Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-000572
On appeal from DA/00264/2020

THE IMMIGRATION ACTS

Heard at Bradford IAC
On the 5 August 2022

Decision & Reasons Promulgated
On the 27 October 2022

Before

UPPER TRIBUNAL JUDGE REEDS

Between

[M R]
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R. Khubber, Counsel instructed on behalf of the appellant
For the Respondent: Ms Z. Young, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant appeals, with permission, against the determination of the First-tier Tribunal promulgated on 21 January 2022. By its decision, the Tribunal dismissed the appellant's appeal against the Secretary of State's

decision dated 8 July 2019 to deport him from the United Kingdom. A supplementary decision was also made maintaining the deportation dated 8April 2021.

2. The First-tier Tribunal did not make an anonymity order and no grounds have been advanced on behalf of the appellant to make such an order.

3. The decision to deport was made under Regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The appellant's case was that the decision was not in accordance with Regulation 27 and Schedule 1 of the Regulations, and/or that it was incompatible with his rights under Article 8 of the Convention, and thus unlawful by reason of S.6 of the Human Rights Act 1998.

4. By a decision and reasons promulgated on the 21 January 2022 the FtTJ dismissed the appeal, holding that the decision was in accordance with the Regulations as the FtTJ found that the respondent had established that the appellant represented a genuine, present and sufficiently serious threat to public policy or security such that his deportation was justified. The judge also considered the issue of proportionality of the decision.

5. The appellant appealed and permission to appeal was granted by the First-tier Tribunal Judge Boyes on 9 March 2022.

6. The hearing took place on 5 August 2022, Mr Khubber of Counsel appeared on behalf of the appellant and Ms Young, Senior Presenting Officer appeared on behalf of the respondent. I am grateful to Mr Khubber and Ms Young for their clear oral submissions.

Background:

7. The appellant is a citizen of Poland. The key factual background is set out in the decision of the FtTJ, the decision letter, OASYs report and the witness statements filed on behalf of the appellant and the ISW report.

8. The appellant entered the United Kingdom on a date in 2008 for the purposes of work and job seeking. Whilst in the UK the appellant was convicted of a number of offences.

9. On 9 June 2010 he was convicted at the magistrates court of shoplifting (an offence committed whilst on bail) and on 10 June 2010 was sentenced to a community order of unpaid work of 120 hours.

10. On 17 January 2011 he was convicted at the magistrates court of theft (shoplifting offence being committed whilst on bail) and was sentenced to a community order of the hundred and 70 hours unpaid work. He was also convicted on the same day the breach of the community order resulting from the original conviction on 10 June 2010 the order being revoked.

11. On 20 August 2012 he was convicted at the magistrates court of failing to comply with the requirements of the community order resulting from the original conviction of 17 January 2011. The order was revoked.

12. On 21 August 2012 he was convicted at the magistrates court of 2 offences; possessing a controlled drug class B amphetamines and failing to surrender to custody after an appointed time. He was sentenced the same day to a fine of £100 and cost of £80 in one day detention at the courthouse.

13. On 15 May 2012 the appellant was made the subject of an extradition order under an EAW.

14. The appellant met his partner at a party in 2012 and develop their relationship. She became pregnant and on 22 July 2013 N was born.

15. On 28 May 2013 he applied for asylum which was refused and certified as clearly unfounded in a decision taken on 19 July 2013.

16. On 14 August 2013 he was extradited to Poland from the UK.

17. On 10 October 2015 the appellant was released from prison in Poland.

18. On 25 October 2015, the appellant attempted to return to the UK but was removed following day.

19. On a date unknown, the appellant returned to the UK and came to the attention of the authorities when arrested for burglary and theft in November 2017.

20. On 23 February 2018, he was convicted at the magistrates court of burglary and theft and was sentenced on 27th February 2018 to a sentence of imprisonment of 18 weeks, suspended for a period of 12 months.

21. On 4 September 2018 at the magistrates court the sentence was varied in the order amended due to breach of the order. He was sentenced to continue the unpaid work requirement in addition to the original sentence.

22. On 5 January 2019 a child L was born.

23. On 6 February 2019 the appellant was convicted the Crown Court of 2 offences; burglary and theft and a commission of further offences during the operational period of suspended sentence order. The appellant was sentenced to a period of imprisonment of 16 months for the burglary and theft and was sentenced to a further period of 3 months imprisonment to be served consecutively for the breach of the suspended sentence making a total of 19 months imprisonment.

24. On 12 February 2019 he was issued with a notice of liability to deportation served on the appellant on 14 February 2019. The notice stated that he

was liable for deportation pursuant to Regulation 27 of the Immigration (European Economic Area) Regulations 2016.

25. In response to this, the appellant signed a disclaimer on 14 February 2019 confirming that he wished to return to Poland.

26. On 8 July 2019, the appellant was made subject to sign deportation order issued and certified under regulation 33 of the EEA Regulations 2016. The documents had served him on 17 July 2019.

27. In response to this, the appellant signed a further disclaimer on 17 July 2019 confirming that he wished to return to Poland.

