Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00395/2019**

THE IMMIGRATION ACTS

Heard at Field House (via Teams)	**Decision & Reasons Promulgated**
On the 25th May 2021	**On the 21st June 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SADIK HUSAN HALANI
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms R Petterson, Senior Presenting Officer
For the Respondent: Mr A Mian, instructed by Mondair Solicitors

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals, with permission granted by Upper Tribunal Judge Pitt, against First-tier Tribunal Judge J W H Law's decision to allow Mr Halani's appeal on human rights grounds. To avoid confusion, I shall refer to the parties as they were before the FtT: Mr Halani as the appellant, the Secretary of State as the respondent.

Background

2. The appellant is a French national who was born on 3 May 1966. He seemingly arrived in the United Kingdom in the late 1980's. He first came to the attention of the British authorities on 14 April 1994, due to a series of offences involving his ex-wife.

3. On 14 April 1994, the appellant threatened to kill his ex-wife. Later that day, he reversed his car into a car driven by his ex-wife, causing injuries to her and her daughter. He was arrested and granted bail. Five days later, he made further threats to kill and was re-arrested and remanded in custody. On 25 July 1994, he was released on bail to a hostel in Lincoln. Eleven days later, he took a knife from the bail hostel and travelled from Lincoln to Peterborough where he attempted to murder his ex-wife by stabbing her repeatedly in what was subsequently described by the sentencing judge as a planned and pre-meditated attempt to kill her. She only survived the attack due to the fact that she received prompt and expert medical attention. She was in intensive care for two days, during which she lost her spleen and her pancreas. She suffered lasting physical and mental consequences.

4. The appellant fled the country shortly after he had attacked his ex-wife. He lived in Madagascar, where he remarried. He and his current wife have four children, two born in France and two born in the UK.

5. The appellant attempted to return to the UK in 2007 but he was detected at the juxtaposed control in Coquelles. He was arrested for the offences described above and he denied involvement, maintaining his innocence until the day of his trial before the Crown Court at Cambridge. On 18 January 2008, he was sentenced by HHJ Haworth to a total of nine years' imprisonment. In sentencing the appellant, HHJ Haworth noted that he had a limited appreciation of the impact of his offence and he endorsed the conclusions of a psychiatrist, Dr Smith, that he presented a continuing risk, at that time, of similar offending in the future, in the context of the failure of an intimate relationship. The judge made these remarks as he was 'quite certain' that the Parole Board would wish to see his remarks in due course.

6. The appellant completed his custodial sentence in August 2012. On 10 August 2012, the Parole Board noted that the extant OASys assessment was that the appellant posed 'a medium risk of harm to the public and to children with a high risk of harm to a known adult and low risk of violent re-offending'.

7. The appellant was released from immigration detention later that month. He had been served with a notice of intention to deport and he appealed to the First-tier Tribunal against that decision. His appeal was dismissed by a panel of the FtT comprising Judge A W Khan and Mrs R M Bray JP on 9 January 2013. The FtT found, notwithstanding the passage of time since the offence, that it was 'undoubtedly true to say that the appellant remains at moderate to high risk of reconviction for a violent offence within an intimate relationship': [26].

Permission to appeal against that decision was refused and the appellant became appeal rights exhausted on 6 February 2013.

8. On 1 April 2013, the appellant was deported to France.

9. Six months later, on 16 October 2013, the appellant arrived in the UK in breach of the deportation order, having travelled to this country via ferry from Ireland. He was returned to Ireland by ferry the following day.

10. Two years later, on 17 June 2015, the appellant attempted to re-enter the UK for a second time. He was encountered by Immigration Officers on a ferry from Belfast. After his arrival in the United Kingdom, representations were made on the appellant's behalf for him to remain in the UK. Those submissions were refused without a right of appeal and the appellant was returned to France on 28 September 2015.

11. On 12 December 2017, an application was made to revoke the appellant's deportation order. The letter in which that application was made spans eleven pages of single-spaced type but it was submitted, in summary, that the appellant no longer presented a risk and that his continued exclusion was unjustifiably to the detriment of his relationship with his family, all of whom were settled in the UK and could not relocate to either France or Madagascar.

