Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00126/2016

THE IMMIGRATION ACTS

Heard at Field House
On 18th June 2019

Decision & Reasons Promulgated
On 9th July 2019

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MAM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Ms R Chapman, Counsel instructed by Wilson Solicitors LLP

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but for the purposes of this decision I shall refer to the parties as they were before the First-tier Tribunal, that is Mr MAM as the appellant, and the Secretary of State as the respondent.

2. The appellant is a citizen of Sierra Leone born on 13th September 1980 and who was notified on 17th August 2015 that the Secretary of State intended to make a deportation order against him on the grounds of public policy/public security in

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accordance with Regulation 19(3)(b) and Regulation 21 of the Immigration (European Economic Area) Regulations 2006. Despite the representations submitted on his behalf, the Secretary of State made a decision to make a deportation order on 27th February 2016, refusing his human rights claim. The appellant appealed to the First-tier Tribunal which allowed his appeal on 24th May 2018. The Secretary of State was granted permission to appeal. The grounds of application noted that the appellant had amassed fourteen court appearances for seventeen offences and convictions over a period of 2003 to July 2015. Amongst those his key convictions were:

(i) A conviction for dealing drugs (cannabis) on the streets in 2009. The appellant received a custodial sentence which was reduced to ten months' imprisonment.

(ii) On 25th February 2015 at North London Magistrates' Court possession of a controlled drug (cannabis) and obstructing the powers of search for drugs, the appellant was fined.

(iii) On 22nd July 2015 at Blackfriars Crown Court the appellant was convicted of supplying controlled drugs (cannabis) and sentenced thereafter to a term of imprisonment of fifteen months.

The grounds of appeal queried whether the appellant had been rehabilitated. His last offences were committed whilst he was on bail and showed a complete disregard for the law. He was married to his EEA sponsor at the time and as such, she did not prove to have any control over the appellant to prevent him committing offences. Given the cases of **R v Bouchereau [1997] EUECJ 30-77** and **Kamki [2017] EWCA Civ 1715** and given the appellant's offending behaviour, it was submitted that the judge had erred in law in the assessment of the issues in the case. Given the public interest in dealing with drug dealers, the grounds were granted permission.

3. The matter came before the Upper Tribunal on 27th July 2018 and a material error of law was found because the First-tier Tribunal judge had placed considerable reliance on the appellant's marriage to his partner who had not been able to prevent him from continuing to commit offences and had placed considerable reliance on the probation officer's report dated 4th August 2016 with reference to an assessment on 11th May 2016 finding him to be of low risk of serious harm and the appellant expressed genuine remorse for his actions. The probation officer noted that the appellant had engaged with a recovery focus programme to address his cannabis use and "while searching for full-time employment, Mr M undertook a weekly programme of activities designed to assist him with his job search and in keeping busy whilst in recovery from cannabis addiction" and further,

> *"It is very rare that I have the opportunity to supervise an individual so committed to making a change in their life as Mr M: he appears someone who is genuinely aware of how his behaviour has impacted on others and completely committed to living his life in future in a way that reflects his desire to give back to society. Mr M's level of motivation to implement these changes is probably one of the highest I have seen during my time working as a probation officer".*

That report, however, predated the accepted cannabis smoking of the appellant and was thus based on erroneous information. The probation officer in a second letter of 24th May 2017 confirmed the contents of her previous letter, that is 4th August 2016, and that the appellant's attitude had been exemplary. The judge placed considerable weight on the report of the probation officer when finding it to be "highly supportive of the view that the appellant would not be a present threat to society if allowed to remain".

4. The reliance demonstrated the First-tier Tribunal judge did not take into account all relevant factors and failed to give adequate reason for reliance on a probation report bearing in mind the oral evidence given that the appellant smoked cannabis immediately prior to the birth of his child in August 2017. That decision was set aside, and the matter resumed before me.

Background

5. The appellant, now 38 years old, was forcibly abducted and recruited as a child soldier aged 12 years in Sierra Leone and exposed to violence and drug abuse whilst a minor. He remained as a child soldier until he was able to escape at the age of 19 years in 2001. He was diagnosed with PTSD two years ago and has relied on drugs (cannabis) to relieve his problems. Indeed, the point was made that he was introduced to cannabis whilst a child soldier. He is now married to an EEA national (she is in fact a dual national and British citizen).

6. He was first encountered in the United Kingdom in 2002 having entered illegally and claimed asylum which was refused, and his appeal was dismissed on 19th November 2003. He was initially detained under immigration powers on 23rd December 2004 but absconded from detention on 24th December 2004. He was arrested on 2nd March 2005 on suspicion of immigration offences.