28. On 21 August 2019 he was removed from the UK based on his signing of the disclaimer and that he did not seek to challenge the deportation order.

29. The appellant subsequently re-entered the UK on an unknown date (which he claimed to have been 10 November 2019). He was arrested on 15 November 2019 and return to prison to serve the remainder of his prison sentence.

30. On 23 January 2020 he was removed from the UK. The appellant again re-entered the UK having been encountered at a ferry terminal on 25 January 2020 and served the remainder of his sentence.

31. On 21 August 2020, the appellant lodged an out of time appeal against the deportation decision which was accepted by the tribunal (the decision of tribunal case worker).

32. On 15 September 2028 pre-action protocol (PAP) was submitted by the appellant's legal representatives at that time challenging the decision to deport him and the decision to certify the decision under Regulation 33 of the 2016 Regulations.

33. On 29 September 2020, the respondent replied to the PAP stating that the decision to deport would be reconsidered.

34. On 6 November 2020 the appellant's partner was granted settled status under the EU settlement scheme.

35. On 13 July 2021 the child O was born.

36. The respondent reconsidered the decision in a supplementary decision letter on 8 April 2021.

37. The decision letter began by setting out the appellant's immigration and criminal history as set out above. It was noted that he had not provided any evidence in support to show that he had been exercising treaty rights in the UK for a period of 5 years continuously. Thus it was not accepted that he had acquired a permanent right to reside in the UK.

38. Consideration was therefore given to whether his deportation was justified on grounds of public policy or public security. It was noted that within the decision to deport dated 8 July 2019, it was considered appropriate to deport him on the basis of his serious criminal convictions and that the respondent was satisfied that he presented a genuine, present and sufficiently serious threat to the interests of public policy, if allowed to remain in the UK. In addition, the decision letter referred to the OASYs report completed 21 October 2020 which provided further details of the serious nature of his offending and the risk he posed.

39. The respondent set out the sentencing remarks of the Crown Court judge at paragraph 47.

40. It was noted that when completing the OASys's report the offender manager found that he posed a medium risk of harm to the public and in assessing him as a medium risk the respondent considered that he had potential to do harm.

41. The respondent set out at paragraph 49 that having been assessed as a medium risk it was considered that there were identifiable indicators that he would seek to reoffend.

42. On the available evidence the respondent concluded that it indicated he had a propensity to reoffend and thus represented a genuine, present and sufficiently serious threat to the public to justify his deportation on grounds of public policy.

43. In terms of proportionality, the decision letter the appellant's family situation between paragraphs 55 – 60. It was noted that the appellant had a partner and 2 daughters and that his partner, a Polish national claims have resided in the UK since July 2008 and both daughters were born in the UK. The appellant also had another daughter, age 9 also born in the UK by an ex-partner. The respondent noted the lack of evidence in relation to the children and that no evidence had been provided to confirm that he had any form of relationship with them. The undated letter of support from his partner was considered but his relationship with the children had already been affected by the separation from them as a result of his offending which resulted in his imprisonment and also removal from the UK on 3 separate occasions. It was considered that the children could remain in the care of their mother as they had done throughout their lives. There were no concerns that it would not be able to meet the welfare needs of the children. As regards his partner, it was considered that due to the length of residence in the UK she will have form friendships may have family members could help and support should she require it upon his deportation. Ultimately it would be the decision of his partner whether she would wish to accompany him back to Poland to maintain the family unit. However if she chose not to, she could maintain contact via telephone, email or Skype. Whilst accepting that maintaining contact via such methods is not ideal, they have been previously used to maintain contact whilst in custody and upon 3 occasions where he had been removed from

the UK. It was considered that the relationship with his family did not raise issues which would render deportation disproportionate. The economic situation was addressed at paragraph 61 – 63.His length of residence was set out at paragraph 64 – 65. Issues relating to social and cultural integration with that at paragraph 66 – 68. Links of his country of origin were set out between paragraphs 69 to 72.

44. The issue of rehabilitation was sat out at paragraph 73 – 77 . Having regard to all the available information, it was concluded that his deportation to Poland would not prejudice the prospects of rehabilitation and that any interference to it would be proportionate and justified when balanced against the continuing risk posed. It was concluded that there was a real risk that he may reoffend and therefore it was considered that his deportation was justified on grounds of public policy, public security, or public health in accordance the regulation 23 (6) (b). His personal circumstances had been considered but given the threat posed, the decision to deport was proportionate and in accordance with the principles of regulations 27 (5) and (6).

45. The decision letter also addressed additional matters relevant to Article 8 of the ECHR between paragraphs 79 – 86.

46. Under the heading “very exceptional circumstances” the respondent considered whether there were very compelling circumstances such as it should not be deported (see paragraphs 87 – 110).

47. The respondent concluded that having considered the facts in the circumstances including the best interests of children, that the appellant’s deportation would not breach the United Kingdom’s obligations under article 8 of the ECHR because the public interest in deporting outweighed his right to private and family life. The decision to deport the appellant dated 8 July 2019 was maintained.

