IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002740
First-tier Tribunal No: DA/00035/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 09 October 2024

Before

UPPER TRIBUNAL JUDGE RASTOGI

Between

RJ
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE OF THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Hogan of Church Street Solicitors
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

Heard at Field House on 30 September 2024

Order Regarding Anonymity

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 the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is a 41 year old Ghanian national who has been in the United Kingdom since. He is married to a German national and lives with her and their two children currently aged 9 and 4 (8 and 4 at the date of the decision under appeal). The appeal arises in the context of the respondent's decision of 15 June 2023 to refuse his application under the EU Settlement Scheme ("EUSS") dated 24 November 2020, to deport him from the United Kingdom and to refuse his human rights' claim. In the refusal letter, the appellant was 'given' a right of appeal against the deportation decision pursuant to regulation 36 of the Immigration (European Economic Area) Regulations 2016 (as saved) ("the EEA Regulations"). He appealed the human rights decision pursuant to section 82(1)

of the Immigration Nationality and Asylum Act 2002 ("the 2002 Act"). By way of a decision promulgated on 8 May 2024, First-tier Tribunal Judge Cary ("the judge") dismissed the appellant's appeal ("the decision"). The appellant appeals the decision with the permission of First-tier Tribunal Judge Boyes.

2. The respondent made the decision to deport the appellant pursuant to regulations 23 (6) (b) and 27 of the EEA Regulations ("the European regime"). The respondent refused the appellant's application to the EUSS on suitability grounds pursuant to paragraph EU15 of Appendix EU of the Immigration Rules. The respondent refused the human rights claim on the basis that the appellant had not been able to show that deporting him amounted to very compelling circumstances over and above Exception 1 and 2 as contained within the framework within sections 117A-D of the 2002 Act.

3. The appellant had provided a 319 page consolidated bundle for use at the hearing ("HB"), which included the respondent's Rule 24 response and the appellant's reply to that. Mr Hogan also uploaded a skeleton argument. I heard oral submissions from both advocates and at the end of the hearing I reserved my decision.

The Appellant's Immigration and Criminal History

4. In light of the issues to determine in this appeal, and given the importance of residency and levels of protection within the European regime, it is necessary to set out a detailed chronology of the appellant's history.

Sept 2000 – appellant entered the UK on a visit visa
12 October 2006 – appellant convicted at South Essex Magistrates Court of obtaining property by deception and sentenced to a 12 month community order
12 March 2010 – appellant convicted of dishonestly making false representations and possessing a false identity on 19 September 2009 and sentenced at the Chester Crown Court to 12 months imprisonment suspended for 24 months
12 September 2010 – appellant convicted of breach of suspended sentence order and sentenced to unpaid work
20 December 2010 – the appellant married Ms D. Brown
4 November 2011 – applied for an EEA residence card as a spouse of an EEA national – issued on 24 January 2012 (5 years)
9 December 2013 – convicted of multiple fraud offences committed during 2009 and 2010 and in breach of the suspended sentence order and sentenced to 9 months imprisonment for the new offences alongside the activation of 9 months of the suspended sentence
4 January 2017 – appellant applied under the EEA Regulations for a residence card to confirm a permanent right to reside
3 April 2017 – appellant convicted of dishonestly making false representations at Isleworth Crown Court and sentenced to 12 months imprisonment
21 September 2017 – application refused on grounds of criminality
12 November 2018 – EEA appeal dismissed by FTTJ Adio; permission to appeal refused and the appellant was appeal rights exhausted on 2 October 2019
19 April 2018 – Stage 1 Notice of Decision to Deport issued
16 May 2018 – appellant's representations against deportation (family life grounds)
31 July 2020 – further representations against deportation
24 November 2020 – appellant made an EUSS application
29 March 2023 –notice of liability of deportation under the European Regime sent to the appellant
10 April 2023 – appellant lodged a section 120 response and grounds

30 May 2023 – the appellant was sentenced at the Inner London Crown Court for offences of fraud and under the Identity Documents Act 2010 committed in June, July and December 2021 and sentenced to 18 months imprisonment
15 June 2023 – EUSS and human rights' application refused and deportation order signed.

