IAC-AH-SC-V2

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00110/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 7 October 2021	**On the 17 November 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

PPK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Jaisri, Counsel, Direct Access
For the Respondent: Mr T Lindsay, Home Office Presenter Officer

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

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1. The Appellant is a citizen of Poland. His date of birth is 14 April 1982.

2. Upper Tribunal Judge Jackson granted the Appellant permission to appeal against the decision of the First-tier Tribunal (Judge Buckwell) which was promulgated on 30 December 2019 dismissing his appeal against the Secretary of State's decision dated 17 June 2016 to deport him under the Immigration (European Economic Area) Regulations 2006. The deportation order is dated 6 July 2016. The matter came before me to determine whether the First-tier Tribunal made an error of law.

3. The Appellant claims to have entered the UK in 2011. On 6 July 2016 the Secretary of State made a deportation order against the Appellant as a consequence of his convictions on 1 June 2015 at Chichester Crown Court of conspiracy to commit burglary and failing to surrender to custody at an appointed time. On 17 February 2016 he was sentenced to ten years and four months' imprisonment. Between 19 September 2011 and 16 May 2012 the Appellant was involved in a conspiracy to burgle up to 57 houses in the West Sussex area. The burglaries were all committed at night, often with children present and in close proximity to each other. High monetary value items were stolen (in one burglary over £25,000) and items of exceptional sentimental value. During the 57th burglary, the occupant was sprayed with CS gas when he noticed a disturbance in his home. The Appellant failed to attend the Crown Court to be sentenced on September 2015.

4. The Secretary of State relied on the Appellant's previous convictions in Poland between 29 June 2001 and 10 September 2008. He has been convicted of offences on five occasions. The offences range from attempted robbery, burglary, obtaining property by deception, using threatening, abusive, insulating words or behaviour with intent to cause fear or provocation or violence and possessing a firearm without a certificate. He received custodial sentences of between 24 and 30 months' imprisonment.

The hearing before the First-tier Tribunal

5. The Appellant's appeal came before the First-tier Tribunal. At the time the Appellant was a serving prisoner at HMP Pentonville.

6. At the hearing before the First-tier Tribunal the Appellant gave evidence as did his partner, EK and their friends VN, TG and ES. The Appellant was not represented. He gave evidence through a Polish interpreter.

7. The Appellants said that his due release date was 16 April 2021. He came to the UK in September 2011 to seek a change of life and to "turnover a new leaf". He had family members here. He has been continuously employed since May 2012. He had worked in various capacities in the Bognor Regis area. He had been employed by his friend (VN) as a welder. He met his partner EK in May 2012. The Appellant said that he felt guilty about his criminal conduct which he had turned to because he was unemployed. He had been sent to Bognor Regis by his brother but the conditions there were poor. He had financial difficulties and had to repay debts. During his

detention in HMP Maidstone his partner and children visited him once a month. Before then he was in HMP Pentonville and they visited more often.

8. In cross-examination the Appellant said that his co-defendant whom he knew from Poland had drawn him into criminality. He considered his culpability in relation to between 22 and 30 burglaries, not 57. His involvement was attributed to having to repay debts. He owed £5,000 to a person who has been deported from the UK following his involvement in human trafficking.

9. The Appellant was not with his partner at the time he committed offences. They began to live together from May 2012. He relied on an OASys assessment. He said that a course relating to "thinking skills" had not been made available to him. The Appellant said he was last employed in 2015. He had his own business which was in construction including joinery and painting and decorating. He spent a lot of time in prison in Poland and although he had previously worked there he did not believe that he could start again should he return. Because of his criminality he would be stigmatised. He accepted that he could undertake some form of work in the construction industry in Poland but that would be as a labourer. The Appellant's evidence is that he no longer has friends in Poland with the exception of a female cousin.

