IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Appeal No: DA/00409/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 8th February 2024

Before
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between
ANTHONY OMO OKOH
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr M Symes, Counsel, instructed by Powell Spencer and Partners Solicitors

For the respondent: Ms A Everett, Senior Presenting Officer

Heard at Field House on 10 January 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant's son, L, is granted anonymity. The appellant is <u>not</u> granted anonymity.
No-one shall publish or reveal any information, including the name or address of L, likely to lead members of the public to identify L. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. This is the re-making decision in the appellant's appeal against the respondent's decision, dated 1 August 2019, to make a deportation order under the Immigration (European Economic Area) Regulations 2016 ("the Regulations").
2. The appellant has a lengthy immigration history in the United Kingdom and the current proceedings have been, to say the least, protracted. I propose only to summarise the position here as the parties are well-aware of the details.
3. The appellant is a citizen of Nigeria, born in 1968. He came to the United Kingdom in April 2000 as a visitor. He married a Portuguese national, AA and was issued with a residence card as her family member under a predecessor of the Regulations. This was revoked in 2007 following his divorce from AA two years previously. The appellant then married a Lithuanian national, SD, in May 2006 and was eventually issued with a further residence card in 2008 as her family member. The appellant divorced SD in January 2013. The appellant married his third wife, OM (aka TC), in September 2013. OM is a British citizen and, as matters currently stand, they remain married, although it is said that divorce proceedings have been initiated.
4. The following individuals are also relevant to this case:

(a) S, the appellant's biological daughter, born in 1996 during a relationship whilst he was in Nigeria;

(b) K, the appellant's biological son, born in 1999 during the same relationship;

(c) D, the appellant's biological son, born in 2005, whose mother is SD;

(d) T, the appellant's biological son, born in 2008, whose mother is SD;

(e) L, the appellant's biological son, born in 2013, whose mother is OM. L is the subject of the anonymity direction in this case;

(f) X and Y , whose biological mother is OM, from her previous relationship; and

(g) Z, the biological son of OM's deceased sister, who lives with OM.

5. On 10 February 2014, the appellant was convicted by a jury on counts of conspiracy to facilitate a breach of immigration law and using unlicensed security operatives. In 2007 the appellant and SD had set up companies, one of which was Blue Feathers Guarding, which supplied security guards to building contractors. The appellant was found guilty on the basis that he had been instrumental in the conspiracy, which ran from April 2007 until October 2012. A "large number" of individuals with no right to work in the United Kingdom were recruited and exploited by virtue of being significantly underpaid for their labour. The company's clients - building contractors - were deceived into believing that the guards had the right to work. Whilst it was accepted that the appellant had played no part in assisting the unlawful entry of the individuals into this country, his exploitation of them had been conducted on a "sophisticated and organised", basis. The appellant had used his position within the company (as one of the directors) to induce others to create false documents in order to cover up the true position once it came to light. The companies had generated a turnover of over £6 million over the course of time, and the appellant had pursued the conspiracy for financial gain.

6. In March 2014, the appellant was sentenced to 54 months' imprisonment on the first count and 24 months' imprisonment on the second, to run concurrently. He was also disqualified from being a director of a company for six years.

7. The appellant appealed against the sentences. In July 2014 the Court of Appeal duly increased the overall sentence to 96 months' imprisonment.

8. In August 2015, the appellant was sentenced to an additional 48 months' imprisonment for perjury, with that sentence to run consecutively.

9. Proceedings under the Proceeds of Crime Act 2002 ("POCA") were initiated and at some stage a confiscation order was made in the sum of £746,219 ("the POCA order"). Over time, this was reduced to £279,961 (there is some uncertainty as to the balance, a matter to which I will return later).

10. The appellant was initially released from prison in November 2019, but was returned to custody in February 2020 as a default sentence for failing to comply with the terms of the POCA order referred to above. As I understand it, he was released again in August 2021.

11. His licence is due to expire in November 2025.

12. I now turn to the procedural history. Initially, the respondent made a decision to refuse a human rights claim in March 2016, with an accompanying deportation order. An appeal against that decision was dismissed by the First-tier Tribunal on 17 November 2016. That decision was set aside by the Upper Tribunal in April 2017 and the decision was re-made, dismissing the appellant's appeal on all grounds (including under the Regulations). The Upper Tribunal's decision was appealed to the Court of Appeal. Following the grant of permission by the Court in January 2019, the appeal was allowed by consent, with the respondent agreeing to reconsider the basis of the original decision to deport, with particular reference to the Regulations. Importantly, the respondent conceded that the appellant had in fact acquired a permanent right of residence under the predecessor to the Regulations.

13. The respondent then made the decision which is the subject of the appeal before me. The essence of that decision is that, in light of the appellant's offending and overall circumstances: there was a significant threat to the safety and security of the public of the United Kingdom; deportation was justified on serious grounds of public policy; deportation would be proportionate under the Regulations; that course of action would also be proportionate with reference to Article 8 ECHR.

14. The appellant appealed to the First-tier Tribunal and his appeal was allowed under the Regulations by a decision promulgated on 6 December 2019. The respondent challenged that decision and, by a decision issued on 30 June 2020 pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (decision without a hearing), Upper Tribunal Judge Jackson concluded that the First-tier Tribunal had materially erred in law on the basis that:

(a) the judge had failed to take proper account of relevant matters under paragraphs 2-6 of Schedule 1 to the Regulations;

(b) in particular, there was a failure to take account of the nature of the appellant's offending, the length of his prison sentence, and how these considerations might have affected the question of integrative links in the United Kingdom;

(c) the judge had failed to adequately assess the question of rehabilitation in view of the appellant's failure to have accepted full responsibility for his offending;

(d) there was a failure to consider relevant considerations under paragraph 7 of Schedule 1 to the Regulations.

15. Judge Jackson's error of law decision is annexed to my re-making decision.

16. Judge Jackson directed that the case be retained in the Upper Tribunal and a resumed hearing would take place in due course. The appellant then made an application for Judge Jackson's decision to be set aside, following the decision of the High Court in R(oao JCWI) v President

of the Upper Tribunal (IAC) [2020] EWHC 3103 (Admin). By a decision dated 10 May 2022, Judge Jackson refused to set aside her previous decision, having regard to the circumstances of the case and the Court of Appeals judgment in Hussain v SSHD [2022] EWCA Civ 145. That refusal was not challenged.

17. The case was then allocated to me. There then entailed a series of events (which I do not propose to set out in detail here) which resulted in several adjournments and the long delay leading up to hearing before me on 10 January 2024. The only matter I would mention briefly is the fact that in August 2022 the appellant was arrested following an allegation made by OM that he had sexually assaulted her. In the event, no charges were made. However, because the appellant was still on licence, he could not be released until the matter had been considered by the Parole Board. For reasons which I am unclear about, such consideration was not possible until April 2023 and the appellant was finally released at the beginning of May.

The issues in the case and the essential legal framework

18. There is no dispute as to the applicability of the Regulations to this appeal, notwithstanding the United Kingdom's departure from the European Union and the revocation of the Regulations on 1 January 2021.

19. It remains common ground that the appellant acquired, and has not lost, a permanent right of residence in the United Kingdom.

20. The specific provision with which I am concerned is regulation 27. Its contents are well-known, but I emphasise the following:

> 27(3) the decision under appeal (i.e. the appellant's deportation) can only be justified on "serious grounds of public policy and public security";
>
> 27(5)(a) if serious grounds of public policy and public security are demonstrated, the decision must nonetheless comply with the principle of proportionality;

27(5)(b) the decision must be based exclusively on the personal conduct of the appellant;

27(5)(c) the personal conduct of the appellant must represent a "genuine, present and sufficiently serious threat" affecting one of the fundamental interests of society;

27(5)(d) matters isolated from the particular facts of the case and/or generalised considerations do not justify a decision to deport;

27(5)(e) a person's criminal convictions do not in themselves justify the decision;

27(6) a wide variety of factors must be taken into account, including age, health, length of residence, and social and cultural integration;

27(8) public policy and public security requirements involve consideration of the fundamental interests of society, including in particular the considerations set out in Schedule 1 to the Regulations.