The Decision under Appeal

5. The key parts of the judge's decision were:

a) he noted the decision of First-tier Tribunal Judge Adio dated 12 November 2018 dismissing the appellant's appeal against the respondent's refusal to issue him with a residence confirming a permanent right to reside in the UK. Judge Adio did not find the appellant able to establish such an entitlement, primarily because his criminal offending. The judge noted that Judge Adio's decision represented the starting point;

b) he decided at the hearing before him, the appellant was still unable to show a permanent right to reside in the UK, particularly in light of the appellant's continuing offending and sentences and the remarks of the sentencing judge;

c) consequently the appellant was only entitled to the lowest level of protection pursuant to regulation 27(1) of the EEA Regulations, namely that his deportation had to be justified on grounds of public policy;

d) he found that the appellant continued to present a risk of re-offending in a like manner such that he represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society;

e) having considered factors such as the best interests of the appellant's children, the impact upon them and the appellant's wife if he was deported and the circumstances he would face in Ghana, the judge decided that respondent's decision was proportionate pursuant to regulation 27(5) of the EEA Regulations;

f) he did not find that the appellant's deportation was unduly harsh on wither the appellant's wife or his children nor that there were very compelling circumstances over and above Exceptions 1 and 2 in section 117C of the 2002 Act.

The Appellant's Challenge

6. The written grounds were not well particularised, nor were the paragraphs numbered. They were also skewed by the appellant's overarching position that he is entitled to the highest level of protection (imperative grounds). For the reasons set out at [22] below, that is unarguable. These difficulties in the written grounds were compounded by unfocused oral submissions. Nevertheless, having considered the written grounds (HB 21-3), I have distilled them as follows:

Ground 1: the judge failed to make a necessary finding as to whether the appellant had acquired a right of permanent residence before considering which level of protection applied to the appellant (the appellant's case being that he should have the highest level of protection (imperative grounds));
Ground 2: the judge placed too much weight on the appellant's previous convictions rather than assessing whether those convictions were serious enough to meet the imperative grounds threshold;
Ground 3: the judge arrived at decision about the risk posed by the appellant without sight of the OASys report (having noted that one was not available at the

hearing and no adjournment was requested to obtain one) which calls into question the judge's assessment of risk and whether it meets the imperative threshold;
Ground 4: the judge erred in failing to carry out an adequate Article 8 proportionality assessment;
Ground 5: the judge erred in failing to carry out an adequate assessment of the children's best interests and failed to have regard to the impact upon them of the appellant's deportation in light, particularly, of the appellant's wife's evidence and the children's health problems;
Ground 6: the judge erred in finding the appellant had not been lawfully resident in the UK most of his life.

7. Judge Boyes granted permission on the following basis:

> "1. The application is in time. The grounds are not dated and timed which is unfortunate in the least. I will say that some of the language used in the application is discourteous and has no place in a proper application for permission to appeal.
> 2. The grounds of appeal assert that the Judge erred in the assessment of numerous matters including the lack of an OASys report, the S.55 considerations and the Article considerations.
> 3. The grounds are arguable. It is incumbent upon a Judge in a case where there
> are children to consider their best interests alongside the competing interest of
> the UK government removing from the jurisdiction recidivist fraudsters who prey on their victims for financial gain. The considerations in this case arguably
> did not include that which was required.
> 4. The Article 8 assessment is arguably brief and lacking in specific detail. Although the public interest in removing fraudsters from the UK is very high, the Judge nonetheless needed to consider these matters in the proportionality
> exercise under Regulation 27.
> 5. I reject as being without any foundation or merit the suggestion that the OASys
> report was deliberately withheld. This remark should not have been made.
> 6. Permission is granted on all matters raised."

8. At the hearing, Mr Hogan confirmed that he relied primarily on the 'grounds' as found by Judge Boyes but without resiling from the other written grounds as distilled above.

9. I shall refer to the oral submissions as necessary in my analysis which follows.

The Legal Framework

10. The particular framework under which the deportation decision was made was not the subject of express challenge within this appeal.

11. The structure to be followed in an appeal involving an EEA national or their family members in deportation cases is set out in Abdullah and Ors (EEA; deport appeals; procedure) [2024] UKUT 66 (IAC) at paragraph [105] (replicated in the headnote). The respondent's deportation decision purported to be made under the EEA Regulations and the basis for that appears to align with para. 105 (C)(2)(ii) of Abdullah which says:

> (C) In respect of conduct carried out prior to 31 December 2020, the EEA Regulations only apply directly to an individual (and thus give rise to an appeal under those regulations) if:
> .....
> (2) the individual was an EEA citizen (or a family member of such a person) lawfully resident under the EEA Regs (including those who had acquired permanent residence under reg 3 the EEA Regulations) and either:
> (i) the decision was taken by 30 June 2021; or
> (ii) was taken after that date but when a valid application under the EUSS had been made before 30 June 2021 and was still pending (but not if they had been granted leave under the EUSS); or
> .....