7. On 4th September 2009 he was considered as a non-EEA national to meet the criteria for conducive deportation because he had been given a sentence on 1st August 2007 at Hull Crown Court for drugs related offences where he was sentenced to six months' imprisonment, and for his conviction on 6th April 2009 at Blackfriars Crown Court for possessing controlled class C drugs with intent to supply and he was sentenced to 30 months' imprisonment. This was reduced on 3rd September 2009 on appeal to ten months' imprisonment. It was considered that he had an aggregated total of sixteen months' imprisonment and he was issued with a decision to make a deportation order on 4th September 2009. That decision was withdrawn following an EEA application in the light of his subsisting relationship with his partner and he was sent a warning letter to inform him that if he reoffended he would remain liable for deportation. Following judicial review proceedings on 6th August 2013 he was issued with an EEA residence card as a family member of an EEA national.

8. He was then convicted on 22nd July 2015 at Blackfriars Crown Court for supplying a class B controlled drug (cannabis) and sentenced on 24th July 2015 to fifteen months' imprisonment. There followed the Secretary of State's decision to make a deportation order on 27th February 2016

9. The full criminal history of the appellant was set out in the immigration decision of the Secretary of State

> "11. *On 28 June 2003, you were cautioned by Sussex Police for possessing a Class B controlled drug (cannabis).*
>
> 12. *On 10 October 2003 at Highbury Corner Magistrates Court, you were convicted of possession of a Class B drug – cannabis resin and fined £150.00 and costs of £50.00 to pay.*
>
> 13. *On 22 January 2004 at Highbury Corner Magistrates Court, you were convicted of possessing controlled Class B drugs – cannabis, for which you were fined £50.00.*
>
> 14. *On 29 September 2004 at Highbury Corner Magistrates Court, you were convicted of possessing cannabis, a Class C controlled drug and fined £30.00 and costs of £55.00 to pay.*
>
> 15. *On 10 December 2004 at Highbury Corner Magistrates Court, you were convicted of possessing cannabis, a Class C controlled drug and fined £50.00 and costs of £55.00 to pay.*
>
> 16. *On 23 March 2005 at Highbury Corner Magistrates Court, you were convicted of possessing cannabis, a Class C controlled drug and fined £100.00.*
>
> 17. *On 30 March 2006 at Highbury Corner Magistrates Court, you were convicted of failing to leave a locality having been directed to do so, for which you were fined £50.00 and costs of £75.00 to pay.*
>
> 18. *On 1 August 2007 at Hull Crown Court, you were convicted of possession with intent to supply cannabis, a Class C controlled drug and possession of a Class C controlled drug. You were sentenced to 6 months imprisonment for both offences.*
>
> 19. *On 27 December 2007 at Highbury Corner Magistrates Court, you were convicted of possessing a Class C controlled drug, for which you were issued a community order and an exclusion requirement for 12 months.*
>
> 20. *On 15 February 2008 at Highbury Corner Magistrates Court, you were convicted of possessing cannabis, a Class C controlled drug, for which you were issued a community order, an exclusion requirement for 12 months and costs of £70.00 to pay.*
>
> 21. *On 25 June 2008 at Brent Magistrates Court, you were convicted of possessing cannabis, a Class C controlled drug, for which you were fined £200.00 or a one day in custody which was served.*
>
> 22. *On 17 January 2009 at Highbury Corner Magistrates Court, you were convicted of possessing a Class C controlled drug, for which you were fined £100.00 or 1 day in custody which was served.*
>
> 23. *On 6 April 2009 at Blackfriars Crown Court, you were convicted of possessing cannabis resin, a Class C controlled drug and possessing a Class C controlled drug with intent to supply. You were sentenced for both offences to 30 months imprisonment. This was varied on appeal on 3 September 2009 at the Court of*

Appeal Criminal Division, where the sentence reduced to 10 months imprisonment and you were placed on an anti-social behaviour order for 5 years.

24. *On 25 February 2015 at North London Magistrates Court, you were convicted for count 1 of obstructing the powers of search for drugs and count 2 of possession of Class B controlled drugs (cannabis/cannabis resin). For count 1 you were fined £200.00, costs of £300.00 to pay and a victim surcharge of £20.00 to pay. For count 2 you were fined £100.00.*

25. *On 22 July 2015 at Blackfriars Crown Court, you were convicted of supplying a Class B controlled drug (cannabis) and sentenced on 24 July 2015 to 15 months imprisonment, issued a criminal behaviour order for 5 years and a victim surcharge of £100.00 to pay. You did not appeal against the conviction or sentence".*

The Hearing

10. At the resumed hearing before me the appellant adopted his witness statements, the latest being 2nd June 2019 and confirmed that he continued living with his partner and their relationship was good. He worked part-time and was effectively the primary carer for his daughter, taking her to playgroup or nursery school from Monday to Thursdays and working at the weekends. He accepted that he had a long list of convictions although he maintained that the latest conviction in 2015, he had not been intending to supply drugs. He accepted that he had another child but in her own interests he had decided to desist from contact.

