Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/02564/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14 June 2017

Decision & Reasons Promulgated
On 10 October 2017

Before

MRS JUSTICE CHEEMA-GRUBB
UPPER TRIBUNAL JUDGE CRAIG

Between

ADEBAYO ABDUL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Knafler QC and Mr A Grigg, instructed by Wilsons, Solicitors
For the Respondent: Mr D Blundell, instructed by The Government Legal Service

DECISION AND REASONS

1. The appellant, who was born on 29 August 1974 is a national of Nigeria. He has been present in the UK since 1990. He was an overstayer from 31 October 1997 and had no

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lawful status in the UK until he was granted an EEA residence card on 8 February 2011, following a successful appeal to the First-tier Tribunal against the respondent's decision, made on 17 September 2010, to refuse his application which had been submitted in February of that year. For present purposes, it is common ground that the appellant has a derived EEA right of residence, but that he does not have a permanent right of residence under EEA law, because such periods of residence as could be said to be pursuant to EEA law were interrupted by prison sentences, such that he never resided in this country for a continuous period of five years under the Immigration (EEA) Regulations ("the 2006 Regulations").

2. In addition to having a poor immigration history, the appellant also has a substantial criminal record. He has amassed a total of nine convictions for 21 offences, which include serious convictions for fraud of which the last was a conviction for conspiracy to defraud on 27 January 2012 for which he was sentenced to 54 months' imprisonment. Although the appellant pleaded guilty to this offence, he originally claimed that his involvement had been less than the prosecution had alleged, but following a *Newton* trial, the judge disbelieved his account. As a result of making what the judge had regarded as a dishonest plea, he received only a 10% reduction on his sentence rather than the reduction of one third he would otherwise have received.

3. The appellant has two daughters in this country, A, who was born in 2002 and M, who was born in 2004. Before us, it was accepted on behalf of the respondent that it would be in the best interests of both these children that the appellant should remain in the United Kingdom.

Chronology, to include Immigration History and History of Offending

4. We set out below a detailed summary of the appellant's immigration history, to include the history of his offending.

5. The appellant first arrived in this country in July 1981, just before his 7th birthday and remained here with leave for about three years until he returned to Nigeria in 1984. He remained there until 1990 when he returned to the UK and was granted leave to remain for six months. He returned to Nigeria and in December 1990 was granted a further period of leave for another six months, re-entering the UK for a third time in December 1990. He was granted further periods of leave until October 1997.

6. In 1996 the appellant married Ms O, a British national, but on 25 June of that year he was cautioned for assault. Just before his leave expired, on 20 October 1997 he was convicted of driving with excess alcohol, in respect of which he was fined and disqualified from driving for eighteen months. He became an overstayer on 31 October 1997.

7. The appellant apparently ignored his disqualification from driving because just three months later, on 15 January 1998 (while he was an overstayer) he was convicted of driving while disqualified and with no insurance, for which he was placed on probation and disqualified from driving for a further twelve months.

8. Then, on 1 March 1999, he was again convicted of driving with no insurance, and of other driving offences for which he was sentenced to community service and disqualified from driving for a further three years.

9. In 2001, he commenced a relationship with Ms T, a Swedish national, but in September of that year he also applied for leave to remain on the basis of his marriage to Ms O, which application was refused in November 2001.

10. In May 2002 the appellant was convicted of attempting to obtain services by deception, for which he was fined £100, and in July of that year he had a daughter, A, with Ms T. In October of that year he was convicted of another offence of obtaining services by deception, for which he was sentenced to 100 hours community rehabilitation.

11. In January 2003 he divorced Ms O, and in April of that year he married Ms T. A month previously, he had been convicted of assault and resisting arrest, together with three counts of obtaining property by deception, for which he was sentenced to a further twelve months of community rehabilitation.

12. The same year, in December, he was again convicted of attempting to obtain services by deception, and on this occasion he was sentenced to six months' imprisonment.

13. While in prison, in January 2004, his daughter M was born; she was the daughter of Ms W, a British national.

14. The appellant had appealed against the refusal of his application for leave to remain on the basis of his marriage to Ms O, and this appeal was heard in July 2004 (by which time he and Ms O were divorced). Unsurprisingly, this appeal was dismissed the following month and the appellant was appeal rights exhausted on 7 September 2004. He had not had any lawful leave to remain during the period when his appeal was pending, because the application had been made at a time when he was an overstayer.

15. In May 2005 the appellant submitted an application for leave to remain on the basis of his marriage to Ms T, the Swedish national, who was said to be exercising treaty rights in this country, but that application was refused in November 2005. The appellant's appeal against the refusal of this application was made on 17 May 2005, heard on 3 February 2006 and dismissed on 4 March 2006. He was appeal rights exhausted in respect of this appeal (again made at a time when he had no lawful right to remain in the UK) in May 2006.

16. On 6 December 2006 the appellant was convicted of two serious counts of conspiracy to defraud for which he was sentenced to three years' imprisonment.

17. In July 2008, the appellant was served with notice of the respondent's intention to make a deportation order, and the appellant's appeal against the decision to make this order was dismissed on 30 January 2009. His appeal rights were exhausted in April 2009.

18. In September 2009 the appellant applied to revoke the deportation order which had been made, which application was refused on 16 October 2009. The appellant appealed against this decision also.

19. On 10 December 2009 this appeal was allowed by First-tier Tribunal Judge Greasley, following a hearing at Hatton Cross on 1 December.

20. It is clear from reading Judge Greasley's determination that even though at this stage the appellant had not been granted a residence card, his claim was considered under the EEA Regulations. At paragraph 60 of his determination, Judge Greasley stated as follows:

> "60. In an EEA case such as this, Mr Roberts [the appellant's Counsel] submitted that the starting point had to be the nature of the threat and the deportation as last resort."

21. Judge Greasley founded his decision on his finding that the appellant did not present "a genuine and sufficiently serious threat" (the test he applied – see paragraph 66). He took into account, (at paragraph 70), that notwithstanding the appellant's past record, "It is also relevant the appellant has not committed any offences recently", and further that "Based on the professional evidence before me, I find that there is no evidence now of a propensity to do so". At paragraph 68, the judge had stated, somewhat questionably, that "I cannot go behind what is, in effect, professional evidence in relation to propensity to commit further offences". We would comment in this regard that while professional evidence is of course relevant, it must be considered in light of all the evidence. Essentially, the judge accepted the appellant's claim that he was a reformed character, whose circumstances had changed and who had not reoffended during his supervision period, and found further that because of his relationship with his children it would not be proportionate to deport him.

22. Eleven days after this decision had been promulgated, on 21 December 2009 the deportation order was revoked.

23. On 18 February 2010 the appellant applied for a residence card as confirmation of a right to reside in the United Kingdom under the EEA Regulations. The respondent refused this application because the appellant had not provided evidence to show that his marriage to his EEA national spouse (Ms T) had been dissolved, although the appellant does not appear to have applied for the residence card on the basis that that marriage had been dissolved. He appealed against this decision and in a determination promulgated on 16 November 2010, following a hearing at Hatton Cross on 11 November 2010 his appeal was allowed by First-tier Tribunal Judge O'Flynn, who relied upon some of the findings previously made by Judge Greasley. Judge O'Flynn found that the appellant was still married to Ms T, who was a Swedish national exercising treaty rights, and accordingly unless and until the marriage was dissolved, he was still a family member entitled as such to a residence card. Following that decision, the appellant was eventually granted a residence card on 8 February 2011, and the appellant's passport was endorsed to this effect.

