IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00476/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 3rd August 2022	**On the 05th October 2022**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

'AA' (POLAND)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify him, his former partner, their daughter, or any other member of their families. Failure to comply with this order could amount to a contempt of court. The reason is that the subject matter of this appeal discusses the appellant's former partner, who was the victim of an offence (perpetrated by the appellant) under the Sexual Offences Act 2003 and therefore the mandatory anonymity requirements apply to her by virtue of Section 1 of the Sexual Offences (Amendment) Act 1992. Identification of the appellant would risk the former partner's "jigsaw" identification. The daughter, a minor, is the subject of Family Court orders and it is appropriate that she too is not identified. The Family Court has consented to this Tribunal's consideration and discussion of Family Court proceedings.

Representation:
For the Appellant: *Mr J Dhanji*, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is a reserved remaking decision in respect of the appellant's appeal against deportation under the Immigration (EEA) Regulations 2016 (the 'Regulations').

2. The appellant is a citizen of Poland, born in 1978. He arrived in the UK in March 2003. He was convicted of common assault in 2007, and a robbery in 2014. The respondent does not rely upon these offences in maintaining her deportation order but they are by way of background in that the appellant was not of good character when he committed the subsequent index offence. The appellant was convicted in February 2019 of the index offence, committed on 20th September 2018, of sexual assault occasioning actual bodily harm of a female victim, his former partner.

3. Following the appellant's conviction, he was sentenced on 25th February 2019 to two years and three months' imprisonment and placed on the Sex Offenders Register for 10 years. His EEA appeal against the decision to deport him was dismissed by First-tier Tribunal Judge Hanbury, in a decision promulgated on 13th July 2021. Permission to appeal was granted and Upper Tribunal Judge Lindsley found that the First-tier Tribunal had erred in law for the reasons set out in her decision, at the Annex to this decision.

The remaking hearing

4. The matter now comes before me to remake the appeal. The parties agreed at the error of law hearing that while the FtT's decision and findings at §§32 to 34 should be set aside, the FtT's other findings at §§25 to 31 should be preserved. For ease of reference, those preserved findings are repeated in the findings of fact set out below. In simple terms, it had been found that the appellant poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and that this should be my starting point at the remaking hearing. The parties agreed with me that the remaking hearing therefore was simply to consider the "proportionality" assessment in relation to the appellant's deportation. The focus of that proportionality assessment, but not the sole focus, was on balancing the best interests of the appellant's daughter as a primary consideration with the factors weighing in support of his deportation under the Regulations. The appellant has what is often referred to as the "basic" level of protection under the Regulations.

5. In terms of the evidence in the bundle, I considered a supplementary electronic bundle ("ASB") comprising some 154 pages, which included the appellant's updated witness statement and the witness statement of a supporter, whom I do not name. The appellant and his supporter attended the hearing to confirm their witness statements and the appellant was cross-examined on his oral evidence. The supporter's witness evidence was accepted without dispute. It testifies to the appellant's recent abstinence from alcohol, his attendance at Alcoholics Anonymous and the supporter's belief that he has turned a corner in his alcohol dependency. There are a number of other witness statements in support of the appellant, but none of the authors of those statements attended to give witness evidence. On the one hand, the consequence of this is that I attach more limited evidential weight to those witness statements. On the other hand, as Mr Kotas accepted, there was only a very limited area of factual dispute between the parties.

6. I was also referred to a letter of support from the appellant's former partner in the original appellant's bundle before the FtT. I was also referred to an alphanumerical bundle prepared by the respondent before the FtT ("RB") which included a copy of the OASys assessor's report, which considered the risk posed by the appellant. However, at the risk of repetition, the parties accept before me that the appellant's personal conduct continues to present a genuine, present and sufficiently serious threat so as to engage Regulation 27(5)(c) of the Regulations.

7. I do not recite the evidence or the parties' submissions. Instead, I set out the findings which are largely undisputed and my reasons. The representatives helpfully set out what in essence was a balance sheet of factors in favour of the appellant and those against him. I was grateful for the clarity of their submissions. Both representatives acknowledged that the proportionality assessment was finely balanced.

8. The primary focus was on the best interests of the appellant's daughter. Mr Kotas pragmatically accepted that it was in the best interests of the appellant's daughter for the appellant to remain in the UK. For his part, Mr Dhanji accepted that the appellant did not have parental responsibility, as a non-resident father, but both parties agreed that the appellant has regular fortnightly supervised contact with his daughter who is now aged five. The appellant is only allowed in-person contact. That contact is conditional on a Court-authorised person being in attendance at all times. The contact visits are typically two hours in duration. The appellant is not allowed any contact via electronic means or by telephone, or any indirect contact, such as with his daughter's school.