12. Applying that to the appellant's case, it was not in dispute that the conduct on which the respondent relied to make the decision to deport took place prior to 11pm on 31 December 2020 and that, on that date, the appellant was living here as the family member of an EEA national who was exercising Treaty rights; his last sentence of imprisonment prior to that date was on 3 April 2017 (12 months, of which he would have served half) so in accordance with regulation 3 of the EEA Regulations, his residence had been continuous since the conclusion of that sentence; he made an EUSS application before 30 June 2021 which had not been decided at the date the deportation order was made.

13. In my judgement, any reference the judge made to the appeal rights being found in the Immigration (Citizens Rights Appeals)(EU Exit) Regulations 2020 ("the CRA Regulations") is not material as the process for considering the appeal pursuant to the European Regime is the same (see para. 105 (F) of Abdullah) save perhaps in the way in which permanent residence is established (see 105 (G)) to which I will return.

14. The respondent was required to consider whether or not the appellant's deportation was justified in accordance with the European regime as contained within regulations 23 and 27 of the EEA Regulations.

15. The respondent relies on regulation 23(6)(b) which says:

> "(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—
> .....
> (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27; or"

16. The relevant parts of regulation 27 say:

> "27.—(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an *EEA national* who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
……

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;
(b) the decision must be based exclusively on the personal conduct of the person concerned;
(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
(e) a person's previous criminal convictions do not in themselves justify the decision;
(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.
…….
(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.)"

17. The relevant parts of Schedule 1 say:

"2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

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

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.
.....

The fundamental interests of society

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

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;
(b) maintaining public order;
(c) preventing social harm;
(d) preventing the evasion of taxes and duties;
(e) protecting public services;
(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action
(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);
(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);
(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;
(j) protecting the public;
(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);
(l) countering terrorism and extremism and protecting shared values."

18. The appellant's human rights appeal is governed by the structure set out in section 117A-D of the 2002 Act, particularly s.117C which says:

"Article 8: additional considerations in cases involving foreign criminals
(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

Discussion and Conclusions

19. At para. 27 of the letter notifying the appellant of the decision to deport him and refusing his human rights claim ("the refusal letter"), the respondent accepted the appellant was a family member of an EEA national and that the EEA Regulations applied to him. However, pursuant to Judge Adio's decision, the respondent decided the appellant had failed to show he had acquired a permanent right to reside and that his deportation was to be considered on grounds of public policy (para. 28).

20. At [35]-[37] of the decision, the judge referred to Judge Adio's decision and the findings made therein and noted that it represented the starting point applying Devaseelan [2002] UKIAT 00702. The judge noted the respondent's position that the appellant's deportation was justified on public policy grounds in light of the extent of his criminal offending and his propensity to reoffend and the harm caused thereby [43]. The judge also made reference to offending within the context of Schedule 1 of the EEA Regulations [44] before moving on to confirm that his first task was to decide upon the appellant's status in the UK at the date of the respondent's decision, so as to reach a decision as to the level of protection to which the appellant is entitled [45] and he considered at [46] what has to be shown at the basic level where deportation is said to be necessary on grounds of public policy, security or health.

21. Contrary to the claim at ground 1, it is in this part of the decision that the judge expressly recognised the need to decide if the appellant was able to show that he had acquired a right of permanent residence. The judge noted at [49] the appellant's claim to be entitled to the highest level of protection (imperative grounds) and he set out correctly the burden and standard of proof. At [50]-[53] the judge set out and discussed the nature of the residence required to give rise to a permanent right of residence before moving on to apply that to the

appellant's circumstances [52]-[55]. In particular the judge identified the difficulty the appellant had in demonstrating his integrative links with the society of the United Kingdom, given his record of dishonestly offending, resulting in custodial sentences and breaches of court orders; his work history; the lack of evidence of friends; the sentencing remarks from the judge who sentenced the appellant in 2023; Judge Adio's decision and the appellant's continued offending since that decision. At [55] the judge did not find the appellant able to establish the necessary lawful residence for 5 years to acquire permanent right of residence.