24. During the period while the appellant was waiting for the grant of a residence card (which would confirm his right not only to be in this country but to work here) and for some months thereafter (the precise dates will be discussed below) the appellant was engaged in the very serious criminal conspiracy to defraud referred to above for which he was eventually arrested and on 27 January 2012 convicted and sentenced to 54 months' imprisonment. We set out below extracts from the judge's sentencing remarks which are relevant to our decision in this appeal:

> "The fraud involved was a fraud on railway operating companies and it covered a period of something more than a year between about summer 2010 and September 2011 when you were arrested. What the prosecution case has always been is that you conspired with others unknown to defraud the railway operating companies of money by what they say was a sophisticated, professionally organised and pre-planned, large-scale fraud and that the aim up to the date of your arrest was to cheat them of a total amount in the region of £60,000. That was the loss which had you succeeded altogether you would have caused them. ...
>
> When your flat was raided for the purpose of your arrest in September 2011 a search of your computer showed no less than 247 stolen credit card details, many of which had not up to that date apparently been used for the purpose of the conspiracy, so that it is suggested by the prosecution, not unreasonably, that had you not been arrested in due course those credit cards too would have been used.
>
> The method used for this conspiracy was largely to use these compromised credit or debit card details over the telephone to order tickets for delivery to you using different aliases, or sometimes to people that were nominated, normally by you, at different addresses, very frequently addresses associated with places that you had been living in. ...
>
> So this was, I am satisfied, a professional planned and well-organised conspiracy. You entered a basis of plea when you pleaded guilty in January this year which sought to minimise your involvement in the conspiracy. Essentially, you were blaming your brother and you were saying that he was using your premises and your equipment for the purposes of the fraud. As I understand the basis of plea, you were essentially simply saying that your involvement and your guilt flowed from the fact that you knew what he was doing and were providing him with your address for the purpose of carrying out the fraud. The prosecution did not accept that minimal level of involvement that you were putting forward and as a result a *Newton* hearing was ordered, which began this morning.
>
> I say straight away that the *Newton* hearing involved an enormous amount of preparation on the part of the prosecution. More than 100 additional pages of evidence were served following your plea of guilty. ... You have put the prosecution team to a great deal of additional work by putting forward this basis of plea. After [prosecution Counsel] had begun to open the case to me, it became apparent that you were very deeply involved in this conspiracy. The evidence in that regard was plainly overwhelming. The result of the search of your premises had been to produce a veritable goldmine of material that showed how deeply involved you were in this conspiracy. At the end of the day [your Counsel] was driven to accept, on your instructions, that at the very least you were an equal principal in the conspiracy, if not, as the Crown suggests, the moving spirit of the conspiracy. ...

As to your personal gain, it is difficult to know the full extent of your gain. What [prosecuting Counsel] says, relying on the documentation, is that in addition to all the jobseeker's allowance and whatever other benefits you were drawing from the state, there are about £20,000 worth of unexplained cash payments into your account, which he invites the court to suppose were cash payments from your customers. On top of that, he submits that there would have been cash received by you which you spent directly without paying it into your bank account, and I accept that submission. So there was a considerable amount of personal gain in this case, quite apart from the loss you caused the railway companies ...".

25. The judge then went on to state as follows:

"Aggravating features identified as potentially aggravating features in the guidelines, which are present here, are the planning of the offence, the obvious intention to go on committing the offences had you not been arrested, the fact that this was an offence involving others together with yourself. That is the conspiracy element. Finally, and most importantly, the antecedents. It is those that take this case right outside the normal bracket for a case of this kind".

26. When considering the appellant's antecedents, the judge made the following observations:

"I have before me your antecedents and I also have a note of the sentencing remarks of the judge at Middlesex Guildhall Crown Court on 6 December 2006 when you were last sentenced for an offence of this kind, on which occasion you were sentenced to three years' imprisonment for conspiracy to defraud, having been given full credit to your plea of guilty, thus suggesting that had you been sentenced after trial the sentence would have been four-and-a-half years' imprisonment.

Looking at your record, you are a Nigerian by origin. Your offending involving railway fraud started as long ago as 2002. You were convicted of various attempts and actual obtaining of property by deception involving railway fraud by the Magistrates in Doncaster on 22 May 2002. There was a further conviction not long afterwards in Newcastle-upon-Tyne Crown Court in March 2003. Again, in December 2003 at Horseferry Road Magistrates' Court, the same kind of offending. Then the matter to which I have referred, Middlesex Guildhall Crown Court on 6 December 2006, two conspiracies to defraud, treated by the judge as effectively a single conspiracy, three years' imprisonment after being given full credit for your plea of guilty. In the note of the sentencing remarks, your offending history in relation to using credit cards fraudulently in order to obtain railway tickets is set out fully by the learned judge."

27. The judge then summed up his findings regarding the appellant's antecedents, as follows:

"It is a deplorable history, showing constant and repeated offending of exactly the same type. The judge said on that occasion that the pre-sentence report that he had before him showed that you are a well-educated man and he said it is all the more regrettable that you have misused your education and your obvious intelligence to engage in what he could only describe as an act of dishonesty. He sentenced you on the basis of being involved in something like about £45,000 worth of transactions. It seems that you cannot stop yourself from committing this kind of railway ticket fraud.

> It goes on and on and all the court can do is to attempt to discourage you by passing increasingly long sentences and by so doing it can to some extent protect the railway companies from your depredations."

28. When giving reasons for only discounting the sentence which would otherwise have been applicable on a not guilty plea (which the judge considered was five years' imprisonment) by only 10%, the judge stated as follows:

> "You were plainly a prime mover in this conspiracy. The evidence, as I have said, was overwhelming and it is difficult to understand why you caused so much work to the prosecution, potentially a two-day *Newton* hearing, reduced now to one day, by your taking the position you did".

29. Finally, the judge remarks as follows, regarding the potential deportation of this appellant:

> "I very much hope this is the last time that you will be troubling these courts. Apparently it was intended that you be deported on a previous occasion. That did not happen. I suppose you are likely to be deported following this latest conviction".

30. Subsequently, on 17 December 2013, the respondent made a decision under the 2006 EEA Regulations and Section 5(1) of the Immigration Act 1971 to make a deportation order. The appellant appealed against this decision, which appeal was heard before First-tier Tribunal Judge Talbot, sitting at Hendon Magistrates' Court on 16 February 2015. In a determination promulgated on 3 March 2015, Judge Talbot dismissed the appellant's appeal, both under the EEA Regulations and under Article 8.

31. The appellant appealed against this decision, permission having been granted by Upper Tribunal Judge Rintoul, and in a decision promulgated on 13 January 2015, following a hearing on 9 December 2015, the President, The Honourable Mr Justice McCloskey, found that Judge Talbot's decision was infected by two material errors of law, such that it needed to be set aside. The President considered that the Upper Tribunal was "fully equipped to remake the decision" and the appeal was accordingly retained in the Upper Tribunal for rehearing.

32. The President was particularly concerned that it was not clear from the Decision of Judge Talbot that he had given adequate consideration to the interests of the appellant's children. In particular he expressed concern that Judge Talbot had found that "the family life of the appellant and that of his children will be placed in some jeopardy by his removal". As the President rightly stated at paragraph 15 of his Decision:

> "The conclusions of the Tribunal that the removal of the appellant from the United Kingdom would (merely) place the family life enjoyed by the children and him '*in some jeopardy*' is simply unsustainable. Their family life, as enjoyed and experienced by the three persons involved, would be decimated, left hanging by the thread of occasional long distance communications".

33. The President was also concerned that Judge Talbot had not appreciated the importance of the EU Charter of Fundamental Rights, pursuant to which very great weight had to be given to the fundamental rights of the appellant's children. We set out the President's exposition of these rights, and the great weight which has to be given to them:

"

26. The Charter entered into force, in tandem with the Lisbon Treaty, on 01 November 2009. Constitutionally, it is one of the three dominant instruments of governance of the EU. Notably, one of the recitals in its preamble proclaims the necessity of strengthening the protection of fundamental rights. This is reflected in its contents. Thus while many of its provisions approximate closely to the European Convention on Human Rights and Fundamental Freedoms (the "*ECHR*"), the reach of the Charter is more expansive. In some specific instances, it goes demonstrably further than the ECHR. Furthermore, it enshrines rights which the ECHR does not contain, such as economic and social rights, cultural rights and others belonging to the realms of the environment, consumer protection and criminal justice. The adoption of the Charter is, by some measure, the most important development in human rights protection in Europe since the introduction of the ECHR over 60 years ago.

27. Article 24 of the Charter bears the title "The Rights of the Child". Under this banner, it provides:

"*(1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*

(2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

(3) ***Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless this is contrary to his or her interests."***

I have highlighted paragraph (3), as this is the provision of Article 24 which the Appellant invokes. Having regard to the gateway provisions of Article 51, it is clear that, by virtue of the EU law context, Article 24 applied to both the underlying decision of the Secretary of State and that of the FtT on appeal. This was not in dispute. The parties were also agreed that Article 24(3) extends beyond the narrow context of disputes relating to the residence of and contact with children.

