



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00196/2019

THE IMMIGRATION ACTS

Heard at Birmingham Justice Centre

**Decision & Reasons
Promulgated**

On 22nd December 2020

On 21st January 2021

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MC

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Bates, Senior Home Office Presenting Officer

For the Respondent: Ms A Bachu, instructed by Duncan Lewis & Co Solicitors

DECISION AND REASONS

An anonymity direction was made by the First-tier Tribunal (“FtT”), and as this appeal concerns the best interests of the appellant’s minor children who have been the subject of separate proceedings

before the Family Court, it is appropriate that a direction is made. Unless and until a Tribunal or Court directs otherwise, MC is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

1. The appellant in the appeal before me is the Secretary of State for the Home Department (“SSHHD”) and the respondent to this appeal is MC. However, for ease of reference, in the course of this decision I adopt the parties’ status as it was before the FtT. I refer to MC as the appellant, and the Secretary of State as the respondent.
2. The respondent appeals the decision of First-tier Tribunal Judge Lloyd promulgated on 18th November 2019 allowing the appellant’s appeal under the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”) against the respondent’s decision to make a deportation order. Permission to appeal was granted by Upper Tribunal Judge Grubb on 7th February 2020.

Background

3. The appellant is a national of the Czech Republic. She last entered the United Kingdom in 2016, having previously lived in the United Kingdom between 2010 and 2013. It is common ground between the parties that the appellant has not acquired a permanent right to reside in the UK. The appellant’s criminal history is set out in the respondent’s decision in the following way:

“5. Between 13 June 2017 and 11 February 2019, you have amassed 9 convictions for 19 offences namely for 1 offence against the person, 10 theft and kindred offences and 6 offences relating to police, courts and prisons.

6. On 11 February 2019 at Walsall and Aldridge Magistrates Court, you were convicted of 4 counts of theft – shoplifting, 1 count of failing to comply with the requirements of a community order, for which you were sentenced to 1 month, 26 days imprisonment.”

4. The respondent noted in her decision that on 25th August 2017, the appellant was previously considered for deportation due to her criminal convictions, but deportation was not pursued at that time. The appellant was served with a warning letter on 4th September 2017 and despite that warning, went on to commit further offences. The respondent considered whether the appellant's deportation is justified on grounds of public policy or public security. She referred to Schedule 1 of the 2016 Regulations and concluded that the appellant's behaviour is a threat to the fundamental interests of society to justify deportation on grounds of public policy. In reaching the decision to deport the appellant, the respondent also considered the principles set out in Regulation 27(5), and in particular, whether the decision to remove the appellant from the United Kingdom complied with the principle of proportionality as required by Regulation 27(5)(a) of the 2016 Regulations.
5. The appellant's appeal against that decision was heard by First-tier Tribunal Judge Lloyd and was allowed for reasons set out in a decision promulgated on 18th November 2019.

The appeal before me

6. The respondent claims Judge Lloyd failed to direct himself correctly as to the law, failed to have regard to material matters and failed to provide adequate reasons for his decision. The respondent claims that in reaching his decision at paragraph [12], that the appellant's pattern of offending was all over a relatively short period, related to the appellant's issues with alcohol and that there was no escalation in the seriousness of her offending, Judge Lloyd erred in failing to make reference to, or to have regard to the matters set out in Paragraph 3 of Schedule 1 of the 2016 Regulations 2016.
7. The respondent claims the appellant did not dispute the immigration history referred to by the respondent or the record of her offending. The appellant had arrived in the United Kingdom in May 2016 and had

committed 17 offences between 11th December 2016 and 10th February 2019, The numerous convictions over a period of 2 years and 3 months spanning the majority of her time in the UK, points to a greater likelihood that the appellant's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society.