22. In my judgement, it is clear from the above that the judge had in his mind that the appellant was claiming protection at the highest level and that he needed to make a finding about that. Leaving aside for a moment the fact that as a non-EEA national the appellant is not entitled to the highest level of protection which is reserved to the EEA national (see italicised part of regulation 27 (4) at [16] above), the appellant would still have been eligible for a higher level of protection pursuant to regulation 27 (3) if he had permanent residence as that is not limited solely to EEA Nationals and must, therefore, cover their family members.

23. In my judgement, the appellant has failed to articulate a basis on which the judge erred in this part of his assessment and it is clearly not correct to say that the judge failed to make a finding about whether or not the appellant had acquired a permanent right to reside as the appellant asserts in the grounds.

24. The fact is there is no unbroken period of five years from when the appellant became a family member of an EEA national during which he has lived here in accordance with the Regulations. Periods of imprisonment break the continuity of that residence when one is seeking to acquire a permanent right to reside (Onuekwere v Secretary of State for the Home Department (Case C-378/12) [2014] 1 WLR 2420 at [27]).

25. For completeness, whilst the case did not turn on this, I simply make the point that, for the same reason, even had the judge been required to consider permanent residence under the CRA (and looking therefore just at the length of continuous residence without the additional requirement of that being in accordance with the Regulations), the appellant would still not have been able to meet the definition given that his periods of imprisonment break the continuity of his residence (definition of deportation order under the EUSS applies (see para. 105 (G) of Abdullah)).

26. For these reasons I do not find Ground 1 to disclose any error of law.

27. Ground 2 goes to the question of whether or not the judge was correct to find the appellant's conduct sufficient to satisfy the public policy criteria for removal. This is sometimes known as the 'level of threat issue'. As I understand the appellant's challenge here, it is that the judge placed too much weight on the appellant's previous convictions. I make the point here that it is trite that weight is a matter for the judge. It is also worth remembering that the appellant had accrued a significant number of offences and as Judge Boyes put it in the grant decision he is a "recidivist fraudster".

28. It is helpful to set out the part of the judge's decision on this issue:

> "56. I have to determine if the Appellant's conduct satisfies the applicable public policy criteria for removal and in particular if there appears to be a risk that he will offend in the future. The evidence (including past criminality) must establish a future risk to society for any removal to be

> justified. If there is no real risk of reoffending, then the power to deport on the grounds of public policy or public security does not arise. This requires an evaluation of the likelihood that that the Appellant will re-offend and what the likely consequences of that will be if he did. The burden of proof is on the Respondent to prove on the balance of probabilities that the Appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society - Arranz (EEA regulations – deportation – test) [2017] UKUT 294.
>
> 57. I have to balance the risk of future harm against the need to give effect to the right of free movement – SSHD v Straszewski and Kersys (2015) EWCA Civ 1245. The threat must also be sufficiently serious (i.e. can it properly be said to affect one of the fundamental interests of society?) Such interests are listed in paragraph 7 of Schedule 1. His convictions do not in themselves justify the decision (regulation 27(5)(e)). It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. *This tends to mean, in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present (realistic) threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. It is my view that the Appellant does pose such a risk particularly in view of his convictions, the decision of FTTJ Adio and what is said in the sentencing remarks. His wife and children do not appear to have been a sufficient influence to stop him from offending either in 2017 or 2021. There is no evidence that their presence or influence will dissuade him from continuing to commit fraud (my emphasis)*.
>
> 58 I am therefore satisfied that the Appellant's conduct satisfies the applicable public policy criteria for removal in that there appears to be a risk that he will offend in the future."

29. There is an overlap here with Ground 3. Mr Hogan elaborated on this ground in oral submissions when he argued that it is not permissible to assess risk without an OASys report and any such assessment should not attract much, if any, weight. I pause here to note that, although the OASys report is now available, Mr Hogan did not make a rule 15(2A) application or, indeed, any application on Ladd v Marshall grounds (see Akter (appellate jurisdiction; E and R challenges) [2021] UKUT 272 (IAC)) for it to be admitted (I made this enquiry at the hearing). This means Mr Hogan was not in a position to address me on what difference, if any, the OASys report would have made to the assessment of risk.