28. Article 24 has been considered by the CJEU. In Deticek – v – Sgueglia [2009] EUECJ C-403/09 the Court gave consideration to the interpretation of Council Regulation (EC) 2201/2003. This concerns jurisdiction and the recognition and enforcement of judgments in matrimonial matters and, specifically, the question of whether this permits a provisional child custody measure in certain circumstances. The Court, having noted that the Charter features in the preamble to the Regulation, described the rights of the child contained in Article 24 as "*fundamental*", at [53], continuing:

"[54] One of those fundamental rights of the child is the right, set out in Article 24(3) of the Charter, to maintain on a regular basis a personal relationship and direct contact with both parents, respect for that right undeniably merging into the best interests of any child.

[55] Article 20 of Regulation No 2201/2003 cannot be interpreted in such a way that it disregards that fundamental right.

[56] In this respect, it is clear that the wrongful removal of a child, following a decision taken unilaterally by one of the parents, more often than not deprives the child of the possibility of maintaining on a regular basis a personal relationship and direct contact with the other parent.

[57] Article 20 of Regulation No 2201/2003 cannot therefore be interpreted in such a way that it can be used by the parent who has wrongfully removed the child as an instrument for prolonging the factual situation caused by his or her wrongful conduct or for legitimating the consequences of that conduct.

[58] It is true that, under Article 24(3) of the Charter, an exception may be made to the child's fundamental right to maintain on a regular basis a personal relationship and direct contact with both parents if that interest proves to be contrary to another interest of the child.

This analysis gave rise to the following conclusion:

"[59] It follows that a measure which prevents the maintenance on a regular basis of a personal relationship and direct contact with both parents can be justified only by another interest of the child of such importance that it takes priority over the interest underlying that fundamental right."

29. In a later decision, McB – v – El E [2010] EUECJ C-400/10, a case which had a Hague Convention context involving the disputed return of a child from the United Kingdom to the Republic of Ireland, the CJEU said the following, at [60]:

"It must also be borne in mind that Article 7 of the Charter, mentioned by the referring court in its question, must be read in a way which respects the obligation to take into consideration the child's best interests, recognised in Article 24(2) of that Charter, and taking into account the fundamental right of a child to maintain on a regular basis personal relationships and direct contact with both of his or her parents, stated in Article 24(3) (see, to that effect, Case C-540/03 Parliament v Council [2006] ECR I-5769, paragraph 58). Moreover, it is apparent from recital 33 in the preamble to Regulation No 2201/2003 that that regulation recognises the fundamental rights and observes the principles of the Charter, while, in particular, seeking to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter. Accordingly, the provisions of that regulation cannot be interpreted in such a way that they disregard that fundamental right of the child, the respect for which undeniably merges into the best interests of the child (see, to that effect, Case C-403/09 PPU Detiček [2009] ECR I-0000, paragraphs 53 to 55)."

There was some focus in the arguments of counsel on the "*undeniably merges into*" part of the above passage. In my judgment, taking into account its approach in Deticek, to which explicit reference is made, the Court was not suggesting that Article 24(3) adds nothing of substance to Article 24(2).

30. I am of the opinion that Article 24(3) creates a free standing right. It may, of course, be viewed as the unequivocal articulation of a concrete "*best interests*" right and, on this analysis, is a development, or elaboration, of Article 24(2). Furthermore, given the exception formulated in the final clause of Article 24(3), the nexus with Article 24(2) is unmistakable. However, I consider it clear that Article 24(3) was designed to create a discrete right, an analysis which is harmonious with general principles of EU law. These include the well known principle that every part of a measure of EU law is presumed to have a separate and individual effect and impact. Article 24(3) may also be viewed through the prism of the principle that where one has an amalgam of specific and general provisions, the former should normally be considered in advance of the latter. This construction is further fortified by the Commentary of the Charter of Fundamental Rights of the European Union (published by the EU Network of Independent Experts on Fundamental Rights), at p207:

"….. Children are no longer considered as mere recipients of services or beneficiaries of protective measures but rather as rights holders and participants in actions affecting them."

31. Notwithstanding that Article 24(3) of the Charter was canvassed in the Appellant's written argument at first instance, the decision of the FtT is silent on this issue. This failure is reflected in the submissions of Mr Blundell which, reduced to their essential

core, advanced the contention that no material error of law had been committed. The outworkings of this argument were that the FtT was clearly aware of the issue of separation of the Appellant from his children, something which is, in Mr Blundell's words, an "*ever present*" in cases of this kind.

32. The main flaw in this argument, in my view, is that it overlooks the profound nature of the flaw in the decision of the FtT. In short, the Judge failed to acknowledge the existence of a right conferred on both children by one of the constitutional measures of EU law. *Ipso facto*, he also failed to appreciate that this has been characterised a "*fundamental*" right in the jurisprudence of the CJEU. If this error had been avoided, it is as a minimum possible, as Mr Knafler argued, that the Judge's analysis in the passages to quoted in [13] above would have been quite different. In particular, it seems to me inconceivable that the vague "a relationship" and the limp "*in some jeopardy*" assessments would have featured. I conclude, accordingly, that the FtT's error of law on this issue cannot be dismissed as immaterial."

34. The remitted appeal was originally listed for 13 April 2016 but adjourned on the respondent's application. Another hearing was subsequently listed for 22 February 2017 but had to be vacated due to judicial unavailability. Eventually, the appeal was listed before us on 14 June 2017.

The Hearing

35. We heard evidence from the appellant and also the mother of one of his children (not his wife) and his current partner, all of whom were cross-examined. We also heard submissions from Counsel to both parties and were assisted by their respective skeleton arguments.

The Law

36. The parties had between them prepared an authorities bundle consisting of no less than 81 items, but following discussion with the Tribunal the parties' respective Counsel between them only referred the Tribunal to four of these authorities, and none of these were more than peripheral, as essentially the parties were agreed as to the relevant legal principles which applied.

37. As already noted above, it is common ground between the parties that the appellant has a derived EEA right of residence, but that he does not have a permanent right of residence under EEA law, because such periods of residence as could be said to be pursuant to EEA law were interrupted by prison sentences such that he has never resided in this country for a continuous period of five years under the 2006 Regulations. Accordingly, the conditions which apply to the making of a deportation decision, and the lawfulness of such decision are those set out within Regulations 19 and 21 of the 2006 Regulations, the relevant parts of which are as follow:

"Exclusion and removal from the United Kingdom

19.— …

(3) Subject to paragraphs (4) and (5), a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if—

…

(b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

Decisions taken on public policy, public security and public health grounds

21.—(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 permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

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

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

(b)is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(1).

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a)the decision must comply with the principle of proportionality;

(b)the decision must be based exclusively on the personal conduct of the person concerned;

(c)the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(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.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin. …"

38. The way in which the case was argued on behalf of the appellant was that the respondent first had to establish (pursuant to Regulation 21(5)(c)) that the personal conduct of this appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society such as to justify his deportation. If this was not established, then the appeal must succeed. Further, this requirement was only a "gateway"; because, even if the appellant represented such a risk, the respondent still had to establish that his removal would be proportionate, weighing this risk against the composite rights of the appellant and his daughters and other family.

39. On behalf of the respondent, Mr Blundell did not seek to suggest that this was not a fair analysis of the legal principles involved. The issues between the parties were first, whether or not the threshold was met; and secondly, even if it was, whether assessing such risk as there was to society by reason of the appellant's continued presence in this country, when weighed against the interests of the appellant and his family, in particular his daughters, his removal would be proportionate. It was common ground that the best interests of the appellant's daughters was a primary consideration, but not paramount.

40. On behalf of the respondent, Mr Blundell, in his skeleton argument and also in his oral submissions accepted that "it would be in the appellant's daughters' best interests for him to remain in the United Kingdom" (at paragraph 15 of the respondent's skeleton argument). Mr Blundell's submissions within paragraph 15 of that skeleton argument continued as follows:

> "The Secretary of State does not suggest that A or M should relocate with the appellant to Nigeria. She accepts that they can and would remain in the United Kingdom with their primary carers, their mothers. The assessment in this case should, therefore, take place on the basis that:
>
> (1) it is in A and M's best interests for their father to remain in the United Kingdom;
>
> (2) they will remain here if he is deported;
>
> (3) the physical contact which currently takes place in the United Kingdom will be lost; and
>
> (4) the frequency of telephone and social media contact may reduce from current levels".