The Respondent's Decision

12. On 8 July 2019, the respondent refused to revoke the deportation order. She directed herself in accordance with regulation 34(5) of the Immigration (EEA) Regulations 2016 and considered whether the criteria for making the order were no longer satisfied. She did not consider regulation 34(5) to be satisfied. In reaching that conclusion, the respondent noted the assessments made by the various professionals and by HHJ Haworth about the risk posed by the appellant and the absence of evidence from a suitably qualified individual to show that the appellant had addressed the underlying issues: [42]-[54]. The respondent also took account of the FtT's conclusions in 2013: [56]-[57]. At [61]-[62], the respondent considered submissions made by the appellant's representatives about his conduct post-deportation:

> [61] In addition to the above you have stated that "Our client had no further convictions and abides by the law". It is accepted that your client had received no further criminal convictions since his deportation. However it is not accepted that he had abided by the law completely in that time as he has on two separate occasions on 16 October 2013 and 17 June 2015 attempted to enter the United Kingdom unlawfully despite him being fully aware of the fact that he is the subject of a signed Deportation Order. This clearly demonstrates that your client is willing to circumvent the immigration rules of the United Kingdom and the law of the country by attempting to enter with no right to do so.

> [62] In addition to this, the Secretary of State takes a particularly serious view of serious criminals such as your client attempting to evade the authorities by entering the United Kingdom with no right to do so and without the knowledge of the authorities. This is because had he entered the United Kingdom with no right to do so without the authorities being aware of his presence in the United Kingdom, then no measures would have been put into place to minimise the risk that he poses to the public and in particular his ex-partner.

13. The respondent concluded that there had not been a material change of circumstances and, at [65]-[76] of her decision, she concluded that the appellant's continued exclusion from the UK was a proportionate course under the EEA Regulations.

14. At [77]-[141], the respondent considered Article 8 ECHR. She reasoned that there was a significant public interest in the maintenance of the deportation order: [87]. Whilst it was accepted that the appellant was maintaining a limited form of family life with his family in the United Kingdom, via visits to third countries and using the telephone and internet, she did not consider it to be established that Social Services would permit the appellant to return to the family home in the event that he was permitted to re-enter the United Kingdom: [102]-[109]. The respondent noted that the FtT had previously concluded that the appellant's wife and children could relocate to France or Madagascar and did not consider there to be any reason to take a different view: [110]-[124]. There was no evidence to show that the appellant's mother suffered from any medical conditions and no evidence to show that his absence was causing any emotional suffering: [125]-[130]. The entire family could relocate to either Madagascar or France and there were no exceptional circumstances which outweighed the public interest in the appellant's deportation: [131]-[140].

The Appeal to the First-tier Tribunal

15. The appellant appealed to the FtT on 2 August 2019. There were detailed grounds of appeal in which it was averred that the family could not reasonably be expected to relocate to either France or Madagascar given their length of residence in the UK and their significant ties to this country. The appellant's separation from his family was having an adverse effect on the family and the children in particular. Modern means of communication were no substitute for family life together. There had been a material change in the appellant's circumstances and in the level of threat he posed. The OASys report had been prepared a decade previously and did not accurately reflect the level of risk. There was no evidence of any further criminality and the appellant intended to abide by the law in the future. There was no evidence of a genuine, present and sufficiently serious threat to the fundamental interests of the UK. The appellant's continued exclusion was contrary to the Regulations and to Article 8 ECHR.

16. So it was that the appeal came before Judge Law ("the judge"), sitting at Nottingham Justice Centre on 5 February 2020. The appellant was represented by Mr Mian of counsel, as he was before me. The respondent was represented by a Presenting Officer. The judge heard oral evidence from the appellant's family (wife, sister, mother and the two older children) and submissions from the advocates before reserving his decision.