48. The remains of the decision letter related to regulations 33.

<u>The decision of the FtTJ:</u>

49. The appellant appealed the decision, and it came before FtTJ Pickering on 14 December 2021. In a decision promulgated on 21 January 2022 the FtTJ dismissed the appeal.

50. The FtTJ set out the issues that required resolution at paragraph 35:

    (1) does the appellant pose a genuine, present and sufficiently serious threat;

    (2) whether in view of his circumstances, deportation complied with the principles of proportionality.

51. The FtTJ also set out that it was agreed that the appellant was not entitled to any enhanced forms of protection as he had not acquired permanent residence.

52. The FtTJ accepted the respondent's characterisation of the appellant's record as one of "escalating" based in the observations in the OASY's report and the appellant's antecedents. The FtTJ accepted the OASys's report's assessment that the appellant as a medium risk of reoffending (page 121) and whilst accepting that the appellant had not reoffended since the index offence stated that this was not a "useful barometer for gauging the appellant's risk of reoffending as the appellant was removed in the UK and under licence conditions in the index offence." (Paragraph 41).

53. The FtTJ referred to his conduct and that he had repeatedly attempted to return to the UK. Whilst the judge took into account his evidence that he wants to be reunited with his family the judge found that that was a complete disregard for the law. At paragraph 44 the judge found that is antecedents showed a propensity to breach orders.

54. As to the circumstances to his offending, the judge found they appeared to be when he was struggling financially. The judge noted that she had concerns as to the appellant circumstances and that whilst he was supported by his partner presently, the concern was that without work it would place him in a position to make it more likely to reoffend.

55. In terms of rehabilitation this was not an issue that weighed heavily on the consideration as there was little evidence but the action upon re-entering the UK was difficult to reconcile. The judge found there was a paucity of evidence about family connections outside his immediate family unit and concluded they would not provide any particular support for him.

56. As to his family life, the judge accepted that the appellant was the father of 4 children. In in respect of his relationship with his eldest child W, the judge stated that she attach little weight to that relationship "because I have not received any independent evidence about this relationship from the ISW or W's school". The judge accepted the conclusion of the ISW about the positive nature and the quality of the relationship between the appellant, N, L and O. Judge stated that she felt able to do so as the ISW had the opportunity to observe and speak with the family on a number of different occasions and also consulted sources outside of the family such as N's school. The judge considered "I considered her well qualified to make observations about the family relationship and dynamics in play. "The judge accepted that the appellant played an active role in the lives of N, L and O. He lives with them, is involved in their care and is known to do so by N's school. The judge accepted that the ISW observed a loving family which is supported by other evidence, including numerous photographs.

57. Having made those findings of fact, the judge applied them to the issues in the appeal.

58. At paragraphs 51 – 52, the judge addressed the question of whether the appellant posed a genuine, present and sufficiently serious threat setting

out that she had reached that conclusion in the light of her concerns about the appellant's risk of reoffending set out at paragraphs 40 – 45 and that there is at least a medium risk that he will reoffend.

59. At paragraphs 53 – 58 the judge addressed the issues of proportionality of the appellant's removal. The judge accepted family life with his partner and children but that it did not assist as integration as they will share the same nationality and language schedule 1 (2)). The relationships were formed when the appellant had convictions in this detracted from his integration (schedule 1 (4)) alongside his ability to live within the confines of the law.

60. As to the circumstances of N, the judge accepted that she was very settled in the UK, attending school and had friends. She had no experience of living in Poland, but she would not be alone she would have the support of her mother father and siblings who were her main sources of support. Whilst the judge acknowledged the concerns of the appellant's mother about the child's confidence in Polish, there was evidence that she was able to speak read and write it. The judge said that whilst not seeking to minimise N's feelings about making mistakes at school in Poland she would no doubt receive support and reassurance from the parents about these issues. The appellant's partner had family in Poland who could provide them with support. In relation to the other children they were of an age where they would be more adaptable to life in Poland. The judge acknowledged that it would not be the 1st choice for the appellant's partner to live in Poland. The judge concluded that in light of the appellant's risk of reoffending the decision of removal was a proportionate one and dismissed the appeal.

The legal framework:

61. The appellant is an EU citizen. Under Article 20 of the Brexit Withdrawal Agreement the conduct of EU Citizens, their family members, and other persons, who exercise Citizens' rights under the Withdrawal Agreement, where that conduct occurred before the end of the transition period, 31 December 2020, shall be considered under the provisions of Directive 2004/38/EC which gives effect to the free movement of persons. This means that in this appeal it is the EU standards and not the UK standard that applies to any decision to deport, which are more favourable to the appellant than those applying under UK law.

62. The deportation of EEA nationals is subject to the regime set out in the Immigration (European Economic Area) Regulations 2016 ('The EEA Regulations') which were made under section 2 of the European Communities Act 1972 by way of implementation of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States. The Directive sets conditions that must be satisfied before a Member State can restrict the rights of free movement and residence provided for by EU law.

63. By virtue of Regulation 23(6) of the 2016 regulations 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:

> (a) that person does not have or ceases to have a right to reside under these Regulations; or
>
> (b) the Secretary of State has decided that the person's removal is justified on the grounds of public policy, public security, or public health in accordance with regulation 27; or
>
> (c) the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3).