8. The respondent also claims that in considering the risk of reoffending, Judge Lloyd failed to have proper regard to the principle set out in Regulation 27(5)(c) of the 2016 Regulations. At paragraphs [17] to [26] of the respondent's decision, the respondent noted, in particular, that the appellant had continued to offend without being deterred by previous convictions or sentences, including a custodial sentence imposed in August 2017. The respondent had noted in her decision that in August 2017, although deportation was not pursued against the appellant, she was served with a warning letter on 4th September 2017, but she nevertheless went on to commit further offences. The respondent submits that when considering whether the conduct of the appellant represents a genuine, present and sufficiently serious threat, Judge Lloyd failed to have regard to the principle set out in Regulation 27(5)(c), that the threat does not need to be imminent, but reached his decision based on the absence of an immediate threat at the time of the hearing.
9. The respondent also claims that in reaching his decision, Judge Lloyd failed to have regard to the fundamental interests of society in the United Kingdom as set out in paragraphs 7(f), (g), (h) and (j) of Schedule 1 of the 2016 Regulations, which include *inter alia*, 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).
10. The respondent claims that Judge Lloyd considered whether the respondent's decision complied with the principle of proportionality, but

failed to address Regulation 27(6) of the EEA Regulations 2016. Finally, the respondent claims Judge Lloyd failed to have regard to paragraph 4, of Schedule 1 of the 2016 Regulations. The respondent claims Judge Lloyd failed to have regard to the appellant's length of residence in the United Kingdom, her social and cultural integration, and the extent of her links with the Czech Republic. Furthermore, Judge Lloyd failed to consider the extent to which any links were formed at or around the same time as the commission of a criminal offence or when the appellant was in custody.

11. Permission to appeal was granted by Upper Tribunal Judge Grubb on 7th February 2019.
12. Mr Bates relied upon the grounds of appeal. He submits the appellant's offending that spanned the majority of her time in the UK, is relevant to the risk of further offending. The assessment of the risk of reoffending required the judge to have regard to the appellant's past conduct and, as the 2016 Regulations make it clear that the risk need not be imminent, to consider the risk going forward.
13. Mr Bates submits that at paragraph [9] of his decision, Judge Lloyd referred to the letter from the appellant's Offender Manager that is to be found at page 91 of the appellant's bundle. The letter confirms that the appellant is currently assessed as presenting a high risk of reoffending and a low risk of serious harm to the public. The judge refers to the opinion expressed by the Offender Manager in that letter that the threat of deportation has considerably reduced the risk of reoffending. It would appear Judge Lloyd accepted what was said by the Offender Manager but neither the Offender Manager nor Judge Lloyd say what the risk level is. The offender manager noted that the appellant was "*currently assessed as presenting a high risk of reoffending* " and believes that the threat of deportation has considerably reduced her risk of reoffending, but does not say whether the risk of reoffending is now a 'medium risk' or a 'low

risk'. Mr Bates submits Judge Lloyd erred in failing to make a finding as to the level of the risk of reoffending. It cannot, Mr Bates submits, be assumed that because the threat of deportation has considerably reduced the risk of reoffending, the risk of reoffending is now a low risk. In any event, although the threat of deportation may have considerably reduced the risk of reoffending, it was incumbent upon the judge to consider what might happen when there is no threat of deportation. The 2016 Regulations make it clear that the threat does not need to be imminent, and Judge Lloyd failed to consider what the risk of reoffending would be going forward, in context. He submits the appellant had had numerous opportunities to amend her ways, but simply failed to do so even having received a warning previously.

14. Mr Bates submits Judge Lloyd also failed to have regard to other relevant factors, including a previous lengthy period of abstinence. The appellant's evidence was that she started to have problems with alcohol during 2017. Following a short period of imprisonment in 2017, she claims she worked hard with her probation officer to address her drinking. On her own case, she acknowledges that following a relatively lengthy period of abstinence, in February 2019 she had a relapse and following an argument, started drinking again, leading to further offending.
15. As to the assessment of proportionality, Mr Bates refers to the Child Arrangement Order made on 28th March 2019. The Conference and Outline Plan produced in respect of the children confirm that the local authority was concerned about the appellant's alcohol consumption whilst looking after her children and how that was affecting their emotional well-being. The order made by the Family Court on 28th March 2019 contains 'Warning Notices' that warn the appellant that it is a criminal offence to take the children out of the UK without the consent of everybody with parental responsibility unless the court has given permission. The warning continues; *"However, if an order has been made*

that a child is to live with a person, that person may take that child out of the UK for up to a month at a time". There is, Mr Bates submits, nothing preventing the children living in the Czech Republic with the appellant and her mother providing the appellant's mother consents. Mr Bates submits that at paragraph [15] of his decision, Judge Lloyd appears to proceed upon the erroneous premise that an offence may be committed if the children were to be removed from the UK without leave of the court.