21. The burden of showing that there are "serious grounds of public policy and public security" (regulation 27(3)) and that the appellant represents a "genuine, present and sufficiently serious threat" (regulation 27(5)(c)) rests with the respondent: Arranz (EEA Regulations – deportation – test) [2017] UKUT 294 (IAC) (this aspect of the decision is not affected by what the Court of Appeal said in Robinson (Jamaica) v SSHD [2018] EWCA Civ 85, at [80]-[84], or the judgment of the Supreme Court in that case – [2020] UKSC 53).

22. As agreed at the hearing, the specific fundamental interests of society relied on by the respondent in this case are those stated in [35] of the decision letter and [28]-[37] of Judge Jackson's error of law decision, namely those set out at paragraphs 1-7 of Schedule 1 to the Regulations.

23. The respondent has also taken on additional point which had not seemingly been raised before. The skeleton argument drafted by Mr Lindsay, Senior Presenting Officer, and dated 21 November 2023, contends that the appellant's offending was so significant that the so-

called Bouchereau exception applies: R v Pierre Bouchereau [1977] EUECJ R-30/77. I will deal with this submission in detail later on

The evidence

24. I have had regard to the relevant evidence contained in the appellant's consolidated bundle, indexed and paginated 1-384. Without opposition I also admitted a letter from the appellant's Probation Officer, Ms S Foxon, dated 21 December 2023, and three 2014 media reports from "News Shopper" adduced by the respondent and relating to the appellant's offences.

25. The appellant alone attended the hearing to give evidence. I will address relevant aspects of this when setting out my findings and conclusions, below.

The parties' submissions

26. Ms Everett relied on the decision letter and Mr Lindsay's skeleton argument. Her central submissions can be summarised as follows. Even if the Bouchereau exception did not apply, the appellant was not a truthful witness, he has not in fact taken full responsibility for his offending, and in all the circumstances he in fact represents a significant risk of offending again and in a serious manner. Ms Everett submitted that the appellant was seeking to blame his ex-wife, SD and had provided implausible evidence about his financial and personal circumstances. His life appeared to be chaotic and this was clearly a risk factor as regards the prospect of re-offending. It was also telling that no one else had attended to give evidence on his behalf.

27. Mr Symes relied on his skeleton argument, dated 27 October 2023. He submitted that the appellant's offending, whilst serious, did not meet the very high threshold applicable to the Bouchereau exception, as discussed in Robinson (Jamaica). In addition, the Probation Service had consistently assessed the appellant as being of "low" risk of re-offending.

They had the institutional competence to assess risk. There was no evidence from the respondent to indicate that there remained an outstanding balance in respect of the POCA order. The appellant had legitimately set up a new company, with the prospect of receiving income. In respect of the appellant's relationship with L, the lack of contact was down to his mother, OM. She appeared to have significant problems of her own. It would be in L's best interests to have both parents in his life.

28. In response to a point I raised at the hearing relating to a letter from the Probation Officer dated 20 October 2023, both representatives were agreed that the stated increase of the "risk of harm" categorisation from "low" to "medium" appeared to have occurred simply on the basis of OM's unsubstantiated allegation against the appellant. There was no suggestion that the increase was based on a substantive assessment, as opposed to what might be described as an automatic step.

29. At the end of the hearing I reserved my decision.

Assessment and conclusions

30. I have considered the evidence before me as a whole, with particular reference to that expressly relied on by the parties when setting out their respective cases in writing and orally.

31. By virtue of his acquired permanent right of residence, the appellant enjoys the medium level of protection against deportation. All that follows must be read in that context.

Serious grounds of public policy and public security: regulation 27(3) of the Regulations and the Bouchereau exception

32. In Bouchereau, the CJEU considered the ability of Member States to justify expulsion on the basis of an individual's past conduct alone, with reference to EU Directive 64/221. At [29]-[30], the Court concluded that:

> "29. Although, in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy.
>
> 30. It is for the authorities and, where appropriate, for the national courts, to consider that question in each individual case in the light of the particular legal position subject to Community law and of the fundamental nature of the principle of the free movement of persons."

33. That exception was considered by the domestic courts in a number of cases, the last of which is Robinson (Jamaica). For present purposes, the following passages are particularly relevant (although I have had regard to the entirety of the paragraphs referred to in the respondent's skeleton argument):

> "80. Accordingly, I am of the view that the decision in *Bouchereau* continues to bind the courts of this country.
>
> …
>
> 84…Although the CJEU did not expressly refer to *Bouchereau* with approval in *CS*, nor it did in terms overrule it or depart from it. Further, there is no reason, in my view, to regard the two decisions as being necessarily inconsistent with each other. This is because, as I have said in my earlier analysis of *Bouchereau*, that case itself recognised that what one is looking for is a present threat to the requirements of public policy; but it also recognised that, in an extreme case, that threat might be evidenced by past conduct which has caused deep public revulsion.
>
> 85.However, with all of that said, I am also of the view that the sort of case that the ECJ had in mind in *Bouchereau*, when it referred to past conduct alone as potentially being sufficient, was not the present sort of case but one whose facts are very extreme. It is neither necessary nor helpful to attempt an exhaustive definition but the sort of case that the court was thinking of was where, for example, a person has committed grave offences of sexual abuse or violence against young children.
>
> 86.I would not wish to belittle the seriousness of the offence in the present case but it is not the sort of offence in which public revulsion at a past offence alone will be sufficient. I note that, in *Straszewski*, Moore-Bick LJ

> referred to "the most heinous of crimes" at para. 17. That gives an indication of the sort of offence the ECJ had in mind when it said that a past offence alone might suffice. I also note that, in *ex p. Marchon*, the defendant was convicted of an offence of conspiracy to import 4½ kg of a Class A drug (heroin); he was a doctor; and he was sentenced to 11 years' imprisonment. As Moore-Bick LJ observed in commenting on that case in *Straszewski*, at para. 18, the offence had been described by this Court in *ex p. Marchon* as being "especially horrifying" and "repugnant to the public" because it had been committed by a doctor. In contrast, as the UT noted at para. 28 of its judgment in the present case, the sentence of 30 months' imprisonment that was imposed on this Respondent was at the lower end of the scale for offences of supplying Class A drugs."

34. It is clear from these passages that the Bouchereau exception is to be applied only in very limited circumstances: the type of appropriate case is described as "extreme" and one in which the facts are "very extreme". Unsurprisingly, the Court of Appeal did not wish to provide an exhaustive definition, but it offered what I respectfully consider to be entirely appropriate examples such as "grave offences of sexual abuse or violence against young children." The Court noted what had been said in other domestic cases: in one, Straszewski, reference was made to the "the most heinous of crimes"; in another, ex parte Marchon, and offence of conspiracy to import a large amount of heroin by a doctor was described as "especially horrifying" and "repugnant to the public".

35. For the following reasons, I conclude that the appellant's offending and personal conduct, whilst undoubtedly serious and self-evidently contrary to a number of fundamental interests of society, was not such that *it alone* demonstrates that he represents a genuine, present and sufficiently serious threat to those interests.

36. First, the appellant's offending did not involve serious violence, sexual abuse/assault, the importation/supply of drugs, or extremist/terrorist activities. In my view, offences of such a nature are indicative of the type of "extreme" or exceptional cases which might trigger the application of the Bouchereau exception.

37. Secondly, the appellant's offending did not involve the facilitation of illegal entry into the United Kingdom by way of, for example the provision of false identity documents or the arrangement of passage by small boat or concealed in vehicles. Serious offending of that nature might also, depending on the particular facts, engage the exception.

38. Thirdly, the appellant's offending was indeed concerted, exploitative of vulnerable individuals, and undertaken for personal financial gain over a prolonged period of time. It is perhaps a sorry state of affairs, but I agree with Mr Symes' submission that it cannot be said that the conspiracy was an extremely rare occurrence, or constituted an especially grievous example of exploitation.