Regulation 27 of the EEA Regulations provides as follows: -

> ' **27.** - (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security, or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> (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.
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who-”
>
> > (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
> >
> > (b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989
>
> (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 concerned 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.).

64. SCHEDULE 1

CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

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.

6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including-”

(a) entering, attempting to enter, or assisting another person to enter or to attempt to enter, a marriage, civil partnership, or durable partnership of convenience; or

(b) fraudulently obtaining or attempting to obtain or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

The fundamental interests of society

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

(a) preventing unlawful immigration and abuse of the immigration laws and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area.

(b) maintaining public order.

(c) preventing social harm.

(d) preventing the evasion of taxes and duties.

(e) protecting public services.

(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).

(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking.

(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).

(l) countering terrorism and extremism and protecting shared values."

The appeal before the Upper Tribunal:

65. Before the Upper Tribunal, the appellant was represented by Mr Khubber of Counsel and the Secretary of State was represented by Ms Young, Senior Presenting Officer.

The submissions:

66. Mr Khubber relied upon the grounds as drafted and his outline submissions.

67. It was submitted that there were 2 grounds:

(1) That the FtT materially misdirected itself in relation to whether the SSHD had discharged the burden on her to show that A's personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (Reg 27(5)(c) EEA Regs 2016) and/or

(2) The FtT had materially misdirected itself in relation to whether deportation would be proportionate (under EU law) in light of the adverse impact of deportation on the best interests of A's children lawfully residing in the UK (Reg 27(6) EEA Regs 2016 and to the extent necessary Article 8 of the ECHR).

68. Dealing with the first ground, Mr Khubber referred to the relevant law contained in regulation 27 (5) (c) that 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 the past conduct of the person (although the threat does not need to be imminent).

69. He submitted that the crucial requirements to be satisfied are "a present threat" what is required is a dynamic assessment on the "current" position at the time of the material decision that is when the appeal was heard and that secondly, the threat is properly evaluated as "sufficiently serious" even where an EU national does not achieve permanent residence and that a "risk" of further offending or harm is not enough (see Arranz v SSHD [2017] UKUT 294) and what is required is consideration of the nature of the risk and the likelihood of it occurring. For example a medium risk of

petty theft is unlikely to meet this threshold whereas a high risk of armed robbery is very likely to.

70. He submitted that the appellant's case was that the respondent had not discharged the burden. When looking at the evidence before the FtT it consisted of the history of the appellant's convictions which were not disputed, his immigration history, his statement, his partner's statement and the OASys' assessment.

71. The FtTJ's reasoning on this issue was set out at paragraphs 51 – 55 and by reference to the factual findings made in the earlier part of the decision at paragraphs 40 – 45 and concluded that the appellant posed a medium risk of reoffending (see paragraph 52).

72. Mr Khubber submitted that the reasoning of the FtTJ was problematic in a number of respects. He submitted that the judge approached the issue by adopting an over generalised approach and not focusing in an exacting way by looking at the evidence to see if the burden was in fact discharged. It was not sufficient to conclude that there was a "risk" of further offending or harm even if medium in order for the respond to discharge the burden to show that there was a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The FtTJ was required to explain what the offending/harm there was a risk of and why that met the high threshold required (what type of crime/harm is anticipated and why it reached that threshold.

73. The error was material because on the evidence available the level of risk of reoffending was not high and was being managed at the time of the appeal. Mr Khubber submitted that whilst the judge referred to the OASys report and the medium risk of reoffending, it was necessary to look at the context of the conclusions in that report and the details of the report and how the conclusion was reached. I set out in the written grounds, the FtTJ's failure to appreciate the relevant evidence on the issue was reflected in the failure to appreciate relevant parts of the OASys report as shown by the lack of reference in the FtTJ's decision.

74. It is submitted that the OASys report explanation of what constituted a medium risk of serious harm was important that there was a potential to cause serious harm that the person was unlikely to do so unless there was a change of circumstances. The current circumstances were that he was being supported by his partner in terms of finances and in relation to compliance. That it assisted with his rehabilitation. If that were removed by way of deportation, his likelihood of offending increased. If it remained it was unlikely that he would reoffend to the extent of causing serious harm. The judge failed to appreciate this in the assessment undertaken.

75. The 2nd point made is that the judge failed to consider the evidence that did exist in relation to rehabilitation and was relevant to the extent of the threat. The appellant's conduct set out in the OASys assessment showed compliance. By the time of the hearing in December 2021 he had

completed his custodial period of his sentence, his licence had expired 7 August 2020 and his post-sentence supervision had expired on 25 October 2020 without any difficulty (OASys p6). The appellant had been on immigration bail since 20 August 2020 and complied with it for over a year before the appeal. Furthermore a lengthy time had elapsed since the commission of the index offence in October 2018. Thus this was a material error of law which fed into the question of whether the threat had been established.

76. In his oral submissions Mr Khubber submitted that the point made in the OASys report was that the appellant had achieved stability in his life having accommodation family support and had been compliant with the probation service.