11. The appellant did state that he regretted what went wrong and going to prison. Although he considered the last time he committed a criminal offence was in 2007 he did accept that he smoked cannabis two to three months before his younger daughter was born but resisted the suggestion that he would go back to smoking cannabis because he needed to spend the money on his daughter who was now 19 months old. It was this rather than the conviction which had persuaded him to give up. He was however now having counselling every two weeks. He accepted that his partner's view of his offending was that it was very disturbing, and she was distressed. He was adamant that he did not use cannabis anymore.

12. Under re-examination he confirmed he would like to resume contact with his older daughter, but he did not quite know how to go about it as he did not have solicitors in the Family Court. He associated offending with the police and being handcuffed and sent to prison. The first time he got post-traumatic stress disorder support was when he went and had moved to Treforest.

13. The appellant's wife attended and gave oral testimony. She confirmed that having received a no-fault eviction notice she had decided to buy the couple a home where they could live together with their daughter and there was more space and away from London. She was engaged in a legal training contract which would end in September 2020. They had met in London where things had not gone well for her husband and she thought that they could start again in Wales. She confirmed he was the primary carer for their daughter and she would not know how to cope without

him. He had ceased contact with his older daughter, in her interests, but he did not have legal aid and she confirmed that there were no concerns in relation to the care that he had of his daughter. As it was more damaging to carry on the contact in the acrimonious family law proceedings, he had decided to cease contact.

14. She thought there had been "massive changes" in their lives. They were living in a completely different place and her husband was away from the previous influences that had got him into trouble. Previously he had been able to get a job and had returned to London which was a poor idea. Previously there had been much instability in their lives, but they were now settled.

15. Under cross-examination she accepted that the appellant had previously had a job in London and that he had a long criminal record but she asserted that there was a long period when he did not offend and his last offence was a huge mistake but he was in a very different place now particularly being a primary carer of their daughter with a stable job and a stable home. He had engaged in treatment and learned techniques to help him.

16. She confirmed that she was entirely comfortable with her husband looking after their child, she would never leave the child in the custody of someone that she did not trust except, for example, her husband and her mother. She confirmed that the effect on her daughter of her husband's removal would be devastating. She was concerned that her husband would commit suicide if he was removed, and the effect on her daughter would be enormous.

17. The appellant's mother-in-law Mrs CMDG attended and adopted her statement and gave oral testimony. She confirmed that he was the primary carer. She herself lived and worked in Devon as a film programmer and in the box office of an art centre. The emotional impact on her daughter and granddaughter would be desperate.

18. Both Mr Avery and Ms Chapman made submissions which I have taken into account and I refer to in my conclusions. In particular, Ms Chapman referred to the report of Lisa Davies, Chartered and Registered Forensic Psychologist of Expert Psychological Services Ltd dated 3rd June 2019 which was admitted under Rule 15(2)(a) of the Upper Tribunal Procedure Rules.

Analysis

19. The principles governing the deportation of EEA nationals are to be found at Regulation 21 of the Immigration (European Economic Area) Regulations 2006 which provide:

> "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.*
>
> *(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".*

20. From the above it is clear that the tests in regulation 21(3) and in regulation 21(5) both have to be satisfied in his case if the Secretary of State's deportation decision is to be upheld and see **Kamki**.

21. The person concerned must also be a present threat, **Orphanopoulos and Oliveri v Verwaltungsgericht Stuttgart**, **[2004] ECR 1999** and previous convictions are relevant:

> *"Only insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy".*

It is also relevant to note that in the **Secretary of State for the Home Department and Straszewski** **[2015] EWCA Civ 1245** Moore-Bick LJ at paragraph 13 confirmed that exceptions to the permanent right of residence based on public policy are construed restrictively and that public revulsion is not generally relevant to decisions to deport under EU law.

22. At paragraph 31 of the decision to make a deportation order it was specifically accepted by the Secretary of State that the appellant had the "middle level of protection" whereby his deportation needed to be justified on serious grounds of public policy or public security and as set out above.