17. The judge's reserved decision is carefully and logically structured. He summarised the background at [1]-[2]; the appellant's representations at [3] and the respondent's decision at [4]-[6]. There was reference to the grounds of appeal at [7] and to the evidence and submissions at [8]-[9]. The judge made reference to the applicable law at [11]-[15].

18. Under the sub-heading 'The revocation issue under the 2106 Regulations', the judge directed himself that what the appellant was required to show was material change of circumstances since the deportation order was made: [16]. He took account of the conclusions of the FtT in 2013 at [17]. The judge noted at [18] that Mr Mian had placed particular reliance in his submissions on a report by a Consultant Psychiatrist, Dr Waquas Waheed, on 26 January 2020.

19. At [20], the judge observed that Dr Waheed's report was significantly more recent than the assessments relied upon by the respondent. He noted that the appellant's current wife had lived with him for seven years and 'does not say that he had ever threatened violence towards her.', although he was conscious of the fact that the previous FtT panel had taken that into account.

20. At [21], the judge noted that Dr Smith's report and the Probation Officer's report (as taken into account by HHJ Haworth) both related expressly to the specific point in time at which they were written. The judge then took into account the passage of time since the appellant was sentenced: [22]. There had been no further convictions or offences and it had been open to the respondent to ask the Madagascan authorities for details of the same. The judge proceeded on the basis that there were no further convictions. Then, at [23]-24], the judge expressed his conclusions under the EEA Regulations in the following terms:

> [23] The passage of time since deportation is itself recognised in the immigration rules as a potential change in circumstances sufficient to warrant revocation of the order: paragraph 391A of HC395, as amended. While this provision is not repeated in the 2016 Regulations, the fact that it would be taken into account under the stricter deportation regime relating to 'foreign criminals' strongly indicates that EEA nationals should benefit from the same consideration.
>
> [24] Having considered the evidence and the submissions by both representatives, I am satisfied on balance that both the passage of time since deportation and the genuine remorse and rehabilitation of the appellant together amount to a material change in the circumstances which justified deportation in 2013. He is therefore entitled to succeed under the 2016 Regulations.

21. The appeal under the EEA Regulations was therefore allowed. At [25]-[27], the judge set out his reasons for concluding that the appeal was to be dismissed on Article 8 ECHR grounds. He accepted that the appellant's family would not live with him in Madagascar or France and that the deportation order would result in their continued separation. He was not satisfied that the respondent's decision was a disproportionate interference with the family life which existed, however: [27].

The Appeal to the Upper Tribunal

22. There is said to be a single ground of appeal, which is described by the author as 'making a material misdirection/lack of adequate reasoning'. The seven paragraphs which follow that sub-heading in fact contain the following grounds:

    (i) The judge failed to have regard to relevant matters, in particular: the appellant's attempts to enter the UK in breach of the order; the seriousness of the index offence; and the deterrent effect of deportation.

    (ii) The judge misdirected himself in law in failing to consider the consequences of re-offending in line with Kamki v SSHD [2017] EWCA Civ 1715 and the application of the principle in R v Bouchereau (Case 30/77) [1978] ECR 732 to the facts of the appellant's case.

23. Permission to appeal was granted by UTJ Pitt, who noted that it was arguable that the judge had left out of account the appellant's attempts to re-enter the UK and that 'the report of Dr Waquas … does not show that he was qualified to give a professional opinion on forensic matters, in particular the risk of re-offending and remorse.'

24. In a detailed response to the grounds of appeal under rule 24 of the Upper Tribunal Rules, Mr Mian submitted that the judge did not fall into legal error.

25. The appeal came before UTJ Plimmer on 3 November 2020. Mr Diwnycz, who represented the respondent, indicated that he wished to amend the grounds to take the point about Dr Waquas which had first been mentioned by UTJ Pitt in granting permission. Mr Mian indicated that he was prejudiced because 'he could have sought further clarification regarding Dr Waquas' expertise'. The hearing was therefore adjourned, for the respondent to amend her grounds and for the appellant to secure further evidence from Dr Waquas.

26. The respondent's amended grounds, settled by Mr Diwnycz on 16 November 2020, advance the further complaint that the expert's 'otherwise impressive qualifications' did not disclose 'the relevant forensic psychological expertise required to assist this tribunal'.