Findings of Fact

Preserved findings

9. §§25 to 31 of Judge Hanbury's judgment dated 13th July 2021 are preserved:

"25. I found the appellant to be an intelligent man who gave his evidence in a straightforward way. It was impossible to hear the appellant's evidence without feeling some sympathy for him as clearly some of his offending has been fuelled by alcohol. He clearly has some insight into that offending, as Susan Pagella comments in her report. It appears he had a difficult childhood with an alcoholic father who treated him badly - hence his strength from him. His mother has now died, sadly.

26. As I have stated above, the appellant deserves some credit for maintaining a sufficiently good relationship with [former partner] to enable contact to take place with their daughter [name omitted], with whom he has also established a relationship. It is also noteworthy that the child, who was born on 22 December 2016 has suffered from lack of contact (see the order of the Family Division dated 25 March 2020). It seems probable that the appellant's removal from the UK would harm his relationship with his daughter, which was no doubt difficult to repair following the assault on the daughter's mother. However, I also have to bear in mind that, particularly following the last 18 months, it has become clear that people can communicate effectively electronically. When [the child] is old enough, she may be able to travel to see her father in Poland as well as communicating with him electronically when she is able to.

27. But I have to balance the appellant's possibility of rehabilitation against the risk he continues to pose a threat to members of the public including family members.

28. His offending was serious and not isolated. The offence the appellant was convicted of in 2019 was a serious offence committed in a domestic setting. The fact that the offence was not committed on a stranger is not a mitigating factor, indeed, it is an offence of considerable seriousness given the fear it creates amongst those less able to fend for themselves (the victim been described as 'vulnerable').

29. Unfortunately, it was not the only offence the appellant has committed. [Former partner] puts it down to his alcoholism. Were he to be effectively addressing his alcoholism I may well have concluded that the respondent had failed to establish that the appellant was a 'sufficiently serious threat to society' to discharge the burden on her. I bear in mind that this may not all have been the appellant's fault as well, as Covid 19 clearly prevented his attendance at AA group sessions that might otherwise have been possible. However, I refer to the following piece of evidence:

(i) The appellant undertook a detox program whilst in prison - a period of custody which was extended as a result of his arrest and detention for immigration offences which ended with his been released on bail. It is noteworthy that the appellant has since lapsed into his former alcoholism;

(ii) This is a pattern that has occurred in the past. His recent, and probably all, his offending has been linked to alcohol and it is therefore incumbent on him at the age of 43 to tackle this abuse. All the experts who have commented on

> *the appellant had qualified the advice and recommendations they have given by reference to the fact that he must tackle his alcohol abuse. The Cafcass officer in her report which recommended supervised contact with [child] at paragraph 18... qualifies her recommendation to the court by saying "...It is essential that he engages in long – term support to prevent him relapsing into alcohol abuse." The witness goes on to say that the appellant's chances of relapsing are "high";*
>
> *(iii) Susan Pagella's report is qualified by remark similar.....*
>
> *(iv) There is no doubt that the appellant has recently made attempts to resume his attendance at Alcoholics Anonymous and I take account of the report by [name omitted], at page 73 of the above-mentioned PDF, a member of Alcoholics Anonymous, who emailed on 21 June 2021 to indicate that the appellant was trying to address his addiction. I have no doubt this is correct and I have no doubt that it is his genuine intention to quit alcohol but intention and success are two different things when it comes to this form of addiction.*
>
> *30. Therefore, in answer to the first issue identified by Mr Dhanji that is required to be decided, at the date of the hearing I have concluded that the appellant does continue to pose to justify the decision to deport.*
>
> *31. This makes it unnecessary to consider issues ii and iii. II essentially overlaps with i and it probably would be justified on public policy grounds in that the respondent maintains a clear public policy to take a strict line on abusive or alcohol fuelled relationships, particularly where young children are involved. "*

