Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00180/2019 (V)

THE IMMIGRATION ACTS

Heard by a remote hearing	**Decision & Reasons Promulgated**
On 23 April 2021	**On 3 June 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M I H

Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer.
For the Respondent: Mr Georget, Counsel instructed on behalf of the respondent.

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal (Judge Welsh) promulgated on 23 April 2020. By its decision, the Tribunal allowed the Appellant's appeal against the

Secretary of State's decision, dated, 18 March 2019 to deport him from the United Kingdom.

Introduction:

2. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Mr Hotak as the appellant, reflecting their positions before the First-tier Tribunal.

3. The First-tier Tribunal did make an anonymity order without giving any reasons in the decision. The Upper Tribunal gave directions for the appellant's representatives to provide grounds as to why an anonymity direction was necessary. At the hearing, Counsel Mr Georget informed the Tribunal that he did not seek to advance any grounds as to why such an order would be necessary.

4. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Mr Hotak as the appellant, reflecting their positions before the First-tier Tribunal.

5. The decision to deport was made under Regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The appellant's case was that the decision was not in accordance with Regulation 27 and Schedule 1 of the Regulations, and/or that it was incompatible with his rights under Article 8 of the Convention, and thus unlawful by reason of S.6 of the Human Rights Act 1998.

6. By a decision and reasons promulgated on the 23 April 2020, the FtTJ (Judge Welsh) allowed the appeal, and whilst finding that the respondent had established that the appellant represented a genuine, present, and sufficiently serious threat to public policy or security, for reasons of proportionality he reached the conclusion that his deportation was not justified or proportionate under the Regulations.

7. The Secretary of State appealed and permission to appeal was granted by the First-tier Tribunal (Judge Buchanan) on the 20 May 2020.

8. The hearing took place on 23 April 2021, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

9. I am grateful to Mr Diwnycz and Mr Georget for their clear and helpful written and oral submissions.

Background:

10. The Appellant is a citizen of the Netherlands. The appellant's personal history is set out in the decision letter and the decision of the FtT (Judge Welsh). The appellant's father moved from Afghanistan to the Netherlands. The appellant, his mother and siblings joined him in that country in or about 1996 or 1997. At the time the appellant left Afghanistan he was five years of age.

11. Throughout the time they lived in the Netherlands they lived as a family unit until December 2006 and the family relocated to the UK.

12. It is stated that the appellant's father shortly after this time left the family home and returned to the Netherlands.

13. On 26 July 2018 the respondent notified him of the intention to make a deportation order pursuant to Regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") following his conviction after trial, on 17 July 2018 of the offence of assault occasioning actual bodily harm which he was sentenced to a term of improvement of 30 months. By the date of his conviction, he had been convicted on four occasions for nine offences. The offences and those convictions date from 9 December 2004 to 15 December 2010 and comprise two offences involving acts of violence, four offences relating to damage to property and two offences of dishonesty. He was also reprimanded on 18 December 2008 for an offence of battery.

14. The appellant's legal advisers submitted representations on his behalf in a letter dated 14 August 2018, and 21 January 2019. The summary of the representations made are set out at [3] of the FtTJ's decision.

    (1) That the appellant's family fled to the Netherlands as refugees from Afghanistan when the appellant was very young.

    (2) The appellant and his rest of his family with victims of domestic violence at the hands of the appellant's father.

    (3) The family moved to the UK in December 2006 when the appellant was 15 years of age.

    (4) He lives with his mother and siblings.

    (5) He has built up a strong network of friends since his arrival.

    (6) He has a mental health condition.

    (7) He is a registered care of his mother who suffers from physical and mental abilities.

    (8) With the assistance of his family in the appropriate care and support in the UK, he can be rehabilitated.

15. In a decision taken on 18 March 2019, the respondent rejected the appellant submissions.

16. In relation to his length of residence, the respondent considered that the appellant had not demonstrated that he had been living in the United

Kingdom for a continuous period of 10 years or that he had acquired permanent residence. Consequently, the relevant decision was taken on grounds of public policy. By reference to schedule 1 of the 2016 regulations, the respondent determined that the appellant's offending behaviour, his convictions, his response to sentences and the assessment of risk by the probation service demonstrated that there was a real risk that he would offend in the future and thereby pose a genuine, present, and sufficiently serious threat to the fundamental interests of the UK society.

17. As to the issue of proportionality, the respondent considered that the decision to deport was proportionate and justified having taken into account evidence as his mental health, the lack of social and cultural integration into the UK, that English is widely spoken in the Netherlands so he would be able to form a private life and secure employment and that he would have access to the Dutch welfare system

18. Separate consideration was given under Article 8 of the ECHR.

19. The appellant appealed the decision, and his appeal came before the First-tier Tribunal (Judge Welsh) on 23 January 2020. During the course of the hearing, he heard evidence from the appellant, his younger sister and his older sister alongside documentary evidence submitted on behalf of the appellant and that of the respondent (identified at [11]).

20. The FtTJ's assessment and factual findings are set out between paragraphs [15] – [65].

21. The FtTJ's assessment began with the issue of residence. The judge found and recorded that counsel on behalf of the appellant accepted that the appellant could not demonstrate a right of permanent residence under Regulation 6. It appears that it was argued on behalf of the appellant that Regulation 8 applied. The factual basis being that the appellant had lived as part of the same household as his sisters whilst in the Netherlands and that he had been both dependent on his sisters and living in the same household as them since have been resident in the UK. At paragraphs [15 – 19] the judge set out his conclusions on that issue and having applied the decision in AA (Algeria) v SSHD [2014] EWCA Civ 1741, he concluded that whilst in the Netherlands, the appellant and his sisters were living in the parents' household and thus the appellant could not satisfy the requirements of Regulation 8 and thus could not establish a permanent right to reside in the UK. It follows from that submission that the relevant decision was therefore taken on grounds of public policy.

22. At paragraphs [20 – 36] the FtTJ undertook an assessment of whether the appellant presented a genuine, present, and sufficiently serious threat affecting the fundamental interests of society, namely maintaining order, preventing social harm, and protecting the public. His conclusion was in the affirmative and set out his reasoning by reference to the evidence before him.