39. It is clear that the appellant was aware of the underpayment of those his company improperly recruited. He also attempted to cover his tracks by being complicit in the production of falsified documents for the company. On the other hand, having full regard to the Sentencing Remarks and the OASys report, it is not the case the individuals were subjected to physical intimidation, or knowingly made to live in squalid accommodation, nor were any minors involved. The additional evidence provided by the respondent is not in my judgment sufficient to make good a contention that the facts were extreme. The three media articles accompanying Mr Lindsay's skeleton argument, whilst relevant, do not take the respondent's case very much further. The first, dated 18 March 2014, sets out the essential circumstances surrounding the conspiracy, but adds little more. The second, dated 24 March 2014, quotes a former legitimate employee of the appellant's company is describing the operation as "despicable" and that it was "tantamount to slavery but with a bit of pay". At the end of the article there appears to be a comment from a reader of the News Shopper, describing the case as "bordering on slavery". The third article, dated 1 August 2014, noted the increased the sentence imposed by the Court of Appeal, with a solicitor for one of the employees describing the case has been the worst he had seen in 20 years working in the field.

40. The second and third articles clearly reflect the fairly-held views of the individuals concerned. They would undoubtedly prompt most right-thinking people to utterly condemn the appellant's conduct. Yet, it is difficult to ascertain from the articles, published as they are in a media outlet in respect of which I know nothing and may be restricted to a very limited readership, that the offending in fact lead to widespread public revulsion. Taking an overall view, this evidence, taken alone or cumulatively with all other materials before me, does not demonstrate that the criminal conduct was sufficiently serious.

41. Fourthly, the Sentencing Remarks do not allude to the offending as being of the gravest type. The respondent has not provided the judgment of the Court of Appeal in respect of the Attorney General's reference. The increase in sentence was of course very significant, but I cannot be satisfied as to the precise basis on which that was done (I make it clear that it is not for me to go and undertake independent research. The respondent has had every opportunity to adduce whatever materials he wishes to rely on during the course of these proceedings).

42. Fifthly, I do not regard the overall length of the appellant sentences as, of themselves, sufficient to warrant the application of the Bouchereau exception, although it is clearly a relevant consideration. In addition to the absence of the Court of Appeal's reasoning as to why the original sentence was increased, it must be that the particular facts of the case are of primary importance. I have focused on those facts, in the context of what is said in Robinson (Jamaica).

43. Sixthly, it is of some note that, until the point was taken in Mr Lindsay's skeleton argument in November 2023, the respondent had at no stage relied on the Bouchereau exception. It does not feature in the decision letter, nor was it apparently raised in any of the proceedings before the First-tier Tribunal. As mentioned earlier, there has been ample time during the proceedings in the Upper Tribunal for the respondent to have made the submission and potentially provided further evidence.

44. Seventhly, I have not been asked by the respondent to take account of any particular aspect of the appellant's conduct since his conviction and/or release from prison when considering the Bouchereau exception. Whilst I have very significant concerns in respect of the appellant's acceptance of responsibility and his truthfulness on other matters (to which I will return later), I do not in any event regard these as tipping the balance in favour of the application of the Bouchereau exception.

45. Although I have concluded that the Bouchereau exception does not apply, the serious nature of the appellant's offending is certainly relevant to my forward-looking assessment of whether his deportation is justified.

Regulation 27(3) of the Regulations: serious grounds of public policy and public security

46. Having already dealt with the Bouchereau exception, at this stage I direct myself that general deterrence and/or public revulsion have no bearing on the existence of serious grounds and relevant considerations pertaining thereto: SSHD v Straszewski [2015] EWCA Civ 1245, at [11]-[20].

47. I consider the question of "serious grounds" as a matter distinct from the assessment under regulation 27(5) of the Regulations: Kamki v SSHD [2017] EWCA Civ 1715, at [23]-[24].

48. The term "serious grounds" was never defined in the Regulations. As a matter of common sense, it represents on the one hand a higher threshold than if the individual did not have a permanent right of residence, whilst on the other something lesser than the imperative grounds required where an individual has 10 years' continuous residence (including the acquisition of a permanent right of residence).

49. The respondent has demonstrated that the appellant's offending was quite clearly of a serious nature, both in general terms and in light of its particular facts. It involved a number of important features of public

policy and public security, including: the relatively large-scale and prolonged exploitation of vulnerable individuals; the abuse of the immigration system to the extent that people with no right to work were recruited; the significant underpayment of those people for labour provided; the deception of other businesses (the building contractors); the falsification of documents; and perjury.

50. The appellant played a central role in all of this. His conduct was plainly contrary to the following fundamental interests of society, as set out in Schedule 1 to the Regulations: the prevention of abuse of immigration laws and maintaining the integrity and effectiveness of the immigration control system; confidence in the ability of the authorities to take action against relevant offenders; addressing offences likely to cause harm to society (e.g. undermining confidence in the provision of labour, the deception of employers, and/or permitting those with no right to work to undertake unlawful employment); and protecting the rights and freedom of others from being exploited (the fact that the people recruited had no right to work does not exclude them from being entitled to protection).

51. The matters relied on by the respondent are, in my judgment, sufficient to constitute serious grounds of public policy and public security.

Regulation 27(5)(c) of the Regulations: genuine, present and sufficiently serious threat

52. I turn now to the first of the forward-looking assessments in this appeal. On the evidence before me, taken as a whole, has the respondent been able to demonstrate that the appellant represents a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”, taking into account his past conduct and bearing in mind that the threat does not need to be imminent?

53. The starting point for my assessment is the evidence contained in the 2022 OASys report and the letters from the Probation Service, the latest of which is dated 21 December 2023. Mr Symes very fairly places significant reliance on the assessment of re-offending as being low. Indeed, the predictor score of the risk of "serious recidivism" was assessed to be 0.13% in the second year. Mr Symes emphasised the institutional competence of the Probation Service to assess risk and that significant weight should be attached to its conclusions. He submitted that the letters covering the period up to December 2023 indicated that the appellant had remained fully compliant with the conditions of his licence and probation agreement and that the risk assessment was based on predictive scoring rather than personal opinion.

54. I accept that the appellant undertook courses whilst in prison and that this would presumably have been factored into the risk assessment. Even if it was not, the courses are nonetheless a relevant factor to the extent that they will probably have led the appellant to reflect on his past conduct. I take this into account as representing a consideration favourable to the appellant in terms of future risk of reoffending and/or causing harm.

55. In my judgment, the views of the Probation Service should in principle be afforded considerable weight, essentially for the reason given by Mr Symes; it has the professional task of assessing risk based on a wide variety of predictive considerations.

56. That is not to say that the categorisation of risk stated in an OASys report and/or in Probation Service letters is determinative. As with expert reports, it is for me to consider this evidence together with everything else.

57. Having regard to the respondent's skeleton argument, there are certain other aspects of the OASys report which should be noted. Although the risk of serious recidivism was stated as 0.13%, the OGRS3 probability of proven reoffending was 10% and the OGP probability of proven non-violent reoffending was 12%., Whilst still low, the figures

were clearly beyond the negligible figure specifically relied on by Mr Symes.

58. It does not appear from the sources of information referred to when preparing the OASys report that the Judge's Sentencing Remarks were taken into account. Having attempted to go through the report in full, I cannot see any reference to those Remarks elsewhere in the text. Whilst not of the greatest significance, there is in my judgment some merit in the respondent's point that the report appears to have been based (at least initially) on the appellant's own account of the offences, without regard to the Sentencing Remarks, which had placed him at the centre of the enterprise and made it very clear that he had acted dishonestly when criminality had been detected (the appellant's past dishonesty is relevant to my assessment of his overall credibility as to rehabilitation, to which I will return in due course).

59. The OASys report, as initially drafted, confirmed that the appellant had sought to "distance himself from knowledge and responsibility regarding his index offence…" This must clearly have been highly relevant to the categorisation of risk at that time: an individual who has failed to properly acknowledge culpability is very likely to be placed in a higher risk bracket than someone who has fully accepted responsibility. It was only during the 2021 review that the appellant stated that he had taken "full responsibility" for his actions. This was regarded as a "positive shift in [the appellant's] thinking and awareness of the impact of his actions and behaviours." On one hand, the authors of the review might perhaps have been willing to take the appellant's shift in position at face value. It may be that his revised attitude was considered together with other factors considered to be relevant. In my judgment, it is unclear from the report whether his new position was in fact considered in the context of the previous denial of full responsibility and the dishonest conduct which had been highlighted in the Sentencing Remarks.