27. On 17 December 2020, the appellant filed and served an amended bundle of 231 pages, containing further evidence about Dr Waheed's[1] qualifications. Mr Mian amended his response to the grounds of appeal on 8 December 2020.

28. Before me, Ms Petterson represented the Secretary of State. She relied upon the original and amended grounds. She submitted that the passage of time was insufficient to justify the judge's conclusion that there had been a material change of circumstances. Under the Immigration Rules, the general presumption (in paragraph 391) was that a deportation order made against a person with a sentence of four years or more would not be revoked at any time, unless continuation would be contrary to the Refugee Convention or the ECHR or continuation was outweighed by other compelling factors. In any event, the appellant had been deported in 2013 and had tried to re-enter the UK unlawfully on two occasions. The judge had failed to consider that in deciding that there had been a material change of circumstances. The passage of time since the offence had been significant but not the period of time since conviction. The judge had mentioned paragraph 391A of the Immigration Rules but had not really engaged with it.

29. As for Dr Waheed, Ms Petterson submitted that the judge's treatment of his report was to be considered on the basis of the material before the FtT, and not the additional material which had subsequently been adduced in this appeal. The report was factually incorrect in asserting that no other person had been targeted during the attacks, as it was clear that the appellant's daughter had been in the car which he had rammed with another vehicle. It was not clear that Dr Waheed was suitably qualified to assess risk of reoffending but the method by which he had assessed that risk was, in any event, wholly unclear from his report. It seemed that he had simply accepted what the appellant had said about being remorseful. Even if Dr Waheed had been involved in Parole Board proceedings (as he stated in his further evidence), there was insufficient analysis of the risk of re-offending in the report.

30. Mr Mian relied on his amended rule 24 response and submitted that the decision was safe. The judge had noted the re-entry attempts at [2] of his decision and there was no reason to believe that he had lost sight of the point in his subsequent analysis. Mr Mian accepted that entry (or attempted entry) in breach of a deportation order was a criminal offence but submitted that the judge was not required in terms to engage with the point in deciding that the appellant no longer presented a risk.

31. Ms Petterson had drawn my attention to the Immigration Rules but Mr Mian reminded me that the appellant was an EEA national and that the test which applied was in the EEA Regulations. The case law of the CJEU showed that the judge's focus on the passage of time since the commission of the offence (and not

[1] Since the doctor's name is Dr Waquas Waheed, I shall refer to him as Dr Waheed. That follows the approach of the judge of the FtT.

since the conviction) was correct: K v Staatssecretaris van Veiligheid en Justitie [2018] EUECJ C-331/16; [2018] 3 CMLR 26, at [58]. The appellant's offences had been committed as long ago as 1994. The judge was demonstrably aware that the appellant had been assessed as presenting a medium risk in 2008: [20] of the FtT's decision referred. The judge had been concerned to consider whether there had been any subsequent convictions and his reasoning process at [22] could not be faulted.

32. Mr Mian submitted that the Presenting Officer before the FtT had taken no issue with Dr Waheed's ability to give expert evidence on the appellant's risk of re-offending. The evidence which was now before the Upper Tribunal showed quite clearly that he was able to give expert evidence on the point. He was an eminent psychiatrist with extensive experience in the field. Mr Mian accepted that Dr Waheed had made no reference to the appellant's attempts to re-enter the UK in breach of the deportation order but he noted that he would have been aware of the point as he had the respondent's bundle., which had been provided with his instructions. Mr Mian also accepted that Dr Waheed had not engaged with the previous assessments of the risk presented by the appellant, whether by the FtT, HHJ Haworth or the other experts, but he noted that these had also been supplied to him with his instructions.

33. Ms Petterson did not seek to respond.

The Immigration (EEA) Regulations 2016

34. The appellant was deported from the United Kingdom because it was found by the FtT that he presented a genuine, present and sufficiently serious threat to the fundamental interests of the UK and because it was proportionate to do so. That decision was reached under the earlier regulations (the Immigration (EEA) Regulations 2006) but the test in the 2016 Regulations is essentially the same.