30. Neither did Mr Hogan resile from the part of the judge's decision at [7] in which the judge noted the lack of an OASys report but also that there was no application for an adjournment "to enable any further attempts to be made to see if one existed or could be obtained". Generally, there is no procedural unfairness in the judge failing to do something he was never asked to do. Mr Hogan had no answer to that. In any event, I note from [3] of the judge's decision that the appeal had already been adjourned once, in part to allow for the OASys report (if any) to be produced.

31. In any event, I also have regard to what was said about OASys reports in SSHD v AA (Poland) [2024] EWCA Civ 18 at [56] – [59]. Whilst recognising their significance as evidence of risk, they are not prepared for the purposes of the EEA Regulations and the methodology differs. Care needs to be taken to avoid factors such as double-counting (which was the situation in AA). I treat this as

meaning that the OASys report cannot be determinative (alone) of risk. In any event, for the reasons given at [39] below, there were plenty of factors informing the assessment of risk which were before the judge and probative of the question of the appellant's propensity to reoffend.

32. For these reasons, I do not find Ground 3 on its own to disclose a material error of law.
The issue of the risk assessment is nevertheless relevant to Ground 2 and whether the judge was correct to find the respondent able to justify deporting the appellant on public policy grounds. It is to that I now return.

33. It is useful to note here the basis on which the respondent purported to justify the appellant's deportation on public policy grounds (which the judge flagged at [43]). That explanation is found at paras. 31 to 42 of the refusal letter. The respondent placed particular emphasis on the appellant's convictions for false identity documents (2010 and 2017). At para. 32 the respondent said:

> "falsified documents can be used to enable identity theft, age deception, illegal immigration, and organised crime. Furthermore, identity-based fraud and the use of false documentation undermines the integrity of a wide variety of institutions and systems, including the revenue and benefits systems, banking and employment".

34. It is also pertinent to note that the appellant was convicted under at least two different identities which the respondent said at para. 38, led to delay in the progression of the deportation proceedings and an inference that he tried to evade those proceedings. The respondent concluded at para. 39 that his risk of re-offending was medium in all the circumstances and that if he does re-offend, the seriousness is likely to escalate. At para. 41 the respondent assessed the risk of causing harm as 'low' then said at para. 42 that "although your risk of re-offending is medium, the serious harm which be caused as a result is such that it is not considered reasonable to leave the public vulnerable to the effects of your re-offending. It is considered that it is in the public interest to deport you from the United Kingdom in order to preserve the safety and security of those resident here" and at para. 42 that such a course of action is justified on grounds of public policy.

35. Mr Hogan's submissions at the hearing that the appellant's convictions were not at a level to meet the relevant threshold have to be considered in the context that he argued the appellant is entitled to the highest level of protection. In that context, he argued that fraud offences are not the sort of cases that are sufficiently serious or have the consequences necessary to engage deportation. That would of course be a stronger argument were the imperative grounds the operative threshold. However, that is not the case here. For reasons already given, the judge did not find that threshold to apply (and nor could it) so it was incumbent on the judge to consider whether the appellant's personal conduct was justified on the grounds of public policy taking into account the factors at regulation 27(5) and, in the context of regulation 27(5)(c), the provisions of Schedule 1 governing the 'fundamental interests of society'.

36. It is clear from [46] and [57] of the decision that the judge correctly identified the legal framework and at [46] he correctly directed himself that convictions are never enough on their own. At [57] the judge applied the framework to the appellant's circumstances. The outcome of that analysis is represented by the italicised section of [57] and that represents the reasons the judge gave for his overall finding on this issue at [58].

37. At first blush, those reasons may seem sparse. However, it is necessary to consider the whole of the judge's decision and the context of the respondent's reasoning for deciding to deport the appellant. As is apparent from the above, the judge had already given detailed consideration to the appellant's previous convictions, Judge Adio's decision and the sentencing remarks. At [53] the judge analysed the nature of the appellant's convictions and their continuation notwithstanding opportunities given to him to change his behaviour (as evidenced by offending whilst subject to a suspended sentence order; despite his marriage and the birth of his children). At [54] the judge analysed the 2023 sentencing remarks of Recorder Hunter KC as to the sophistication of the appellant's offending on that occasion; his history of breaching court orders; his dishonesty with Probation and that he was not satisfied the appellant's 'remorse' was genuine. At [55] the judge returned to Judge Adio's decision and noted the appellant's further offending since then.

