In ground of appeal 1 the appellant contends that the FtTJ failed to deal with a claim advanced on the basis of article 3 of the European Convention on Human Rights to the effect that in light of the previous extradition proceedings it would be inhuman or degrading to serve a sentence which the High Court had determined would be oppressive. The challenge was on article 3 grounds and not asylum and yet the FtTJ had dealt with the claim as if it was an asylum claim and the issue is put in this way in the ground of appeal:

> "The issue in the case was whether it was in the circumstances of the case, "humiliating and degrading" for the appellant to have to serve the sentence of 15 months imprisonment and if so whether requiring A to serve the sentence of 15 months could be justified on serious grounds of public policy and security or imperative grounds of public security."

Article 3 is said to have been a material aspect of the case such that failure to deal with it was a material error of law.

21. The remaining grounds of appeal can be summarised more briefly:

- In ground 2 the appellant contends that the FtTJ went behind a concession made by the Secretary of State in the decision, which was that the appellant had been resident in the UK in accordance to EEA Regulations for a period of 5 years continuously from January 2007 to March 2012 by omitting from consideration the period from 1 January to 31 March 2012.
- In ground 3 the appellant contends that the judge erred in "going behind" a probation officer's risk assessment that the appellant presented "low risk of serious harm to the public." In doing so the FtTJ had failed to adequately reason why, by his conduct, the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. She had erred in considering the issue of proportionality before the issue of whether the appellant represented the requisite level of threat.
- In ground 4 the appellant contends, somewhat indirectly, that the FtTJ erred in rejecting the oral evidence of the appellant and his witnesses having stated at para 7 that he found them broadly credible.
- In ground 5 the appellant contends that the FtTJ erred in law by failing to acknowledge the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to consider and identify the best interests of the appellant's six year old daughter who was born in the UK and not Poland as

the FtTJ had narrated. The child lives with the appellant and his partner and there was thus evidence of a genuine and subsisting relationship with a child.

*Submissions for the appellant*

22. On ground 1, Mr Berry argued that it had not been "safe" for the FtTJ to order deportation without first determining whether the appellant was still at risk of oppressive execution of the Polish sentence in relation to which the High Court had declined to extradite the appellant on the ground of oppression in 2013.

23. Whilst explicitly acknowledging that the point had been raised under article 3 of the ECHR before the FtTJ, Mr Berry submitted that the decision was "unsafe" given the obligations on the FtT under the Human Rights Act 1998. In this case the court ought to have considered the protections of not just article 3, but also article 5 and 6. Counsel had to accept that this last-mentioned submission was being made for the first time before us and he offered no authority or reasoning to demonstrate how the decision in separate extradition bearings should be considered to bear on this application for deportation made in light of the commission of wholly separate offending in the UK.

24. Mr Berry had nothing to say about ground 4 and on ground 2 only faintly proposed that if three months residence had erroneously been left of account, it had some bearing on the question of integration so as to be of at least some consequence in any proportionality assessment.

25. On ground 3, he suggested that the FtTJ had no sufficient basis to go behind the risk assessment of the appellant's probation officer. Further, the FtTJ had conflated the criterion for exclusion and the question of proportionality. In MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC) the Upper Tribunal had adapted previous guidance in the light of the Court of Appeal decision in Secretary of State for the Home Department v Dumliauskas [2015] EWCA Civ 145. The proper approach, as the UT explained at para 29(b), was to proceed on the basis that it is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, in terms of the 2006 EEA Regulations, that it would be relevant to consider whether the decision is proportionate taking into account all the considerations identified in regulation 21(5)-(6).

26. On ground 5, Mr Berry submitted that there was a failure to give discrete and explicit consideration to the question of the best interests of the appellant's 6 year old daughter which, given the observations of Lady Hale in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, was a material error. Mr Berry confirmed that the child is not a British citizen and is not a qualifying child in terms of Exception 2 in section 117C (5) of the Nationality, Immigration and Asylum Act 2002.

*Submissions for the Secretary of State*

27. On ground 1, Mr Bramble adopted his note under Rule 24 where the Secretary of State observed that the FtT had not been presented with any objective evidence about the effect of the appellant serving a prison sentence in Poland. There was no material error because the claim under article 3 could not have succeeded and no issue had ever been raised on grounds of article 5 or article 6. The deportation and extradition proceedings were wholly distinct.