35. As the judge in the FtT noted, the principles governing the revocation of such an order are to be found in regulation 34 of the 2016 Regulations, which provided[2] as follows:

> **34.— Revocation of deportation and exclusion orders**
>
> (1) An exclusion order remains in force unless it is revoked by the Secretary of State under this regulation.
>
> (2) A deportation order remains in force—
>
> (a) until the order is revoked under this regulation; or
>
> (b) for the period specified in the order.

[2] The Regulations were revoked upon the UK's withdrawal from the European Union on 31 December 2020 but remain in force for present purposes.

(3) A person who is subject to a deportation or exclusion order may only apply to the Secretary of State to have it revoked on the basis that there has been a material change in the circumstances that justified the making of the order.

(4) An application under paragraph (3) must set out the material change in circumstances relied upon by the applicant and may only be made whilst the applicant is outside the United Kingdom.

(5) On receipt of an application under paragraph (3), the Secretary of State must revoke the order if the Secretary of State considers that the criteria for making such an order are no longer satisfied.

(6) The Secretary of State must take a decision on an application under paragraph (2) no later than six months after the date on which the application is received.

Analysis

36. Despite Mr Mian's determined submissions to the contrary, there can be no doubt that the judge erred in law in his decision. In concluding that the appellant had not re-offended since his deportation, the judge overlooked the uncontested fact that he had twice re-entered the United Kingdom in breach of a deportation order.

37. The re-entry point – and the significance of it – was expressly relied upon by the respondent at [61] and [62] of her decision (as reproduced above) and it was clearly a material matter for the judge to take into account in assessing whether the appellant was, as he claimed in his witness statement of 28 January 2020, a man who had learned his lesson, repented, and would not make any other 'mistakes' in his life. The fact that the appellant had re-entered the UK (by a circuitous route) in breach of the deportation order in 2014 and 2015 was *prima facie* evidence that he had not decided to abide by the laws of the United Kingdom and should have been taken into account by the judge.

38. There is no mention of the appellant's entry to the UK in breach of the deportation order in the judge's analysis of the question posed by regulation 34. Mr Mian submits that the point was nevertheless identified by the judge at [2] of his decision and that there is no reason to think that he lost sight of it when he came to conduct his analysis. I do not accept that submission. There is a world of difference between the recitation of a fact as part of the narrative and the engagement with the significance of that fact in a judge's analysis. I accept, of course, that the decision is to be read as a whole and that the FtT is a specialist tribunal which should be presumed to understand its task unless the contrary is shown. As Mr Mian was constrained to accept, however, the litmus test in deciding on appeal whether a judge had given legally adequate reasons is to consider whether the decision enables the Upper Tribunal to understand why the judge reached his decision: English v Emery Reimbold & Strick [2002] EWCA

Civ 605; [2002] 1 WLR 2409, at [19], as applied in this field by R (Iran) & Ors v SSHD [2005] EWCA Civ 982; [2005] Imm AR 535.

39. The judge's decision gives no indication of what he thought of the appellant's decisions to re-enter the United Kingdom in breach of the deportation order. In my judgment, that was not the kind of peripheral matter about which Brooke LJ spoke (giving the judgment of the Court of Appeal) at [15]-[16] of R(Iran). It was accepted in terms in the letter of refusal that the appellant had not received any further convictions since his deportation but the respondent did not accept that he was a reformed character. One of the main reasons that she reached that conclusion was his conduct in 2014 and 2015. The judge was accordingly required to engage with that conduct – which might properly have resulted in a prosecution under section 24 of the Immigration Act 1971 – and to explain why he took a different view from the Secretary of State. His failure to do so demonstrates a failure to take a material consideration into account or a failure to give adequate reasons for his decision.