60. In terms of the Probation Service letters, there is no reason to doubt that the appellant has been fully compliant with the conditions of

his licence. That is perhaps unsurprising. The appellant is an intelligent individual and would always have been aware that non-compliance could have had adverse consequences for him.

61. In light of the above, I treat the OASys report and the Probation Service letters with some caution and the weight I attribute to this evidence is materially reduced.

62. I have regard, as I must, to paragraph 3 of Schedule 1 to the Regulations. The appellant's sentence was significantly increased on appeal by the Court of Appeal. That revised sentence was substantial and does, on the facts of this case, weighs in favour of the respondent's assertion that the appellant represents a relevant threat.

63. I turn now to the evidence of the appellant himself, particularly that provided at the hearing. That evidence was not all directly concerned with the issue of rehabilitation/re-offending. However, it is relevant to my overall assessment of the appellant's credibility and in turn the threat that he may, or may not, represent. In assessing his evidence I direct myself that:

(a) his past conduct is relevant;

(b) the fact that he has been dishonest in the past does not of itself mean that his evidence in this appeal is necessarily untruthful;

(c) his evidence must be viewed in light of the entire evidential picture; and

(d) it is for the respondent to show that the relevant threat exists.

64. The appellant has engaged in seriously dishonest conduct in the past. Aside from the specific enterprise in which he played a central role (which itself involved the deception of other businesses), the appellant went on to commit perjury. This past conduct is a factor which weighs against the credibility of his evidence before me.

65. It is to my mind very odd that the appellant appears to be unaware as to whether he still owes any money under the POCA order. As a matter of process, one would have expected the authorities (presumably the

CPS) to have formally notified him as to whether any sums remained outstanding. As a matter of common sense, one would have thought that the appellant wanted to know this for sure. Having said that, Mr Symes fairly pointed out that the respondent should have been in a position to adduce relevant evidence on the point, but has not done so. Still, I find it surprising that the appellant himself was unable to provide a clear answer.

66. The appellant told me that his property in Nigeria had been confiscated by the authorities of that country in early 2023. He explained that those authorities had expected the CPS to write to them and that they had been asked by that agency to find out about his properties in Nigeria, which in turn appears to have been connected to the POCA order made in this country. Accordingly, a Nigerian authority described as the EFCC had allegedly investigated and then confiscated land. When asked whether there was any documentary evidence of this, the appellant responded by suggesting that he could ask his/a barrister in Lagos for further information.

67. I find that evidence to be entirely untruthful. It is wholly implausible that the authorities in this country would have asked the Nigerian authorities to investigate and for the latter to then in fact confiscate property in that jurisdiction. The implausibility of this evidence is compounded by the complete absence of any documentary evidence. It is close to fanciful that no such documentation would have been provided by the Nigerian authorities if indeed confiscation had taken place. It is just as implausible that if documentation had been provided, the appellant would not have been in possession of it and, in turn, able to adduce it in these proceedings.

68. The fact that the appellant has chosen to lie about this particular issue has a bearing on my assessment of his overall attitude towards his past conduct and future conduct, which in turn is relevant to the respondent’s ability to demonstrate a threat.

69. Ms Everett quite properly asked the appellant about the taking of responsibility for his past conduct, with reference to his witness statement. I find that his responses were telling. He told me that he had been “confused” when convicted. I do not accept that. There is nothing anywhere else in the evidence to even suggest that there might have been some genuine confusion or other difficulty with the comprehension of what he had done and its consequences.

70. The appellant went on to say that he had made a “bad business decision” and that he regretted it. He told me that he should have obeyed the law and monitored his security manager and ex-wife, and should have reviewed the recruitment vetting procedure. He said that the “bad decision” was not having checked the vetting procedure for all employees. He emphasised that his ex-wife had been in charge of recruitment and that he had “respected her judgment”. I find that this evidence was strongly indicative of a re-emergence of his disinclination to accept full responsibility for his past conduct. To be blunt, it lacked frankness and amounted to an attempt to deflect responsibility onto his ex-wife and security manager. The appellant was in effect telling me that his fault lay only in failing to exercise proper supervision. That is quite clearly inaccurate. The appellant played a central role in a prolonged criminal enterprise and then knowingly sought to cover his tracks when it came to light. This aspect of the appellant’s evidence reflects very poorly on his overall credibility and the genuineness of any rehabilitation.

71. The appellant then told me that he had come to realise his error after completing courses in prison. There is merit in Ms Everett’s submission that these only took place a significant period of time after the offending behaviour itself and after he had initially failed to take responsibility for his actions. When asked why he had not realised his blame worthiness at the time of the offending, he replied that he “thought I was doing the right thing at the time, but I was wrong.” Again, that indicates that even now he does not recognise that what he had in fact done in the past was wrong.

72. I found the appellant's evidence in relation to mediation with his ex-wife and L's mother, OM, to be implausible and unreliable. He told me that he was intending to pay for mediation by using part of a student loan, but this had not started because he was waiting for L to get better from an illness. That made no sense. There was nothing preventing the initiation of mediation, even if L was still recovering. There was no evidence relating to any investigations into mediation or indeed in relation to L's health.

73. The appellant gave what I regard as being confused evidence about OM's apparent eviction from her accommodation, despite the fact that she was caring for minor children. He told me that he had been in contact with OM's sister about possible online schooling for L. There was no evidence from OM's sister, despite him saying that they got on well. The whole picture was unclear and generally unreliable.

74. Another aspect of the evidence which I find to be simply untruthful is that relating to an apparent investigation by social services into OM. He told me that he knew about this investigation because his Probation Officer had told him. I do not believe that. In the absence of any confirmatory evidence from the individual concerned, or indeed from social services, I find it to be entirely improbable that a Probation Officer would (a) know about any such investigation being undertaken by social services and/or (b) would divulge such sensitive information to a third party, namely the appellant (there was no evidence about any express authority to disclose).

75. The appellant told me that he had a "very strong relationship" with his other biological children. I find the appellant's evidence as to why none of them had provided any evidence in support of his case to be untruthful, or at least unreliable. Taking the evidence as a whole, I do not accept the appellant's assertion that he had not informed his adult sons about his current position. When asked about this, the appellant said that he would tell them at "some point". That is almost nonsensical, given that any shock to them would be even greater at the point of possible

deportation than during the course of these appellate proceedings. In respect of his daughter, she could have at least put in witness statement, if not attend the hearing. Overall, I find that he does not in fact have a very close relationship with his adult children.

76. The appellant told me that he had two “major” friends in this country and they were “there for me”. There was no evidence from these two individuals and the appellant attempted to explain this by saying that he did not discuss certain matters with people. Given the obvious importance of these proceedings (the ‘last chance’, as it were), the appellant’s explanation is inadequate. I find that the appellant does not in fact have significant ties with non-family members in the United Kingdom.

77. When asked about his current circumstances, the appellant said that he had set up a company in November 2023 which will apparently operate in the field of customs brokerage “on behalf of the HMRC”. He asserted that his company’s name appeared on the HMRC website, but that the company’s own website was currently under construction.

78. I accept that he was entitled to set up a new company. Beyond that, I do not accept his evidence on the establishment of the claimed company. There was no documentary evidence about this whatsoever and no explanation as to why this was the case. It is more than simply convenient that the company’s website was not functional. I also take into account the significant adverse findings I have made in respect of other aspects of the evidence. Although I do not rely on this, it seems to me particularly odd that the HMRC would associate itself with a company set up by an individual convicted of significant crimes of dishonesty.

79. Even if the company does exist, the appellant accepted that he had not received any income from it as yet. On his own evidence, he still owes money on credit cards and had his previous property in London repossessed as result of the POCA order. His financial situation is, therefore, precarious. That is relevant to the risk of re-offending because what happened in the past was done for financial gain.

80. I am willing to accept that the appellant is currently enrolled as a student. That adds something to a sense of purpose on the appellant's part.