41. The primary issue between the parties (which the appellant's Counsel rightly stated would be dispositive of the appeal if the Tribunal found in favour of the appellant) was whether or not the respondent had established that there was a serious risk that unless deported the appellant would continue to commit offences such as those of

which he had been convicted. During argument, it was accepted on his behalf that the fraud offences of which the appellant had been convicted were offences which cause serious harm to society, and that if the Tribunal found that there was a serious present risk of the appellant continuing to commit such offences if not deported, then the respondent would have passed through the "gateway". However, it was the appellant's case that his deportation would still not be proportionate, in particular because of the effect this would have on the lives of his children.

The Evidence

42. In addition to the oral evidence referred to above, we were also referred to expert evidence, including supplementary reports. These reports were filed very late (despite directions previously given by this Tribunal) and the respondent had not had an adequate opportunity to consider whether or not she wished to cross-examine any of the experts. Mr Blundell did not seek to cross-examine any of the expert witnesses, and in particular Dr Katherine Boucher, a clinical psychologist, whose report was dated 2 June 2017 and had not been served until later, because this would have required an adjournment. However, he did challenge the methodology used by this expert and did not accept that her report had any substantive status or weight. With these caveats in mind, we admitted this evidence.

43. Although we will not set out within this Decision all the evidence which was before us, we have considered all the evidence which was given, together with all the material contained within the file, as well as the submissions which were made, whether or not the same is specifically referred to below.

The Appellant's Evidence

44. The appellant relied upon the five witness statements which he had made in connection with these proceedings and confirmed that they represented his true evidence.

45. In cross-examination, the appellant was taken through his history of offending, and it was put to him that at times when he was offending earlier in his life, he already had a stable relationship with a partner and one of his daughters, but he still offended and went to prison. The appellant accepted that the stability he got from his children was not new, but claimed that it had "greater depth" now. He accepted however that despite being in a strong relationship when he was 29, this had not stopped him committing the fraud offences which led to his going to prison in 2003. He was also obliged to accept that his commission of the offences in 2006 which led to his being in prison for three years had also been committed at a time when he had enjoyed a stable relationship with both daughters.

46. When it was put to him that having come out of prison from the second offence of fraud he must have appreciated that if he offended again he would be likely to get a heavier sentence, the appellant said that he appreciated this "in hindsight, yes, but not at the time".

47. The appellant was also obliged to accept that at the time when he had committed the offences for which he was imprisoned in 2012 he had a strong relationship with his daughters. When asked what it was that was "different" now such that he would not offend again, the appellant replied that he simply could not afford to offend again "for several reasons. My daughters, their mothers, the book would be thrown at me". He also suggested that his relationship with his daughters was "more meaningful now because they are more mature". He asserted that his relationship with both his daughters was "now stronger".

48. In light of this reply, and against the background that the appellant had set out, he was asked questions about his relationship with his daughter A and admitted that he had last seen her on 11/12 March and had not see her since. In light of this current difficulty in his relationship with A, his earlier evidence that his relationship with both his daughters was now stronger than it had been in the past was we find an overstatement.

49. The appellant was then asked about his early conviction for assault, and whether he had told his wife and children of this conviction. His initial reply was that he had, but he then added that the first assault was "a caution". When it was pointed out to him that he had been convicted of assault in March 2003 (a conviction and not a caution) he then said that he was "not sure I've discussed it with them". When asked again whether he had discussed it with his children (having initially said that he had) his answer changed to "No. It was a technical assault" claiming that it was "not something I think about, because in my eyes I didn't attack anyone". When asked again how much his partners knew about his convictions, his reply was "All of it", but when asked again about the assault, he claimed that he had pleaded guilty "because it was a technical assault – there was touching". He then claimed that "I have held my hands up to all my offences".

50. He was asked whether Ms Hanson, his current partner, knew he had been in prison three times, to which he replied that she knew he had been in prison "at least twice". He was asked whether his partners had known about his other fraud convictions, to which he said that he believed so, but when asked again about the assault he then replied that "I definitely did not tell them".

51. In light of the appellant's earlier statement that he had "held his hands up to all his offences", the Tribunal invited Mr Blundell to ask the appellant how this assertion was consistent with the trial judge having rejected the case he had advanced during his *Newton* trial. The sentencing remarks of the judge were put to him (which included that he had in effect put forward a false mitigation) and he was asked whether he accepted these remarks, to which the appellant replied that he did. However, when then asked whether it followed that the basis of the plea which he had attempted to advance had been false, the appellant replied that it was "false now" but that "at the time I didn't understand the legal specifics". He went on to say that he was "more arguing the specifics of what happened" but that "I now realise that any part I played made me equally guilty".

52. When he was asked by the Tribunal whether it was right that that did not seem to be what he was saying then, the appellant responded by saying that "I was trying to say that he [the appellant's brother] played a more major part".

53. The appellant was then asked by the Tribunal whether he had been saying at the time that his involvement was simply to provide an address for his brother, because that is what the judge in his sentencing remarks was saying, to which, after a short pause, the appellant replied "Yes". He was then asked whether that was untrue then, to which again the appellant replied that it was.

54. After some more questions about his criminal history, the appellant was then asked about the application for an EEA residence card which he made in February 2010, his appeal against the refusal of that application eventually being allowed in November 2010, following which he was granted a residence card in February 2011. It was put to him that his last bout of offending had been between summer 2010 and September 2011 (as referred to by the judge in his sentencing remarks) and that it followed that he had not been subject to deportation and had established EEA rights but still continued offending, which the appellant initially accepted had been the position. He also accepted that his EEA rights had been established before he stopped offending.

55. It was then put to the appellant that the judge had said that if the appellant had not been caught he would have carried on offending, to which the appellant replied that "That is what he said". It was put again to him that if he had not been arrested he would have carried on offending, to which he replied "Possibly yes".

56. Mr Blundell then put to the appellant that it followed that he had been committing serious offences during a time when he had been in a stable relationship, enjoyed a close relationship with his children and had had leave to be in this country and the right to work. The appellant, rather than accepting this, replied instead that there had "been a period between 2007 and 2010 when I didn't have the right". It was put again to him that he would probably have continued offending in 2010/11 if he had not been arrested, to which the appellant replied "Possibly yes". He was asked again whether it was correct that he had had a full right to work during that time, to which the appellant then replied that it had taken "a year for them to send the card" (which does not appear to have been correct).

57. The appellant was referred to the chronology from which it was apparent that he had been granted a residence card on 8 February 2011, whereas he had been sentenced on the basis that he had gone on offending until September of that year, when he was arrested.

58. The appellant's response was to repeat that he had "only just got a residence card at that time" and he then said that there was "No way I can explain this without having the confiscation transcript" which he said had said three months. He then said that although he had been arrested in September "the actual offence stopped in March". As Mr Blundell then noted, this does not seem to have been suggested anywhere else

within the papers, and the appellant was asked by the Tribunal as to whether he had lodged an appeal against his sentence on the basis that the judge had got this wrong, to which the appellant replied that "That was what I argued in the *Newton* hearing".

59. Mr Blundell reminded the appellant that he had not been believed in the *Newton* hearing and that he had been sentenced on the basis that he had carried on offending until September of that year, and there was no reference within the sentencing remarks (or anywhere else within the papers) to his only having offended for a period of three months. The appellant replied to this question by saying that "My solicitors advised me".

60. The appellant was then asked by the Tribunal whether the judge had been wrong when he had said that his offending had continued between 2010 and September 2011, to which the respondent replied that the judge had not been wrong, because he had gone on the evidence he had. The question was repeated and the appellant was asked whether if the offences had stopped in March how it was that the judge could be right when he stated in his sentencing remarks that the offending continued until September, to which the appellant replied that he had had the paraphernalia which was still in his home.

61. The appellant was then asked by the Tribunal whether it was now his case that he only continued offending for one month after he had received his EEA residence card, to which he replied that it was.

62. In light of this answer the appellant was asked what caused him to stop this offending, to which he responded that "The procedure wasn't successful. The rail tickets couldn't be acquired". He was asked what he had meant when he had said earlier that he would have carried on if he had not been arrested, to which he replied that he had stopped because he was not successful.

63. The appellant was then asked questions about the brother he had claimed had been heavily involved in the frauds and asked which brother it was, to which he replied that that brother was dead now, he had died he thought in 2016. He had eventually been found and had received a sentence of three years' imprisonment. When he was asked why it was that he had received a lower sentence than the appellant, the appellant replied that this was because it was his first offence.