40. The judge's consideration of Dr Waheed's evidence was also flawed for failing to take account of material matters and giving legally insufficient reasons, for the following reasons. Whether or not the point was taken by the Presenting Officer (and I think it was not), it is for a court or tribunal presented with expert evidence to police the performance of an expert's duties: Kennedy v Cordia (Services) LLP [2016] UKSC 6; [2016] 1 WLR 597, at [58]-[59].

41. At [59] of Kennedy v Cordia, Lords Reed and Hodge (with whom the other Justices agreed) stated that even in the absence of objection to an expert witness's evidence "the judge should, when assessing whether and to what extent to give weight to the evidence, test the evidence to ascertain that it complies with the four considerations which we have set out in para 38 above and is otherwise sound." The matters to which reference had been made at [38] were "(i) the admissibility of such evidence, (ii) the responsibility of a party's legal team to make sure that the expert keeps to his or her role of giving the court useful information, (iii) the court's policing of the performance of the expert's duties, and (iv) economy in litigation."

42. The Supreme Court also endorsed what had been said by Lord Nimmo Smith in McTear v Imperial Tobacco 2005 2 SC 1:

> [I]t is necessary to consider with care, in respect of each of the expert witnesses, to what extent he was aware of and observed his function. I must decide what did or did not lie within his field of expertise, and not have regard to any expression of opinion on a matter which lay outwith that field. Where published literature was put to a witness, I can only have regard to such of it as lay within his field of expertise, and then only to such passages as were expressly referred to. Above all, the purpose of leading the evidence of any of the expert witnesses should have been to impart to me special knowledge of subject-matter, including published material, lying within the

> witness's field of expertise, so as to enable me to form my own judgment about that subject-matter and the conclusions to be drawn from it.

43. With respect to the judge, there is no consideration in his decision of the extent to which Dr Waheed, a Consultant Psychiatrist, was qualified to express an opinion on the critical point at issue between the parties in this case: whether the risk of re-offending had changed since the FtT's assessment in 2013. There was no analysis, therefore, of whether Dr Waheed's opinion on that question fell within the field of his expertise.

44. Given the absence of a submission on the point from the Secretary of State, the judge's conclusion might have been expressed concisely but I can find no engagement at all with the point within his decision. He noted that he had been referred to the report by Mr Mian and he summarised the conclusions "that the appellant was genuinely remorseful and posed no more than a low risk of either specific harm to a particular person or general harm to the public'. The judge attached significance to the fact that Dr Waheed's report was significantly more recent than those relied upon by the respondent. But he did not, at any stage, consider whether Dr Waheed was suitably qualified to express an opinion on the risk of the appellant re-offending.

45. The evidence before the FtT provided little or no basis for concluding that Dr Waheed was suitably qualified to provide expert evidence on the risk posed by the appellant. The report began with a statement that Dr Waheed was a registered medical practitioner approved under section 12 of the Mental Health Act 1983 and registered with the GMC as a specialist in general psychiatry and liaison psychiatry according to the provisions of schedule 2 of the European Specialist Medical Qualifications Order 1995.

46. Dr Waheed appended full details of his qualifications and experience to his report. The Appendix showed that Dr Waheed had qualified in Pakistan and had arrived in the UK in 1996, after which he had worked as a Consultant Psychiatrist since 2004. At the date of the report, he was working as an Honourary Consultant Psychiatrist at Stepping Hill Hospital in Stockport. He had a substantive appointment at the University of Manchester as a reader in Psychiatry. He was extensively published in journals with a focus on 'community psychiatry and ethnic health inequalities'. Under the sub-heading 'Clinical expertise', there was the following statement:

> I am a clinical academic with expertise in diagnosing and managing complex psychiatric patients. I also have an international reputation in working with mental health issues in ethnic minorities, particularly cognitive impairment and depression in British Pakistanis, which was also the topic of my doctorate, awarded by the University of Manchester.

47. The Appendix continued, giving details of Dr Waheed's peer-reviewed publications, book chapters and postgraduate degree students. There is nothing in that section of the Appendix which suggests that Dr Waheed has any

experience or qualifications which meant that his opinion on the risk of the appellant re-offending lay within the filed of his expertise.