77. Mr Khubber took the Tribunal through the relevant part of the OASys report when making his submissions. When addressing the medium risk of harm, he submitted that this needed to be looked at in the context of the rest of the relevant matters such as stability and is accommodation and that this is a "potential risk" bearing in mind the stability that he had reached.

78. Mr Khubber highlighted the parts of the report that related to his compliance. The appellant had been subject to supervision the probation officer in September and October 2020 (p3) with his licence expiring on 7 August 2020 and post-sentence supervision expiring on 25 October 2020.

79. He referred to page 8 which dealt with the analysis of the offence and page 9, that it carried out due to financial issues.

80. Pages 10 -11of the report at 2.11 stated that the appellant took responsibility for his actions. Page 12 referred to accommodation is not linked to the risk of harm or his offending behaviour. The appellant was not able to work because the respondent prohibited from him doing so and that was a barrier to further work (see page 14).

81. Mr Khubber referred to the relevant parts of the report relating to his relationship to this family members (page 16), lifestyle and associates (page 17) and page 25 attitudes. Page 28 it was set out that the appellant understood the importance of completing programs.

82. The risk assessment was set out at page 32 and the OVP one-year score was 8 and OVP the percentage score was 14, which indicated that the OVP risk of reoffending was low. The risk of harm was said to be a medium risk of serious harm, but that the offender had the potential to cause serious harm but was unlikely to do so unless there was a change in the circumstances for example failure to take medication, loss of accommodation, relationship breakdown or drug or alcohol misuse (page 40). When looking at the considerations relevant to risk, it was noted at P42 that he reported to have no financial difficulties at present and there was no evidence to suggest otherwise. He was very motivated to

addresses offending behaviour and complied with supervision and had engaged well in interventions in line with a sentence plan. However the ability to complete work in line with the sentence plan objectives have been restricted due to the appellant being subject to probation is supervision for a short period of time after his release from custody. He does accept responsibility for his actions at this been demonstrated in supervision. We continue to be very motivated to desist from offending. Page 43 set out that he had close ties to this family and friends who are all supportive.

83. Mr Khubber submitted that the important point to understand was that reference to "medium risk" was to be considered in the context of the assessment. He referred to the tabular assessments at pages 44 and 45. At page 47 it showed that he had the capacity to change.

84. The reasons for termination was set out at page 51. The appellant had complied with supervision and PSS conditions to date; had engaged in one to one interventions and remained polite and respectful throughout. He demonstrated a positive attitude towards the probation supervision and reacted well when challenged. He would be amenable to supervision the future unfortunately the effectiveness of the supervision period be limited as the appellant was subject to probation for a very short period of time however he been able to develop some prosocial links to the community by advice/support from the offender manager which could be viewed as positive. Mr Khubber submitted that when the report was written in 2020 had shown significant positive aspects to address past criminality. Therefore the assessment was made on the basis of whether there would be a change in circumstances. The stability of his accommodation and his circumstances was having a positive impact on him. It was therefore submitted that this was one element of the assessment and the OASys report could not be seen on its own simply on the basis of him being assessed as a medium risk of harm and there were other elements in the report which the tribunal should have engaged with.

85. As report had demonstrated there had been limited time to make an assessment of his desire to change that the time of the hearing at the end of 2021 he had been released on bail since 2020 and no further offending therefore that was a relevant point which should have been taken into account. This is evidence that the OASys report did not have and made good the point relating to his motivation and that the limited time at the time of the report was not a problem.

86. The FtTJ did not engage with the additional questions that were relevant -what is the risk? Is it the same or less? And finally did it meet the test?

87. Mr Khubber submitted that the judge failed to address the issue of rehabilitation. The report undertaken by the appellant, and this was an important factor to take into account. The contents of the OASys report in the post-sentence conditions and compliance and rehabilitation were all relevant factors.

88. In addition the judge made a mistake in relation to the immigration history. At paragraph 42 the FtTJ stated there were 4 occasions, but the appellant had entered in breach twice.

89. The point made in the grounds was that the appellant's past breaches of the deportation order had to be placed in context. It had been done because the appellant was concerned about the welfare of his family and therefore not simply as a blatant disregard of the law and without the benefit of having any legal advice prior to deportation (see decision by tribunal caseworker 27/8/2020). He submitted that the judge had been aware of the context.

90. Putting those factors together what emerges is that the FtTJ was required to look the key question of whether under the Regulations the burden was discharged and whether the appellant was genuine, present and sufficiently serious threat. His background was highly relevant as was the OASys report. However when looking at the context of the decision paragraphs 51-52 the reasoning was limited and failed to take into account all the material. It was insufficient to say that the appellant was a medium risk of harm without taking into account the motivation to address the offences, the motivation realised in practical terms in light of the compliance and the judge had not addressed this evidence when undertaking the legal question under regulation 27 (5) (c).

91. Dealing with the second ground, this ground was based on the circumstances of the children in the UK, and in particular that the FtT misdirected itself in relation to whether deportation would be proportionate in light of the adverse impact of deportation on the best interests of the appellant's children residing lawfully in the UK.