81. My assessment of the evidence paints a picture of a manipulative individual who has been thoroughly dishonest in the past, has denied responsibility for his actions, then sought to express remorse and seemingly take responsibility, but then disclose (or reassert) his original abdication of responsibility. His life can fairly be described as "chaotic" (a term used by Ms Everett in submissions). There has been very difficult interactions with his ex-wife in recent times. The appellant has been in and out of prison since his initial release in 2019 (bearing in mind of course that the last period did not result in criminal proceedings). There is no contact arrangement with L. The appellant does not have a source of income as such. He does not have close friendships. His relationship with his adult children is probably fair, at best.

82. In turn, on the particular facts of this case, I find that the risk of re-offending is significantly higher than that set out in the 2022 OASys report and the Probation Service letters. There is, in my judgment, a significant risk that the appellant is likely to re-offend, albeit not in respect of violent offences or others of the most serious nature. However, I find that there is a strong likelihood of the appellant committing offences of dishonesty with the aim of financial gain. I find that the nature of further offences is likely to be sufficiently serious, even if not necessarily at the level of his past actions.

83. In truth, I find that the appellant has contrived to put forward what appeared to be a plausible acknowledgement of responsibility for his past actions, but when the evidence as a whole is taken into account, this has been very substantially undermined. By his own word in these proceedings, he has in effect reverted to his initial position of denying full responsibility.

84. Having regard to paragraph 5 of Schedule 1 to the Regulations, the appellant has been unable to provide substantive evidence of not

demonstrating a threat. The wording of that provision may suggest that the burden of establishing the relevant threat rests with the appellant. That is not of course the correct legal position and I have placed the burden on the respondent throughout.

85. Bringing together all of the above in the context of the legal directions I have referred to previously and with the fact that the burden rests with the respondent, I conclude that it has been shown that the appellant does represent a genuine, present and sufficiently serious threat affecting at least one of the fundamental interests of society to which I have referred earlier in this decision. Specifically,, whilst one cannot of course be certain, in my judgment the risk of re-offending is linked to a sufficiently similar type of offence for which the appellant was convicted in the past. As I have mentioned previously, future offending may not attain quite the same level of seriousness as in the past, but that is not the test. It is in my judgment likely that any further offending would involve the deception of others, financial gain and its corollary of financial detriment to others (including the public purse), the exploitation of others, and/or the abuse of immigration laws.

86. Therefore, the respondent's case under regulation 27(5)(c) of the Regulations is made out.

Regulation 27(5) of the Regulations: proportionality

87. I remind myself that proportionality in this context is of the EU law variety: Lumsdon v Legal Services Board [2016] AC 697, at [33]. This involves answering two questions: first, whether the measure in question is suitable and appropriate to achieve the objective; secondly, whether the method measure is necessary to achieve that objective.

88. The respondent's objective is clearly to protect the public from the effects of further offending by the appellant. The measure adopted is to deport the appellant. I conclude that the measure is suitable and appropriate to achieve the objective.

89. Turning to the second question, I must assess whether deportation is necessary in order to achieve the objective of protecting the public.

90. In undertaking that assessment, I have had regard to the written and oral submissions provided by the parties.

91. In terms of general integrative links in the United Kingdom, I have regard to paragraph 4 of Schedule 1 to the Regulations. I note that the appellant's offending conduct ran from 2007 until 2012. He began the enterprise only 7 years after coming to this country. After his conviction in 2014, he spent a considerable period of time in custody (acknowledging that the last period between 2022 and 2023 was not the result of a conviction). With this in mind, on the facts this case the weight attributable to integrative links is clearly reduced.

92. The appellant has been in the United Kingdom for a considerable period of time and that is of course relevant, although subject to what I have said in the preceding paragraph, and below.

93. I accept that he has undertaken employment in this country, other than in relation to the security company connected to the offending.

94. As regards social ties, I do not accept that these are significant. I have already addressed the issue of apparent friends who have not provided supporting evidence. It is likely that the appellant has acquaintances and friendships. However, I do not accept that there is a strong network in this country which might otherwise attract material weight in the consideration of proportionality.

95. The appellant has had three marriages, all of which have broken down. It is not for me to attribute blame for any of that, and I do not do so. It does, however, indicate something of an unstable thread running through the appellant's residence in this country.

96. I have already found that the appellant's relationship with his adult children is not of the strength he has claimed. On the evidence before me, I accept that the appellant's deportation would cause upset to those children, but there is nothing to suggest that it would have anything

approaching a disproportionate impact on them, or indeed the appellant himself.

97. The appellant's son, T, has not really featured by way of evidence in this case. He was born in 2008, and as far as I can tell lives with his mother, SD. I find that there is no genuine and subsisting parental relationship between the appellant and T.

98. The evidence surrounding L's current circumstances is, to say the least, less than clear. The appellant acknowledges that there has been very little contact in recent times. I accept that contact had been more frequent previously, although of course a large proportion of L's young life was spent whilst the appellant was in prison (L was born in February 2013 and the appellant's began his initial custodial sentence in March 2014, with further periods of incarceration thereafter). I accept that forms of contact were maintained whilst the appellant was in prison, but the nature of the day-to-day relationship was clearly not the same as if they had lived together as a family unit.

99. The appellant claims that L's mother, OM, has drug and/or alcohol problems and is unable to properly care for L, X, Y, and Z. He recounts in his witness statement a claimed incident in August 2023 when his ex-wife was apparently discovered unconscious due to intoxication. It appears to be his evidence that OM and the children are living with her sister, although the evidence is by no means clear.

100. I have very significant concerns as to the appellant's overall credibility (as set out previously). On the face of it, his evidence relating to OM is unlikely to be reliable. I note also the absence of any evidence from OM's sister concerning the current situation and the appellant's claim that he can see L at the sister's house. If indeed OM was suffering from significant alcohol/drug problems and was a carer for four children, it would seem highly likely that social services would be involved (that does not of course mean that the appellant would have been told about any investigation through his Probation Officer). All-told, the picture is unsatisfactory. On balance, I do not accept that OM is unable to care for

the children. It may be that she does have problems, but I am not satisfied on the evidence that they amount to incapability. I also find that her sister is at least providing some assistance to her.

101. In his witness statement, the appellant asserts that he has instructed a solicitor "to make a child arrangement order". There is no documentary evidence about this, and I simply do not accept the appellant's word. As with the issue of mediation and several other issues, the appellant has untruthfully added this assertion in in an attempt to portray himself in a better light.

102. Taking everything into account, I am willing to accept that the appellant still has a genuine and subsisting parental relationship with L, but only by a very narrow margin. In principle, L's best interests rest with having access to both of his parents. The reality of the situation is a significant countervailing consideration. There is no mediation between the appellant and OM. There is no child arrangement order in place and none has even been sought. The appellant's direct interaction with L has been extremely limited in recent times. He is not playing any effective role in L's day-to-day life. The appellant's financial circumstances currently make it difficult, if not near-impossible, for him to meaningfully contribute to L's upbringing.

103. As regards X, Y, and Z, many, if not all, of the above considerations also apply to their relationship with the appellant. The focus of the appellant's case before me was very much on L. In any event, there is certainly nothing of substance in the evidence which adds to any particular ties between the appellant and X, Y, and Z.

104. I find that the appellant has property in Nigeria. I accept that he was given land by his mother. I have not accepted that this land was confiscated by the Nigerian authorities. The appellant has visited Nigeria since arriving in the United Kingdom in 2000. It cannot be said that the appellant has no ties to and familiarity with that country.

105. In respect of the appellant's health, I accept that he suffers from obstructive sleep apnoea, as confirmed by the letter of 18 May 2023 from

relevant Consultant at the Queen Victoria Hospital. The letter confirms that the appellant has a CPAP machine which is safe for transportation on an aircraft and has been fully paid for. There is no reason to suppose that the appellant would be deprived of the machine on return to Nigeria. It is unlikely in the extreme that he would not have the means to ensure its operation. He is clearly able to use it himself (it is used during the night) and there is no suggestion that additional medication and/or other specialist treatment is required.

106. I have not been referred to any evidence relating to the job market in Nigeria. The appellant is intelligent, resourceful, and has employment experience in the United Kingdom and Nigeria. He is well-educated. It is highly likely that he would be able to obtain reasonable employment on return to Nigeria.