23. The judge found him to be a persistent offender have been convicted of 10 offences and one reprimand between December 2004 and July 2018. He did not find the offending of seven years between the commission of the offence of attempted robbery in 2009 and the commission of the offence in February 2007 to break the chain of offending. However, he concluded that the index offence was similar in nature and seriousness to previous offending and thus it marked a "resumption of past behaviour not an aberration in the behaviour of an otherwise changed man."

24. The judge set out the sentencing remarks relevant to the most recent offence at [23] noting that the appellant with a friend of his played an equal and similar role in an unprovoked attack on the victim. Whilst the knife had not been used, the judge found that it was produced by or to the appellant, his co-defendant having threatened to stab the victim. The judge noted that the appellant did not accept responsibility for his part in the offence and the view set out in the PSR was of the same view reported in the OASys's assessment.

25. By reference to his medical records at [27] the FtTJ summarised the relevant factual issues namely that he had a long-standing history of reacting inappropriately to conflict or perceived conflict combined with the abuse of alcohol. Whilst in custody issues around conflict were discussed, the judge found that the comments made demonstrated an inability to control his temper and gave examples at [28].

26. In making an assessment of risk, the judge gave significant weight to the assessment made by the probation officers which was that he presented a medium risk of serious harm to public. However, the judge recorded that his behaviour had notably improved in the last two months of custody; he was recorded as spending his time productively and not demonstrating a negative attitude towards staff and having no issues with other prisoners.

27. At [31] the FtTJ considered whether intervention could assist the appellant made reference to a 12-month supervision order that was imposed which led to a significant period of seven years when he did not offend. Judge also considered that during that period he grew up given that the time of the offence he was 17 years of age. The judge also considered as assessment about the absence of real change in attitude and that it needed to be considered in the context of the fact that he had not had any substantial therapeutic intervention whilst in prison or on licence. This was based on the evidence from the probation service and stated that he had not completed any programs because of funding shortages and that he remained on a waiting list.

28. The FtTJ then consider the issue of proportionality of the decision balancing the public and policy and public security requirements with the factors relevant to his private life, family live in those matters set out in Regulation 27 and Schedule 1 to the Regulations.

29. Dealing with family life, the FtTJ set out his assessment of this issue at paragraphs [38]-[47]. He found that the appellant's ties with his family in the UK were "very strong" and that there was a "mutual dependency between family members that would not ordinarily be expected in a family where the children are adults". The judge found as ties of dependency to be as a result of the extremely difficult circumstances experienced by appellant and his family throughout their lives. The judge made reference to the circumstances in which the family had to flee Afghanistan and that they suffered brutality at the hands of the pen's father which led to the appellant assuming a protective role towards mother and siblings putting their needs above his own.

30. The judge recorded that he found the evidence given by the appellant and his family members concerning this background to be both "credible and reliable" being supported by documentary evidence, not undermined by any consistency lack of detail inherent plausibility and that the witnesses and evidence given support was done honestly and "without exaggeration".

31. At [40] the judge found that the appellant and his family had always lived as a family unit and that their flight from Afghanistan to the Netherlands in 1996 to avoid persecution. As a result of the domestic circumstances which were "extremely difficult" led to the appellant taking a caring role in relation to his mother and siblings, far beyond that which should be expected of a child. The nature of the abuse is set out at paragraphs [41]-[42].

32. At [43 – 44] the FtTJ concluded that the evidence before him demonstrated that the emotional consequences of the unsettled and violent family life was severe for all family members and that the appellant had reported trauma prior to the custodial sentence. Reference was made to the appellant's mental health and the effect upon family members. When the family were abandoned by the appellant's father, it led to the appellant taking on a caring role which had been of particular importance to the family as a result of the appellant's mother's disabilities. References also mater her serious ill-health at [44]. References further made to the role undertaken by the appellant within the family home and how that affected and assisted the other family members involved.

33. The FtTJ at [46] considered the appellant's position within the household and from the conclusion that this was as a result of him having chosen to take on the responsibility and to accept the "self-sacrifice" that it had entailed. He also concluded that the school records demonstrated that the appellant had exhibited a positive attitude and was clever; he had studied between 2007 – 2011 and evidence demonstrated that he had provided a high level of commitment, was respectful and was positive to both teachers and other students.

34. At [47] the judge concluded that the evidence demonstrated the family members enjoyed an unusually strong emotional and practical ties and

that the deportation of the appellant would have a "significant adverse effect on him and his family."

35. The FtTJ addressed the issues of the appellant's private life at [48] – [57]. The judge reached the conclusion that the appellant was socially and culturally integrated into the UK and that there would be impediments to his integration into the Netherlands.

36. He set out his reasoning within those paragraphs taking into account his history and having arrived as a family in 2006 and that he had remained in the UK ever since. The judge took into account his length of residence of 13 years and gave significant weight to that factor not only on account of the length of time but because of his age and his previous history. The judge found that this was the longest period of time that he had spent in any country. Taking into account his age when he arrived in the Netherlands, he concluded that "the focal point of his life with his family, not the wider community".

37. The judge also considered that the extent of his integration was demonstrated by the fact that despite not coming to the UK until 15 he was perfectly fluent in English. The appellant had studied in the UK until 2011 when he assumed the role of carer for his mother. The judge considered the evidence, including the documentary evidence which he found demonstrated that the appellant was fully integrated into college life, for a good relationships with teachers and other students. He obtained qualifications and the judge gave "significant weight" to his participation, his studies and positive attitude to other students and staff and found that his "life experience to date must have required showed great fortitude to engage so positively."

38. Against those positive factors, the judge took into account the absence of wider integration from 2011 observing that it was partly explained by his role within the family as a carer. However, the judge took into account the commission of his criminal offending at the end of that period and also the index offence which had led to the proceedings for deportation (at [51]).

39. Having balanced the relevant factors, judge concluded that he gave "far greater weight to the positive indications and the negative ones" and concluded overall that "he was socially and culturally integrated in the UK".