23. At the hearing, to my mind correctly, Ms Chapman relied on, (albeit a Scottish case), **Goralczyk [2018] CSIH 60** at paragraph 22:

> *"22. Moore-Bick LJ's expectation that there should be stringent restrictions on a Member State's ability to remove an EEA national, including a 'foreign criminal', who has acquired the right to reside in the United Kingdom is borne out by the terms of the 2006 Regulations. In particular, a decision to deport an EEA national with a permanent right of residence may not be taken except on serious grounds of public policy or public security: regulation 21(3). Regard has to be had to the word 'serious', a point made by Mr Caskie when explaining the effect of the 2006 Regulations as being to establish three levels of rights and consequent degrees of protection against removal. A decision to remove a person who has resided in the United Kingdom for less than five years may be taken 'on grounds of public policy' but a decision to remove a person who has resided in the United Kingdom for more than five years cannot be taken 'except on serious grounds of public policy'. It follows that 'serious grounds' of public policy must mean something different from "grounds" of public policy, and it follows from that that the decision-maker must identify just what the relevant grounds are and then evaluate them as to their seriousness. Moreover, a relevant decision must be taken in accordance with the principles set out in regulation 21(5). Finally, in terms of regulation 21(6), before taking such a decision the decision-maker must take into account considerations such as the age, state of health, family and economic situation of the person, his length of residence in the United Kingdom and the extent of his links with his country of origin".*

24. It is also relevant to underline that the burden of proving that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society under Regulation 21(5)(c) of the EEA Regulations rests with the Secretary of State and that the standard of proof is the balance of probabilities, **Arranz (EEA Regulations- deportation -test) [2017] UKUT 00294**.

25. Even if the conduct represents a genuine and present and sufficiently serious threat affecting one of the fundamental interests of society, before taking a relevant decision the decision-maker must go on to take into account the considerations such as the age, state of health, family and the economic situation of the person, the person's length of residence in the UK, and their social and cultural integration in the UK, and the extent of their links with the country of origin. In all cases it is necessary to consider whether it is proportionate to proceed with removal in all the circumstances, and whether it is the least onerous method of achieving a legitimate aim. As held in **Essa (EEA: rehabilitation/integration) [2013] UKUT 316**, deportation must represent a present threat by reason of propensity to reoffend or an

unacceptably high risk of reoffending. The mere fact of a criminal conviction is not enough and with regards rehabilitation:

> *"34. If the very factors that contribute to his integration that assist in rehabilitation of such offenders (family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like) will assist in the completion of a process of rehabilitation, then that can be a substantial factor in the balance. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation".*

Specifically, the Tribunal must consider the relative prospects of rehabilitation, that is ceasing to commit crime when considering whether an offender should be deported, **Secretary of State for the Home Department v Dumliauskas & Ors [2015] EWCA Civ 145**.

26. In **MC (Essa principles recast) Portugal [2015] UKUT 520** the Upper Tribunal provided the following guidance:

> *"8. Gauging such prospects requires assessing the relative prospects of rehabilitation in the host Member State as compared with those in the Member State of origin, but, in the absence of evidence, it is not to be assumed that prospects are materially different in that other Member State (Dumliauskas [46], [52]-[53] and [59]).*
>
> *9. Matters that are relevant when examining the prospects of the rehabilitation of offenders include family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like (Essa (2013) at [34]). However, lack of access to a Probation Officer or equivalent in the other Member State should not, in general, preclude deportation (Dumliauskas [55]).*
>
> *10. In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (Dumliauskas [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide-ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (Dumliauskas at [46] and [54])".*

27. Mr Avery submitted that I should maintain the deportation order. The appellant's wife had not prevented him from offending, and he had previously worked whilst offending. Mr Avery referred to his extensive list of criminal convictions. I address these points in my reasoning below.

28. The appellant having been recruited in Sierra Leone, remained as a child soldier until he was able to escape in 2001. He arrived in the United Kingdom in 2001 and clearly

there is evidence that he was here in 2002 and has thus been in the United Kingdom since that time which is approximately 17 years. Despite his appeal being dismissed it was accepted at the hearing before the Immigration Tribunal in 2002 that he had indeed been forcibly recruited as a child soldier but owing to peace building activities he would no longer be at risk on return. He asserts that he was witness to atrocities during his time in effective captivity and there is no reason to disbelieve this.

29. Ms Chapman referred to the report of Ms Davies, the Consultant Forensic Psychologist, dated 3rd June 2019, and the report of Professor Katona dated 17th February 2016 who confirmed that the appellant had a diagnosis of post-traumatic stress disorder. Professor Katona confirmed at paragraph 7.3 and 7.4 of his report the following:

> *"7.3 In my opinion Mr M's PTSD has been caused by the traumatic experiences he had suffered in Sierra Leone while forced to be a child soldier. PTSD is almost invariable in former child soldiers (Derluyn et al 2004).*
>
> *7.4 These experiences have had a lasting impact on his psyche. He has a range of psychologically disturbing problems which are significantly compromising his social functional ability. His intrusive thoughts, his nightmares, and his flashbacks are particular indicators of psychological trauma and are unlikely to occur in the absence of such trauma".*

He also diagnosed the appellant in 2016 as having a cannabis use disorder and that the appellant would experience forced return to Sierra Leone as forced re-traumatisation and an increased risk of suicide in people with PTSD. It was concluded that there was a high risk he would attempt suicide with potentially fatal consequences if he lost hope of being allowed to remain in the UK with his wife who is his main source of emotional strength. That was prior to the birth of his younger daughter. Professor Katona recommended effective treatment of PTSD and associated depressive symptoms which included psychological treatment.