28. On ground 2 he argued that it was not clear that there had been any departure from the Secretary of State's concession, but in any event, this could not be material. On ground 4, he observed that whilst the witnesses were assessed to be broadly credible, this was subject to qualifications signposted in the first sentence in para 7 which were later amplified and the reasoning was valid.

29. On ground 3 he submitted that on a proper analysis it was clear that the FtTJ had approached her evaluation correctly and she was entitled to consider information about the appellant's further conviction after being released from prison.

30. On ground 5 he observed that the position of the child was noted in the determination. The reality was that there was no further information before the FtTJ beyond the bare fact of her living in the same family as the appellant. There was no basis to conclude that a failure to state in terms that her best interests lay in staying with her mother, wherever her mother may be, or that they lay in her parents being together, was a material error. The position of the child had been considered in light of the immigration rules and the EEA Regulations.

*Relevant law*

31. Regulation 23 of the EEA Regulations 2016, provides in part:

> "23.- Exclusion and removal from the United Kingdom
>
> …
>
> (6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—
>
> > (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27;"

32. Regulation 27, provides in part:

> "27.- Decisions taken on grounds of public policy, public security and public health
>
> (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 right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

…

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(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;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

…

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

33. Schedule 1 of the Regulations provides, in part:

"1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

(a) the commission of a criminal offence; …

…

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

…

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

...

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27); …

(j) protecting the public;

> (k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child); ..."

34. It was accepted before the FtT that the appellant was a person with a right of permanent residence under Regulation 15 so that he could not be deported except on serious grounds of public policy and public security.

*Analysis*

*Ground 1*

35. Whilst Mr Berry proposed that the FtT was obliged to determine whether the appellant would serve his sentence in Poland, we consider that the FtTJ proceeded on the basis that the appellant *may* have to serve his Polish sentence on return, but she also noted that the appellant would be taking legal action to avoid doing so. The judge made express reference to this at paragraph 66 based on the appellant's own evidence that he had engaged lawyers in Poland who were working within the legal system to resolve the issue. The outcome lies in the future and it was not practicable for the FtT to ascertain with certainty what the future will hold and the FtTJ was entitled to proceed as she did.

36. On the article 3 point, Mr Bramble accepted that this was not an asylum claim and, to that extent, there was an error at paragraph 36.

37. However, as we have noted above, it has not been shown that article 3 featured in the grounds of appeal before the FtT. Reference to article 3 is certainly not to be found in the only grounds of appeal in our papers, which are in the appellant's bundle for the FtT hearing on 5 April 2018 which was adjourned.

38. In his skeleton argument presented to the FtT the primary point made by counsel then instructed was that the appellant had been resident for 10 years and could only be excluded on imperative grounds. He also argued that the decision was not proportionate; the appellant did not meet the criterion of presenting a genuine or realistic present risk constituting a present threat to the requirements of public policy affecting one of the fundamental interests of society; he had been assessed as posing a low risk of serious harm to the public; and:

> "In the alternative the appellant contends that his removal from the UK will breach his rights under articles 3 and 8 of the ECHR."

39. In his skeleton argument for the appeal in the Upper Tribunal, at para 10, Mr Berry confirmed that it was argued before the FtT that it would be contrary to article 3 ECHR to deport the appellant to Poland. By para 12 of his skeleton this had grown to encompass articles 5 and 6 but no argument is developed there and no further argument was developed before us, beyond a general assertion that consideration of articles 5 and 6 still awaited performance. Beyond the terms of the decision of the High Court there was no evidence before us and we were offered no further assistance by way of submissions in this regard. In these circumstances, we are not

able to find that deportation for offences committed in the UK in 2014 would breach the appellant's rights under article 5 and/or 6.

40. We do not accept that the decision in this deportation case brought following the appellant's conviction in the UK in 2015 somehow represents an abuse of process in relation to the extradition proceedings, relating to an offence in Poland committed in 2004, which were terminated by the High Court in 2013. The proceedings are plainly distinct. In the proceedings before us the Secretary of State is not seeking to revisit the failed extradition, the Secretary of State is seeking to deport the appellant because of his offending in the UK. In para 66 of the determination, the FtTJ considered whether the possibility of having to serve the sentence in Poland might amount to very compelling reasons (per section 117C (6) of the 2002 Act) and concluded that they did not.