64. The appellant was then asked whether he had kept in contact with him in Nigeria, to which he replied that he had not. He was then asked how he had found out he had died, to which he replied that he had sixteen siblings. The impression which we understood the appellant had been intending to give was that because he had so many siblings obviously he was kept abreast with what was happening to his family within Nigeria. However, following further questioning, when asked with how many of his siblings within Nigeria he had any contact at all, he replied that it was just two of them, adding that their brother's death "has brought us closer".

65. We have set out some of the answers given by the appellant in cross-examination in such detail because they have informed our decision as to the confidence we can

place in his assertion that he is now a reformed person who does not represent a serious risk of reoffending.

66. In re-examination, Mr Knafler put to the appellant that without further explanation his statements that unless apprehended he would have continued offending but also that he had stopped because the fraud was not working appeared contradictory, to which the appellant responded that he could only suggest that "the companies were seeing what we were doing and were putting in security measures".

67. The appellant was then asked by the Tribunal whether it was correct that when he had appealed against the previous deportation decision before the First-tier Tribunal (after his previous conviction for fraud) following which Judge Greasley had found that he had no propensity to offend, he had told the judge on that occasion that he knew this was his last chance and that he would never offend again, to which the appellant replied that he believed that he had. He also accepted that he had then offended again.

68. When asked why the Tribunal should believe him now he replied that the children were older and they had "more meaningful discussions" and that he did now realise that his actions were morally wrong. He had done a lot of work with his character with different support groups, learning about society and crime. He wanted to get back into society, and once he overcame the medical issues he was going through, become a better role model for his children.

69. The Tribunal then heard evidence from M's mother who had gone to considerable lengths to come down from her home in South Shields in order to give evidence. She had had to leave her home at around 5.00 a.m. and had had to bring her children with her, but she felt she had to because, as she put it, she was "M's voice".

70. This witness was asked in cross-examination what she had been told by the appellant about his previous offending, and in particular what she knew about the offences he had committed. When asked about any convictions for assault, she said she had heard about this through other people, someone she knew in Newcastle had told her about it and the appellant had confirmed that it was a fight. He had only told her about one assault. The witness when asked said that the appellant had not told her about any driving offences, and nor had he told her the details about any frauds, even the period in which he had been offending. Although M had a stepfather (he was also the father of her younger sibling) he could not replace the appellant. He was "a rock" but M deserved to have her father in her life.

71. In re-examination the witness said that she did not wish M to be the victim of the appellant's criminal activity, which she was very against. M was at the worst time of her life, as a teenager and had a natural bond with her father.

72. In answer to a question from the Tribunal, the witness said that the appellant saw M about every six weeks in term time, they tried to arrange weekends, but M would spend more time with him during the holidays.

73. The Tribunal then heard evidence from Ms Hanson, an air hostess employed by British Airways, who has been in a relationship with the appellant for about two years, and has a 5 year old son who lives with her. She has met both of the appellant's daughters, A and M, and in her statement, upon which she relied, had stated that the appellant was close to both of them.

74. In cross-examination, she referred to the help that the appellant (who stayed with her four or five times a week when she was not working - she worked two weeks on and two weeks off) provided by taking her son to school.

75. Ms Hanson was asked about her knowledge of his criminal convictions and whether, for example, she knew how often he had been to prison, to which she replied that she knew it was more than once but did not know how often. She was asked whether she knew why he had gone to prison, to which she answered it was for fraud, but he had not told her any of the details, he had just said it was fraud. She was asked whether the appellant had told her that he had convictions for a range of offences for fraud for which he had received community sentences, to which she said that he had but she did not know how many.

76. Ms Hanson was then asked whether he had mentioned assault to which she replied that he had, but when asked what he had told her about any assault she just replied that he had said he had "been in trouble". She had just wanted to know the outlines but had not gone into details. When asked about whether she knew about his conviction for assault she then replied that she did not, and when asked by the Tribunal whether she knew what assault was, she replied that she did not really.

77. When it was explained to Ms Hanson that assault usually means that a person had been to court because he or she had unlawfully hit someone, and she was asked whether he had ever told her that he had been involved in an assault on a police officer, Ms Hanson replied that he had told her a bit but that he had not gone into it in any detail. This was in the context of a shooting in America. When then asked whether it was right that he had not told her that he had been arrested for assault and had been found guilty by the court, she replied that that was correct.

78. Ms Hanson was asked whether the fact that he had that conviction raised any concern as to his continuing to spend time with her son; she replied that it did not, but that she would ask about it. However she does not regard him as a threat to anyone.

79. When asked whether she knew about his driving convictions, she said that she did, but she did not know how many there had been, but there must have been a few.

80. In re-examination Ms Hanson said that she did not consider she had been misled by the appellant.

Submissions

81. On behalf of the respondent, Mr Blundell submitted that there was very little between the parties with regard to the law. The relevant Regulations were the 2006 Regulations by virtue of the transitional Regulations in Schedule 4. Regulation 21 codified the Luxembourg case law over many years.

82. At this point, Mr Knafler, on behalf of the appellant, interrupted to agree with Mr Blundell that the case law indicated that the Tribunal should consider this application in two stages. First, consideration should be given as to whether there was a "genuine, present and sufficiently serious threat affecting one of the fundamental interest of society" and only if the answer to that was that there was, did the Tribunal have to consider proportionality.

83. With regard to the appellant, the respondent submitted that he was not a reliable witness. He was evasive, failed to answer questions and was revealed to have lied to those closest to him. He was not a witness of truth. So far as M's mother was concerned, it was accepted on behalf of the respondent that she had attempted to give honest evidence. In respect of Ms Hanson, her evidence was of very limited use; her evidence was very vague, perhaps understandably.

84. With regard to M's mother, although her evidence was that she had heard about the assault "on the grapevine from a friend", she did not know the details, and when she had asked the appellant, he had not told her that it was an assault on a police officer who was in the course of arresting him.

85. Although Mr Blundell referred the Tribunal to two authorities, these were clearly peripheral to the issues in this case, and need not be set out within this decision.

86. With regard to the risk of the appellant reoffending, Mr Blundell asked the court to take account of five particular factors. First, there was a long line of similar offending, one only had to look back to the relatively recent past to see that the appellant had "form", with more than a decade of convictions for serious fraud. His offending was rightly referred to as "deplorable" by the sentencing judge.

87. Secondly, the appellant plainly did not accept his true criminal responsibility, especially with regard to his last offence. Although there had been a clear finding that the fraud had lasted for over a year and there had never previously been any suggestion that that finding was not correct, when challenged, he said that the offending had either been three months or, later, five months. His evidence was inconsistent, evasive and he had to be asked the same questions repeatedly. There was a clear distinction now between the basis upon which he had been sentenced (in respect of which he did not successfully appeal against his sentence) and what he now said the duration of his offence was.

88. The second element within this heading was his failure to accept full responsibility for what he had done. At the outset he had set out what he said was his brother's

role, but that had been found to be false. His explanation now was as false as it was then.

89. Accordingly, the Tribunal should appreciate that when the appellant says effectively that he is a "leopard who has changed his spots", there is no basis upon which the Tribunal can believe him because he still denies the extent of his guilt. The fact that in words he has accepted, in re-examination, the judge's description of his conduct as "deplorable" really does not help.

90. Thirdly, it became clear from the evidence given in this hearing that he had lied or not been wholly truthful about the extent of his offending to those closest to him. His evidence on this point as regards the assault conviction was in some ways the most striking; his evidence was that he did not think he had told them about it, but a rather more complex picture emerged from the evidence of the witnesses. M's mother had "heard on the grapevine from friends"; she had thought it was a fight and the appellant had seemed to confirm this. Certainly he did not tell her that he had assaulted a police officer in the course of his arrest. So he had lied to her. Also, she did not know about his driving convictions, although she did know about other frauds.

91. Ms Hanson's evidence on this was vague. It might be understandable in the circumstances; certainly she was aware of some incident of aggression, but she did not know that he had been arrested for assault on a police officer in the course of his arrest. She only knew a fraction of his other offending.

92. Fourthly, and this was the crux of the case, nothing really had changed. Every time the appellant had gone to prison he had had a strong relationship with his children and some relationship with his partner. His case was that there had been a big change in his life and that he has a wholly different relationship with his children now since his release from prison in 2014, which is how he put his case at the hearing. He knew he was in the "last chance saloon", but the Tribunal must know that this is not a tenable argument. The appellant has been in that saloon once before, and the Tribunal had referred him to his appeal against the earlier deportation decision.