40. At paragraphs [53 – 57] the FtTJ set out his reasoning in support of his conclusion the personal circumstances of the appellant were such that there would be impediments to his integration into the Netherlands.

41. He identified a number of factors; that the appellant social integration into the Netherlands was limited and he had not preserved any ties to that country. His time there was during a period when because of his age, his family rather than the community would have been the focal point of his life and that the separation for the wider community was intensified by the

fact that both he and his family members entered as foreigners thus they would not have been able to assist him to adapt. Reference was also made to the conduct of the appellant's father (at [54]). The judge took into account his education but that it was limited by events that occurred whilst at school and set out at [55].

42. The judge considered the evidence that pointed the other way which included his ability to communicate would only be slightly read restricted and that he would be able to pick up the language once again. He made reference to the educational qualifications and his perfect English and taking into account his mental health difficulties, he did not find that would prevent him from forming friendships.

43. However, the judge concluded that having weighed up those positive and negative factors reach the conclusion that there would be impediments to his integration into the Netherlands.

44. At paragraphs [58]-[64] the FtTJ addressed the issue of rehabilitation. His conclusion on the issue was that there was a prospect of rehabilitation and such a prospect would be strengthened by the appellant remaining in the UK with his family. At [60] the judge summarised again the factual findings that he had made in the earlier part of his decision. He then went on to identify a number of factors which led him to conclude that there was a "prospect of rehabilitation". At [61] the judge took what he described as a "common sense view" about the consequences of the conduct of his father upon the appellant and the family members. At [62] the judge returned to the appellant's engagement with medical professionals which the judge found that led to a "degree of acknowledgement by the appellant that there are other ways of coping with conflict other than the one that he is thus far chosen and that there are the people who can help and change." Whilst the judge had earlier indicated that the issue of alcohol abuse was something that he could not admit the judge took into account that that had in fact been acknowledged to the professionals in prison as being a relevant factor.

45. At [63] the judge considered further the prospects of rehabilitation taking into account the nature of the offences and that the majority bar one was committed whilst he was a juvenile. The judge identified two factors which when combined led him to conclude overall the prospects of rehabilitation would be "greater in the UK than in the Netherlands". The two factors began by an assessment of his age, reference being made also to his residence in the UK is the only time that he had experienced ability. He had had a positive experience of school which had not had in the Netherlands, he had assumed the role of carer which the judge considered reflected positive aspects of his personality and character. The judge also identified that the appellant was about to commence as part of his licence conditions a program designed to address is offending behaviour. The judge found that the relationship with the doctors in prison showed that he was able to engage proactively which had provided a benefit to him. Reference is further made to the last period of supervision with the

probation service which is followed by a period of seven years without committing an offence.

46. At [64] the judge took into account as a supporting factor the appellant sense of responsibility towards his family and their support for him described as “unwavering” which he identified as a very important factor in finding ways to address the root causes of offending. The judge found that that, combined with the help that he would receive from probation service would not be present in the Netherlands.

47. In respect of the issue of rehabilitation, the judge made it plain that that was a factor which he gave “only limited weight” (at [59]).

48. The conclusion reached after balancing the relevant factors of proportionality against the earlier findings set out at paragraphs [20 – 36], was that the appellant’s deportation would be disproportionate and thus the decision to deport was not justified on the particular factual circumstances of this appellant’s case.

49. The respondent sought permission to appeal, and permission was granted by Judge Buchanan on 20 May 2020.

The applicable legal framework:

50. The appellant is an EU citizen. Under Article 20 of the Brexit Withdrawal Agreement the conduct of EU Citizens, their family members, and other persons, who exercise Citizens' rights under the Withdrawal Agreement, where that conduct occurred before the end of the transition period, 31 December 2020, shall be considered under the provisions of Directive 2004/38/EC which gives effect to the free movement of persons. This means that in this appeal it is the EU standards and not the UK standard that applies to any decision to deport, which are more favourable to the appellant than those applying under UK law.

51. The deportation of EEA nationals (in the circumstances as set out above) is subject to the regime set out in the Immigration (European Economic Area) Regulations 2016 ('The EEA Regulations') which were made under section 2 of the European Communities Act 1972 by way of implementation of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States. The Directive sets conditions that must be satisfied before a Member State can restrict the rights of free movement and residence provided for by EU law.

52. Reg.23(6)(b) permits the removal of an EEA national if the Secretary of State decides that that person's removal is justified on grounds of public policy:

> *“**Exclusion and removal from the United Kingdom***
>
> *23.- …*

(6) ... an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if-"

(a) ...

(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security, or public health in accordance with regulation 27; or

(c) ..."

53. When the Secretary of State considers if removal is justified on public policy grounds the decision must be taken in accordance with reg.27 and in particular the six principles set out at reg.27(5):

*"**Decisions taken on grounds of public policy, public security and public health***

27.- (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security, or public health.

...

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

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

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

(c) the personal conduct of the person must represent a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent.

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision.

(e) a person's previous criminal convictions do not in themselves justify the decision.

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

(7) ...

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security, and the fundamental interests of society etc.).”

54. Schedule 1 provides as follows:

CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

Considerations of public policy and public security

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

Application of paragraph 1 to the United Kingdom

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

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

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

(a) the commission of a criminal offence.

(b) an act otherwise affecting the fundamental interests of society.

(c) the EEA national or family member of an EEA national was in custody.

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

6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including-”

(a) entering, attempting to enter, or assisting another person to enter or to attempt to enter, a marriage, civil partnership, or durable partnership of convenience; or

(b) fraudulently obtaining or attempting to obtain or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

The fundamental interests of society

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

(a) preventing unlawful immigration and abuse of the immigration laws and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area.

(b) maintaining public order.

(c) preventing social harm.

(d) preventing the evasion of taxes and duties.

(e) protecting public services.

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action.

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union).

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27).

(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking.

(j) protecting the public.

(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child).

(l) countering terrorism and extremism and protecting shared values.