10. The Appellant's partner gave evidence. She is Latvian. She met the Appellant after the commission of the offences. She said that he would not have committed crimes had they been together at the time. They have two daughters, P, (date of birth 30 August 2007) and, V (date of birth 9 May 2014). They are settled here but have Latvian citizenship. P is the Appellant's stepdaughter. She has no contact with her birth father who is a Russian citizen. V has language difficulties

11. In respect of the failure by the Appellant to attend the sentencing hearing in 2015 the judge took into account that he was in a relationship with his partner at the time and stated at para. 132;-

> "I note that that situation did not appropriately encourage the Appellant to comply with lawful requirements, including his required attendance before the Crown Court for sentence. The attitude of the Appellant, generally to the need to comply with the law was not shown by his failure to attend at the Crown Court in September 2015."

12. The judge at para. 133 stated that the Appellant placed considerable emphasis on his family circumstances. The judge took into account that the Appellant presented a "medium risk" according to the OASys assessment.

13. The judge concluded, at para. 137, having looked at the evidence "in the round" that taking full account of proportionality with reference to the EEA Regulations the Respondent had discharged the burden. The judge noted that the offences were very serious and the number of offences committed must be part of his consideration. The judge found that the Appellant could return to Poland where he accepted in evidence

he could find employment. His partner and their two children could go to Poland with him or they could remain in the UK without him.

14. The judge went on to consider Article 8 ECHR (para. 139). The judge found that there is a genuine and subsisting relationship between the Appellant and an EEA citizen lawfully present in the UK and a genuine and subsisting parental relationship with two settled children (para. 142). The judge considered whether deportation would be unduly harsh having directed himself on the law with reference to PG (Jamaica) [2019] EWCA Civ 1213.

15. At para. 143 the judge stated "… Exception 2 itself is not met in view of the behaviour and risk which the Appellant represents, the separation would not be unduly harsh. Accordingly very compelling circumstances beyond those required in relation to a consideration for Exception 2 do not apply".

16. The judge went on to consider proportionality outside of the Immigration Rules and found as follows:-

> "144. I find there to be no other basis on which the decision of the Respondent could be found to be disproportionate in the consideration of Article 8 ECHR family and private life rights outside the EEA Regulations. In considering proportionality overall I have taken an accumulative approach, following the Court of Appeal's guidance in Lal [2019] ECWA Civ 1925. The best interests of the children have been taken into account. A breach of Article 8 ECHR rights does not occur. Reliance upon Article 8(2) ECHR applies. Unjustifiably harsh consequences do not arise from the decision. The duty under Section 6 of the 1998 Act has not been breached."

The Grant of permission

17. The grant of permission is a partial grant on Article 8 grounds only. The judge granting permission found that it was arguable that the First-tier Tribunal erred in law in its assessment of whether the Appellant's deportation would be a disproportionate interference with his and his family's rights under Article 8 with reference to s.117C of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) given the reference in paragraph 143 of the decision to a finding that deportation would not be unduly harsh because of the behaviour and risk posed by the Appellant. That approach is contrary to the Supreme Court's decision in KO (Nigeria) and SSHD [2018] UKSC 53. The judge granting permission stated that that error arguably flows into the finding that there are no very compelling circumstances. The judge also found that there was no separate consideration of the unduly harsh test in respect of the partner and children individually and that there is no express consideration of whether remaining in the United Kingdom without the Appellant would be unduly harsh or as to relocating with him to Poland or Latvia.

18. The Appellant was not granted permission on ground 1 (a failure to consider material evidence) or ground 3 (he was unrepresented). He was granted permission on ground 2 in so far as it relates to Article 8 ECHR. The Appellant was not granted

permission to challenge the decision to dismiss the appeal under the EEA Regulations.

The Law

19. KO is binding authority that the assessment of unduly harsh in the context of s.117C (Exception 2) of the 2002 Act is self-contained (see para. 22 of Lord Carnwath's judgement)[1]. It is a child centred assessment without consideration of the Appellant's criminality. It is not a balancing exercise.