48. In the second Appendix to the report, Dr Waheed stated, oddly, that his report had been prepared in accordance with rule 33 of the Criminal Procedure Rules. Amongst other matters, he also confirmed in this Appendix that '[a]ll of the matters on which I have expressed an opinion lie within my filed of expertise'. Mr Mian placed some reliance on that statement but it represents no answer to the respondent's complaint. Had the expert omitted that statement, the weight attached to his report might legitimately have been reduced, but the fact that he had included that statement did not remove the onus on the judge to decide what "did or did not lie within [Dr Waheed's] field of expertise", as required by the authorities to which I have referred above.

49. Mr Mian's intention, as is clear from the additional evidence in the appellant's most recent bundle and his amended rule 24 response, was to submit that the evidence subsequently provided by Dr Waheed was an answer to the respondent's complaint. I suggested to him at the hearing, however, that the question of whether the FtT's decision was tainted by legal error was to be resolved on the basis of the material before the FtT. Mr Mian was unable in response to provide any reason whatsoever why the later evidence might bear on that question.

50. The absence of a response is unsurprising; the position in that respect has been appreciably clear since at least CA (Ghana) v SSHD [2004] EWCA Civ 1165 and the appellate scheme now in place is materially the same as that which was analysed by Laws LJ (with whom Mummery LJ and Sir Martin Nourse agreed). I decline, therefore, to consider the subsequent evidence. It is quite clear that the judge failed to turn his mind to the extent to which Dr Waheed was qualified to express an expert opinion on the risk of the appellant re-offending. Had he turned his mind to that question he could not, on the basis of the material before him, have concluded that Dr Waheed's opinion in that regard was within his field of expertise.

51. Unfortunately, there is a further error in the judge's consideration of the expert report of Dr Waheed. In R (British American Tobacco & Ors) v Secretary of State for Health [2016] EWHC 1169 (Admin); [2016] ETMR 38, Green J (as he then was) was presented with a plethora of evidence in a challenge to the Secretary of State's decision to prohibit the sale of tobacco products in anything other than plain packaging. One of the numerous grounds advanced by the tobacco industry concerned the Secretary of State's consideration of expert evidence adduced in opposition to the prohibition. Green J described a number of 'common sense rules' for the evaluation of expert evidence.

52. One of those rules was that which I have just touched upon: the assessment of the qualifications and competence of the expert. Another, however, was the importance of testing whether expert evidence complies with methodological

best practice accepted by the scientific community: [20]-[21] of Green J's judgment refers. (Green J's judgment, dismissing the grounds advanced against the prohibition, was upheld on appeal: [2016] EWCA Civ 1182; [2018] QB 149.

53. The methodology applied by an expert will often be clear from his or her report. The examples given in MH (Iran) [2020] UKUT 125 (IAC) illustrate the point:

> [40] In many cases, it will be apparent that the methodology and validity of a field of knowledge or science is such that it can validly underpin expert evidence. It is well established in the field of refugee status determination, for example, that a suitably qualified doctor can provide expert evidence on the likely causes of physical lesions on a claimant's body, in compliance with the Istanbul Protocol: KV (Sri Lanka) v SSHD [2019] UKSC 10; [2019] 1 WLR 1849. Expert evidence regarding an individual's mental health is also frequently received in international protection appeals, documenting diagnoses made by the application of diagnostic criteria such as the ICD-10 or the DSM-V: TD & AD (Albania) CG [2016] UKUT 92 (IAC). In Kennedy v Cordia itself, it was accepted that a consulting engineer with a degree in engineering and a diploma in safety and hygiene who was, amongst other things, a former member of the Health and Safety Executive, was properly able to provide expert evidence on a range of matters concerning the precautions which might properly have been taken to prevent the appellant's wrist injury.

54. The Immigration and Asylum Chamber is also frequently presented with reports in which an opinion is given on the risk of an individual re-offending. Most frequently, these are in the form of pre-sentence or Offender Assessment System ("OASys") reports complied by the officers of the National Probation Service. The statistical and evaluative tools used in those reports (including, for example, the Offender Group Reconviction Scale ("OGRS 3") and the OASys Violence Predictor ("OVP")) are generally accepted by the Tribunal and other bodies, including the Parole Board, to adopt a methodology which generates an informative conclusion as regards the risk of reoffending.