55. Reg.27(5)(c) requires the personal conduct of the person threatened with removal to represent a "genuine, present and sufficiently serious threat" affecting one of the fundamental interests of society. Those interests are listed (the list in each case is non-exclusive) at reg.7 and para.7 of schedule 1 to the Regulation.

56. Reg.27(6) requires the Secretary of State to take account of considerations such as the individual's family situation, age and length of residence and integration into the United Kingdom (reg.27(6)).

57. Reg.27(8) requires a court or tribunal considering if the requirements of the Regulation are met to "have regard to" schedule 1. The schedule broadly provides guidance on how the Tribunal should approach the question of whether the Secretary of State's decision has been made in accordance with reg.27. For example, paras.2 and 4 provide guidance on the subject of integration (see reg.27(6)), para.3 provides guidance on the question of whether the relevant person poses a "genuine, present and persistent threat" (see reg.27(5)(c)) and para.5 deals with proportionality (reg.27(5)(a)).

58. The principles set out at reg.27(5) represent mandatory guidance.

The hearing before the Upper Tribunal:

59. In the light of the COVID-19 pandemic the Upper Tribunal issued directions, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face-to-face hearing and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.

60. Before the Upper Tribunal, the Secretary of State was represented by Mr Diwnycz and the appellant represented by Mr Georget of Counsel who had represented the appellant before the First-tier Tribunal.

61. Mr Diwnycz, on behalf of the respondent indicated to the tribunal that he did not seek to make any oral submissions but relied upon the grounds as drafted and the two sets of written submissions dated 1 July 2020 and 6 November 2020.

62. Mr Georget had also provided a Rule 24 response dated 13 November 2020 and made oral submissions to the tribunal.

63. It is not necessary to set out the submissions of each of the parties as I will set out the relevant aspects of those submissions when dealing with the grounds advanced on behalf of the Secretary of State and my consideration of those issues.

64. I am grateful for the submissions made by each of the advocates. I confirm that I have taken them into account and have done so in the light of the decision of the FtTJ and the material that was before him.

Discussion:

65. The grounds seek to challenge the FtTJ’s assessment of the issue of proportionality.

66. The first ground advanced on behalf of the respondent submits that the FtTJ failed to provide adequate reasoning for the overall findings that it would be disproportionate to remove the appellant to the Netherlands.

67. Regulation 27 prevents the removal of an EEA national present in the UK except on grounds of public policy and public security. If that test is not met, then the person may not be removed. There is, at that stage, no proportionality assessment. It is only if there are serious grounds of public policy and public security that it is then necessary to address the additional requirements imposed by regulation 27(5): "it must also be taken in accordance with the following principles", and see MC (Essa) principles recast) Portugal [2015] UKUT 520 (IAC) at [29b]. The first of those additional requirements is that the decision must comply with the "principle of proportionality" - see regulation 27(5)(a).

68. The "principle of proportionality" to which reference is made in regulation 27(5)(a) is taken from Article 27(2) of the Freedom of Movement Directive. It derives from a general principle of EU law that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties" - see article 5(4) of the Treaty on European Union. That principle is separate from the test of proportionality under the European Convention on Human Rights, as distilled in Bank Mellat v Her Majesty's Treasury (No 2) [2013] UKSC 39; [2014] AC 700 *per* Lord Reed JSC at [74]. The principle of proportionality under EU law requires consideration of two questions - see R v Lumsdon v Legal Services Board [2015] UKSC 41; [2016] AC 697 *per* Lord Reed and Lord Toulson JJSC at [33]:

> "... first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method."

69. The approach to be taken in assessing whether removing a fundamental freedom under the Treaties accords with the principle of proportionality was explained thus by Lord Toulson at [55]-[56]:

> "55. ...the court must determine whether the measure is suitable to achieve the legitimate aim in question and must then determine whether it is no more onerous than is required to achieve that aim if there is a choice of equally effective measures. The position was summarised by Advocate-General Sharpston at para 89 of her opinion in Commission of the European Communities v Kingdom of Spain (Case C-400/08) [2011] ECR I-1915, a case concerned with the right of establishment:
>
> > 'Whilst it is true that a member state seeking to justify a restriction on a fundamental Treaty freedom must establish both its appropriateness and its proportionality, that cannot mean, as regards appropriateness, that the member state must establish that the restriction is the most appropriate of all possible measures to ensure achievement of the aim pursued, but simply that it is not inappropriate for that purpose. As regards proportionality, however, it is necessary to establish that no other measures could have been equally effective but less restrictive of the freedom in question.'
>
> 56. The justification for the restriction tends to be examined in detail, although much may depend upon the nature of the justification, and

> the extent to which it requires evidence to support it. For example, justifications based on moral or political considerations may not be capable of being established by evidence. The same may be true of justifications based on intuitive common sense..."

70. Thus, the principle of proportionality under the Treaties does not in all circumstances incorporate the proportionality balance that is the fourth of the Bank Mellat criteria - namely whether "balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

71. However, in this particular context the Court of Justice of the European Union has treated the principle of proportionality under EU law in a similar way as the test for proportionality under Article 8 of the European Convention on Human Rights - see Orfanopoulos and others v Land Baden-WÃ¼rtenberg C482/01 [2005] 1 CMLR 18 at [95]-[99]:

> "95. ... the examination on a case-by-case basis by the national authorities of whether there is personal conduct constituting a present threat to the requirements of public policy and, if necessary, of where lies the fair balance between the legitimate interests in issue must be made in compliance with the general principles of Community law.
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> 96. It is for the competent national authority to take into account, in its assessment of where lies the fair balance between the legitimate interests in issue, the particular legal position of persons subject to Community law and of the fundamental nature of the principle of the free movement of persons...
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> 97. Moreover, it is necessary to take into account the fundamental rights whose observance the Court ensures. Reasons of public interest may be invoked to justify a national measure which is likely to obstruct the exercise of the freedom of movement for workers only if the measure in question takes account of such rights...
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> 98. It must be noted, in that context, that the importance of ensuring the protection of the family life of Community nationals in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty has been recognised under Community law. It is clear that the removal of a person from the country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8 of the ECHR, which is among the fundamental rights, which, according to the Court's settled case-law, are protected in Community law...
>
> 99. Finally, the necessity of observing the principle of proportionality must be emphasised. To assess whether the interference envisaged is proportionate to the legitimate aim pursued, in this instance the protection of public policy, account must be taken, particularly, of the nature and seriousness of the offences committed by the person concerned, the length of his residence in the host Member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country of origin of the person concerned (see, as regards Article 8

of the ECHR, Boultif v Switzerland (54273/00) [2001] ECHR 493, paragraph 48)."