107. Bringing all of the above considerations together, I conclude that the respondent has demonstrated the necessity of deporting the appellant in order to achieve the objective of protecting the public in the context of public policy and public security. Deportation is proportionate.

The Regulations: summary

108. I conclude that the respondent has made out his case in respect of regulation 27(3) and regulation 27(5) of the Regulations.

109. The appellant's appeal is dismissed under the Regulations.

Article 8 ECHR

110. Article 8 has not featured in the written or oral submissions. However, it was addressed by the respondent in her 2019 decision letter and, for the sake of completeness, it is appropriate to consider it.

111. The appellant is clearly a foreign criminal within the meaning of section 117D of the Nationality, Immigration and Asylum Act 2002, as amended.

112. It is in the public interest that he be deported.

113. The offences for which he was convicted were undoubtedly serious, as reflected by their facts and the sentence ultimately imposed by the Court of Appeal.

114. The appellant is unable to rely on either of the Exceptions under section 117C(4) and section 117C(5). He must demonstrate the existence of very compelling circumstances under section 117C(6).

115. With reference to the private life Exception as a relevant consideration, I conclude that he quite clearly could not have met it even if his sentence had not precluded that. In view of my assessment of the evidence and findings set out previously, he has not been in the United Kingdom lawfully for most of his life, is not culturally and socially integrated, and in any event there would clearly not be very significant obstacles to his reintegration into Nigerian society.

116. As regards the family life Exception, there is no question that L or any of the other minor children would go to Nigeria with the appellant. However, in light of my assessment of the evidence and findings set out previously, it would clearly not be unduly harsh for L to be separated from the appellant.

117. Turning, then, to the very compelling circumstances test. I take into account the serious nature of the appellant's offending and the risk of re-offending, as I have assessed it to be. I take account of the appellant's relationship with L, as I have found it to be. I take account of the lack of significant ties in the United Kingdom, despite the lengthy residence. I take into account the existence of ties to Nigeria, including the ownership of property. I take into account the appellant's health and the fact that he has the necessary equipment for his sleep apnoea. I take into account the fact that he would be able to communicate with his children by way of Internet-platform calls.

118. Weighing all relevant considerations up, I conclude by a fairly significant margin that the appellant has failed to show that there are very compelling circumstances in his case.

119. The appeal is dismissed on Article 8 grounds.

Anonymity

120. Up until now, the appellant himself has been the subject of an anonymity direction. At the hearing, I raised the question as to whether that direction was, in all the circumstances, still appropriate. I received brief post-hearing written representations from Mr Symes on the matter. He quite properly acknowledged the significance of the principle of open justice and the difficulty in justifying continued anonymity for the appellant. However, it was said that the appellant's son, L, should be granted anonymity on the basis that there is a possibility that family law proceedings might be instigated.

121. The principle of open justice is indeed very important. The appellant himself has been named in media reports relating to his offending and there is a strong public interest in him being identifiable. There is no basis to indicate that the appellant would be at risk of serious harm if he were to be identified. In all the circumstances, I rescind the anonymity direction in so far as it relates to the appellant.

122. However, I conclude that it is appropriate for L to be granted anonymity, on the basis put forward in the post-hearing representations. There is clearly no certainty as to the instigation of family law proceedings, but it remains a possibility and I adopt a precautionary approach in that regard.

Notice of Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and that decision has been set aside.

The decision in this appeal is re-made and the appeal is dismissed on all grounds.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 6 February 2024

ANNEX: JUDGE JACKSON'S ERROR OF LAW DECISION

Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: DA/00409/2019(P)

THE IMMIGRATION ACTS

Decided under rule 34 Decision & Reasons Promulgated

On 11 June 2020

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Before

UPPER TRIBUNAL JUDGE JACKSON

Between

AOO

(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. Pursuant to directions dated 28 March 2020 indicating a provisional view that in light of the need to take precautions against the spread of Covid-19 and the overriding objective, it would be appropriate in this case to determine the issue of whether the First-tier Tribunal's decision involved the making of an error of law and if so whether the decision should be set aside; the parties agreed with no objections being raised and both made written submissions on the issues raised in the appeal. This decision has therefore been determined on the papers in light of those submissions and the full appeal file.

2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Griffith promulgated on 6 December 2019, in which AOO's appeal against the decision to make a deportation order against him under Regulation 23(6)(b) and Regulation 27 of the Immigration (European Economic Area) Regulations 2016 (the "EEA Regulations") dated 1 August 2019 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with AOO as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a national of Nigeria, born on 17 June 1968, who first arrived in the United Kingdom in April 2000 with entry clearance as a visitor valid to 17 July 2000. After expiry of that visa, he applied for an EEA Residence Card as the spouse of an EEA national, which was initially rejected but a further application on 24 October 2003 was successful with a Residence Card being issued and valid to 27 October 2008. It was however revoked on 26 June 2007 following the Appellant's divorce in August 2005.

4. On 20 April 2007, following his marriage to a Lithuanian national with permanent residence in the United Kingdom, the Appellant applied for leave to remain as the spouse of that person. That application was refused because he had no leave to remain in the United Kingdom and his appeal was ultimately dismissed. He made a further application for an EEA Residence Card on the basis of the same relationship on 26 August 2008, which was granted, valid from 21 September 2009 to 9 April 2014. An application in 2011 was made by the Appellant from Nigeria for entry clearance for settlement as the spouse of

the same person which was granted on 10 February 2011, valid to 10 May 2013. The Appellant was divorced from his second wife on 9 January 2013.

5. On 5 April 2013, the Appellant applied for leave to remain outside of the Immigration Rules, which was rejected because no fee had been paid and a subsequent application on the basis of private and family life was made on 10 May 2013, which was refused in March 2016, around the time that the first deportation order was made against the Appellant, under the domestic statutes and Immigration Rules, with a refusal on human rights grounds which generated an initial right of appeal. That appeal ultimately ended on 27 March 2019 when the Court of Appeal referred the application back to the Respondent to reconsider under the EEA Regulations given that it had been recognised and accepted at that point by the parties that the Appellant had obtained permanent residence and therefore his deportation should have been considered under the EEA Regulations.

6. As to the Appellant's criminal history, he received a caution for assaulting/ill-treating a child (his daughter) on 9 January 2006 and deportation action was triggered after his later convictions in 2014 and 2015. The first was on 10 February 2014 when he was convicted of conspiring/assisting unlawful immigration into an EU member state and using unlicensed security operatives between 10 April 2007 and 19 October 2012. He was sentenced to 54 months imprisonment and disqualified from being a company director for a period of six years. On the Appellant's appeal to the Court of Appeal, his sentence was increased to one of 96 months. On 27 August 2015, the Appellant was sentenced for a further offence under the Perjury Act 1911 for wilfully making a sworn witness or untrue statement, for a period of four years to run consecutively. A confiscation order was made against the Appellant in the sum of £746,219.78 and as at October 2019, the outstanding amount to be repaid was £279,671.70 (plus interest).

7. In the decision dated 1 August 2019, the Respondent set out the Appellant's immigration and criminal history. It was accepted in that letter that the Appellant retained a right of residence following his divorce from an EEA national on 9 January 2013; that he had been resident in the United Kingdom in

accordance with the EEA Regulations for a continuous period of five years and as such had acquired a permanent right of residence under the same. The decision was then taken under Regulations 23(6)(b) and 27 of the EEA Regulations as to whether the Appellant's deportation was justified on serious grounds of public policy.

8. The Respondent considered that the Appellant's behaviour was a threat to no less than six of the fundamental interests of society listed in Schedule 1 of the EEA Regulations, including but not limited to the prevention of unlawful immigration and abuse of immigration laws, protecting the rights and freedoms of others, particularly exploitation and protecting the public. The Respondent set out the nature of the Appellant's offending and quoted from the sentencing remarks about his involvement in his company exploiting large numbers of those without any right to work United Kingdom as unlicensed security guards and the creation of false records to attempt to cover this up.