38. When considered in its entirety, it is clear that the judge's decision at [58] was not based solely or to an excessive degree on the fact of the appellant's previous offending. The judge has undertaken an evaluation of all of the relevant factors to assess what risk or threat the appellant currently poses and why. In my judgment his assessment reflects the approach to be taken applying paras. 3-5 of Schedule 1 of the EEA Regs.

39. Paragraph 7 of Schedule 1 contains a non-exhaustive list of what constitutes 'the fundamental interests of society'. I have set out above the respondent's position.

40. I do not find the appellant's claim that it was not open to the judge to assess the appellant's risk without sight of the OASys report to have any merit. Whilst the OASys report is often a useful piece of evidence that informs the assessment of risk, the appellant did not provide authority for the submission that it is an error of law to assess risk without it. Indeed, the unchallenged evidence here of the appellant's continued offending for a period of about 15 years including whilst on a suspended sentence order, whilst deportation is pending and notwithstanding what might be considered stabilising factors of a spouse and children, is weighty evidence that the risk of reoffending is real. These are the factors the judge considered. It is difficult to see that an OASys assessment would arrive at a different conclusion. As to the risk of harm, there is no suggestion that dishonesty offences cause harm of the same nature as sexual or violent offending. However, the judge made reference to the values involved in some of the appellant's offending [13] and [42] and of the sentencing remarks about harm [15] and [42] and referred to the respondent's observations [43].

41. Whilst it is not easy to see where the judge said in terms which fundamental interest of society he found the appellant to threaten, one can glean some idea from [65] of the decision which concluded the judge's proportionality assessment when he says "the protection of society must take priority". Even if this does not amount to a finding that this is the fundamental interest of society in question, it is clear from the paragraphs I have set out at [27] above that the judge was aware of what those interests are and where they were and, as a specialist judge, it is trite that he can be expected to do so bar clear evidence to the contrary. There is no basis, in my judgement, to find that the threat the judge found the appellant to pose, namely continuing to commit dishonestly offences, did not affect one of the interests set out in paragraph 7 of Schedule 1.

42. Taking this together, in my judgement, Ground 2 has no merit. The appellant has failed to satisfy me the judge committed an error of law in how he dealt with the level of threat issue.

43. The remaining limb of the regulation 27 assessment, is the proportionality assessment. There is an overlap here with grounds 4 and 5 which deal with the judge's assessment of the best interests of the appellant's children and which, as Judge Boyes recognised in his grant decision, is a necessary component of the regulation 27(5)(a) proportionality assessment (as well as Article 8 which I deal with below). Here, the burden remains with the respondent to demonstrate that the decision is proportionate.

44. It is here [60]-[63] that the judge returns to the appellant's risk of reoffending and the prospect of rehabilitation. I am prepared to accept that the appellant's criticisms of the judge's reliance on the appellant's previous offending also apply to the way in which the judge approaches the proportionality assessment as much as they did to the judge's approach to assessing the nature of the threat the appellant posed.

45. However, the judge did not limit his assessment of the proportionality of the decision to deport the appellant to the appellant's previous offending. I return to the judge's self-direction in Straszewski and the principle that flowed from it, namely that the issue is interference with a fundamental right [17] and the judge is assumed to have applied that.

46. In addition to the appellant's previous convictions, he also had regard to the appellant's personal circumstances and the situation he would face in Ghana if returned [64]; he had regard to the impact of the appellant's deportation on the his wife and children [65] and he evaluated the appellant's explanation for his previous offending although he rejected that as untruthful and provided adequate reasons for that finding [66]. That has not been challenged.

47. When dealing with the impact on the children at [65] the judge said:

> "I accept that the Appellant's removal will have an impact on Ms Darko-Brown and the children. However, she has been able to manage in the past when the Appellant was in prison in 2017 and again in 2022/2023. Although I accept that it will not be easy for her to manage with 2 children she has shown herself to be resilient and able not only to organise care for the children but also continue with her studies and hold down a job when the Appellant was not about to assist. Hopefully as the children become older they will become easier to manage. Although I was told that Klayton has speech problems and suffers from autism, I have no expert evidence dealing with the likely impact on him or his sister of the Appellant's removal. I quite accept that it is in the children's best interests for their father to remain with them in this country but the protection of society must take priority."