92. The appellant had 4 children in the UK. His eldest child, W, was from a previous relationship but it was the appellant's case that she was very much part of the appellant's family unit, enjoying time with her half siblings and the appellant's partner. The appellant had 3 younger children, N, L and O all living in the family unit.

93. It is submitted that the recent decision of the Supreme Court in *HA (Iraq) and others v SSHD* [2022] UKSC 22, handed down 20 July 2022 (and hence after the FTT's decision), further supports the second ground of challenge. With this decision the Supreme Court has once again emphasised the need for a fact specific enquiry where the statutory provisions (here the EEA Regs 2016) are intended to be consistent with the general principles relating to the "best interests" of children (para 37).

94. Further still, it is important to recognise that under EU law there is no requirement to satisfy the "unduly harsh" test as there is under s.117C (5). What is required is a consideration of whether deportation would be disproportionate as a matter of EU law in the circumstances of the case.

95. Mr Khubber submitted that the FtTJ was required to undertake a dual analysis of the proportionality decision alongside the article 8 consideration family life and the extent and the impact on the best interests of the children. The assessment was set out at paragraphs 53 – 57 that in essence, N was settled in the UK and that she had no experience of living in Poland, but the conclusion was set out at paragraph 56 of her decision. In this scenario she focused more on the "go" scenario and upon the evidence of the appellant's partner as a last resort that she would go to Poland with the appellant. The difficulty with that was that even if that was a finding open to the judge it was insufficient to answer the legal question as to whether this was justified for the impact on the children?

96. When looking at the ISW report the picture that emerged was a complicated set of circumstances which were not appreciated by the judge. There was a tension between the 3 individuals involved; and did not want to go to Poland, a mother stated that she would take them if she had to, and the appellant did not want and to leave the UK. That had not been appreciated or taken into account when looking at the best interest of the children.

97. Furthermore, the FtTJ did not appreciate there was another family member W, whose relationship with N would be severed as there was no obligation for her to go to Poland. His eldest child, W is for a previous relationship. It was part of the appellant's case that W was very much part of the family unit enjoying time with his partner and of the children. This is an important point and needed careful evaluation on the circumstances as to what would face the relevant children when undertaking a "best interests assessment".

98. When looking at the evidence, the FtTJ had evidence from the appellant and his partner and also the report of the ISW as to the family life enjoyed by the appellant, his partner and the children. The appellant was seen to actively engage as a father and set out his emotional relationship with his family (see 2.21 – 2.22). He was described as "a consistent presence in the home and is an actively involved father." At 3.5 it was stated "I have no doubt that [M] has established strong and essential relationship to both his daughters, and this provides them with love, care and support and family stability that is necessary for their optimal development".

99. Here the FTT focussed on the fact that A's partner reluctantly stated that she would relocate to Poland with the children to keep the family together (para 57) but without further addressing the relevance of the impact that that would have on the best interests of the children. In relation to N it was stark because of social and cultural integration in the UK and for W (A's daughter from a previous relationship) such relocation was impossible resulting in a severing of the relationships between the children.

100. In his oral submissions Mr Khubber referred to the key parts of the ISW report. He submitted that the FtTJ's reasoning was limited to looking at the

last resort of the appellant's partner relocating to Poland but that this was insufficient when looking at the nature of the best interest enquiry. The judge had failed to look at or understand the relationships and genuine anxiety between all 3 people involved. The appellant's partner looked at her perspective alone but that was only one aspect of the analysis and the FtTJ was required to look at the best interests of each child and the issue proportionality.

101. In essence the FtTJ undertook a generalised approach and did not analyse the real issue as to what was in the children's best interests. The judge erred in law by failing to draw the relevant threads of the evidence together.

102. Ms Young confirmed that the respondent had not provided a rule 24 response. Thus she made oral submissions.

103. As regards ground 1, Ms Young submitted that in answer to the criticism raised that the FtTJ had misunderstood the appellant's immigration history, when looking at paragraph 42 of the decision, the FtTJ properly found that he was removed and unlawfully returned twice and was in breach of the deportation order. The judge was not wrong to refer to 4 occasions when looking at the factual background. Ms Young set out the chronology that was detailed in the decision letter in this respect. She further submitted that even if it could be described as 2 attempts to re-enter the United Kingdom it was not material whether it was 4 or 2 occasions as the point that was being made at paragraph 42 was that the appellant's attitude had troubled her and that he had sought to re-enter the UK.

104. Whilst the grounds referred to reasons why he re-entered the UK (relying on his family), the FtTJ considered this at paragraph 42 that drew the conclusion that it still showed a disregard for the law and the FtTJ was not in error in reaching that finding at paragraph 42.

105. Ms Young submitted that the judge had given clear and adequate reasons for reaching the conclusion that the appellant represented the present and genuine threat. The FtTJ accepted the conclusions in the OASys report and did not seek to go behind the report and at paragraph 43 considered the appellant's antecedents that showed a propensity to breach orders and that at paragraph 44 the judge set out the circumstances which led the appellant's offending and that that was as a result of him struggling financially. Therefore she submitted all the points outlined on behalf of the appellant had been considered by the FtTJ.