9. The Respondent considered the latest OASys report, recognising that the Appellant was found to pose only a low risk of reoffending, however concern was raised that the score given on the report was in conflict with the written comments of the offender manager. In particular, that financial issues were linked to the Appellant's offending behaviour and the risk was likely to be greatest for similar offences that the Appellant had been convicted of. Further, that there was insufficient evidence to show that the Appellant had fully addressed his offending behaviour and there was a lack of evidence of improvement in his personal and financial circumstances since conviction such that the Appellant was likely to revert to offending to support himself. A similar instance of offending would cause serious harm. Overall, the Appellant was considered to pose a significant threat to the safety and security of the public of the United Kingdom and deportation was considered to be justified on serious grounds of public policy.

10. The Respondent then took into account all of the Appellant's personal circumstances to assess whether the decision was proportionate, specific consideration being given to rehabilitation as well. The Respondent did not accept that the Appellant was socially and culturally integrated in the United

Kingdom given his conviction for employment of illegal immigrants over a period of more than five years. It was however accepted that the Appellant has family, including a British citizen wife, three children, four step-children and two further adult children. The Respondent noted that the Appellant still has links with Nigeria and had returned there on numerous occasions and would be able to find employment and reintegrate on return.

11. Finally, the Respondent separately considered the Appellant's human rights under Article 8 of the European Convention on Human Rights and in accordance with the Immigration Rules. The details of this part of the decision are not relevant to the current onward appeal.

12. Judge Griffith allowed the appeal in a decision promulgated on 6 December 2019 under the EEA Regulations. In summary, the First-tier Tribunal found that the Appellant's offences fell within the serious grounds of public policy category given the nature of the offences and lengthy custodial sentences imposed for them. It was further found that the Appellant's offences were contrary to two of the fundamental interests in Schedule 1 of the EEA Regulations, including the protection of rights and freedoms of others, particularly exploitation and protecting the public.

13. In terms of the level of threat posed, regard was had to the four OASys assessments from 2014, 2016 and two in 2019, all of which assessed the Appellant's risk of reoffending as low. The First-tier Tribunal noted that at the time of the earlier OASys reports, the Appellant had not accepted responsibility for his offences and that if he was not truly aware of illegal activity of his own company, there was concern with his ability to recognise problems and deal with them. The lack of acceptance of responsibility was identified as a difficulty with engagement in offending behaviour programmes. Only in the most recent assessment in October 2019 was it recorded that the Appellant accepted full responsibility for the offences, which were committed purely for financial gain. No reasons were given for this change.

14. The First-tier Tribunal then referred in paragraphs 77 to 78 to the Appellant's evidence that he now accepted the obligations placed on him as a director of a company and his failure to fulfil those; together with his evidence

of completing courses in prison and receiving positive feedback during his time there, including as an Enhanced prisoner, as a Listener and with good behaviour.

15. In paragraph 79, the First-tier Tribunal finds, having had regard to the evidence of the Appellant's behaviour in prison and the number and nature of courses he has undertaken, that the Appellant does now accept the serious shortcomings that led to his conviction and has taken steps to acknowledge and address appropriately and as far as possible those matters; with such factors weighing heavily in favour of his rehabilitation.

16. The First-tier Tribunal refers to the Appellant's family and personal circumstances in paragraph 80 and considers his integration in the United Kingdom in paragraph 81. The First-tier Tribunal concluded that notwithstanding the Appellant's lengthy prison sentence for his crimes, he was socially and culturally integrated in the United Kingdom. He was educated in Nigeria but has also worked in the United Kingdom and pursued his own business ventures here, with earnings as well as tax and national insurance payments between 2003 and 2013. It was accepted that he still has a number of links to Nigeria, but the ties have been lessened given his length of residence in the United Kingdom.

17. The First-tier Tribunal concluded, having regard to the Appellant's steps towards rehabilitation, the most recent OASys assessment and the consistent assessment of him being a low risk of reoffending, that the Appellant did not represent a genuine, present and sufficiently serious threat to a fundamental interest of society. The Appellant's integration into life in the United Kingdom and strength of his family life, including consideration of the rights of his child and rehabilitation weighed heavily in his favour in conducting any proportionality balancing exercise and his removal would be disproportionate.

18. In the written grounds of appeal, the Respondent sets out the following errors as grounds of appeal. First, that the First-tier Tribunal placed too much weight on the fourth OASys report and erred in finding the Appellant's sudden acceptance of responsibility for his criminal offending on that occasion, consistently denied before, as credible, despite the lack of any explanation for

it and the Appellant's history of not being truthful, including a four-year prison sentence under the Perjury Act 1911 for wilfully making a false or untrue statement.

19. Secondly, that the First-tier Tribunal has materially misdirected itself in law by failing to consider all of the relevant fundamental interests of society in Schedule 1 of the EEA Regulations. The First-tier Tribunal relied only upon two, but failed to consider the others identified by the Respondent which were applicable to a person who had wilfully employed those with no right to be in the United Kingdom and placed them in positions of trust; risking harm to society by placing unvetted individuals into positions of trust and security; and presumably not fully declaring money charged to contractors, paying associated taxes and employment dues as well as breaking employment laws; and creating false records in an attempt to cover his tracks. Further, the length of sentence, totalling 12 years in prison is a relevant factor in Schedule 1.3 of the EEA Regulations, which states that the longer the sentence, the greater the likelihood that an individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. This was not taken into account at all by the First-tier Tribunal.

20. Thirdly, the First-tier Tribunal fails to consider at all whether the Appellant's integration in the United Kingdom had been damaged and/or diminished during his lengthy period in prison. Further, the First-tier Tribunal's reasoning in support of the finding that the Appellant was integrated in the first place, appeared to be based on some employment, a business which was the foundation of his criminal offending and three marriages and children, where one of the spouses through whom the Appellant obtained permanent residence, was a co-defendant and business partner.

21. Fourthly, the First-tier Tribunal erred in attaching positive weight to the Appellant's rehabilitation, contrary to the Court of Appeal's confirmation that no material weight ordinarily falls to be given to rehabilitation in the proportionality balancing exercise in Binbuga (Turkey) v Secretary of State for

the Home Department [2019] EWCA Civ 551, with reference to SE (Zimbabwe) v Secretary of State for the Home Department [2014] EWCA Civ 256.

22. Finally, the First-tier Tribunal failed to take into account the full nature of the Appellant's offending and that his statement that, in his 40s and the owner of a business, he was naive and did not realise what he was doing was wrong and only very recently accepted that he had not fully complied with his responsibilities as a director. The Appellant has not addressed the consequences of his offending, in particular the risk to the public using unvetted security guards and therefore has not fully addressed his conduct and consequences of his actions. This undermines the conclusion that he has rehabilitated and no longer poses a danger to the public. Further when considering the risk of reoffending, the First-tier Tribunal failed to take into account the harm that would be caused if re-offending took place in accordance with Kamki v Secretary of State for the Home Department [2017] EWCA Civ 1715.

23. In the written representations received on behalf of the Respondent, the appeal is framed essentially as a rationality challenge to the First-tier Tribunal's findings primarily in relation to integration but also on rehabilitation, future risk and proportionality. Further matters are highlighted that the First-tier Tribunal failed to take into account, including the Appellant's relatively short space of time that he has spent legally in the United Kingdom, during which he was committing a serious criminal offence.

24. The Appellant opposes the appeal for reasons set out in detailed written submissions in response to both the grounds of appeal and further written submissions on behalf of the Respondent. It is submitted on behalf of the Appellant that the First-tier Tribunal's decision is both lawful and rational, correctly identifying the level of protection owed to the Appellant; correctly identifying the burden of proof; correctly identifying the appropriate test and provisions of the EEA Regulations; and took into account all relevant considerations; coming to a conclusion that it was open to it on the evidence available.

25. The Appellant emphasises that there is a very high hurdle for the Respondent to establish perversity in the decision of the First-tier Tribunal and that the weight to be attached to evidence is primarily a matter for the First-tier Tribunal.