Other findings

10. It is not disputed that the appellant came to the UK in or around March 2003 and has resided in the UK ever since, having left Poland aged approximately 25 years old. Mr Kotas accepts that the appellant has no contact with relatives in Poland. He had a particularly problematic relationship with his father, who was said to be an abusive alcoholic. He is not in contact with a brother who was said to be outside Poland, and with whom he has not spoken for at least 11 years. Since his arrival in 2003, the appellant has returned to visit Poland a few times, but has never stayed for more than two weeks. His last visit to Poland was in 2012 when he brought his former mother-in-law into the UK. As the appellant outlines in his witness statement at §4, page [3] ASB, he initially worked as an employee on a construction site and subsequently as a self-employed contractor, working full-time in 2018, but was detained shortly after the index offence, committed in September 2018. After his release from immigration detention, since the summer of 2021, the appellant has resumed work. There is an employment reference, in glowing terms, from a large company, confirming at page [134] ASB that the appellant started work in July 2021 on an initial six month contract, which has been

extended. He is currently working 40 hours a week as a handyman. He is described as likeable and professional. Team members respect his craftsmanship. The manager says that he would be happy to offer the appellant a permanent direct contract. This is consistent with the remarks of the sentencing judge, Her Honour, Judge Kent, in respect of the index offence, who at page [B4] RB described the appellant as a hardworking person. However, HHJ Kent also reflected that the central risk in this case, which both parties accept, is the appellant's dependency on alcohol. As HHJ Kent remarked, on the same page, "*it is feared that you have a huge problem with alcohol and that this is a longstanding issue*." In the same sentencing remarks, at pages [B2] to [B3] RB, she described the appellant's violence and sexual assault of his former partner. I set out excerpts below:

> *"[The appellant's former partner] was in the kitchen, sitting down and expressing milk for your daughter who was asleep in the flat. You were drunk and in an angry mood. You took your trousers down, you exposed your penis and you forced [partner] to hold it, despite her attempts to refuse. You grabbed her hand forcefully and placed it on your penis and held it there. This amounted to count one, causing a person to engage in sexual activity without consent.*
>
> *After she was able to free her hand, you committed the offences in count two, making threats to kill and count three, assault occasioning actual bodily harm. You took hold of a kitchen knife with a 12 centimetre blade. You walked aggressively towards her with the knife raised at head height and the blade pointing at her. She was still sitting down. You put the knife to her chest and told her you wanted to have sex with her to repair the relationship.*
>
> *She was frightened, she panicked and held the knife by the blade to try and protect herself. She screamed for help. You threw the knife on the floor, put your hand over her mouth and told her to shut up. When you removed your hand and she said she was going to call the police, you took a further three kitchen knives and held them to her chest threatening to kill her if she called the police. She grabbed the blades of those knives resulting in cuts to her right hand. She screamed and asked you to stop. You put the knives on the kitchen worktop.*
>
> *Fortunately, from the photographs I have seen, the injuries to her hand were modest and appear to be limited to a few cuts. … You then made her go to the living room where you committed the offences on count four, sexual assault.*
>
> *I saw the video recording of your behaviour in the living room. You forced her to sit on the sofa. During this part of the incident you climbed on top of her twice. She was afraid you were going to force her to have sex with you. You demanded to see her breasts and tried to open her shirt. At one point you put both hands on her throat and pushed her, so she was lying on the sofa. You ignored her requests for you to stop. She was crying and shaking. When she screamed, you told her to shut up. You put your hand over her mouth and she closed it and tried to kick you away. At one point when she attempted to go you threatened to find an axe and kill her. [Partner] was terrified; she believed you would carry out your threats to kill her. …*

> *This is a very serious series of offences against your partner, taking place in a domestic violence context, taking place in her home where she should have felt safe, at a time when she was expressing milk for your daughter who was asleep in another room. Although it is the first time you have offended against her in this way, it was an incident that was of some duration. She would have been petrified, and the presence of your young daughter in that flat who was asleep in another room, who I accept you care for, shows the extent to which you were so drunk, so angry and out of control.*
>
> *The video footage is quite shocking. It shows what a horrible and frightening event this would have been for [partner]. The video shows that she was trembling and shaking while you continued to commit these offences and while you were moving backwards and forwards shouting at her and berating her. These offences taken together are so serious that only a custodial sentence is justified. …"*

11. HHJ Kent then went on to set out the basis for the sentencing, including the aggravating factors of knives and the threat to kill the appellant's former partner. In mitigation, HHJ Kent noted that the appellant at the time was 40 years old, but did not have the benefit of good character. He had one conviction for robbery in 2014, and a caution for common assault in 2007 which took place within a domestic relationship. Apart from the caution for assault, the appellant did not have a record of violence. HHJ Kent then went on to make a restraining order, limited to 15 years, and by which the appellant would be allowed to communicate with Social Services in order to make contact with his daughter. He has an adult son by a former relationship, who lives in the UK, from whom he is currently estranged.