16. Mr Bates submits Judge Lloyd did not make a comprehensive assessment of proportionality and the reasons given by the judge are inadequate. At paragraph [16], the judge declined to make findings in respect of the conditions that the appellant would find herself in if removed. In fact, he submits, the appellant's length of residence in the UK, social and cultural integration in the United Kingdom and the extent of her links with the Czech Republic are relevant under Regulation 27(6) to a decision on the grounds of public policy and public security, and also the assessment of proportionality. The judge should therefore have addressed those matters. Mr Bates submits there is no balancing exercise undertaken by the judge when he considered whether the decision complies with the principle of proportionality. The assessment is entirely one-sided, with a focus upon the findings made in favour of the appellant but without any regard to matters that weigh against the appellant and relevant to the public interest.
17. In reply, Ms Bachu relied upon the Rule 24 reply dated 18th March 2020. She submits the grounds of appeal amount to no more than a disagreement with the Judge's assessment of the evidence. The judge had the benefit of hearing from the appellant and several members of her family, and carefully considered all the evidence before him in reaching his decision.

18. Ms Bachu submits the respondent has not challenged the findings made by Judge Lloyd that the escalation of sentencing and the deportation proceedings, with the associated risk that she might end up separated from her children, have had a profound effect on the appellant's behaviour. She submits reaching that in reaching his decision, Judge Lloyd was aware that the basic level of protection applied in this appeal, and he had the appellant's history of offending at the forefront of his mind when assessing the risk of reoffending. Ms Bachu submits Judge Lloyd considered all the evidence before the Tribunal, including the evidence from the Offender Manager and the expert, Dr Galappathie. The evidence of the experts was reinforced by the oral evidence of the appellant that was accepted by Judge Lloyd. Ms Bachu submits that in any event, it was open to Judge Lloyd, having carefully considered the order made by the Family Court, the current arrangements for the care of the children and in particular, the significant daily contact enjoyed by the appellant with her children, to conclude that the decision does not comply with the principle of proportionality.
19. Before me, Ms Bachu submits that paragraphs [9], [10] and [11] of the decision, read together, demonstrate that Judge Lloyd had careful regard to the principles set out in Regulation 27(5) of the 2016 Regulations. Judge Lloyd refers to the evidence before the Tribunal of 'significant changes' to her life from which the appellant has developed a strong motivation to remain abstinent from alcohol, and with the ongoing support of family, she has maintained abstinence from alcohol and avoided a return to offending behaviour. The oral evidence of the appellant reinforced that picture. Judge Lloyd noted there was no evidence of any further offending, or alcohol related behaviour since the appellant's release.
20. Ms Bachu submits that it was not just the prospect of deportation that had caused the appellant to make significant changes, but the consequences and impact that deportation would have upon her

relationship with her children that had had a profound effect on the appellant and brought home to her the effect of her offending behaviour. Ms Bachu submits the risk of reoffending must be considered in the round and Judge Lloyd noted in his decision that the Offender Manager had confirmed that the appellant had engaged well with her key worker on a programme which addressed her alcohol issues.

21. Ms Bachu submits Judge Lloyd accepted, at paragraph [15], that the children are the subject of an order made by the Family Court and it is clearly in the children's best interests to remain in the UK. It was open to Judge Lloyd to conclude that the separation of the children from their mother would, in all the circumstances, be entirely disproportionate.
22. As for Regulation 27(6) and paragraph 4 of Schedule 1 of the 2016 Regulations, Ms Bachu submits the appellant obviously has long-standing links with her family and children. Although the appellant's links to the UK were established during a short period, the appellant had explained her offending behaviour and there was evidence of the change in the appellant's circumstances. Ms Bachu submits that although Paragraph 4 of Schedule 1 of the 2016 Regulations states that 'little weight' is to be attached to the integration of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as the commission of a criminal offence, that is not to say 'no weight' should be attached to the integration.

Discussion

23. It is convenient to set out, at the outset, the relevant Regulations that form the backdrop to the decision. Regulation 27 of the 2016 Regulations, insofar as it is relevant states:
 - 1) In This regulation, a 'relevant decision' means an EEA decision taken on the grounds of public policy, public security or public health.

...

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.

24. It is also convenient to set out Schedule 1 of the 2016 Regulations insofar as it is relevant to this appeal.

Considerations of public policy and public security

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.

Application of paragraph 1 to the United Kingdom

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;
- (b) an act otherwise affecting the fundamental interests of society;
- (c) the EEA national or family member of an EEA national was in custody.