72. Aside from complying with the principle of proportionality, a Regulation 27 decision may only be made after having regard to the other factors set out in Regulation 27(5) and (6). These include, on the one hand, the question of whether the person represents a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society, and, on the other hand, considerations such as the family of the person. Although expressed in the Regulation as separate requirements, the Upper Tribunal has held that they fall for assessment when addressing the principle of proportionality - MC at [29b] and [29f]. What is required, both under the Directive and the 2016 Regulations is a "wide-ranging holistic assessment" - see MC at [29j].

73. The respondent's submissions are based on the premise that as the FtTJ assessed the appellant's conduct to remain a threat to society the remaining issues identified by the FtTJ had been inadequately reasoned.

74. Within that general submission, the grounds challenge the factors identified by the FtTJ as relevant to the proportionality assessment. In particular, the reasoning underpinning the assessment of his social and cultural integration in the UK and secondly, the issue of rehabilitation.

75. The advocates before the tribunal have addressed those two issues separately. I therefore address the submissions relevant to the issue of social and cultural integration.

76. In this context the respondent advances three points. Firstly, the judge found the appellant have been integrated in the UK by forming relationships with peers and teachers while studying from arrival in 2007 until he took over as a carer in 2011. However, it is said that this period of time spent looking after his siblings and mother does not and should not be characterised as "integration". The second point made in the grounds is that the appellants integration was tarnished by as offending and his relationship with friends being "those with whom he used to drink alcohol" and this was not factored into the FtTJ's assessment. Thirdly, it is submitted that the period since 2011 covers a greater period than that where integration was considered to have occurred and therefore was capable of weakening integration as was the time spent in custody.

77. In his written rule 24 response Mr Georget submitted that it was difficult to see the relevance of those submissions to the overall assessment of proportionality and that even if made out, they were not findings directly material to the outcome. Firstly, because this was not an article 8 appeal and the Part 5A section 117C (4) considerations did not apply and secondly, because there was no point raised as to whether the apparent integration had been broken by his imprisonment (see paragraph 10 of the written submissions).

78. In his oral submissions, he sought to clarify that approach on the basis that the respondent sought to consider individual elements rather than considering the overall balance of factors which the judge had taken into account in the assessment of proportionality.

79. In my judgement the respondent is correct to state that the issue of social and cultural integration was a material consideration and relevant to the proportionality balance as recognised by Regulation 27(5) (a) in conjunction with regulation 27(6) which refers to factors such as age, state of health, family and economic situation of P, P's life in the UK, P's and cultural integration into the UK and the extent of links in P's country of origin. Furthermore Schedule 1 of the 2016 Regulations also make a reference to integration and that having "extensive familial or societal links of persons of the same nationality and language does not amount to integration."

80. I consider the point made on behalf of the appellant is that whilst social and cultural integration is cited as a relevant factor, and this is plain from the Regulations, it is not the only factor which the judge took into account in his overall assessment of the proportionality of the decision to deport.

81. When addressing the grounds of challenge, having considered the substance of them and how they are framed, I agree with Mr Georget who characterised the challenges advanced as being a "reasons challenge". This is supported by reference in the grounds to inadequacy of reasoning in support of the proportionality assessment set out at paragraphs 4, 8 and 12 of the grounds.

82. In this context I remind myself of the following well known jurisprudence which is also set out in the written submissions.

83. Citing Floyd LJ in *UT (Sri Lanka) v SSHD* [2019] EWCA Civ 1095 at [19], a passage recently approved by Popplewell LJ in *KB (Jamaica) v SSHD* [2020] EWCA Civ 1385 at [16]:

> "...
>
> "*19. I start with two preliminary observations about the nature of, and approach to, an appeal to the UT. First, the right of appeal to the UT is "on any point of law arising from a decision made by the [FTT] other than an excluded decision": Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), section 11(1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in AH (Sudan) v SSHD at [30]: "Appellate courts should not rush to find such misdirection's*

> *simply because they might have reached a different conclusion on the facts or expressed themselves differently.*""

84. In so far as the duty to give reasons is concerned, a judge need do no more than *"identify and record those matters which were critical to his decision"* (*English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 *per* Lord Phillips MR, cited with approval by Brooke LJ in *R (Iran)*. Another dictum cited by Brooke LJ – that of Griffiths LJ in *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 put it thus:

> "*[An adjudicator] should give his reasons in sufficient detail to show the [IAT] the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on [an adjudicator], in giving his reasons, to deal with every argument presented by [an advocate] in support of his case. It is sufficient if what he says shows the parties and, if need be, the [IAT], the basis on which he has acted, and if it be that the [adjudicator] has not dealt with some particular argument but it can be seen that there are grounds on which he would have been entitled to reject it, [the IAT] should assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion.*"

85. When addressing the grounds concerning social and cultural integration and in the light of the decision of the FtTJ, the relevant paragraphs are at [48]-[57]. Those paragraphs relate to the FtTJ's assessment of the appellant's private life and take into account not only the issue of social and cultural integration in the UK, but the other issues identified in the Regulations that concern the links to the country of nationality, or as the judge considered them whether there were impediments to integration to the country of his nationality. That assessment also considered the appellant's length of residence in the host state and his age at arrival.

86. Those findings can be summarised as follows. The FtTJ accepted the evidence of all the witnesses concerning the appellant's history which was supported by the documentary evidence placed before the FtT. This demonstrated that the family came to the UK in 2006 and that the appellant had been resident in the host state since that date and thus is length of residence was 13 years. The judge gave "significant weight" to the length of residence, not only on the basis of the length of time but because of his age and his previous history. The judge found the length of residence to be the longest period of time spent in any one country and contrasted is length of residence in Afghanistan of only five years and having spent 10 years in the Netherlands.