12. The appellant has expressed remorse for his actions and the genuineness of this was unchallenged. The genuineness of the appellant's remorse is corroborated by the facts that the appellant's former partner was at least initially willing to provide a letter in support to the FtT, and has also been willing to foster the relationship between the appellant and their daughter, which has resulted the supervised access. The appellant's former partner said, in her correspondence to the respondent at page [10] AB, dated 15th October 2019, that before the index offence, the appellant was an outstanding father. He had done extensive gardening work in the property in which they lived, in order for their daughter to be able to crawl around in the yard outside. He had also been of great assistance to his former partner when she was giving birth in December 2016. He was always patient with their daughter, when she slept little or would cry for extended periods because of colic and reflux. Their daughter still recited some of the Polish lullabies that the appellant had sung to her when she was a small child. The appellant had been an active father, changing their daughter's nappies, giving her her first bath, taking her to the playground for the first time and he built a paddling pool for her. When the former partner was on maternity leave, he took their daughter to swimming lessons, the library, museums and musical concerts. He was, despite what she described as his "humble" origins, a brilliant born educator. He

prepared delicious meals for the daughter. The daughter's first word was 'Tata', or 'father' in Polish. The daughter was not allowed to visit the appellant in prison as a result of the restraining order. She had previously loved to go to swimming lessons and after the appellant's arrest and detention, she had started to refuse to attend the swimming lessons, as she used to attend them with her father.

13. After the appellant's detention, the former partner also described a slowdown in their daughter's physical growth. The daughter dropped from the 85th percentile for the standard weight for children of her age, at the time of his detention, to the second percentile and had only begun to recover, in the appellant's absence, by the time of the Cafcass report. The daughter, despite her very young age, also asked about the appellant and expressed her wish to see him. It was at the former partner's own application to the Family Court, that the terms of the restraining order were varied on 25th March 2020, to allow supervised contact. The Family Court recorded that the conclusion of the Cafcass report filed on 17th March 2020 was that the "*child's emotional well-being and general development have suffered in the period she has not had contact with the father and therefore the contact ordered would be overwhelmingly beneficial to the child and would enhance her welfare*."

14. The appellant was in criminal detention from the date of the index offence in September 2018 until 27th November 2019. Following the end of his custodial sentence, he was then in immigration detention until his release on immigration bail on 26th January 2021. After his release on immigration bail, the appellant was able to arrange supervised contact with his daughter. Contact was described by the Contact Centre Manager, whom I do not name, as being "initiated" (presumably arrangements were being put in place at that stage) in March 2021.

15. In his supplementary bundle, the appellant has provided reports of "observations of contact" through the "Bold Moves" organisation, from 26th June 2021 until the most recent observation, 2nd July 2022. They describe fortnightly, face-to-face, two hour contact visits between the appellant and his daughter, with a contact worker always in attendance. The appellant lives a considerable distance away from his daughter and drives 120 miles each way to visit her. The visits are clearly important to him. They are supported and encouraged by his former partner. Without belittling the importance of those visits to him and his daughter, the observation reports record a close, but typical bond between a non-resident father and his five year old daughter. They describe them meeting at a contact centre and visits to public parks, playing together with ease and without any need for intervention by the contact worker. The daughter brings presents for her father.

16. The one (obvious) difference from the norm of these interactions is that a contact worker is constantly in attendance. There was also one instance in October 2021 of a more extended attendance at London Zoo, for four hours as opposed to the usual two hour visit, but once again, always

supervised by a contact worker who then provides a detailed log as to any interventions or concerns. A consistent theme of the observations is that no concerns are identified.

17. The only additional point of note in these observation reports is that in the last report dated 2nd July 2022 at page [123] ASB, it records that the former partner had been asked to provide a statement in support of the appellant, to which she responded that she would think about it. The appellant is recorded as being disappointed about her reservations in agreeing to produce another statement. That being said, Mr Kotas said that I should not draw any adverse inference from the former partner's unwillingness to provide a statement. The appellant could not say why his former partner was unwilling to provide a statement but speculated that it might be because she found the situation embarrassing and did not wish to be involved in the immigration process any longer. Mr Kotas accepted that the lack of a witness statement should not indicate a lack of support from the former partner for the appellant continuing to reside in the UK. I accept his concession on that point. However, it also means that there is limited evidence beyond the observation reports of the appellant interacting with his daughter at contact centres or playing with her in parks, in assessing what effect the appellant's deportation would have on his daughter. No updated report has been provided by Cafcass since March 2020. Mr Kotas accepts, pragmatically, that the impact would be significant and once again I accept that concession. He also accepts that there is no requirement for formal evidence such as an independent social worker report or letters from the daughter's school. I also accept his submission that while he accepts that the impact will be significant, there is otherwise very limited evidence of the likely effect, beyond the Cafcass report.