30. I thus accepted that the appellant presented, as Ms Chapman urged the court to do so, as a vulnerable witness particularly when giving his evidence before the court. Mr Avery made comment on the appellant not understanding the seriousness of his offending and lacking in acceptance of his offending but the appellant's presentation in court can conceivably have been affected by his PTSD and I note the report of Ms Davies below which did register the appellant's genuine remorse.

31. Is he a present threat and are there serious grounds to deport him? In relation to the offences the appellant has numerous convictions but almost entirely relating to the use and supply of cannabis, although that is not to indicate an underestimation of the use and supply of drugs. Most of the convictions date from prior to 2009 with two further convictions, one on 25th February 2015 at North London Magistrates Court where he was convicted of obstructing powers of search and possession of cannabis for which he was fined, and a second conviction on 22nd July 2015 at Blackfriars Crown Court where he was convicted, more seriously, of the index offence and sentenced to fifteen months' imprisonment. The appellant did not appeal either

conviction or sentence. It is noted that the cannabis related offence was committed in 2014, some five years ago. I do take note that at paragraph 7.7 in his report Professor Katona describes the appellant being forced to use cannabis when he was recruited as a child soldier and his offending is related to that drug use.

32. His former probation officer Ms Emily Fry wrote in a letter dated 24th May 2017 that the appellant's attitude was exemplary throughout his supervision on licence and that he demonstrated a determination to make a new positive future for himself. She described him previously on 4th August 2016 as being assessed as a low risk of serious harm. In the error of law decision, I made a criticism of those two reports from the probation officer on the basis that the author did not appear to be aware that the appellant had once again indulged in cannabis smoking.

33. I specifically asked Mr Avery at the hearing before me whether there was any reliance placed on the **Bouchereau** point such that a threat to public policy can exist even where there is no propensity on the part of the appellant to reoffend. Protecting society from crimes such as those that the appellant has committed, that is the supply of drugs, are clearly of a fundamental interest to society given that the nature of the offence involves drugs. I acknowledge that even a slight risk of the appellant reoffending could constitute a genuine and present and sufficiently serious threat to one of the fundamental interests to society. However, Mr Avery resiled from any reliance on **Bouchereau** considering that the offence was perhaps not serious enough, and although the appellant has on his own evidence had three terms of custody for supplying drugs in the form of cannabis the question is whether he presents a sufficiently serious threat affecting one of the fundamental interests of society and there are serious grounds for removing him.

34. I note from the OASys assessment which was printed on 25th September 2018 that the date on which the assessment was completed was on 12th May 2016. At that point it was noted that the purpose of the sentence was punishment rather than reduction of crime or public protection. The report made no reference to any form of violent offence and again recorded his very traumatic childhood experiences for which he used cannabis. His drug use, linked to his offending, was restricted to cannabis. The report also recorded two attempts at suicide. Specifically his risk of reoffending at that time was classified as low although the OGRS3 probability of proving reoffending over a two year period was given a medium category. Medium risk of offending is not minimal. It has, however, now been five years since his last conviction. The OASys assessment recorded that he was very motivated to address his offending, understood his offending and he was very capable of having the capacity to change and reduce his offending. The positive factors maintained he had a supportive relationship and stable accommodation.

35. The OASys report analysed in detail whether there was any risk of serious harm to others (that is the public) and based on the overall information in the report, it was identified that the appellant had not been convicted of any of the categories of offence listed as violent, sexual, possession of weapons, robbery or 'any other offence which is as serious'. The report identified that none of the further categories of risk

relating to significant events on page 30 of the OASys report applied. In the risk of serious harm screening his risk was classified as a risk of reoffending as low and the 'Layer 3' risk of serious harm screening noted under the question 'is there anything else about the offender that leads you to consider that a full analysis should be completed?' the answer was 'no'. Under the conclusion 'likelihood of serious harm to others': 'The full risk of serious harm analysis indicates the following risk' was followed by the insertion 'no data found'. That, I stress, relates to serious harm rather than no harm.

36. When assessing the risk of re-offending, I also take into account the evidence of the appellant's wife who following working as a casework manager at the Independent Office for Police Conduct (formerly the Independent Police Complaints Commission), started a legal training contract on 1st October 2018. I accept the credibility of her evidence owing to the responsible positions she has held and the consistency and cogency of her oral evidence.

37. She confirmed that her husband is now under the care of the community mental health team with increased help from a psychiatrist and a community psychiatric nurse. This followed a mental health crisis in the second week of September 2018. She gave evidence that he is now a hardworking family man and does not pose a threat to anyone. She confirmed that he spent most of his time now either looking after their child or working.