87. As to the time spent in the Netherlands and the relevance to his integrative links, the judge considered that the focal point of his life with his family and not the wider community. The judge took into account and placed weight on his language and that "the extent of his integration was demonstrated by the fact that despite not coming to this country until he was 15 years old, he is perfectly fluent in English" (at [50]).

88. The judge considered his educational history and that he studied the UK from his arrival in 2007 up until 2011 when he assumed care of his mother. In this context, the judge considered the documentary evidence which he found to demonstrate that he was “fully integrated in college life, forming good relationships with teachers and other students” (also at [50]). Reference was made to the appellant and gain some qualifications which the judge then set out. The judge also went on to find “I give significant weight to his participation with his studies and his positive attitude to other students and staff given that the appellant’s life experiences to date must have required him to show great fortitude to engage so positively.” The reference to the appellants “life experiences” were directly referable to the assessment made of the conduct of the appellant’s father to the appellant and his family members including physical and verbal abuse and the emotional consequences which are found to be “severe for all family members” (at [41] – 44]).

89. When looking at those paragraphs, the FtTJ set out particular factual circumstances relevant to this appellant in reaching the overall view taken as to the extent of his social and cultural integration.

90. As can be seen from those paragraphs, they included matters relevant to the proportionality assessment including his age, length of residence in the host state. As identified by Mr Georget the appellant had lived in the UK since the age of 15 for a period of 13 years of was almost half of his life. The level of integration was also characterised by specific features of his private life which the judge identified as his language, type of integration in the UK based on the length of time spent in any country and that at the time he spent in the country of nationality was characterised as integrative links with his family rather than the wider community. Mr Georget also points to the factual circumstances which the judge accepted concerning the tragic nature of the personal history and previous history circumstances in Afghanistan of witnessing and fleeing war and also when in the state of his nationality being a victim of abuse. The other factors taken into account relate to his educational links and success in college notwithstanding the difficult dramatic circumstances which are outlined in the judgement.

91. In my judgement, when those paragraphs are read together, it is not the case as the grounds submit that the judge failed to give adequate reasons. The grounds at paragraph (7) do not provide any basis for a challenge to the factual findings based on inadequacy of reasoning. At best, paragraph 7 of the grounds provides other reasons to disagree with the judge’s factual findings and assessment. For example, it is stated that the judge found the appellant be integrated by virtue of forming relationships with his peers and teachers from studying in 2007 until he took over as carer in 2011 thereafter looked after his mother and that this “did not amount integration”. Similarly, the written submissions at paragraph (4) (dated 1/7/20) refer to the appellant being unemployed and no evidence of social ties outside of the family.

92. In my view none of those submissions identify any inadequacy of reasoning in the FtTJ's assessment of the issue of social and cultural integration in the host state. They make reference to individual elements such as the time spent on education and the longer time spent looking after his mother but failed to take into account the other factors and reasoning underpinning the overall assessment, which was specific to the appellant including his background, length of residence type of residence, language skills in the context of his arrival, age, qualifications, and education. In my view there is no lack or deficiency of reasoning in that assessment.

93. Insofar as the grounds and the submissions of the respondent challenge the assessment made by the judge at paragraphs 51 on the basis that the judge failed to say why the positive factors outweighed the negative (paragraph 8 of the grounds) and that it was not clear how the weight was apportioned in terms of adequacy of reasoning (paragraph 4 of the written submissions), neither of those submissions are made out.

94. At paragraph [51] the FtTJ set out the factors which militated against his earlier assessment and thus identified the absence of wider integration after he left college in 2011, and the absence of evidence of friends in the commission of crimes at the end of the period. Whilst those factors were identified, the judge also noted that the lack of evidence of wider integration of 2011 was partly explained by the appellant assuming the care of his mother (although not wholly). That finding was supported by the earlier factor assessment at paragraph [43] and the description of the emotional consequences from the appellant's father's conduct, the abandonment of the family [44] and the appellant taking on the caring role which had been of particular importance to the family as a result of his mother's physical and psychiatric disabilities (at [44]). Importantly at [46) a judge considered the role of the appellant as carer and why he had assumed that role and concluded from the evidence that it was not as a result of having the lack of drive, commitment, or abilities as his siblings but because he chose to take on the responsibility and accept the "self-sacrifice". His earlier positive academic record was put in the balance when reaching that finding.

95. Therefore, the earlier assessment was relevant to the balance and weight attached to the negative factors identified at [51]. The judge did not fail to take into account the appellant's offending history and the weight attributable to that within the balancing exercise. In my judgement, when the paragraph is read as a whole, the FtTJ carried out a balancing exercise at [48] and [52], taking into account the positive features and the negative features indicative of social and cultural integration before reaching his conclusion on that balance. Therefore, the grounds of challenge in this respect are not made out.

96. The written grounds at paragraph 8 assert that the finding at [53] is inadequately reasoned and also contradictory. It was submitted on behalf of the respondent that the judge did not make it clear why there were

impediments to integration when the impediments identified were minimal. This was a point relied upon by Mr Diwnycz in his oral submissions.

97. The written submissions at paragraph 5 also submit that the FtTJ's reasoning for impediments to his integration were predicated upon his age. The respondent observes under the immigration rules there is an acceptance after seven years it is likely a child will develop an independent private life; and 10 years a child's life is not an inconsiderable period of time. Whether or not the appellant was bullied at school would not preclude him from having formed some friendships over a decade. It is said that the judge simultaneously found his controlling father prevented him from phoning other children. The judge in any event found that the appellant would be able to communicate and could form friendships whilst having transferable educational skills (at paragraph 56 and 57).

98. At paragraph [53] – [57] the FtTJ assessed the appellant's personal circumstances and considered whether there were impediments to his integration to the receiving state. This is a factor identified in the Regulations albeit on the basis of links to the state of nationality (Regulation 27(6)).