20. The Court of Appeal in HA (Iraq) v Secretary of State [2020] EWCA Civ 1176 has given the following guidance to the meaning of unduly harsh: -

> "51. The essential point is that the criterion of undue harshness sets a bar which is 'elevated' and carries a 'much stronger emphasis' than mere undesirability: see para. 27 of Lord Carnwath's judgment, approving the UT's self-direction in *MK (Sierra Leone)*, and para. 35. The UT's self-direction uses a battery of synonyms and antonyms: although these should not be allowed to become a substitute for the statutory language, tribunals may find them of some assistance as a reminder of the elevated nature of the test. The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including medium offenders): see para. 23. The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest.
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> 52. However, while recognising the 'elevated' nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as

[1] 117CArticle 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

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

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

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

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

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

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

high as that set by the test of 'very compelling circumstances' in section 117C (6). As Lord Carnwath points out in the second part of para. 23 of his judgment, disapproving *IT (Jamaica)*, if that were so the position of medium offenders and their families would be no better than that of serious offenders. It follows that the observations in the case-law to the effect that it will be rare for the test of 'very compelling circumstances' to be satisfied have no application in this context (I have already made this point – see para. 34 above). The statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal (see Lord Carnwath's reference to section 117B (6) at the start of para. 23) and the (very high) level applying to serious offenders.

53. Observations of that kind are, I hope, helpful, but they cannot identify an objectively measurable standard. It is inherent in the nature of an exercise of the kind required by section 117C (5) that Parliament intended that tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be 'unduly harsh' in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value."

21. The Court of Appeal in NA (Pakistan) v SSHD [2016] EWCA Civ 662 stated as follows in respect of s.117C (6):

"28. The next question which arises concerns the meaning of 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. The new para. 398 uses the same language as section 117C(6). It refers to 'very compelling circumstances, over and above those described in paragraphs 399 and 399A.' Paragraphs 399 and 399A of the 2014 rules refer to the same subject matter as Exceptions 1 and 2 in section 117C, but they do so in greater detail.

29. In our view, the reasoning of the Court of Appeal in *JZ (Zambia)* applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that 'there are very compelling circumstances, over and above those described in Exceptions 1 and 2'. As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in

Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of Article 8.

31. An interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament's intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having regard to the guidance given by the ECtHR in *Maslov v Austria* [2009] INLR 47, and hence highly relevant to whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2.'

…

33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.

34. The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in *Secretary of State for the Home Department v CT (Vietnam)* [2016] EWCA Civ 488 at [38]:

> 'Neither the British nationality of the Respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation.'

35. The Court of Appeal said in *MF (Nigeria)* that paras. 398 to 399A of the 2012 rules constituted a complete code. The same is true of the sections 117A-

> 117D of the 2002 Act, read in conjunction with paras. 398 to 399A of the 2014 rules. The scheme of the Act and the rules together provide the following structure for deciding whether a foreign criminal can resist deportation on Article 8 grounds.
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> …
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> 37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2' as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6).

The Rule 24 Response [2]

22. The Secretary of State accepts that the judge has not conducted a detailed enquiry with regards to whether the Appellant's separation would be unduly harsh; however, it is submitted that any consideration of the issue would have led to the same conclusion because there is a paucity of evidence to show that there would be any unduly harsh effect on the family. The evidence shows that whilst the Appellant's daughter is receiving support for speech and language and toileting issues there is no evidence to show that any issue has prevented the children from being able to continue with their education; access services or maintain their day-to-day activities. They have both received support. The youngest child's condition is improving. There was no evidence to suggest that the issues the children were currently facing could not be resolved or adequately managed or that the impact that they are having is adversely detrimental to their health and wellbeing. The Appellant's partner has been able to maintain the family in the Appellant's absence. There is no evidence to show that she has not been able to meet their basic needs, maintain their health or access relevant support and services. The highest the Appellant's case is put, is that the family would not be able to manage in his absence, despite them having done so since his incarceration.

Submissions

23. Mr Lindsay conceded that the judge erred in law with reference to what is said at para. 143. However, he submitted that this was not a material error for the following reasons:-

    (i) The judge carefully considered the evidence and the effect of deportation.