38. I also found the evidence of the appellant's mother-in-law to be entirely credible. She explained the devotion of the appellant to his wife and daughter, for whom he is the primary carer. The witness also has a responsible position in employment, are clearly aware of the appellant's past. Both were determined that the appellant has reformed.

39. I turn to the independent psychological risk assessment report of Lisa Davies dated 24th April 2019 and I give weight to that report. Lisa Davies is a well-qualified and experienced Consultant Forensic Psychiatrist and Director of Expert Psychological Services. She works in private practice and until July 2012 was contracted to work at the Dene Hospital medium secure unit and low secure and locked rehabilitation services. She has previously worked in high security at both Broadmoor and Rampton high secure psychiatrist hospitals undertaking research into the placement needs of men and women detained in high secure hospitals. She was also the Acting Treatment Manager for the cognitive self-change programme at HMP Kingston and has knowledge and experience of assessing suitability for the accredited offending behaviour programmes currently run in HM Prison Service. For these reasons, I found her report important, current and persuasive.

40. At 3.2.27 of her report Ms Davies stated that the appellant described intrusive symptoms of PTSD when seen by Professor Katona in custody and admitted to using cannabis to assist him with relief from his PTSD symptoms. He was referred to a counsellor and recommended to start CBT intervention for complex PTSD. He was also referred to a cannabis users support workshop. She also recorded at 3.2.28 that

the appellant received no adjudications during his time in custody and of having fully engaged with all supervision activities and appeared open and reflective with regards to his offending behaviour and the harm caused to the community. She also recorded that his dynamic risk of reoffending was assessed as low.

41. She recorded that the appellant commenced counselling in 2016 and now sees a counsellor regularly to talk about his experience of drugs, trauma and offending.

42. Of particular importance at 3.2.31 she recorded the appellant

> *"spoke positively of his engagement in counselling and reported that it has been helpful to him in understanding his experiences as a child soldier and his response to those experiences. He is awaiting an appointment with a psychiatrist and reported that he is keen to engage in further treatment when available to him. He expressed pride in his ability to achieve abstinence from cannabis whilst still experiencing a pronounced level of PTSD symptoms".*

43. Ms Davies reviewed the appellant's forensic history and confirmed that he had ceased to use cannabis since June 2017. He reported that he would never become involved in the supply of drugs in the future and had ceased all contact with individuals involved in the supply of drugs. He reported that he is committed to recovery and feels better in himself having stopped using cannabis (3.3.10).

44. Ms Davies confirmed that the appellant now keeps himself busy and distracts himself with cleaning and chores and he has managed to cope with his PTSD symptoms without using cannabis (3.4.3).

45. At 3.4.6 the report confirmed that

> "*Mr M is not currently subject to licence conditions and supervision by the National Probation Service as this expired on 21st October 2016. He is reported to have successfully completed his licence period*".

He identified his plans to include "*looking after my family, keeping working and live a normal life*" (3.4.8).

46. At 5.0.8 Ms Davies reported that she would "*concur with assessments of his risk of future violence falling in the low range"*, and at 5.0.9

> "*the OASys reconviction scores were now out of date due to the time that has passed since they were calculated*".

47. I accept that the OASys report itself may be dated (2016), but it maintains relevance in terms of the serious harm that could be caused by his offending, and those indicators I have discussed above and taken into account.

48. In particular, Ms Davies confirmed at paragraph 6.3 that having considered his offending behaviours on the Level of Service Case Management Inventory as current risk falling in the low range. He was considered to be at increased risk of reoffending in the event of a deterioration in his mental health and a return to

cannabis use when experiencing difficulties securing employment. However, protective factors to be maintained included his support of relationship with his wife, the stability of his accommodation and his willingness to work and engage with agencies.

49. Ms Davies set out at paragraph 7.2.3 a list or protective factors relating to work, financial management, motivation for treatment, attitudes towards authority, life goals and medication, all of which were present. The only one absent was leisure activities. At paragraph 7.3.1 external factors included social network, intimate relationship, living circumstances which were present. I noted that professional care was identified as absent but Ms Chapman referred to this as being in relation to the Probation Service.

50. In particular, Ms Davies confirmed that the appellant

> *"reports no current debts or financial concerns, there is no recent evidence of financial irresponsibility. He is engaged in regular and stable employment and reports intention to maintain his employment. He has distanced himself from criminal peer associations and abstained from illicit drug use since June 2017".* (8.4 of the report).

51. She added at 8.5 that the appellant does not express current pro-criminal attitudes and beliefs and expresses appropriate regret for his offences and acknowledgment of the harm caused.