18. Without criticism of the appellant, he does not provide any financial support for his daughter. Every aspect of her home life, apart from the contact visits, is provided for by the former partner. The former partner does not consult with the appellant about, nor does he play any substantive part in, any aspect of their daughter's home life, other than the contact visits. He has no parental responsibility for her, in the narrow legal sense. As already noted, there is no electronic media or telephone contact, nor is the appellant allowed any contact with their daughter's school.

19. In terms of the effects on the daughter of the appellant's deportation, Mr Dhanji submitted that it was unlikely that the appellant's former partner would be willing to take their daughter to Poland to visit the appellant, bearing in mind that only supervised contact had taken place until now. The consequence of deportation would be that for at least for a significant period of time, face-to-face contact would cease. There was currently no provision for any social media contact. For his part, Mr Kotas indicated that that submission was a leap too far. The appellant's partner had not said that she would be unwilling to take their daughter on a visit to Poland, and she herself had sought variations to the restraining order, allowing for

contact between the appellant and their daughter. It was quite possible that she would be willing to facilitate or play her part in facilitating future electronic contact, and if possible, a visit to Poland.

20. On balance, I prefer the submission of Mr Dhanji that the current limits of the restraining order allow only for supervised contact with a contact worker present. The child is very young and could only travel with her mother. It is a moot point as to whether the former partner could take the daughter to visit the appellant unsupervised. The Family Court records suggest that the former partner has sought permission to take the daughter outside the UK to visit her relatives. I accept that it is one thing for the former partner to be willing to support supervised contact, but another for the former partner to be willing to take a very young child to Poland, particularly in the circumstances of the index offence as I have outlined and without the protection of third parties, which the former partner and daughter currently enjoy. I do not accept that it is speculative or too much of an evidential leap to conclude that, at least in the short term, the appellant's former partner would be unwilling to take the child to Poland to visit the appellant and that the consequence of this would be that the appellant would lose face-to-face contact with his daughter for that period. I do not find, however, that there would be a loss of all contact. Whilst this would require a variation in terms of the restraining order, (and without suggesting what the Family Court should make such a variation), I find that the former partner would support a variation of the restraint order to allow supervised, regular, remote social media contact, whether by FaceTime or such other social media, to ensure that the appellant's daughter has regular contact with her father, just as the former partner sought an earlier variation to allow face-to-face contact. I accept that this is no substitute for face-to-face contact, albeit it is at least partly a mitigating factor in terms of the sense of the appellant's daughter's identity, her identification with her father and potentially, in the future, in the context of a further variation such that the appellant's former partner may in the longer term be willing to travel to Poland to visit the appellant. By reference to longer term, I regard this as realistically being in a number of years, rather than weeks or months after the appellant's deportation.

21. I am conscious of the daughter's young age (five, coming up to six years old) and the importance to her development during these critical years of face-to-face contact, and the impact of its loss, at the very least, for several years. I find that the appellant's deportation would cause significant emotional distress to the daughter. Her relationship with the appellant would be weakened. The Cafcass report dated 16th March 2020, (provided loose), the conclusion of which was accepted by the Family Court, had referred at §11 to the daughter's physical growth being limited, which was only now starting to recover, although the report did not specify that the lack of growth was because of the appellant's absence. The report was completed when the appellant was in prison and the former partner had tried to support their daughter with photographs of the appellant. She and their daughter watched videos of the appellant, i.e., without live social media contact. The Cafcass author had noted at §17

the negative impact on the daughter's emotional development and general wellbeing, which the Family Court accepted. However, I also observe that these general Cafcass observations are not developed or explained further, beyond descriptions by the former partner about the daughter wandering around as a very small child, asking for her father and not wanting to engage in her normal activities, and her lack of growth (for which there is no medical evidence as to its cause).

22. While I note the Cafcass evidence of the daughter's changed behaviour, namely not wanting to go swimming, and the slowing in her physical growth, and while I accept that the bond between the appellant and his daughter will have strengthened since their regular contact was re-established in July 2021, with the implications for the daughter's significant distress if face-to-face contact is then curtailed, I am not satisfied that there is reliable, up-to-date evidence, that the appellant's deportation would materially harm his daughter's health, educational development and other milestones in the medium to longer term. Without belittling the appellant's role, the daughter's sole carer, in every aspect of her life, is her mother. In contrast, the appellant's contact, while important, is very limited and heavily supervised.

23. In summary, the appellant's presence in the UK is in his daughter's best interests. It is an important factor and indeed a primary factor but not one that automatically renders deportation disproportionate. His removal will cause her significant distress, but there is not reliable, current evidence that it would cause her material, long-lasting harm.