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.

...

The fundamental interests of society

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

...

(f)excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

(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);

...

25. It is common ground between the parties that the appellant has not acquired permanent residence and is only entitled to the basic level of protection set out in Regulation 23(5) and Regulation 27(1) of the 2016 Regulations. Nevertheless, as set out in Regulation 27(5)(c), the appellant cannot be deported unless her personal conduct represents "a *genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account her past conduct. The threat does not need to be imminent.*" Paragraph 1 of Schedule 1

confirms that the EU Treaties do not impose a uniform scale of public policy or public security values and member States enjoy considerable discretion, acting within the parameters set by the EU Treaties to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time. The application of paragraph 1 to the United Kingdom is informed by what follows at paragraphs 2 to 6 of Schedule 1.

26. The failure to refer to Schedule 1 of the EEA Regulations 2016 is not in itself fatal to the decision of the First-tier Tribunal provided that it is clear that Judge Lloyd applied the correct test. A party appearing before a Tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the Tribunal is addressing its mind and the basis of fact on which the conclusion has been reached.
27. A finding as to whether the conduct of the appellant represents a genuine, present and sufficiently serious threat is a prerequisite for the adoption of an expulsion measure and it is only upon such a threat being established, that the issue of proportionality arises. Here, at paragraphs [9] and [10] of his decision, Judge Lloyd referred to the letter from the appellant's Offender Manager and the two psychiatric reports that were before the Tribunal. At paragraphs [11] to [13], Judge Lloyd said:

“11. The oral evidence before me only reinforced this picture. There was no evidence of any further offending, or alcohol-related behaviour since release, and I accept what Ms Bachu puts to me, that the escalation of sentencing and deportation proceedings with the associated risk that she might end up separated from her children, have had a profound effect on her behaviour. I was also told about her immigration bail conditions which included residence and regular reporting, all of which, in the absence of any evidence to the contrary, she appears to have complied with.

12. I also accepted Ms Bachu's submission that the pattern of offending was all over a relatively short period, was related to the appellant's issues with alcohol, and that there was no escalation in seriousness. These were, relatively speaking “low level” offences.

13. On those findings, I concluded that the threshold of a present and serious threat to one of the fundamental interests of society is not, at the time of the hearing, made out, and on that basis alone I would allow the appeal.”

28. In reaching his decision, Judge Lloyd appears to have taken into account a number of factors, including the absence of any reoffending, the appellant's engagement with her key worker on a programme which addressed alcohol issues, abstinence from alcohol use, compliance with bail conditions, the threat of deportation, and the risk of separation from her children, all of which he considered to have had a profound effect on her behaviour. In my judgement, in reaching his decision the judge had regard to a number of factors that weigh in favour of the appellant and the judge was undoubtedly entitled to have those factors in mind.
29. However, Judge Lloyd was required to have regard to the principles set out in Regulation 27(5)(c) of the 2016 Regulations. He concluded that the threshold of a present and serious threat to one of the fundamental interests of society is not, at the time of the hearing, made out. He plainly had regard to the past conduct of the appellant, but in my judgement, failed to consider the principle that the threat does not need to be imminent.
30. I accept the submission made by Mr Bates that in reaching his decision, Judge Lloyd referred to the opinion expressed by the Offender Manager that the threat of deportation has considerably reduced the appellant's risk of reoffending, but Judge Lloyd does not reach a clear finding as to the level of the risk, and fails to have regard to what might happen in the absence of the threat of deportation.
31. I have carefully considered what was said by Judge Lloyd at paragraphs [9] and [10] of his decision and although he refers to the evidence of the experts, I accept that he does not make a finding as to the level of the risk of reoffending. I cannot accept, as Ms Bachu invites me to, that taking those paragraphs together, Judge Lloyd clearly proceeds on the premise that the appellant presents a low risk of reoffending. The Offender Manager acknowledged that the appellant is "currently assessed as presenting a high risk of reoffending and a low risk of serious

harm to the public”, and although he believes that the threat of deportation has considerably reduced the risk of reoffending, he did not express any view as to whether the risk of reoffending had been reduced to a “low” or “medium” risk. Dr Galappathie is a Consultant Forensic Psychiatrist, and stated at paragraph [110] of her report:

“In my opinion it is notable that she has not committed further offences following release from Yarl’s Wood IRC and that she has remained abstinent from alcohol during this time. In my opinion it is likely that her prison sentence and experience of having a deportation order placed against her and being detained at the IRC has effectively made her take stock of her situation and develop the motivation required to remain abstinent from alcohol with the ongoing support from her family. In my opinion, it is not possible for me to know whether her account of committing past offences of theft due to lack of care due to being intoxicated is accurate or not, however in my opinion it is very clear that her past offences are directly linked to alcohol misuse, in that when she has drunk alcohol to excess, she has become chaotic in her lifestyle and vulnerable to impulsive low-level offending behaviour such as theft. Now that she has achieved and maintained abstinence from alcohol, she is no longer vulnerable to such offending behaviour and has no underlying dissocial or pro-offending attitudes.”

32. At paragraph [114] of the report, Dr Galappathie expresses the opinion that the appellant is not at risk of reoffending. That assessment is said to be based upon a clinical interview with the appellant, a mental state examination and review of her case papers. Insofar as Dr Galappathie appears to express the opinion that there is no risk of reoffending at all, that is plainly at odds with the evidence of the Offender Manager who noted the appellant is currently assessed as presenting as a high risk of reoffending, although the threat of deportation has considerably reduced the risk of reoffending. Both Dr Galappathie and the Offender Manager refer to the threat of deportation as being a factor relevant to the risk of reoffending, but neither express any opinion as to the risk if the appellant were not under the threat of deportation.

33. As Mr Bates submits, the appellant arrived in the United Kingdom in May 2016 and had committed 17 offences between 11th December 2016 and 10th February 2019. She had therefore been in the United Kingdom for approximately seven months before she began offending. She was then

convicted of 17 offences over the following 2 years and 3 months, spanning the majority of her time in the UK. She had received a short sentence of imprisonment in August 2017 and a warning letter on 4th September 2017, but that was to no effect. The appellant's evidence in her witness statement before the First-tier Tribunal was that she started to have problems with alcohol during 2017. Following a short period of imprisonment in 2017, she claims she worked hard with her probation officer to address her drinking. On her own case, she acknowledges that following a relatively lengthy period of abstinence, in February 2019 she had a relapse and following an argument, started drinking again, leading to further offending.

34. Although the appellant had engaged well during supervision sessions following her release from prison and had abstained from alcohol use, this is not a case where there had been a prolonged period of industrious good behaviour showing that the appellant's offending can be considered in isolation when considering the fundamental interests of society, one of which is to combat 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); Paragraph 7(h) of Schedule 1.
35. There is no reference at all by Judge to the 'fundamental interests of society' expressed in Schedule 1 of the 2016 Regulations. In the end, I cannot be satisfied that Judge Lloyd would have reached the same conclusion, if he had properly made a finding as to the level of the risk of reoffending, and properly directed himself that the threat does not need to be imminent. Similarly, I cannot be satisfied that he would have reached the same conclusion if the matters set out in Schedule 1 had been taken into account, and Judge Lloyd had factored in, that one of the fundamental interests of society is combating the effects of persistent offending, particularly in relation to offences, which have taken in

isolation, may otherwise be unlikely to meet the requirements of Regulation 27.

36. I should also add that Regulation 27(6) required Judge Lloyd to take account of considerations such as the age, state of health, family and economic situation of the appellant, the appellant's length of residence in the United Kingdom, her social and cultural integration into the United Kingdom and the extent of the appellant's links with her country of origin. It appears from what is said by Judge Lloyd at paragraph [16] of his decision that he declined to make detailed findings as to the conditions that the appellant would find herself in, if removed to the Czech Republic because of his finding set out in paragraph [15] that there would be a clear and disproportionate interference with family life in removing the appellant from the UK.
37. In my judgement, the conclusion reached by Judge Lloyd at paragraph [13] of his decision that the threshold for finding that the conduct of the appellant must represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society is not made out, is vitiated by an error of law and must be set aside.
38. Although it is only upon such a threat being established that the issue of proportionality arises, in any event, at paragraphs [14] and [15] of his decision, Judge Lloyd considered whether the decision to restrict the rights otherwise conferred by the 2016 Regulations in order to protect the fundamental interests of society, complied with the principle of proportionality as required by Regulation 27(5)(a) of the 2016 Regulations. He said:

"14. ... I would then need to consider the proportionality of the decision. At the hearing, Mr Cordon focused his cross-examination of the appellant and her family members on whether they would continue to remain in contact with her, and visit her in the CR. Whilst there seem to be some doubt on this from the appellant, the other family members were adamant that they would continue to support the appellant and I accept that. It was on this basis that Mr Cordon built his argument that the decision was proportionate.