93. The appellant's relationship with his children had always been strong, but this had had no influence on him and had not prevented his offending. This was very relevant to the likelihood of his reoffending now, because the Tribunal could have no confidence that these factors would have the necessary and desired effect. They would not.

94. The same points could be made with regard to his immigration status as well. His offending began when he had status. Whatever he says now, it was clear that his offending continued after he had been given an EEA residence card.

95. Accordingly, when considering the essentials of his case, he says that he does not present a sufficiently serious threat that he will offend again because of his

daughters. His history tells us otherwise; every time when he has been to prison he has had that relationship.

96. The appellant also says he was drawn to offending because of his precarious immigration status and inability to work, but that again is demonstrably untrue.

97. Fifthly, the appellant told the Tribunal at this hearing that he only stopped offending because his scam was not working. This was another area where he was evasive; he accepted first probably and then secondly possibly, that he would have continued offending if he had not been arrested. That deals with his point about not offending for three-and-a-half years. He only stopped in the first place because of his arrest and now he lives under the shadow of deportation proceedings. He has had lengthy periods when he has not been arrested for offending in the past, but that has not stopped his continuing to offend after these periods.

98. Mr Blundell then made submissions regarding the expert evidence upon which the appellant was relying. He first dealt with the clinical psychology report produced by Dr Katherine Boucher dated 2 June 2017. He submitted that it was very unusual to rely on a report from a clinical psychologist to establish a lack of propensity to offend, and noted that this was anyway a matter for the Tribunal to decide. It was far from obvious how a psychologist could speak to issues like this because her conclusions would be based upon what she had been told by the appellant. There was very little reference within this report to any control test to establish whether or not the appellant was in fact telling the truth.

99. With regard to the methodology used, Dr Boucher referred to this at 5.1 of her Report under "Risk Assessment". However, it was clear from this part of her report that the methodology that she was adopting was designed to consider a different issue, which was the risk of violent offending. She explained her approach as follows:

> "Though the HCR.-20 is designed to assess the risk of violent offending, it is being used in this assessment to also consider the risk of general re-offending, as many risk factors for violent offending are also relevant when considering general recidivism".

100. Although Dr Boucher considered that many of the risk factors were relevant, there was no assessment of how many or which ones were relevant and there was no assessment of the degree of relevance. So Dr Boucher was applying a test which was relevant for a different assessment and one could not just assume that one can transfer the results across. If Dr Boucher had been present, this would have been put to her in cross-examination.

101. Mr Blundell also noted that Dr Boucher appreciated that "ideally the HCR-20 should be completed by a multi-disciplinary team", which was another factor which could not be applied in this case.

102. In summary therefore, Mr Blundell suggested that Dr Boucher's Report was of no assistance whatsoever in this case.

103. Mr Blundell then made submissions with regard to the two reports of Dr Mahomed, who is a consultant psychiatrist, and whose most recent report was dated 29 March 2016. Both reports depended entirely on the truth of what the appellant had told him, which was often the case with psychiatric reports, but in this case, the Tribunal had heard the answers given by the appellant when he was cross-examined and was able to form its own judgement. The best evidence, relevant to assessment of future risk, was what had been given by the appellant from his own lips. The Tribunal would also be aware of previous findings where Judge Greasley had said that he could not go behind the experts, and yet he was back in prison within two years. The appellant had clearly fooled Judge Greasley (and the experts) which was very serious, because they were all wrong. The fact that there had been no offences recently was not different from the circumstances which existed when that previous decision had been made.

104. In these circumstances, there was clearly a sufficiently serious risk that the respondent had, in the words of Mr Knafler "passed through the gateway" such that the Tribunal then needed to assess whether the deportation of this appellant was proportionate.

Proportionality

105. So far as the best interests of the appellant's children were concerned, the respondent accepted that the appellant had a genuine relationship with both his daughters, neither of whom realistically could be expected to live in Nigeria. There would be a serious disruption in their lives and being realistic, this was a separation case. However, when looking at the effect of separation, this would be for a lesser period in their childhood than if they were 6 or 7 year olds. A would soon be 15 and M was 13. Also, when looking at the effect of separation, of course the appellant had been a part of the lives of both his daughters since birth, but he was not there throughout their childhood, having spent various periods in prison. He sees M every six weeks or so and during school holidays, but the starting point was that he did not have contact every day.

106. Mr Blundell accepted that the President had been right to criticise the First-tier Judge for not considering this aspect of the case properly, but, in the words of Lord Justice Sedley in *A.D. Lee* [2011] EWCA Civ 348 "that is what deportation does".

107. The appellant did have some contacts within Nigeria, with his siblings and others, and the reasons why the respondent considered that the decision was proportionate was because the removal was necessary to protect this society from the very serious risk of his continuing to offend and this outweighed the interests of his daughters. The threat that he posed by his continued presence in this country was sufficiently serious to outweigh the best interests of his daughters.

108. So far as these best interests are concerned, the respondent accepted that it is in the best interests of both the appellant's daughters that he should remain here. This is uncontroversial and unexceptional, but these best interests were outweighed by the need to remove this appellant. Both daughters had very supportive families. M had

a supportive stepfather, who was a "rock" in her life, and was doing a lot of things that a father does. A was a difficult child, and although teenage children had fall-outs with parents from time to time, it was hard to have a reconciliation when the child and her father were not living together. It was a factor that A and her father were not seeing each other at the moment, and it was relevant that the appellant's relationship with A's mother had broken down. When considering the level of disruption there would be to the appellant's daughters' lives by his removal, it was relevant that he was not a full-time living-in father; in reality he saw M only every six weeks or so and currently did not see A at all.

<u>Submissions on behalf of the Appellant</u>

109. Mr Knafler submitted that the risk that this appellant would commit further serious offences was "very low indeed". He relied on the expert evidence, and his starting point was the OASys assessment compiled by the Probation Service after the appellant's most recent offence. In particular reliance was placed on the assessment of the "risk of serious harm full analysis" starting at page 150, tab 1 of the bundle. Mr Knafler referred to the predictor scores and risk categories set out within pages 164 to 165 of tab 1 of the bundle which showed that the "likelihood of serious harm to others" was assessed as "low and low" (it was however noted by the Tribunal at this stage that this part of the report appeared to be dealing with the risk of serious harm posed by this appellant while in custody).

110. Mr Knafler noted that the report was very out-of-date by now and that although there had been a prediction that it was 50% likely that the appellant would commit a non-violent crime within two years following the report, that did not happen. Also there was a great deal more evidence which had been adduced on behalf of the appellant which had not been considered within this assessment. Notwithstanding this, the risk of serious harm was assessed as low, and while this was not precisely the same test as whether the appellant would pose a serious threat affecting one of the fundamental interests of society, it was nonetheless close enough to make this relevant.

111. Mr Knafler then referred the Tribunal to the first report of Dr Mahomed, the consultant psychiatrist, at tab 1, page 80 of the bundle. His conclusions are at page 87, where at "V. Please comment on the likelihood of Mr Abdul re-offending", Dr Mahomed had noted that the appellant "comes from a stable and initially supportive background with strong religious values" and that "he reconnected to these values whilst in prison" and "seems to have a better understanding of the effects of his criminal behaviour on others and himself". He continued by noting that "he values his relationship with his partner and children and seems determined that he would not want to jeopardise 'all he has' by his criminal past". Having taken these factors into account, Dr Mahomed's conclusion, within this report, which was written on 9 April 2014, following an "examination" on 3 April 2014 was that "I am of the opinion that in all probabilities, [the appellant's] 'new-found' vision as well as his ingrained values and current supportive relationship will keep him away from re-offending".

112. While Mr Knafler accepted that the Tribunal's hands were "not tied", he nonetheless submitted that the expert evidence was "relevant and consistent" and that the experts had a legitimate role to play. Although the Tribunal had had the advantage of seeing the appellant in cross-examination, the Tribunal could be assisted by taking account of the views of experts who "we can presume are not easily fooled".

113. Mr Knafler then referred the Tribunal to Dr Mahomed's second report, dated 29 March 2016, following his "examination" on 24 March 2016, which begins at page 1 of tab 5 of the bundle. It was apparent from pages 2 and 3 of this report that Dr Mahomed was aware of the appellant's offending history, but then at page 4, at 10.1, when asked whether he continued to stand by the conclusions set out in his previous report, his conclusion was that "I can confirm that I continue to stand by the conclusions I outlined in my original report". He considered that the appellant had "good insight into his criminal behaviour in the past and is resolved to keep away from breaking the law". The overall tenor, according to Mr Knafler, was that Dr Mahomed had seen a degree of maturity and change in the appellant. This report was important because it was written having seen the appellant twice, over a period of time, and took account of his history of offending.