    (ii) There was no independent social worker's report.

[2] Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008

(iii) The Appellant was in custody serving a sentence at the time of the hearing and had been for four years. The decision to deport him maintained the status quo.

(iv) The Appellant is a serious offender and only properly identified very compelling circumstances would enable him to succeed.

(v) Friends of the Appellant attended the hearing to give evidence. The Appellant's wife and children would not be isolated should they remain here.

(vi) He relied on the points raised in the Rule 24 to support that the error is not material to support his assertion that had the judge allowed the appeal the decision would have been perverse on the evidence before him.

24. I asked Mr Jaisri to address me in respect of materiality in the light of the Respondent's concession. He pointed out that the Appellant was not represented at the hearing before the First-tier Tribunal. Mr Jaisri said he was in some difficulty because there were no witness statements before the First-tier Tribunal. He said that he was unaware of the evidence that was before the judge other than what is in the decision. However, he said that there was "a paucity of conclusions made on the facts". He said that there was no assessment of the Appellant's children or partner's circumstances.

Conclusions

25. The Appellant's case is that his deportation would breach his rights under Article 8 ECHR. He relied on his relationship with his children and his partner. The relationships were found to be genuine and subsisting and the Appellant relied on Exception 2 of s.117C of the 2002 Act. However, the Appellant's appeal could only succeed if he were able to establish that there are very compelling circumstances over and above those described in Exceptions 1 and 2 (s.117C(6)) because he is a foreign criminal who has been sentenced to a period of imprisonment of at least four years. However, whether the impact of deportation would be unduly harsh is a material part of that assessment. When assessing whether the impact would be unduly harsh the law is set out in KO where the Supreme Court found that unduly harsh in this context is self-contained. In the instant case the judge erroneously took into account the Appellant's criminality rather than focussing on the impact of deportation on the children or partner. This is an error of law, as properly conceded by the Secretary of State.

26. However, there is no need for me to interfere with the decision of the First-tier Tribunal unless the error is material to the outcome. Which means that there is a possibility that had the judge not made the error he would have reached a different conclusion. I gave the parties the opportunity to address me on materiality. Mr Jaisri did not explain to me how had the judge applied the correct test, there was a chance that he would have reached a different outcome. My understanding of his submissions on the materiality point is that the judge made insufficient findings on the evidence. My attention was not drawn to evidence that the judge did not take into account. He did not seek to explain what further findings of fact the judge should have made on the evidence before him. It was not advanced that the judge

did not resolve matters of conflict. The grant of permission relates to the judge having failed to apply the correct legal test, which is accepted by the SSHD. The insufficient findings made by the judge relate to the application of the legal test. There is no properly articulated argument challenging the judge's findings on the evidence or establishing that the judge did not make sufficient findings on the evidence before him. It is in the application of the legal test where the judge erred. The judge made findings on the evidence that are sustainable. There is no reason to interfere with these.

27. There was limited evidence before the judge. The grounds of appeal before the judge are in reality a lengthy statement from the Appellant responding to the SSHD's decision letter to which the Appellant attached evidence that the family was living together prior to his incarceration. The Appellant said that the children are healthy but brought to the judge's attention additional needs which related to their emotional well-being. The Appellant submitted documents from the children's schools. The Appellant's case is that the family could not relocate to Latvia because the children do not speak Latvian. Similarly they could not relocate to Poland because they do not speak Polish. The education system in Poland is different to that in the United Kingdom.

28. The Appellant gave evidence about V's speech difficulties and P's emotional problems. The judge heard oral evidence from the Appellant's partner. He had before him a letter from her to the Home Office. In this letter she explains that P was very upset when the Appellant was imprisoned and she lost interest in life. She said that the Appellant took care of the family. She described the impact of the Appellant's relationship on P who considers him to be her father. (There was before the judge a letter from P dated 10 August 2016). She said that without the Appellant she would not be able to pay the rent. The family would have nowhere to live in Poland or Latvia. They cannot imagine life without the Appellant. She wants her children to have a father.