99. Insofar as the grounds challenge paragraph [53] as being inadequately reasoned, such a challenge fails to take into account the reasoning for reaching the conclusion expressed at [53] although set out at paragraphs [54 – 57]. When those paragraphs are read together, the judge in my view gave adequate and sustainable reasons which were evidence-based as to why he reached the overall view that the personal circumstances of the appellant would constitute an impediment to his integration to the receiving state or in other words the lack of links.

100. When read together the judge identified the limited nature of the social integrative links there (see paragraph [54] when read alongside paragraph [49], he has not preserved any ties to the country of nationality, his resident in the host state that during a period of time when his focal point had been on his family rather than the community, his separation (or rather link of integration to the Netherlands) was intensified by the fact that he and his parents entered as foreign nationals and his parents have not been able to assist him in his adaptation to life and also by the conduct of his father which was expressly addressed at [54] and when read in the light of the factual findings at [40]and [41].

101. At [55] a judge considered the educational links to the receiving state but found it was limited due to the appellant being bullied and set out the independent evidence of this in his decision. At paragraphs [56] and [57] the judge proceeded to identify the factors militating against this taking into account his ability to communicate that that would only be "slightly restricted" by the language barrier and that whilst he had been speaking English for 13 years, it would be likely that he could pick up the language after time and at [57] referred to the relevance of his educational

qualifications. In addition, the judge took into account his mental health found that that would not prevent him from forming friendships nor would having undertaken the care of his mother thus the inference from his findings were that it was something which could be replicated in the Netherlands.

102. When those paragraphs are read together in my view and contrary to the grounds, there is no inadequacy of reasoning nor is there any failure to balance the relevant factors identified by the judge. Indeed, it is plain that the language employed by the judge referring to "balancing all the factors" (at [52]) and that he identified the positive indicators set out at paragraph [53 – 55] and placing more weight upon those than the negative factors identified at [56]. Barring irrationality, the relevant weight attached to those factors was a matter for the judge.

103. I see no contradiction in the findings as the grounds and written and oral submissions assert and, in my judgement, there is no merit in the suggestion made the judge failed to resolve any conflict of opinion, but in fact carried out a balance of the positive and negative factors identified from the overall evidence.

104. The second area identified in the grounds advanced on behalf of the respondent relates to the issue of rehabilitation.

105. The grounds at (9) and (10) set out the challenge to the decision where it is submitted that at paragraph [63] the reasons given by the judge in support of his finding that there were stronger prospects of rehabilitation in the UK than in the Netherlands were reasons that predated the index offence and therefore had no bearing on the issue of current rehabilitation. The second point made in the grounds is that within the judge's reasoning there was a conflict of findings by referring to the prospects of rehabilitation being reinforced by a period of non-offending when the judge had found his offending was an escalation (at paragraph [21]).

106. Paragraph 10 of the grounds challenge the findings made at [64] and that the judge failed to take into account the decision of MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC).

107. On behalf of the appellant Mr Georget submitted that the issue of rehabilitation was an issue to which the judge only gave limited weight. He submitted that whilst it been argued that there was a lack of reasoning, the decision at [61] set out a number of factors including the offence considered in the light of his traumatic experiences, some element of learned behaviour and more importantly that he had engaged with medical professionals and the degree and acknowledgement of change.

108. He further submitted that when weighing up the prospects of rehabilitation in the UK at [63] the FtTJ reached the conclusion that there were greater prospects in the UK than the Netherlands having identified he had the support of his family, the contact with the probation service and by the

negative referenced memories of the Netherlands and the limited experience that he had had there. The experiences that he did have the judge had found to be traumatic (at [56]).

109. Mr Georget submitted that if it was being suggested that there was an absence of reasoning as to why the appellant could not access rehabilitation in the Netherlands, when considering the issue of his licence, the judge took into account that the appellant was about to commence a program that addressed his offending behaviour and therefore being supervised by the probation service in the UK was relevant to the prospects of rehabilitation.

110. Lastly, he submitted that the judge had not reached an irrational conclusion that in the UK that he would have family support whereas there would be none in the Netherlands. Given his very difficult childhood and the circumstances in the Netherlands, the judge carefully considered the factual circumstances and the competing factors. Thus, he submitted even if not every judge would have reached that conclusion, it was one that was open to the judge on the factual findings that he made and thus there was no error of law in his decision.

111. I have considered the submissions of the parties relevant to the issue of rehabilitation.

112. It is important to note that the assessment made of this issue was not one elevated to an issue that was accorded “significant weight” but one which the judge considered was worthy of weight but only “limited weight” (at [59] and [65]). I do not think that this is recognised in the submissions advanced on behalf of the respondent who seek to characterise the judge’s assessment as one which featured significantly in his decision. However, I accept that this was a factor which was material to the overall assessment proportionality and thus I address the criticisms made.

113. In relation to the issue of rehabilitation, in Essa (EEA: rehabilitation/integration) [2013] UKUT 316 (IAC) it was held that for those who at the time of determination are or remain a present threat to public policy but where the factors relevant to integration suggest that there are reasonable prospects of rehabilitation, those prospects can be a substantial relevant factor in the proportionality balance as to whether deportation is justified. 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. At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, it cannot be seen how the prospects of rehabilitation could constitute a significant factor in the balance. Thus, recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with propensity to commit sexual or violent offences and the like may well fall into this category.