48. The judge followed this at [67] where he said "his conduct as identified above represents a genuine and present and sufficiently serious threat effecting one of the fundamental interests of society and that deportation would be proportionate in all the circumstances".

49. Having dismissed the appeal under the European regime the judge then considered the Article 8 claim. At [69] he recognised the need to recognise first

what is in the children's best interests. When dealing with the appellant's relationship with his family said at [72]:

> "the appellant does play a role in the children's upbringing particularly in view of their work and study commitments of Ms Darko Brown. He provides her with practical (not financial) support in bringing up the children. However she has been able to manage in the past and I have no doubt that if the Appellant is removed she will be able to do so again as she has done in the past when the Appellant has been in prison".

50. For those reasons, at [73] the judge did not find the appellant's deportation unduly harsh upon either the appellant's wife or the children.

51. At the hearing, Mr Hogan submitted that the judge's conclusion that the appellant's deportation was justified was infected by an error in that the respondent failed to adduce evidence relating to what was in the child's best interests and/or the judge failed to obtain the children's views of what was in their best interests. Mr Hogan was not able to provide any authority for this submission aside from a general reliance on ZH (Tanzania) v SSHD [2011] UKSC 4 [34]-[37]. In my judgement, that does not help him. Whilst the respondent has the burden of justifying the appellant's deportation by reference to regulation 27, and is under an obligation pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009, that obligation extends to identifying what is in the child's best interests and that an acknowledgement of that must be a primary consideration. In most cases the views of the child can be elicited ways other than them giving evidence, remembering that sometimes there may be a conflict between the parents and the child's interests. If the child is old enough, it may be appropriate to hear from them directly.

52. In the appellant's case, both the respondent and the judge accepted that it was not in the children's best interests to relocate to Ghana with the appellant and the judge found it was in their best interests to remain in the UK with both parents [65]. The children were only 4 and 8 at the hearing before the judge and unlikely to be considered old enough to give evidence at the hearing. In any event, I was not told of any submission to the judge that it was inappropriate for the parents to give evidence as to their best interests, their views and the impact upon them and there was certainly no evidence before him to that effect. Even though the burden was on the respondent to demonstrate that deportation was proportionate, it would, of course, have been open to the appellant to have procured evidence from a professional or those engaged in the children's lives (whether professionally or otherwise) on the impact upon them of the appellant's removal. It is not in dispute that the appellant did not do so.

53. Nevertheless, it is necessary to consider whether the judge's evaluation of the proportionality of the appellant's deportation sufficiently identified what the impact on the children would be and what it was about the particular threat the appellant posed that justified that impact.

54. To answer that, it is necessary to go back to what the judge noted about the evidence of the impact upon the children. At [8]-[22] the judge set out the evidence he heard from both the appellant and his wife. There were some aspects of the appellant's evidence which the judge did not accept (see [45] above) but the judge did not appear to take any issue with what the appellant and his wife said about the children and clearly accepted the medical problems that the children have. The judge did not set out any findings about the children other than I have set out above. Mr Hogan did not direct me to any evidence

before the judge to which he failed to have regard. I had noted there was some medical evidence about the children in the bundle [pages 104-109] and it was accepted that was contained within the appellant's bundle before the judge. Mr Melvin submitted that there was no specific reference to that evidence in the appellant's skeleton argument before the judge [HB 12] and so it did not appear to be a particular feature in the hearing before the judge. In any event, the medical evidence in question confirms the diagnosis of autism and asthma for the eldest child which the judge clearly accepted. The evidence does not go to the impact upon the children of the appellant's removal.

55. The primary reason given for the judge's decision that the appellant's deportation was not disproportionate when considering the impact on the children was that the appellant's wife had coped when he was in prison. Here the judge did not return to the summary of the wife's evidence at [19] which he recounted as "Ms Darko Brown said she was studying mental health care. She had 2 years to go. If her husband was deported to Ghana she would be forced to give up all hope of a career. She would find it very stressful. Her husband is very supportive. He does all the chores and takes the children to/from school" and at [18] that "it has been very difficult for her when her husband was recently in prison. She had struggled with the children. The school runs were particularly difficult. She had no family help as her mother is in Germany. She went on a website and found some help but it was costly. One of the helpers had mistreated her son. Her children were invariably late for school. I was referred to some costing details indicating she was paying £17.25 per hour". At [9] the judge noted the appellant's evidence that his wife's earnings as a part-time GP receptionist varied but she earned in the region of £700-£800 per month and they received child benefit and help with the rent. He also noted at [11] the appellant's evidence that his wife was able to continue her studies whilst he was in prison.