41. The difficulty for the appellant is that there was no material basis put before the FtT to demonstrate that serving a prison sentence, even after oppressive delay, in Poland would meet the high threshold for contravention of article 3. Very properly, Mr Berry conceded that he could not advance any material to support an assertion which had been made in para 8 of the grounds of appeal (re ground 1) that the appellant would be exposed to physical or psychological harm should he require to serve his Polish prison sentence.

42. We consider that the error relating to an assessment of asylum is not material. The right result on the article 3 claim was reached by the wrong route, but the result could not have been different on the information before the FtT and before us. That is sufficient for us to refuse ground of appeal 1.

43. Turning to ground 2 and the alleged omission of the first three months of 2012, it is not clear that the concession was departed from but, even if it was, it could only mean that a period of 3 months residence in the UK was left out of account. It could not have borne on the issue of whether the appellant had ten years residence in the UK which was rejected for entirely different reasons and it was accepted by the Secretary of State that he had five years residence in the UK. Such a short, possibly additional, interval of additional integration in the UK could have no material effect on the FtT's consideration of proportionality

*Ground 3*

44. We recognise that in this case, where the appellant had acquired a right of permanent residence, to justify interference with the appellant's rights as an EEA national to free movement the host member state must find that his personal conduct represents a genuine, present and sufficiently serious threat affecting one or more of the fundamental interests of society and that the threat must be justified to the appropriate standard based on the level of protection the individual has acquired.

45. Dealing first with the complaint of going behind a social work risk assessment, we consider that as a matter of generality, even if there is a full risk assessment, a judge is not bound by it and can make her own assessment based on all the evidence before

her. The courts have recognised that an OASys Report is a document compiled by a trained Probation Officer and cannot be lightly dismissed (see **AM v SSHD [2012] EWCA Civ 163** and the decision of the Upper Tribunal in **Secretary of State for the Home Department v Vasconcelos [2013] UKUT 06378**). It is open to the Tribunal to depart from the findings of such a report if there is evidence upon which to do so. The decision of **Vasconcelos** (as cited) makes it plain that in assessing whether an EEA national represents a current threat to public policy by the risk of reoffending, the Tribunal should consider the assessment provided but was not bound to it if the overall assessment of the evidence supports a conclusion of a continued risk.

46. In this case there was no detailed OASys risk assessment before the FtTJ. Rather, there was an email from a probation officer, in the terms noted at para 12 above, who expressed the significant reservation that her assessment was only valid to July 2017. Ms McDonagh's assessment substantially related to the risk of the appellant committing further crimes of violence and she made no reference to the appellant's conviction for drink-driving, an offence committed shortly after his release from prison. It would be a pertinent consideration in assessing risk of reoffending of any kind. It was relevant to note that the appellant had set up a new business. In para 57A there are acceptable reasons for rejecting the proposition that the appellant did not meet the criterion of serious grounds of public policy or public security on the basis of the probation officer's email and assessment of low risk. These include the significant fact of the appellant having created a new business following the same model as his previous business in the context of which he had committed the revenue offences.

47. Turning now to the submission that the assessment was not carried out as required by the *Essa* decisions, we consider that the determination should be examined in the round. We note that at para 29 the FtTJ correctly observed that under the 2016 Regulations, an EEA national who has a right to permanent residence in the UK may only be deported on serious grounds of public policy or public security. At para 30 she noted that an EEA national who has resided in the UK in accordance with the EEA Regulations for a period of five years acquires a right of residence. At para 31 she noted the terms of Regulation 23(6) (b) and at para 33 she set out the terms of Regulation 27 and Schedule 1.

48. Whilst in para 57A there may appear to be a conflation of the first step, assessing whether it had been established he was a genuine, present and sufficiently serious threat to the fundamental interest of society (justified to the appropriate standard (serious grounds of public policy or public security), and the subsequent step of assessing proportionality, analysing the determination as a whole and para 57A in particular, we do not consider that the FtTJ erred materially in this regard.