15. I have before me (with leave from HHDJ Hughes) documents relating to child proceedings in the Wolverhampton Family Court. On 28/03/2019, the court ordered that the appellant's children should reside with their grandmother (the appellant's mother). In light of that order, an offence may be committed if the children were to be removed from the UK without the leave of the court, however, that order does not prevent the appellant having any contact with her children. In oral evidence I heard that the appellant has all-day contact with her children every day. Whilst she does not stay with them overnight at their grandmother's home due to the residence requirements of her bail conditions, she is with them during all their waking hours. She takes a full part in their upbringing, taking them to school and attending to their needs. I accepted all of that evidence and find that she continues to have a genuine and ongoing parental relationship with them. I also have letters from the children and the psychological report from Susan Pagella [AB 51] which is supportive of the strong relationship between her and her children, and the potential for psychological damage to the children if their mother was to be removed from the UK. As the children cannot currently be removed from the UK to go with their mother if deported, I find there is a clear and disproportionate interference with family life in removing the appellant from the UK in the current circumstances."

39. I have therefore considered whether the error of law was material to the outcome of the appeal. The focus as to whether the decision complied with the principle of proportionality was upon the appellant's relationship with her two young children and the arrangements that are in place for their care.
40. The appellant had obtained the leave of the Family Court to disclose the Child Arrangement Order made on 28th March 2019. Mr Bates submits that at paragraph [15] of his decision, Judge Lloyd appears to proceed upon the erroneous premise that an offence may be committed if the children were to be removed from the UK without leave of the court. There is, Mr Bates submits, nothing preventing the children living in the Czech Republic with the appellant and her mother, providing the appellant's mother consents. Ms Bachu accepts that it may in principle, be possible for the children to live in the Czech Republic with the appellant and her mother (their maternal grandmother), but on any view, that cannot be in the best interests of the children and it would mean that the appellant's mother would have to forego the close relationships that she has with other members of her family, all of whom are settled in the UK

41. The Child Arrangement Order made under s8 Children Act 1989 regulates the arrangements as to where the children are to live, and orders that the children are to live with their maternal grandmother. The maternal grandmother has therefore acquired parental responsibility for the children by operation of s12(2) Children Act 1989, while the order remains in place. s13 Children Act 1989 prevents the removal of the children from the United Kingdom without the written consent of every person who has parental responsibility for the children or the leave of the court. I accept the submission made by Mr Bates that Judge Lloyd erroneously proceeds upon the premise that the children cannot currently be removed from the UK to go with their mother, if she is deported. The appellant will require the written consent of every person who has parental responsibility for the child, which here, includes the written consent of the appellant's mother. The focus of the evidence appears to have been upon whether the appellant would remain in contact with members of her family, and whether they would visit her in the Czech Republic. At paragraph [14] his decision, Judge Lloyd preferred the evidence from other family members who were adamant that they would continue to support the appellant. Judge Lloyd did not consider whether the consent of the appellant's mother to removal of the children from the United Kingdom would be forthcoming, and the impact on the appellant's mother and her relationships with other members of her family settled in the UK.
42. In my judgement, the decision of Judge Lloyd as to whether the decision complies with the principle of proportionality fails to take into account relevant factors and Judge Lloyd failed to carry out the broad evaluative exercise required, taking into account matters that weigh in favour of the appellant, balanced against the relevant public interest and the fundamental interests of society which include 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 of the 2016 Regulations.

43. It follows that in my judgement, the decision of Judge Lloyd is infected by material errors of law and the appropriate course is for the decision of First-tier Tribunal Judge Lloyd to be set aside. As to disposal, in my judgment the appropriate course is for the matter to be remitted to the FtT for hearing *de novo* with no findings preserved. I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive.
44. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

45. The appeal is allowed, and the decision of FtT Judge Lloyd promulgated on 18th November 2019 is set aside.
46. The appeal is remitted to the FtT for a fresh hearing of the appeal with no findings preserved.

V. Mandalia

**Upper Tribunal Judge Mandalia
2020**

29th December