114. While Mr Knafler accepted the basic appeal of the submission made on behalf of the respondent, that the appellant had "pulled the wool over the eyes of professionals" before and so could not be trusted in the future, there was still no substitute for a proper examination of future risk, informed by experts.

115. Mr Knafler then referred the Tribunal to the very recent report of Dr Boucher, a clinical psychologist, whose report is at tab 5, page 145 of the bundle. Dr Boucher considered that the risk of reoffending was low, and whether or not it was usual for applicants to rely on reports from psychiatrists or psychologists, it was clear from her CV that she was qualified as an expert in this field, and had experience of assessing the risk posed by prisoners.

116. The methodology which Dr Boucher employed is set out at pages 147 and 148 (pages 3 and 4 of her report) and while it was accepted that this methodology had primarily been designed for use in cases of violent offending, she gave her reasons as to why it was appropriate to use this methodology in this case, having considered every factor and guideline for her interim conclusions and for her final conclusion. So her conclusion (that the appellant represented a low risk of reoffending) was the considered view of an expert in her field who had applied methodology which while not custom-made was nonetheless appropriate. Also, her evidence was of a piece with other evidence relied upon and this was an appellant also who had not reoffended in the three-and-a-half years since his release from prison.

117. Mr Knafler then answered some of the submissions made on behalf of the respondent. He accepted that Mr Blundell had made his points concerning the appellant's evidence "robustly and fairly" but nonetheless submitted that he had been "unduly harsh". So far as the disclosure by the appellant of his offences to his partners, he had disclosed the "big picture", which were the fraud offences for which

he had been imprisoned and other fraud offences. The real point taken against him was that he had failed to disclose other convictions, but rightly or wrongly he felt somewhat hard done by in respect of some of his convictions and it was not possible to say that he had misled either of his partners positively. Certainly neither of the women who gave evidence thought that they had been misled.

118. As far as concerns the period of offending, it was said on behalf of the respondent that the appellant was not a reliable witness because he did not accept the period of offending. With this one exception, the appellant was completely frank, accepting everything without demur or query. It was accepted that the sentencing judge had said that the period of offending had been from the summer of 2010 to September 2011 and not some shorter period, and the appellant may have been right or wrong in his evidence on this point, but Mr Knafler said on his behalf that he had not been evasive or dishonest. He had got something in his head, it is not clear what, that in the forfeiture proceedings it had been found that his offending had been for a shorter period. However he accepted that he was involved with his brother and that his offending had been "deplorable".

119. So the question was, what had changed? On behalf of the appellant, it was submitted that what had changed was apparent from the reports of Dr Boucher and Mrs Pearce (an independent social worker, whose report dated 10 April 2016 is at tab 5, page 9 of the bundle). His daughters were now more mature and his relationship with them was deeper. The time had come when they judged him. Obviously a lot more had changed. He had said to everyone that he felt ashamed and the brother with whom he had been involved had since died. He was older and somewhat wiser, and really did know now that "his whole life is at stake".

120. It was said on behalf of the respondent that his not offending since his last release from prison was because he was under the threat of deportation, but he would always be under this threat, he would not be any more free to commit offences when his daughters were 18.

121. These arguments were advanced in support of the appellant's claim that the "threshold" had not been reached. It was submitted that the respondent had not established that he now posed a serious threat to one of the fundamental interests of society.

122. With regard to proportionality, even if the threat level was such that it could be said that the appellant posed a serious threat to one of the fundamental interests of society, when considering proportionality, the Tribunal should nonetheless when weighing this risk in the balance accept that the risk of fraud was at the lower end. So far as fraud is concerned, it is what it is, but the risk would only just cross the threshold of seriousness.

123. Whatever the risk might be, when considering proportionality, this had to be set against the effect on the children of his removal.

124. Mr Knafler then reminded the Tribunal of the summary of Mrs Pearce's first report contained at paragraph 12 of the President's decision in which the Tribunal had found an error of law in the First-tier Tribunal's decision, which is contained at paragraph 12, and was as follows:

"12. There is one piece of evidence which has a particular bearing on this ground of appeal, namely the report of the independent social worker, to which I now turn. This report was received in paper form by the FtT. Based on interviews of all of the protagonists and the consideration of other materials, the report focuses particularly on the relationship between the Appellant and his younger daughter, aged 11 years. It contains the following material assessments and conclusions:

(a) While children form attachments to any consistent care giver who is sensitive and responsive in their social interactions with them, the quality of the social engagement is more influential in developing that attachment than the amount of time spent. In the Appellant's case, the quality of his interaction with his daughter when they are together is so positive and involves such a high degree of involvement that their relationship has grown and flourished in consequence.

(b) The Appellant has taken positive steps to initiate a relationship between his daughter and her half-sister (the Appellant's older daughter, aged 13).

(c) The Appellant and this daughter have "*a strong, close relationships and (that) their relationship is both meaningful and valuable to both of them*".

(d) This relationship is extremely important to the Appellant's daughter who "*…. sees what he offers her in terms of emotional and psychological support as being essential to her positive functioning and complementing, not duplicating, what her mother offers*".

(e) The Appellant "*…. has consciously thought about the manner of his interaction with* [his daughter] *as she has grown older and more mature ….* [she] *is very emotionally and psychologically dependent on her father presently, because of all he is able to offer her*".

(f) The loss of the Appellant from his daughter's life would be "*very psychologically difficult to manage and …. would be like an abandonment to her*".

(g) Research establishes the importance of the continued presence of a person contributing substantially to a child's emotional stability, security and self-esteem.

(h) Research further demonstrates that the deportation of the Appellant would render his daughter more likely to show signs of depression and experience feelings of loss and sadness. Long distance contact would be no substitute.

(i) Research also establishes the phenomenon of "*significant behavioural changes amongst most children who had experienced parental deportation …*"

(j) Such children have "*a consistently lower score on a variety of moral indexes.*"

(k) Moreover, such children "*… are, on average, more likely to be academic under-achievers …. more likely to experience behaviour problems at school such as having difficulty paying attention or being disobedient ….*"

(l) The extreme distress which the Appellant's daughter is likely to suffer in consequence of his deportation "*… will endure in some form beyond the immediate and medium term*" and is unlikely to be adequately managed by her mother, giving rise to a deleterious impact on this relationship also.

This report was not challenged by any other evidence."

125. This Tribunal would now have to calibrate as precisely as possible in real terms what this meant. What was important to have in mind was the strength of the appellant's relationships with his daughters.

126. In this regard, Mrs Pearce's second and most recent report, which starts at page 115 of tab 5 of the bundle was a most important piece of evidence. This report was dated 15 February 2017. Mrs Pearce considered the relationship with his daughters was "very strong" and the effect of his removal on them would be "crushing".

127. The effect on both children would be very serious indeed; the fact that the appellant had been such a good father to A generally reflected very well on him.

128. Mrs Pearce's conclusions with regard to M, that the effect of the loss of direct contact and reaction with her father "would be immense and would impact emotionally, psychologically, physically, socially and educationally" (see page 141) was borne out by her mother's evidence. M was getting very upset.

129. Finally, Mr Knafler referred the Tribunal to just two of the very many authorities contained within the authorities bundle, *B v SSHD* [2000] EWCA Civ 158 (and in particular to the judgment of Sedley LJ in the Court of Appeal) and *LG and CC (EEA Regs: residence; imprisonment; removal) Italy* [2009] UKAIT 00024, a decision of the Asylum and Immigration Tribunal, presided over by Carnwath LJ, Senior President. Decisions such as these illustrated that for the purpose of the EEA Regulations, even though previous offending might have been serious, removal by deportation still had to be a proportionate response. In *B* in particular, this was held to be disproportionate even though the offending had been very serious indeed.

Discussion

130. We have set out the relevant parts of the evidence and the submissions which were made at some length because it is in the context of this evidence and having considered very carefully the submissions which were made that our conclusions have been reached.