24. I turn to the other factors, aside from the appellant's daughter, which the representatives asked me to consider. The first is the absence of any health barriers to the appellant returning to Poland. The appellant has referred to having hepatitis B and receiving medication for that, but as Mr Dhanji accepted, there are no medical barriers such that the appellant would not be able to receive treatment in Poland for any medical condition he has. He describes his mental health as good, and he also describes himself as having abstained from alcohol since the index offence both within prison and since his release. This is testified to by supporters who have provided witness statements, including another attendee at an Alcoholics Anonymous group whom it is unnecessary to name, who confirms that the appellant has been of support to him.

25. The appellant now has a stable job and means of employment. Notwithstanding the risk of future alcohol misuse, the appellant has a network of support around him that he would not have if he were returned to Poland, which he has not visited since 2012. He has been hardworking and has clearly developed a private life in the UK which is testified to by the glowing reference from his current employers. I accept that if he is returned to Poland, he would be doing so without any family network or contacts there. However, I also find, and it is not, in reality, disputed, that he is somebody who by nature is hardworking, practical, and with initiative. I find that if deported, he would be inclined to, and would,

swiftly find work in Poland. While he has described his support network through Alcoholics Anonymous and a small number of friends in the UK, without belittling those, his focus in the UK is on his daughter. I also find that he would be able to access alcohol dependency services in Poland. He has abstained from alcohol since the index offence, but his recovery from dependency is not complete, with previous periods of abstinence and relapse. He still presents as a high-risk offender, as confirmed by his Sex Offender Manager in July 2022 (see page [9] ASB). In particular, in terms of rehabilitation in the UK versus Poland, while I do not rule out the prospects of the appellant's rehabilitation in either country, Mr Dhanji accepted that there was limited evidence and he therefore accepted that limited weight (but not no weigh) should be placed on this as a factor (I bear in mind MC (Essa principles recast) Portugal [2015] UKUT 00520 (IAC). I am conscious that he would cease to benefit from his current contacts with his local branch of Alcoholics Anonymous, but he is likely to obtain work and be able to access to alcohol dependency services in Poland and will be motivated in seeking to maintain contact, even if via remote means, with his daughter. Noting §29(h) of MC, I do not assume that the relative prospects of the appellant's rehabilitation, such as they exist, are materially different in Poland, compared to the UK, notwithstanding his integrative links in the UK and no current integrative links in Poland. He will be able to readily re-establish himself in Poland, despite being estranged from his family there and his troubled upbringing in that country. He was raised and lived there until the age of 25 and therefore can be expected to have insight, so as to be able to readily integrate as an "insider" in Poland.

Conclusions

26. On the one hand, in the appellant's favour, the appellant is taking steps to address his alcohol dependency and has not consumed alcohol since the index offence, albeit as those assessing the appellant recognised, he remains at risk of alcohol dependency and his offending is directly linked to alcohol misuse in the context of the genuine, present and sufficiently serious threat. He has a close and loving relationship with his daughter, albeit a very limited one and without parental responsibility for her. While there is not sufficient current evidence of long-lasting emotional damage or damage in terms of her development in the event of his removal, I have no doubt that his removal would be distressing to her. She would also not see her father face-to-face for a number of years, albeit I find it likely that there would be regular remote access, which is not a substitute for such face-to-face contact. I place some, but very limited, weight on the impact of deportation on the appellant's rehabilitation, bearing in mind the limited evidence on the issue. Also in his favour are the period of time he has spent in the UK and the integrative links he has formed.

27. In terms of the factors counting against the appellant, I place weight on the nature of the offence itself and also the risk that the appellant continues to present. He is currently managed as a high-risk offender. I also note the absence of any health issues which would prevent the

appellant's relocation to Poland, his hardworking ethos notwithstanding a lack of support network in Poland, and my finding that he would be able to re-establish himself and would be able to access alcohol dependency services. The primary and main focus, as both representatives accepted, will be on the impact on the appellant's daughter. Whilst a finely balanced one, in the context of the appellant's basic level of protection against deportation, I am satisfied that despite the significant emotional distress that it would cause the appellant's daughter, that deportation in this case would not be disproportionate. Accordingly, the appellant's appeal against his deportation fails and is dismissed.

Notice of Decision

The appellant's appeal is dismissed under the Immigration (EEA) Regulations 2016. The respondent's decision is upheld.

Signed J Keith Date: 30th August 2022

Upper Tribunal Judge Keith

Annex – error of law decision

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00476/2019

THE IMMIGRATION ACTS

Heard at Field House
On 12th April 2022

Determination Promulgated

.....