106. She submitted that it was not necessary for the FtTJ to set out on cite all passages in the OASys report in her decision and at paragraph 38 the judge heard expressly stated that her references to the evidence were "selective" but that she had carefully considered the evidence that was placed before her. Ms Young submitted that there was nothing in the decision to demonstrate that the judge had not considered the points

raised in the oasis report which had led to the conclusion that he was a medium risk of harm.

107. The judge considered the issue of rehabilitation at paragraph 45 and took into account the appellant's evidence. She submitted the when the decision was read as a whole there were adequate reasons provided by the FtTJ for reaching her decision therefore no material error of law had been demonstrated.

108. Dealing with ground 2, she submitted the paragraphs 53 to 58 should not be read in isolation but that at paragraph 46 – 49 the FtTJ considered the circumstances of the family and properly considered the best interests of the children within the decision.

109. As to the ISW report that was considered at paragraphs 54 – 57 and when reading paragraph 46 – 49 the judge had regard to the ISW report. At paragraph 55 the FtTJ considered the circumstances of N and her best interests and addressed the points in the ISW report. The judge acknowledged that it was not the appellant's partner's 1st choice to go to Poland but was entitled to find that she would go to Poland so that the family could live together and would not be a split family unit.

110. In essence, Ms Young submitted the challenge to the decision is no more than a disagreement with the findings of fact and the analysis and were in accordance with the law.

111. By way of reply, Mr Khubber submitted that the real point in relation ground 1 is to address the type of threat and not the risk of reoffending. Whilst he accepted that the judge was not required to set out all the evidence, the judge was required to address the core issues and when reading the content of the OASys assessment, the issues is to past conduct, his lack of re-offending his compliance with bail and the probation service and his current relationships went well beyond the conclusions reached.

112. The FtTJ was required to give reasons as to why the appellant constituted a threat but that this had not been explored but "glossed over".

113. As regards ground 2 and the best interests assessment, the FtTJ was aware of the tension between the 3 relevant parties (the appellant, his partner and N) and it could not be glossed over by the judge saying that they could return to Poland together. That is no answer to the best interests questions and how that would affect N and adversely impact her and that is an issue of proportionality in the EU context. He submitted that the point made in the ISW report was that both scenarios were not free from difficulties. The FtTJ had not addressed the difficulties pointed out by the ISW which included the adverse impact on N, the appellant's view that it would not be in N's best interest to in Poland and his partners begrudging view that this was the last resort. This was a clearly important

piece of evidence on the issue of the adverse impact on N was not addressed in the decision.

Conclusions:

114. I am grateful for the submissions made by each of the advocates. I confirm that I have taken them into account and have done so in the light of the decision of the FtTJ and the material that was before him.

115. Ground 1 relates to the assessment as to whether the appellant's personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (set out in Regulation 27 (5) (c) of the EEA Regulations 2016.

116. The grounds advanced on behalf the appellant and expanded upon in the oral submissions made by Mr Khubber submitted that the FtTJ's assessment on this issue was in error by adopting an over generalised approach to the issue and secondly by failing to appreciate the relevance of the evidence available. In particular, it is submitted that the FtTJ did not factor into the assessment the evidence relating to his post-sentence conduct both set out in the OASys's report and as apparent from the evidence of the date of the hearing.

117. Having assessed the grounds in the light of the decision of the FtTJ , I am satisfied that the FtTJ fell into error as advanced by Mr Khubber. The grounds are not as Ms Young submitted, a disagreement with the decision but identify errors that undermine the overall decision reached on this issue.

118. In terms of the general law applicable, the FtTJ was correct in her self-direction at [52] that removal cannot be justified on the appellant's criminal convictions alone (see paragraph 27 (5) (e)). The FtTJ was also correct in the self-direction given that a predictive evaluative assessment of the likely future events was necessary. However where the FtTJ fell into error is that when undertaking the analysis of whether the respondent had discharged the burden of proof that he was a genuine, present and sufficiently serious threat, the FtTJ failed to explain what the offending/harm that there was a risk of and why the threshold had been discharged on the evidence. In other words, what type of harm and why the threshold was reached.

119. In the context of this appeal the judge did have the advantage of an OASys' report. There can be no error of law by a judge taking into account the contents of the OASys report and in particular the view taken in the report as to the risk of reoffending and risk of harm. The Offender Assessment System (" OASys) is used by the probation service for recording its assessment of the risk posed and the needs of the particular offender. It is a structured clinical tool used to assess and manage offenders. The Offender Manager ("OM") provides an assessment showing the likelihood of committing an offence together with the likelihood of

causing serious harm to others and prepares a sentence plan which addresses the issues. The OASys process provides an assessment as to the level of risk of harm posed by an individual at a point of time. The analysis can be subject to change and should be kept under review.

120. When applying those general comments to this appeal, as Mr Khubber submitted, whilst the FtTJ was entitled to consider the evidence in the report which set out that there was a medium risk of serious harm (page 1 to 1 of the bundle), that had to be read in the context set out in the OASys report. That set out that the offender had the potential to cause serious harm but was unlikely to do so unless there was a change in circumstances for example, loss of accommodation, relationship breakdown, drugs or alcohol misuse.