49. As we have noted above, the FtTJ had identified the correct test at para 29. Para 57A commences with the conclusion, based on the reasons given in para 57, that the imperative grounds test was not applicable and the appropriate level of protection was that of serious grounds of public policy or public security. Whilst the use of the word proportionate in para 57A is unfortunate, we understand the FtTJ to be

deciding that for the crime committed by the appellant, the criterion of serious grounds of public policy or public security could be met. The whole paragraph consists of an analysis of the gravity of the offence, consideration of risk and observations about the appellant's new business which was relevantly noted in the context of risk of further offending. The reference to his family appears there in the context of assessment of risk: they were not necessarily an effective protective factor against reoffending since they were part of his life when he offended in the first place. The FtTJ's reference to the appellant's overall record of convictions and associated sentences was part of her examination of the risk of reoffending. In para 58 she went on to consider the issue of rehabilitation, noting also the possibility that he may have to serve his Polish prison sentence before the FtTJ observes that the appellant says that he is seeking to challenge having to serve the sentence with the assistance of a lawyer. In para 59 the FtTJ considered the appellant's circumstances and those of his family generally noting many personal and business connections to Poland.

50. The FtTJ firmly concluded at para 60 that the respondent had established that the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of society and that the appellant's conduct was serious so as to justify deportation on serious grounds of public security, particularly to prevent the evasion of taxes and duties, noting also the danger which he presents when driving in light of his convictions. That appears to us to be an additional consideration, the primary conclusion being reached on the basis of the nature of the revenue offences committed by the appellant in the context of all of the material considered in the course of paras 57A and 58.

51. Article 8 family and private life issues were considered at paras 61-66 through the lens of part 5 of the 2002 Act. In para 63 the FtTJ noted the age of the child and the implication that the appellant could not rely on Exception 2 within section 117C (5), albeit his reference is to para 399(a) of the Immigration Rules. The FtTJ recorded that the child was Polish and, whilst it is correct that she was born in the UK, it has not been contended that the FtTJ erred on the question of the child's nationality. She observed that there was very little information before her about the nature of any relationship between the appellant and his daughter, and there seems to have been nothing more than evidence confirming that they lived together in the same house as a family.

52. Family life with the appellant's partner was considered at para 64 and it was noted that Exception 2 could not be made out which is not challenged.

53. The appellant's private life was considered at para 65 and he could not come within the scope of Exception 1 in section 117C (4) of the 2002 Act. At para 66 the criterion of very compelling reasons over and above the family and private life exceptions (section 117C(6)) was considered in the context of the sentence of 15 months, but it was not found to be a very compelling circumstance in the light of the appellant's conduct in the UK.

54. The findings made by the judge included that both the appellant and his partner retained strong links to Poland; there was no evidence that his partner was settled in the UK (at [64]), she regularly visited Poland and had family living there. The Judge found that the evidence demonstrated that he worked within the Polish community, his businesses have all been connected to Poland as are his business partners (at [65]).

55. From our examination of the determination we are not persuaded that the FtTJ failed to consider the issues of meeting the criteria for exclusion and proportionality separately.

56. Ground 4 - it is trite that a primary finder of fact is entitled to accept one part of the evidence of a witness even if rejecting another part. That is what the FtTJ did and she offered reasons at para 7, and at para 57 detailed reasons including an analysis of all of the available material alongside the witness evidence, for accepting parts of what the appellant and his witnesses were saying whilst rejecting other parts. For the foregoing reasons we reject this ground of appeal on which Mr Berry did not present any oral submissions.

57. Ground 5 – we have already noted that at para 39 of the determination section 55 of the 2009 Act was referred to and the FtTJ observed that safeguarding the welfare of children is a primary but not paramount consideration. We have summarised in paras 46-47 above the consideration of article 8 which included recognition of a family situation in which the appellant's 6 year old daughter lived with him in family. The FtTJ had section 55 in mind, and in her findings said as much as could have been said in light of the very sparse evidence before her. All that she could have added was that it was in the best interests of the child to reside with her mother and that it would be better for the child if her father lived with them also, but there was no more information before the FtTJ about the father-daughter relationship. The appellant could not meet Exception 2 and, in the case of this family with extensive connections to Poland, merely to conclude that it would be in the child's best interests to reside with both her father as well as her mother in England would not have had any material effect. We are not persuaded that there is any error in this regard, and certainly no material error.

58. For all of these reasons we have reached the conclusion that it has not been demonstrated that there any material errors of law in the decision reached by the FtTJ and therefore the appeal is dismissed.

**Notice of Decision**

The decision of the FtT does not involve the making of an error of law.

The appeal is dismissed.

The decision of the FtT still stands.

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 30 January 2019

Lord Beckett, sitting as an Upper Tribunal Judge.