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between
'AA' (POLAND)
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Dhanji, of counsel, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Poland born in 1978. He arrived in the UK in March 2003. He was convicted of common assault in 2007, and a robbery in 2014. In February 2019 the appellant was convicted of sexual assault occasionally actual bodily harm on a female victim. He was sentenced to two years and three months imprisonment and placed

on the sex offenders' register. His EEA appeal against the decision to deport him was dismissed by First-tier Tribunal Judge Hanbury in a determination promulgated on the 13th July 2021.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Grant on 3rd August 2021 on the basis that it was arguable that the First-tier Tribunal judge had erred in law in making the decision based on a mistake of fact, namely that the appellant has lapsed into his former alcoholism when the evidence is arguably that he has not lapsed and is doing what he can not to relapse. Permission was granted on all grounds.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether the error was material and the decision should be set aside.

Submissions – Error of Law

4. In the grounds of appeal and in oral submissions from Mr Dhanji it is contend, in summary, as follows.

5. The first ground of appeal was that the First-tier Tribunal erred at paragraph 3 of the decision by stating that the burden of proof was on the appellant, when the burden in an EEA deportation appeal is clearly on the respondent, however Mr Dhanji very reasonably did not pursue this ground in light of what was said in the Rule 24 notice.

6. Secondly, it is argued, that the First-tier Tribunal erred by making errors of act amounting to an error of law. At paragraph 29(i) of the decision it is stated that the appellant has since lapsed into his former alcoholism, when there is no evidence that he has started to drink again, and the First-tier Tribunal found at paragraph 25 that he had been sober for the past two and a half years. It is argued that no credit is given by the First-tier Tribunal for the fact of his not drinking for this period of time in considering whether he would reoffend, although it was accepted that only seven months of this period had been whilst the appellant was in the community.

7. Thirdly, it is argued, that the First-tier Tribunal erred in law by failing to take properly into account relevant evidence namely: the OASys report with respect to his risk of reoffending which found, in June 2019, that that he posed a low risk of reoffending generally and a medium risk of violent reoffending in the context of the appellant having been out of detention for a period of 7 months at the date of hearing during which time he had not relapsed into drinking or reoffending; the report of Dr Susan Pagella, psychotherapist and trauma specialist who assessed the appellant as being at low risk of reoffending; the child arrangements order, as the First-tier Tribunal found that the appellant could have electronic communications with his daughter when in fact this is not permitted by this order – he can only see her at an authorised contact

centre; the observation of contact reports for March-June 2021 which showed he had had six contact sessions; the evidence of [name omitted], the appellant's flat-mate, about the appellant being committed to remaining sober which is not referenced in the conclusions section of the decision at all.

8. Fourthly and fifthly, it is argued, that the First-tier Tribunal erred in law by failing to consider the best interests of the appellant's daughter, which should have been a primary consideration when considering the proportionality of the appellant's deportation. These errors combine with an error of fact at paragraph 24 of the decision, where the First-tier Tribunal finds that the appellant has only had one or two contact sessions with his daughter when in fact he had six sessions; and the erroneous suggestion that the appellant could travel to see the appellant and have electronic communications with her when these are both impractical for a five year old and contrary to the current child arrangements order; and fails to take into account the conclusions of Cafcass, at paragraphs 17 and 19 of the report, that face to face contact between the appellant and his daughter is beneficial for her in light of her previous close relationship and the negative impact of loss of her father during his imprisonment.

9. In the Rule 24 notice from Mr Tan dated 17th November 2021 and in oral submission from Mr Lindsay for the respondent it is argued, in summary, as follows.

10. It is argued with respect to the first grounds that the statement at paragraph 3 is a typo, and that the First-tier Tribunal clearly understood that the respondent had to justify the deportation at paragraph 29 and 34 of the decision.

11. It is argued that there is no error of fact at paragraph 29(i) of the decision of the First-tier Tribunal because the reference is to a relapse to alcoholism the appellant had in 2015, as set out at paragraph 6(i) of the decision, and to his repeated pattern of periods of treatment of alcoholism and then relapse.

12. It is argued with respect to the fourth and fifth grounds that the First-tier Tribunal properly considered the best interests of the appellant's daughter and the limited contact between them, and that it was clearly envisaged at paragraph 26 of the decision that electronic contact between them would only be possible if she is "able to do so", i.e. if the child arrangements order was varied, and took on board that the appellant's daughter would suffer harm if the appellant was removed from the UK; and similarly the finding at paragraph 33 that she could visit, should be seen as relating to when she becomes an adult and is able to do this independently. Alternatively it is argued that the outcome of the appeal would in any case be inevitably the same if the best interests of the appellant's daughter had been considered as the appellant was assessed by OASys as a medium risk of reoffending to

children and members of the public, and it was said that he was at a higher risk of offending with respect to his family.