121. In the analysis of whether the respondent had discharged the burden as to whether the appellant demonstrated a genuine, present and sufficiently serious threat, the FtTJ did not consider the likely circumstances of the appellant as they were at the date of the hearing, and which was necessary in considering whether the threat was made out as at the date of the hearing. The evidence in the OASys report pointed to the current circumstances and was set out at page 123 AB. It recorded that the appellant accepted responsibility for his actions and regretted his behaviour. The report said that the appellant reported that he had no financial difficulties (which were linked to his previous offending), and the probation officer stated, “there is no evidence to suggest otherwise.”. It recorded that he had a supportive familial network, his accommodation was stable and there was no evidence to suggest that he was partaking in any criminal activity or associating with pro-criminal peers. He was described as “very motivated to address his offending behaviour and as such is complied with supervision to this date and engaged well in intervention in line with the sentence plan.” The report did state that his ability to complete work in line with the sentence plan objectives had been restricted due to the appellant being subject probation for a short period of time after release, however it stated, “he does accept responsibility for his offending and continues to be motivated to desist from offending.”

122. The assessment made by the FtTJ addresses the circumstances at paragraph 44 and the circumstances in the UK that caused him to offend. Whilst the FtTJ referred to the support his partner was providing him, the FtTJ did not take into account the assessment made in the OASys report as the current circumstances or that the risk of harm had been based on there being a change in his circumstances.

123. Furthermore, the FtTJ placed weight on the fact that without work the concern was that it would place him in a position which would make him more likely to reoffend. Again this failed to take into account the description of the circumstances in the OASys report and which did not take into account that the appellant was unable to work due to the restrictions placed on him by the Home Office and in any event that there had been a period of time since his licence expired and his sentence

ended on the same date in August 2020 and that at the date of the hearing in December 2021 the appellant complied with all restrictions placed upon him, including the bail conditions, compliance and supervision, and that his life and achieve some stability in light of the identifiable risk factors such as accommodation, family support, finances and ongoing compliance.

124. Whilst the FtTJ considered that there was little evidence of rehabilitation (paragraph 45) the judge considered that his re-entry into the UK was difficult to reconcile with rehabilitation. However whilst the conduct of his re-entry to the UK was part of the factual matrix there were other elements of his recent conduct which was relevant in terms of likely rehabilitation when considering the overall risk and whether he presented a genuine and present sufficiently serious threat to the fundamental interests of society.

125. I do not accept the submission made by Mr Khubber that the FtTJ was wrong at paragraph 42 when referring to the appellant's previous conduct. There was no dispute as to the chronology set out earlier and that the appellant had attempted to return to the UK following removal. Whilst he had given reasons for doing so, they did not undermine that conduct. However as Mr Khubber submitted, when undertaking the assessment it was necessary to consider the positive elements on the appellant's case as at the present date of the hearing in light of the up-to-date evidence to put that conduct and the OASys report into context.

126. Therefore the assessment was flawed as not all the relevant material or factors relevant to the assessment were considered as at the date of the hearing. Ground 1 is therefore made out.

127. Turning to ground 2, this concerns the assessment of proportionality. Having found an error on ground 1, it is not necessary to address ground 2 in any detail as the assessment of the level of threat plays its part in the decision overall as to whether the decision is proportionate and justified.

128. As to ground 2, Mr Khubber is correct in his submission that there was no best interests assessment undertaken in relation to the children. Whilst reference was made to all 4 children, on any reading of the ISW report, the main focus was upon the circumstances of N, who was the eldest child (see paragraphs 2.16 and 2.9 which identified N as the focus of the enquiry).

129. There did not seem to be a dispute as to the contents of the ISW report nor were any identified in the factual assessment carried out between paragraphs 46 – 49. However in the assessment of proportionality and in particular as set out at paragraph 55, no assessment was made of the best interests of the children or in particular those of N, and what her best interests were, and in particular whether they were to remain in the UK nor any analysis of the likelihood of identifiable harm to her as set out in the ISW report. In the case of N, the likely effects of her having to leave the UK

in the light of her level of integration and cultural identity and in the UK, was not assessed because the assessment of proportionality was based on the appellant's partner accepting as a last resort that she would move to Poland. The ISW pointed to a divergence of approach between the adults and the views and wishes of N, and this was a factor which required analysis if weight and reliance was placed on the " go scenario" based on the appellant's partner's evidence. There was also no analysis of the position for N and the loss of her relationship with W who was her half sibling.

130. For those reasons, the decision of the FtTJ involved the making of an error on a point of law and the decision is set aside.

131. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. Given the time that has elapsed, there will be a requirement for oral evidence to be given on all issues including an updated assessment in relation to the family circumstances and those of the appellant. Accordingly the appeal falls within paragraph 7.2 (b) of the practice statement, and I therefore remit the appeal to the First-tier Tribunal for that hearing to take place.

Decision

The decision of the First-tier Tribunal did involve the making of an error on a point of law; the decision is set aside. The appeal is remitted to the First-tier Tribunal for a hearing.

Signed Upper Tribunal Judge Reeds
Dated : 25 September 2022