26. On behalf of the Appellant it was highlighted that the First-tier Tribunal identified the relevant public interest of protecting the public; the severity of the Appellant's offending (the conviction, nature of the offence, sentencing and sentencing remarks); the finding of integration over 19 years of residence through family and work; was clearly alive to the possibility that imprisonment might sever integrating links but placed great weight on the Respondent's return to his nuclear family on release from prison; and that rehabilitation is not a neutral factor but relevant as set out in Schedule 1.5 of the EEA Regulations. Finally, it is submitted that there was no requirement in the EEA Regulations for an assessment of the severity of harm that may be visited on society where there is no genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Findings and reasons

27. Although it is accepted, as per the submissions on behalf of the Appellant that the First-tier Tribunal correctly identified the relevant protection, legal tests and burden of proof with an appropriate structure to the decision, I find that the First-tier Tribunal failed to take into account and/or make findings on key issues, both factual and matters that it was required to consider under the EEA Regulations; such that there is a material error of law which undermines the findings made.

28. First, the First-tier Tribunal has not set out or expressly referred to the matters in paragraphs 2 to 6 of Schedule 1 to the EEA Regulations when applying matters of public policy, public security and fundamental interests to society. These are as follows:

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 one 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.

29. In respect of paragraphs 2 and 4 above, the First-tier Tribunal fails to expressly take these matters into account when assessing the Appellant's integration in the United Kingdom. There is a clear finding in relation to the Appellant's current family life in the United Kingdom in paragraph 80 of the decision and social and cultural integration is dealt with in paragraph 81. The First-tier Tribunal found that 'nothwithstanding the lengthy prison sentence for his crimes' the Judge was satisfied that he was integrated having worked in the United Kingdom prior to setting up his own business, with evidence of earnings, tax and national insurance between 2003/4 and 2012/13. It was separately

acknowledged that he was educated in Nigeria, has family still there and has visited on a number of occasions.

30. The Appellant's criminal offending was over a five year period, in conjunction with his then EEA national wife between 2007 and 2012 and in accordance with paragraph 4 of Schedule 1 to the EEA Regulations, little weight should be attached to integrative links formed at this time. Further, little weight should be attached to any further integrative links formed whilst in custody between 2013/2014 (the exact date from which the Appellant was held on remand is not available) and November 2019. That leaves only a relatively short period of the Appellant's time in the United Kingdom as capable of carrying any significant weight to his social and cultural integration, namely employment between 2003 and at the latest early 2007. These were matters which were not expressly considered by the First-tier Tribunal, with a bare conclusion of integration, relying at least in part on integration at a time when little weight should be placed on it.

31. Further, there is no express consideration at all by the First-tier Tribunal as to whether the Appellant's integration has been diminished or broken by his lengthy prison sentence beyond the simple statement that notwithstanding this, the Appellant is integrated. The Appellant was in prison for between five and six years (as above, the exact start date is unknown) and although it is undisputed that he maintained family life during that period and returned to his nuclear family on release; there is no identification of any other social or cultural integration during that time. The submissions on behalf of the Appellant state that the First-tier Tribunal would have been alive to the possibility that integration would have diminished in this time, but that is simply not evident in the decision itself and no findings are made on it.

32. In respect of the third paragraph in Schedule 1 to the EEA Regulations, the only substantive reference to the Appellant's length of sentence in the findings part of the decision is in paragraph 72 as part of the assessment of whether there were 'serious grounds'. The length of sentence is not expressly taken into account in relation to the assessment of whether the Appellant's

continued presence represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

33. In relation to paragraph 5 of Schedule 1 to the EEA Regulations, the First-tier Tribunal has failed to consider all material matters in relation to rehabilitation. The nature and concerns raised in the first three OASys reports are set out, as are the unexplained changes in the Appellant's acceptance of his offences in October 2019, compared to in 2014, 2016 and February 2019 (paragraphs 75 to 77); followed by the Appellant's explanation that he has learnt from various courses. Although the First-tier Tribunal notes the matters adverse to the Appellant in the OASys reports and from the sentencing remarks; neither these, nor the very recent change in the Appellant's position, nor that he had been sentenced to a consecutive period of four year's imprisonment for an offence under the Perjury Act 1911 were balanced or taken into account when assessing rehabilitation and there is no express finding on the credibility of the Appellant's evidence on this in such circumstances. In addition, the Appellant only appears to have partially accepted responsibility for his offending, in relation to not fulfilling his duties as a director, without any comment at all on the wider implications of his main offence (such as the risks of using unvetted security personal, the damage to the maintenance of immigration control and so on) or any reference at all to the perjury offence. In all of the circumstances, the finding that the Appellant has rehabilitated, without express consideration or relevant matters, led the First-tier Tribunal to an irrational and unsafe finding on this point which also undermines the overall conclusions reached about whether he continued to pose a threat.

34. The failure of the First-tier Tribunal to take into account these material factors, as it was required to do in Schedule 1 of the EEA Regulations; undermines the conclusion that the Appellant was integrated in the United Kingdom, that he accepted his serious shortcomings and had rehabilitated.

35. Secondly, the First-tier Tribunal has also failed, without any reasons given, to take into account all of the relevant fundamental interests of society set out in paragraph 7 of Schedule 1 to the EEA Regulations. In paragraph 74,

only sub-paragraphs (i) and (j) are taken into account and the First-tier Tribunal appears to discount the relevance of (a) (preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system …) on the basis that the Appellant was not directly involved in facilitating illegal entry to the United Kingdom of those whom he employed. That displays a fundamental misunderstanding of the nature and impact of the Appellant's offending, characterising this only as an offence of financial gain.

36. Further, there is no express consideration by the First-tier Tribunal of sub-paragraphs (c) and (d) of Schedule 1 which are also identified by the Respondent and are clearly relevant given the nature of the Appellant's offence and the sentencing remarks in particular about creating false employment records.

37. The failure to take into account these additional factors in Schedule 1 as to the fundamental interests of society also show that the First-tier Tribunal has failed to engage with the nature of the Appellant's offending and possible future risk, undermining the overall conclusions reached.

38. For these reasons set out above, the First-tier Tribunal's decision involved the making of a material error of law such that it is necessary to set aside the decision. Due to the nature of the errors identified, it is not possible to preserve any findings of fact and the decision as a whole is set aside for a de novo hearing; albeit it is noted that there has been no dispute by the Respondent as to the nature of the Appellant's family relationships at the date of the hearing before the First-tier Tribunal. However, the further evidence, if any (given the extensive documentary evidence, much of which has not been disputed to date), required to re-determine the appeal is likely to be relatively limited, such that it is appropriate for the appeal to be retained in the Upper Tribunal.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

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

Listing Directions

(i) The appeal to be adjourned and re-listed before any UTJ on the first available date on or after 3 August 2020, with a time estimate of three hours.

(ii) Any further evidence the Appellant wishes to rely on is to be filed and served no later than 4pm on 20 July 2020.

(iii) If any witnesses are to be called to give oral evidence at the re-listed hearing, any new or updated written statements are to be filed and served no later than 4pm on 20 July 2020.

(iv) The parties are at liberty to, but are not required to, file a skeleton argument no later than 4pm on 27 July 2020.

Having regard to the Pilot Practice Direction and the UTIAC Guidance Note No 1 of 2020, the Upper Tribunal is provisionally of the view that the forthcoming hearing in this appeal can and should be held remotely, by Skype for Business (to which parties using a regular Skype account can join) on a date to be fixed. For this, the following directions are issued.

1. No later than 7 days after these directions are sent by the Upper Tribunal:

(a) the parties shall file and serve by email any objection to the hearing being a remote hearing at all/by the proposed means; in either case giving reasons; and

(b) without prejudice to the Tribunal's consideration of any such objections, the parties shall also file and serve:

(i) contact/join-in details, were the hearing is to take place remotely by the means currently proposed; and

(ii) in that event, dates to avoid in August and September 2020.

2. The Tribunal will then give further directions, which will either be:

(a) to list the date and time of the remote hearing, confirming the join-in details etc and directing the electronic filing and service of documents in connection with the hearing; or

(b) to give directions with respect to a face-to-face hearing.

3. Documents and submissions filed in response to these directions and in response to the directions issued in the decision promulgated on 24 February 2020 may be sent by, or attached to, an email to FieldHouseCorrespondence@Justice.gov.uk using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents.

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

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

Signed G Jackson Date 11th June 2020

Upper Tribunal Judge Jackson