52. I acknowledge Mr Avery observed that during his oral evidence the appellant appeared not to accept that smoking cannabis was an offence but bearing in mind the report of Lisa Davies at section 9, I can accept that the experience of giving evidence at court was possibly a stressful experience for him and have considered his oral evidence with that in mind.

53. In conclusion at 10.3 and 10.4 Ms Davies had this to say:

> *"10.3 Assessment undertaken in preparation of this report indicates that Mr. M currently presents a low risk of reoffending. He has expressed remorse for his engagement in acts of harm towards others and there is limited evidence to support the presence of antisocial attitudes and beliefs that drove his repeated use of cannabis. He accepts that he has been involved in the use of cannabis and the supply of cannabis to others. He denies ever being directly involved in the sale of drugs for financial gain. He admits to giving other individuals drugs from his own personal use supply in exchange for money. He admits that he has purchased cannabis and also been provided with cannabis, accommodation and food in exchange for his involvement in [indirect] drug supply. He was at the time of his offending vulnerable by virtue of his past trauma, had active PTSD that he was self-medicating with cannabis and was particularly vulnerable to exploitation by others.*
>
> *10.4 With respect to his risk of reoffending and risk of harm, having reviewed the evidence contained within the documents available and my own clinical assessment of Mr. M on 8th April 2019, in my psychological opinion, it is considered that Mr. M presents with a low level of risk for general (non-*

> *violent) offending. He presents with a low risk of causing serious harm at the current time. Protective factors are present for Mr. M that could reduce the risk of him committing further offences and assist him to maintain long term desistance from any further involvement in offences. Maintenance of supportive relationships with his wife, access to specialist trauma focused therapies and engagement in employment are considered important protective factors for Mr. M. There is a moderate to high level of protection available at the current time. I am fully in support of Mr. M being granted the right to remain in the UK, where he can access specialist trauma focused treatment to assist him in his long-term recovery from cannabis dependence and PTSD. I do not consider that the public in the UK would be exposed to an unacceptable level of harm in the event of Mr. M being allowed to remain in the UK".*

54. I found the report of Ms Davies well-reasoned and detailed and I give it weight.

55. **Goralczyk** held that the serious grounds must be made out and although drug supply on the streets of London is a serious matter, I am not persuaded, in the light of his current presentation that there are present and serious grounds on which to deport the appellant. I have factored in the various reports, including those cited and note **Kamki** which identified that even where the risk is low it is still legitimate for the Tribunal to find a sufficiently serious threat. **Kamki,** which involved deportation for a sexual offence (rape), clearly identified at paragraph 35 that the potential level of harm identified in the OASys report caused by the appellant's reoffending was relevant noting

> *'In the context of analysing the OASys report the meaning of the FTT is clear: the offender manager's view as set out in the report was in line with that of the judge, namely that the probability of the appellant re-offending is low ("the appellant is at low risk of offending"), but was also that the overall risk in relation to the commission of similar offences against vulnerable young females was high ("the risk in relation to committing similar offences [etc]"), in the sense of taking the probability of re-offending in combination with the serious harmful effects if it occurred. The FTT judge uses different language to reflect the two different senses of "risk";*

56. I have carefully considered the appellant's previous offending which I have set out in detail but in view of the evidence provided overall, I do not accept therefore that it has been shown that the appellant poses a genuine, present and serious threat such as the threshold of *serious* grounds of public policy or public security justifying his deportation are made out.

57. Even if that were not the case, when approaching the proportionality assessment, I also take into account the considerations of his age and his health. I take into account his background which I have outlined and the fact that he has lived here for over 17 years and now has a settled family life in their home bought in June 2017. Throughout the reports there were references to his increased vulnerability to suicide should he be returned to Sierra Leone where he has not lived for many years and then under traumatic circumstances. His attachment to his family is evident. A

significant alteration in his life will be the advent of his second child in August 2017. I accept that he has another child who was born in 2006/2007 but as explained by the appellant and his wife, he has been unable to see her for her own good for the last seven years, which in itself must have been problematical for the appellant. I accept the appellant's wife's evidence that the rupture in his relationship with his daughter was not the fault of the appellant's and done in order to assist the child.

58. The appellant has a clear attachment with his second daughter, and for whom he is the primary carer. I accept the evidence that he takes the child to nursery school and dovetails his work with that child. He spends much of his time with her and is the main source of child-care while his wife is working. The mother in law can only help intermittently as she herself is working. The care afforded by the appellant to his child was confirmed by the appellant's wife who is full time in her legal training contract. I accept that the child has a dependence on the appellant.

59. Article 24(3) of the Charter of Fundamental Rights of the European Union provides:

> *"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".*

60. The best interests of the child as set out by Section 55 of the Borders, Citizenship and Immigration Act 2009 require the best interests of the child to be considered not necessarily as a trump card but as a primary consideration. I accept that the appellant has weakened his social and cultural integrative links in the United Kingdom owing to his offending and imprisonment, but the child was born subsequent to his last conviction and appears to be a significant motivation in his life. It is axiomatic that the sins of the parent should not be visited on the child.