55. As contended by Ms Petterson, however, Dr Waheed's report gives no indication of whether he employed methodological best practice in coming to the conclusion that the appellant presented a low risk of violent re-offending. The basis upon which he apparently came to that conclusion, as stated at page 8 of the report, was as follows:

> (a) The fact is that the assaults took place in 2004 over a short period of time.
>
> (b) Reportedly Mr Halani acted specifically towards his immediate family at that time.
>
> (c) His behaviour was driven by the reports of his wife having an extramarital relationship.
>
> (d) No other person was targeted during these acts.

(e) After that period over the previous 25 years, there are no reports of him posing any threats to his ex-wife, children or for that matter any other person.

(f) He informed me that there has been no such instance outside the UK, and he has not been in contact with police for any other similar behaviour.

(g) On mental state examination, there was no evidence of any relevant major though preoccupations or delusions.

(h) He denies using alcohol or drugs, which if consumed may contribute towards the repetition of violent behaviours.

(i) He also denied any instances of verbal abuse in his current marriage.

56. The expert's reference to these matters gives scant indication of their relevance to his conclusion. Does the fact that an individual acts violently towards his immediate family mean that he is more or less likely to act in a similar way in the future? Does the fact that behaviour was driven by a specific stressor mean that such behaviour is more or less likely in the future, particularly if that stressor presents again? The expert's conclusion is premised on a list of factors which might, in some respects, militate in one direction or another, with little or no indication of the underlying methodology employed to resolve this critical question in the appellant's favour.

57. It is also to be recalled that HHJ Howarth's particular concern, premised on what he had read in the detailed reports before him, was the risk of the appellant reoffending with violence "in the context of the failure of an intimate relationship". Dr Waheed made no mention of HHJ Howarth's concern. He made no reference to the detailed reports which had been before the Crown Court. Mr Mian protests that all of this material was provided to Dr Waheed but that submission serves to highlight the problem, not to address it.

58. Judges of the Crown Court and the First-tier Tribunal had concluded that the appellant was a man who posed a real risk in the United Kingdom. Those carefully reasoned conclusions, all of which had been provided to the expert alongside the OASYs report, should have been considered by Dr Waheed. Instead, he failed to take any of those assessments into account in reaching his conclusion about the appellant's risk of re-offending. Nor did Dr Waheed confront the question which most obviously presented itself as a result of what had gone before: "Would the appellant react in a similar way in the face of future marital disharmony?" Nor, finally, did Dr Waheed pay any heed to the fact that the appellant had attempted to re-enter the UK twice in breach of a deportation order when concluding that his offending in 1994 was 'out of keeping with his personality'.

59. In sum, therefore, I find that two of the respondent's grounds of appeal are clearly made out. The judge erred in failing to have any or any adequate regard

to the appellant's re-entry in breach of the deportation order in 2014 and 2015. The judge also erred in his consideration of the expert evidence, in that he failed to consider whether Dr Waheed's opinion about the risk of re-offending lay within his field of expertise and he failed, in any event, to evaluate the methodology employed by Dr Waheed in reaching that conclusion.

60. I can deal very briefly with the respondent's remaining grounds of appeal. No error of law on the part of the FtT is identified by those grounds. Ms Petterson made no reference to those grounds, and rightly so. The R v Bouchereau principle was not invoked by the Secretary of State before the judge and it was not for him to take it of his own volition. I do not understand the point which is made in the grounds with reference to Kamki v SSHD, which was a case on its own facts. And, as the judge himself stated, neither s117C of the Nationality, Immigration and Asylum Act 2002 nor the principle of deterrence was of any relevance in an EEA case such as this.

Notice of Decision

The decision of the FtT is unsafe and it must be set aside in full. The appeal is remitted to the First-tier Tribunal to be considered afresh by a judge other than Judge J H Law.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 June 2021