56. The questions here are really a) whether or not the judge failed to properly identify the impact of the appellant's removal from the UK on either his wife or children and b) whether the judge carried out a sufficient evaluation of the balance to be struck between the impact of the appellant and his family on the one hand and the factors relating to threat and public policy on the other.

57. On (b) I return to AA (Poland) at [65] which said "the real issue was whether removal was necessary or excessive, having regard to the countervailing aim of protecting AA's private life rights under Article 7 of the Charter. (His family life rights were unaffected)". Of course here it is the appellant's private, but more importantly his family, lives which operate as the main countervailing factors.

58. Considering the question I have posed at (a) at [55] above, it is not easy to see that the judge made express findings of fact about the family's situation if the appellant was removed, particularly given the role he plays in their day to day life as his wife is both working and studying. However, when the decision is read as a whole, and in particular when [18]-[19] are read alongside [65], it is apparent that the judge did not accept Ms Darko-Brown's evidence as to what the future would hold as it appeared inconsistent with her evidence that she did not have to leave her education whilst the appellant was last in prison nor did she have to stop working. Although it can be implied from [65] that the judge found the appellant's wife would manage if he was deported, when the judge turned to the Article 8 claim, he made that finding expressly [72]. There the judge also noted that the family were in receipt of certain benefits and that the appellant does not contribute to the finances in any case [72]. I have not been directed to any evidence before the judge which pointed away from such a conclusion being

justified so I conclude that this was a finding open to the judge on the evidence before him.

59. Returning to the question I posed at (b) at [55] above, the last sentence of [65] of the judge's decision, purports to be the exercise of the required balance. Whilst there may be some force in the argument that the judge did not carry out an evaluative assessment prior to setting out that conclusion, does that mean to say he did so in ignorance of the test he had to apply and without consideration (or adequate consideration) of the factors to which he should have regard?

60. In my judgement, when read as a whole, it is clear the judge had regard to the appellant and his wife's evidence about the children as he referred to it and evaluated it in the way I have set out above. The reality is there was little, if any, other evidence about the children in the bundle to which the judge could have had regard. It is also worth remembering at this stage, that the test of "unduly harsh" is a high threshold (see HA (Iraq) v SSHD [2022] UKSC 22 at [42]).

61. Having carried out his assessment of the children, what was in their best interests and the impact upon the family, he returned to the correct legal framework for each limb of the appeal before him. Firstly he assessed the impact on the appellant's and his family's life against the threat he posed to one of the fundamental interests of society (pursuant to the European regime) and he set out the structure of that at [59]-[60] and secondly whether or not the consequences of the appellant's deportation was unduly harsh upon his wife and/ or children (section 117C of the 2002 Act). In so doing, he was carrying out a balancing act. Whilst the judge could have laboured the points or set out his analysis differently, that does not mean to say that the substance of what he did fell short of what was required. In my judgement, the appellant has failed to show that the judge was in fact in error within this part of his assessment; that he misdirected himself in fact or law; that he failed to have regard to material evidence or that his decision was otherwise irrational or suffered an absence of reasoning. Rather, I find the grounds to amount to a disagreement with the judge's findings.

62. For all these reasons, I do not find the judge made any material errors of law in this part of his assessment so I do not find Grounds 4 or 5 to be made out. Given all that I have said already, neither does Ground 6 have any merit.

63. As a final matter, Upper Tribunal Judge Gill made a precautionary anonymity order on 26 June 2024 on the basis that "the parties must address the Upper Tribunal at the EOL hearing why it is appropriate for the anonymity order to continue, given the public interest in open justice". Submissions were not made at the EOL hearing, so it is appropriate for the parties be given the opportunity to make any representations they wish to make on the appropriateness of the anonymity order continuing before a decision on that is made. The parties are to submit those representations in accordance with the directions set out below.

Notice of Decision

The decision does not contain any material errors of law so the decision stands.

Directions

1. The parties are to submit any representations in accordance with paragraph 63 of this decision within 14 days of the date this decision is sent

to them. Thereafter the Tribunal will decide if the anonymity order will continue, and if not, an amended decision will be sent.

SJ Rastogi
Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 October 2024