61. I accept that the appellant's wife was previously unable to prevent his re-offending, but it is clear from the reports that his relationship with her is a very supportive, and significant factor in his emotional wellbeing and she and he together provide a stable home for their child. It is in the child's best interests to remain in a stable home together with both parents and at her age to remain with her primary carer.

62. I accept owing to the lapse of time since he has been there that the appellant has minimal links with Sierra Leone and his family life would be completely severed should he be forced to return to Sierra Leone.

63. It is also the case that although there was no evidence before me as to the likelihood of rehabilitation in Sierra Leone that it would be significantly more difficult to access counselling and medical treatment in Sierra Leone particularly in the context of the reports which emphasised the risk of suicide. I take that seriously on the basis of the evidence of the appellant's wife.

64. The appellant has been in stable employment at Tesco working as a shelf filler since early June 2016, and he also is currently receiving support and treatment from his local community mental health team in order to help him with his childhood trauma.

65. His previous convictions alone are not sufficient grounds for a decision and I am not satisfied that the respondent has shown that there is in practical reality a risk of reoffending. Even if that were not the case it is five years since the last index offence and the appellant has undertaken significant work in showing his commitment to moving forward with his life and rehabilitation. He continues to work part-time and care for his daughter. I take into account his previous traumatic experiences and that he had not been diagnosed with PTSD until approximately two years ago. The appellant's daughter however and his key role as her primary carer is a very important protective factor guarding against him falling into making further potentially catastrophic and life changing choices.

66. As I state, he has been in the UK for over seventeen years in a stable and supportive relationship with his wife of eleven years and she is completing her legal training course in order to become a solicitor which must have taken great courage and determination in the face of such adversity.

67. In view of all of the above factors I find that the impact on the appellant's deportation will be severe on his family unit and the impact on his mental health would be to say the least difficult. As such, I also find that the decision to remove him under the EEA Regulations would be disproportionate.

68. Without the protection of the European Economic Area Regulations the appellant would be subject to an automatic deportation order under Section 32 of the UK Borders Act 2007. The facts are those relevant at the date of hearing. It is self-evident that the proposed removal will be an interference with the exercise of the applicant's right to family life and the interference will have a consequence of such gravity as to engage the operation of Article 8. The deportation ostensibly is in accordance with the law (in the event that the provisions under the EEA Regulations were not met) and necessary for the prevention of crime and disorder. The position of the Secretary of State in relation to Article 8 is set out under the Immigration Rules. Under paragraph 398 of the Immigration Rules where a person claims their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Act and the appellant was convicted of an offence for which they have been sentenced to a period of less than four years but at least twelve months, the Secretary of State will in assessing that claim consider whether paragraph 399 or 399A applies and if it does not the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

69. Further to paragraph 399, the appellant has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK and is a British citizen. I have no hesitation in concluding that it would be unduly harsh for the child to live in Sierra Leone and no-one contended otherwise.

70. **<u>KO</u> (Nigeria) [2018] UKSC 53** confirmed that unduly harsh clearly intended to introduce a higher hurdle than of reasonableness under Section 117B(6) and that one was looking for a degree of harshness going beyond what would necessarily be

involved for any child faced with the deportation of a parent. The reference in **MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC)** referred to an evaluative assessment required by the Tribunal and that

> *"By way of self-direction, we are mindful that unduly harsh does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather it postulates a considerably more elevated threshold. Harsh in this context denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Further the addition of the adverb unduly raises an already elevated standard still higher".*

71. As the primary carer for the child, who is now nearly 2 years old, I also conclude that it would be unduly harsh for the child to remain in the UK without the person who is to be deported, that is the appellant. The appellant speaks English and is financially independent. The evidence of Ms Davies confirmed that parental absence can have a profound impact upon children and the importance of children being well equipped with human and social capital for success as they enter school and society. I accept the evidence of the wife of the appellant and I note that she confirmed the devastating effect it would have on the child, and on the family which in turn would affect the child yet further, should the father be removed.

72. Both under the Immigration Rules at paragraph 399 and in relation to Section 117C I conclude that the removal of the child from her father, as a primary carer, for the reasons given above would be unduly harsh.

73. For the reasons given above I allow the appeal.

Decision:

I allow the appeal of Mr M under the Immigration (European Economic Area) Regulations 2006 and on human rights grounds.

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

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

Signed Helen Rimington Date 3rd July 2019

Upper Tribunal Judge Rimington

TO THE RESPONDENT: FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because of the complexity of the issues.

Signed *Helen Rimington* Date 3rd July 2019

Upper Tribunal Judge Rimington