13. With respect to the third ground it is argued that there is a detailed and holistic assessment of the evidence at paragraph 34 of the decision, and that the First-tier Tribunal was not bound to accept the opinion in some of the reports that the appellant was in some respects a low risk of reoffending. It is argued that the evidence of [the appellant's flatmate] did not need to be explicitly considered when assessing whether the appellant posed a threat of reoffending due to an alcoholic relapse as it was reasonable for the First-tier Tribunal to give weight to the expert evidence, which is referenced in the conclusions section of the decision, instead.

14. At the end of the hearing I informed the parties that I found that the decision erred in law in respect of the proportionality exercise only. I did not give an oral judgement but set out my conclusions in writing below. It was agreed that the decision and the findings at paragraphs 32 to 34 of the decision should be set aside, the other findings at paragraphs 25 to 31 of the decision are preserved. It follows that I have preserved the finding that the appellant poses a genuine, present and sufficiently serious threat to society and that this will be my starting point at the remaking hearing, and will be final finding unless displaced by any new evidence. It was agreed that the remaking would take place in the Upper Tribunal.

Conclusions – Error of Law

15. The decision states at paragraph 3 that the burden of proof is on the appellant to show that his deportation is justified. I accept the submission of the respondent that this is clearly a typo as it makes no sense to say that the appellant must justify his own deportation, further at paragraph 15 of the decision it is clear that the First-tier Tribunal understood that the appellant may not be removed unless that removal is justified on grounds of public policy, public security or public health, and goes on to set out, at paragraph 16 of the decision, the requirements for assessing this at Regulation 27 of the EEA Regulations, and at paragraph 29 of the decision to clearly state that the burden is on the respondent. As accepted by the appellant at the hearing there is no error of law on this basis.

16. I find that it is clear that from the evidence set out at paragraph 6(i) of the decision that the appellant accepted that he had committed an assault in 2014 due to his alcoholism; that he had then stopped drinking for two and a half years, but had relapsed into alcoholism in 2018 when he committed the index offence. I find that the conclusion paragraphs 29(i) and (ii) of the decision refer to this past pattern of relapse at the point in time when he committed the index offence, and that there is therefore no error of fact. The evidence of the Cafcass officer is that the chances of a future relapse are high, and the evidence

of Ms Pagella with respect of recidivism is found to be qualified with respect to the appellant needing to effectively address his alcoholism. Whilst it would have been preferably to have made some referred to the evidence of the appellant's flat mate, which is set out at paragraph 8 of the decision, in the conclusions section of the decision I find that this lay evidence could not have made any difference to the First-tier Tribunal's assessment of the likelihood of the appellant relapsing into alcoholism in the future, and thus into crime. The First-tier Tribunal unarguably reasonably finds that the appellant is trying to address his alcoholism, at paragraph 29(iv), but that genuine intention and success are different matters, and ultimately thus concludes that he poses a real present and sufficiently serious threat to a fundamental interest of society sufficient to justify his deportation. This is a conclusion that is unarguably sufficiently reasoned and was unarguably rationally open to the First-tier Tribunal in light of the position in the OASys report that he poses a medium risk of offending with a higher risk to family, and given that his period in the community, not drinking or offending, was only a period of seven months at the date of hearing.

17. I do find, however, that the proportionality exercise errs in law for failure to make explicit findings on the best interests of the child and to balance these as a primary consideration. At paragraph 26 of the decision it is found that the appellant's removal would probably harm his five year old daughter. However, in paragraphs 32 to 34 of the decision, where the proportionality exercise is set out, the only reference to her is that she "may wish to visit him in the future", which given her age cannot be relevant to the proportionality of the appellant's removal at the date of decision. In light of the finding at paragraph 26 of the decision, and the evidence in the Cafcass report that spending face to face time with the appellant will contribute to her identity and be beneficial to his daughter such that expensive contact centre visits should take place, and in light of six of these having taken place at the time of hearing, I find that the decision errs materially in law. It cannot be said that the outcome of the appeal would necessarily be the same given the weight that the best interests of a child must be given as a primary consideration when assessing proportionality.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal.

3. I adjourned the re-make of the appeal.

Directions:

1. Any further evidence relevant to the remaking of the appeal will be filed on the Upper Tribunal and served on the other party 10 days prior to the hearing date.