131. At the outset we accept that our task is first to consider whether or not the respondent has established that the risk posed by the appellant's continued presence in this country is sufficiently serious to one of the fundamental interests of society such as to pass through the "gateway". If this has not been established, we must allow the appellant's appeal. Secondly, even if this risk is established, we must still consider whether this threat to society is sufficiently grave as to outweigh in particular the consequences which will be suffered by the appellant's children as a result of his removal from this country. Unless this risk does outweigh the

detrimental effect on the appellant's children, the decision would not be proportionate. When considering the interests (and rights) of the appellant's children, we have of course had regard to the EU Charter of Fundamental Rights, the President's comprehensive analysis of which has been referred to (and cited) above.

Does this appellant represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, based on his personal conduct?

132. We appreciate that considerations of deterrence or revulsion are not relevant, and nor are economic considerations. The sole issue which must be considered under this head is whether or not there is a real risk that this appellant will continue to commit offences of the type he has been convicted of, it having been accepted on his behalf that the types of fraud for which he has been convicted are serious. As the sentencing judge noted with regard to his history of offending, this was "deplorable".

133. We turn first to consider the various reports relied upon on behalf of the appellant. The first is the OASys assessment, which was prepared in order to assess what management this appellant would need after release.

134. The first point which must be made with regard to the OASys assessment is that, as is apparent from tab 1 page 138, the primary consideration was the risk posed by the appellant while in custody. As stated:

> "The purpose is to identify whether the offender is likely to cause serious harm to others, cause serious harm to staff or prisoners, cause harm to himself, be a risk in respect of escape/abscond, control or breach of trust [or] be a risk because of their vulnerability".

It is also clear that the risk of "serious harm" which is considered within this assessment (should the appellant be released into the community) was not the type of harm with which this Tribunal is now concerned. What this assessment is considering is essentially the risk of violent offences being committed. Although the "predictor scores" shows that the appellant represents a relatively small risk of "violent-type reoffending" (8% in the first year and 14% in the second year) he presents a much more serious risk of reoffending in general, being 39% in the first year and 57% in the second year (see at page 162 of tab 1). So although the likelihood of "serious harm to others" is low, both within the community and in custody, the risk of reoffending is, on the basis of this assessment, high. It appears from the methodology used, that offences of fraud are not considered as ones which cause "serious harm", because it is not considered that they would be likely to cause serious physical or psychological harm.

135. With regard to Dr Mahomed, the difficulty with his evidence is that his reports appear to accept what the appellant has said at face value. In his first report (at page 87 of tab 1, part D of the report), when commenting on the likelihood of the appellant's reoffending, Dr Mahomed believes that the appellant will keep away from reoffending because of his "new-found" vision, coupled with his "ingrained

values and current supported relationships", having "reconnected" to the strong religious values in which he was brought up whilst in prison. The difficulty with this, as acknowledged by Mr Knafler while making his submissions, was that this appellant had previously persuaded "experts" that he was a changed character, when he had successfully appealed against a deportation decision, only to commit the serious fraud thereafter, which fraud he had carried on for a substantial period of time (and which, at times during his evidence, the appellant had accepted would have continued had he not been caught). Dr Mahomed's recent report is also founded upon what the appellant has told him, and accordingly, the weight which we give this assessment must depend upon the impression which we have of the appellant's evidence, which will be considered below.

136. So far as Dr Boucher's assessment is concerned, at 6, giving her "summary and opinion" (at page 168 of tab 5), she asserts that the appellant's "previous offending behaviour appears to have been triggered by financial stress and the importance that financial independence and wealth had for him" relying on a report into fraud apparently conducted by the Parliament of Victoria in 2004 which, after no doubt extensive research and expense had been incurred, arrived at the less than radical conclusion "that the motivation for fraud is a combination of the individual's personality and the situation in which they find themselves". She considers that the appellant:

> "was exposed to another financial crisis for his last offence [that is the serious fraud for which he was sentenced to 54 months' imprisonment] as he had no means of legitimate income due to his immigration status".

This is in fact not correct, because as the judge's sentencing remarks made clear, the offence was committed over a period of about a year, for the last nine months or so of which the appellant had a residence card entitling him to work. Dr Boucher does not appear to have considered this when making her assessment. She also notes at 6.6 (page 171 at tab 5) that the appellant's current circumstances are now different from what they were when he was offending, because he has an insight into the consequences of his offences, a consistent form of income (jobseeker's allowance) and the motivation to live a life free from crime, being (as set out elsewhere within the report) his close relationship with his daughters.

137. This Tribunal, having heard the appellant give evidence, is less easily persuaded. Dr Mahomed and Dr Boucher were not able to assess the appellant in light of cross-examination; we were, and he was an exceptionally unimpressive witness. The evidence given by the appellant in cross-examination has been set out in some detail above; he was evasive, inconsistent and in our judgement not an honest witness. We also cannot ignore that having been afforded what at the time he realised was his "last chance" previously, he then embarked, over a long period of time on the serious fraud for which he received such a substantial prison sentence; this fraud continued over a period of some twelve months, during which he had the right to work, and also had a strong relationship with his daughters. When asked to explain why it was that he continued with the offence even after his immigration status was settled, he

lied, and claimed (contrary to the evidence) that he had got his residence card much later and then that his offending had only been continued over a three month period. We did not regard that evidence as indicative of a person with insight into his criminal behaviour or of a person who truly felt remorse for what he had done.

138. We were in no doubt whatsoever but that the risk of this appellant continuing to offend was a high one; we also consider the type of offences which this appellant has regularly committed to be very serious, and a threat to one of the fundamental interests of society. Accordingly, we are in no doubt whatsoever but that the respondent has established that she has passed through the “gateway”.

Proportionality

139. Even though we are entirely satisfied that the appellant represents a serious threat to society, as required under the Regulations, it is still necessary to consider whether his removal might still be disproportionate, because of the effect that this will have on his daughters. We of course have in mind the factors set out by the President at paragraph 12 of his decision, when finding an error of law, and we also have in mind the report made by Mrs Pearce, the independent social worker. Although at the moment the appellant does not see A, and does not have a good relationship with A’s mother, we are nonetheless satisfied that it is in A’s best interests to have a relationship with her father, and that any chance of having a meaningful relationship with him will, in reality, disappear if he is deported.

140. Although we appreciate the importance of the EU Charter of Fundamental Rights, and the very great weight which we are obliged to give to the childrens’ interests, the rights of the children as set out within the Charter are not absolute rights, but (as recognised within Article 52(1) and as accepted on behalf of the appellant) can be outweighed by the public interest if this is sufficiently high.

141. So far as M is concerned, although the appellant does not live with her, and she only sees him about once every six weeks or so while she is at school, she does currently spend longer periods with him during the school holidays, and we have no reason to doubt the sincerity of her mother when she says that it is very much in M’s best interests to continue seeing him. The result of the appellant being deported will be again that although she would in a literal sense be able to “maintain contact” with her father through the internet and phone calls, M’s relationship with her father will, in real terms, be terminated, much as it was when he was sent to prison. In respect of both children, a relationship by “modern means of communication” is not a meaningful substitute for a real flesh and blood relationship.

142. Regrettably, that is what happens when foreign criminals, whether or not entitled to rights under the EEA Regulations, are deported. The question we have to consider is whether or not the need to protect society from the risk which we have found this appellant poses, is sufficiently strong as to outweigh the price which will be paid by his daughters, having at the forefront of our minds that absent the public interest in their father’s removal, the children would have a right under Article 24(3) of the EU

Charter of Fundamental Rights to maintain on a regular basis direct contact with him.

143. In our judgement, this appellant is a career criminal, who has shown, both through his record of criminal conduct and in his evidence before us, that he continues to represent a serious threat to the security of this country. His fraudulent activities have been serious and sustained and he has in the past continued to offend even though he has a family which cares about him and when he has had settled status in the UK. The respondent has an obligation to protect the citizens of this country, and although there will be a price to pay, and it will be paid by the appellant's daughters, their best interests, while a primary consideration, cannot absolve the respondent, or this Tribunal, from that responsibility. As already noted, the appellant was previously given a "last chance" to demonstrate that the experts' belief that he was a reformed character was justified; he showed that it was not. He went on to offend again and we believe it is very likely indeed that unless deported he will continue to do so.

144. For the reasons we have given, we are clear that the public interest in removing this appellant outweighs the best interests of his family (even having considered those interests through the prism of the EU Charter of Fundamental Rights) by a very wide margin. It follows that his appeal must be dismissed.

Decision

The appellant's appeal against the respondent's decision to deport him is dismissed, under the EEA Regulations.

Signed:

Upper Tribunal Judge Craig — Dated: 9 October 2017