29. The evidence was not challenged. The judge accepted that the Appellant has two daughters and that they both have problems identified by the witnesses. It was not challenged that the separation of the family following the Appellant's incarceration was very upsetting and had repercussion on all. This was supported by the Appellant, his partner and other witnesses.

30. The judge did not focus his mind on the correct test. The starting point is that it is in the children's best interests to remain here in the United Kingdom with both of their parents. However, there is no evidence brought to my attention or in the papers submitted with the appeal that could have resulted in a decision that the impact of deportation on the family in the context of both the family leaving the United Kingdom or the Appellant's wife and children remaining here without him would be unduly harsh, properly applying the test in KO as explained in HA.

31. At the time of the hearing before the First-tier Tribunal (2019) the family had been separated since the Appellant's imprisonment in 2016. At that time deportation

would potentially have extended this period of separation; however, even if the appeal was allowed the family would have remain separated until the Appellant's release in 2021.

32. The family was devastated by their partner/father being separated from them as a result of imprisonment. The problems relating to P may have been exacerbated by her father's incarceration and there is no doubt that all the family members suffered. My attention was not drawn to evidence that the judge did not take into account in respect of the children or the Appellant's partner. The Appellant's children have various problems which may have been exacerbated by his incarceration. The Appellant's partner may have difficulty paying the rent and meeting the family's needs as a single parent. However, at the time of the hearing before the First-tier Tribunal the family was adapting to life without the Appellant. Further separation following deportation would no doubt cause further distress and unhappiness, but the evidence before the judge did not meet the elevated test.

33. The judge found that the family could relocate to Poland (or Latvia). While he did not address the legal test in respect of the children or the Appellant's partner, the evidence before the judge did not establish that the test of unduly harsh was met. The Appellant's evidence was that he could find work in Poland. For the children there would be difficulties with language and continuing their education in a new country. His partner had relocated to the United Kingdom from Latvia and there was no evidence that should she relocate to Poland this would be unduly harsh on her or the children, properly applying the elevated test. There was no evidence that any stigma attached to the Appellant in Poland would adversely impact on his children or partner so as to satisfy the unduly harsh test.

34. There was no evidence that the harshness which deportation will cause for the Appellant's partner and/or their children is of a sufficiently elevated degree to outweigh the public interest.

35. In any event, this appeal can only succeed if the Appellant could establish very compelling circumstances over and above in the context of s.117C (6) of the 2002 Act. Mr Jaisri was unable to point to any circumstances in this case that could amount to compelling circumstances. Of course, it is necessary when making this assessment to take into account that this Appellant was sentenced to a very long custodial sentence for very serious offences. The sentencing judge said. "it is clear that it was organised, persistent offending over a long period of time with multiple victims and justifies being taken far outside the range of Category 1 burglary offence". There was no evidence before the judge capable of amounting to very compelling circumstances, taking into account the very serious nature of the offences committed by the Appellant. There were no circumstances sufficiently compelling to outweigh the high public interest in deportation. The judge's finding in respect of risk of offending with regard to the OASys assessment and the Appellant's attitude with reference to his having failed to attend court in order to be sentenced in 2015 are lawful and sustainable.

36. I agree with Mr Lindsay that the error made by the judge is not material. The making of the decision concerned involved the making of an error on a point of law. However, there is no need for me to set aside the decision of the judge, because I am satisfied that had he applied the correct test he would have reached the same conclusion.[3] The error is not material.

37. The Appellant's appeal is dismissed.

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

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

Signed *Joanna McWilliam* Date 3 November 2021

Upper Tribunal Judge McWilliam

[3] The Tribunals, Courts and Enforcement Act 2007

Section 12 Proceedings on appeal to Upper Tribunal

(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The Upper Tribunal—

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either—

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision.

(3) In acting under subsection (2)(b)(i), the Upper Tribunal may also—

(a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;

(b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.

(4) In acting under subsection (2)(b)(ii), the Upper Tribunal—

(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and

(b) may make such findings of fact as it considers appropriate.