114. In MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC) it was held that:

> (i) Essa rehabilitation principles are specific to decisions taken on public policy, public security, and public health grounds under regulation 21 of the 2006 EEA Regulations.
>
> (ii) It is only if the personal conduct of the person concerned is found to represent a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society (regulation 21(5)(c)) that it becomes relevant to consider whether the decision is proportionate taking into account all the considerations identified in regulation 21(5)-(6).
>
> (iii) There is no specific reference in the expulsion provisions of either Directive 2004/38/EC or the 2006 EEA Regulations to rehabilitation, but it has been seen by the Court of Justice as an aspect of integration, which is one of the factors referred to in Article 28(1) and regulation 21(6) (Essa (2013) at [23]).
>
> (iv) Rehabilitation is not an issue to be addressed in every EEA deportation or removal decision taken under regulation 21; it will not be relevant, for example, if rehabilitation has already been completed (Essa (2013) at [32]-[33]).
>
> (v) Reference to prospects of rehabilitation concerns reasonable prospects of a person ceasing to commit crime (Essa (2013) at [35]), not the mere possibility of rehabilitation. Mere capability of rehabilitation is not to be equated with reasonable prospect of rehabilitation.
>
> (vi) Where relevant (see (4) above) such prospects are a factor to be taken into account in the proportionality assessment required by regulation 21(5) and (6) ((Dumliauskas [41]).
>
> (vii) Such prospects are to be taken into account even if not raised by the offender (Dumliauskas [52])
>
> (viii) 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]).
>
> (ix) 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])
>
> (x) 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]).

115. Whilst the grounds assert that the judge failed to factor into the assessment his earlier findings of risk, at [60] the judge set out a brief summary of the findings of risk which he had set out at length earlier in the decision including the point raised by the respondent in the grounds that the appellant had not shown a willingness to accept responsibility (at [60](3)). However, the FtTJ set out at [61]-[64] the reasoning which underpinned his conclusion that there was a prospect of rehabilitation in the UK that such a prospect would be likely to be strengthened by remaining in the UK with his family.

116. I see no legal error in the approach taken by the judge which he described as a "common sense view about the consequences of him witnessing violence within the home" and considering the appellant's previous background and in the light of the evidence and family members which the judge also recorded at [61]. The judge was entitled to place some weight upon his engagement with the medical professionals which had led to an acknowledgement by the appellant that there were other ways of coping with conflict and that there were people who could help him change. Whilst the judge had earlier identified the issue of alcohol abuse in his findings and assessment of risk, the judge was entitled to take into account that the appellant had made some acknowledgement to the medicals involved that this was a factor which triggered a loss of control even if he had not been able to acknowledge this to the judge.

117. The ground expressly challenges the FtTJ's reference at paragraph [63] concerning the appellant's age. However, it has not been established at the judge was wrong to take account of the offending history and that all of his previous offences save for one had been committed as a minor/juvenile and this was linked to the question the judge posed at [63] as to whether any prospect of rehabilitation could be seen in the light of the appellant getting older.

118. At [63] the judge identified the two relevant factors when combined led him to conclude that the prospects of rehabilitation were greater in the UK than in the Netherlands. Under subsection (1) the FtTJ again referred to his age being "not only the factor in play" which is a reference to the earlier part of paragraph [63] but contrasting his time in the UK with that in the Netherlands as being the only time when he had "experienced stability". In the context of his education, the judge regarded his experience in the UK as being a "positive experience" which contrasted to that in the Netherlands. This is a reference to a finding at [55] and the problems that the appellant had experienced in the Netherlands. Whilst the grounds appear to challenge the reference made by the judge to his father being in the Netherlands, I do not consider that the judge was actively making a finding that the appellant would be at risk from his father but that the presence of his father outside of the home was a stabilising factor. The judge also considered that the appellant's assumption of the role of carer

of his mother was one which demanded “a great deal of patience and understanding”.

119. In my view the second part of paragraph [63] has more relevance. The judge identified that the appellant was about to commence, as part of his licence conditions a program designed to address this offending behaviour. On the evidence that the judge had assessed, he found that the appellant’s relationship with the doctors in prison demonstrated that others were able to engage in proactively and when they did so that there was a “tangible benefit” to the appellant. The judge set out “I am reinforcing this view by the fact that his last period of supervision with the probation service was followed by a period of seven years without committing an offence.” I do not read that sentence as in any way ignoring the offending history which the judge had set out earlier in his decision at paragraph [31].

120. At [64] the FtTJ took into account the appellant’s sense of responsibility towards his family what he described as their “unwavering support of him” as important factors to assist the appellant in finding ways to address the causes of his offending. The judge considered that this, combined with the assistance from the probation service that have been outlined in the preceding paragraph would not be present in the Netherlands. He finally concluded that “actual evidence of rehabilitation is minimal, the prospects of rehabilitation are significantly stronger in this country than they would be in the Netherlands”.

121. It is not the case as the respondent submits that the judge overlooked or ignored the actual evidence of rehabilitation. He did not and expressly stated that it was minimal but the when balanced by the identifiable factors, which included relative stability, assuming the role of carer of his mother which was a reflection of his personality, his strong family life and his commencement of a program part of his licence conditions which was a specific programme to addresses offending behaviour, and that there was reliable evidence of the appellant being able to engage proactively which was a “tangible benefit to him”. This, the judge found, was reinforced by the last period of supervision. I do not consider that the judge ignored his previous findings concerning risk and the commission of offences following a last period of supervision but was seeking to demonstrate the prospects of success based on his history.

122. At [64] the judge identified two particular factors missing from the Netherlands which included the importance of his family combined with the probation service in the United Kingdom. Mr Diwnycz in his oral submissions submitted that there was an absence of evidence as to the prospects of rehabilitation in the Netherlands and that in the light of the decision of Essa (as cited) it could not be assumed that the prospects are materially different in the member state.

123. In my view this is a relevant point to make and as the decision in MC (Essa) states, the lack of a probation officer or its equivalent in a member

state should not in general preclude deportation. However, the headnote at (ix) sets out matters which are relevant when examining the prospects of rehabilitation which include family ties and responsibilities, accommodation, education, training, employment, and active membership of the community. As Mr Georget submitted some of those factors were identified by the judge as present on the facts of this case including the strong family ties the appellant had and as set out at [64] the "unwavering support" they could provide for him would be important for him to find ways in addressing the causes of his offending. Furthermore, his responsibilities towards his family and in particular those of his mother were also identified as relevant factors.

124. While the absence of a probation officer and lack of access to one does not necessarily preclude deportation, it does not mean that the particular type of support offered by the probation service in the UK was an irrelevant factor. The judge expressly identified at [63](2) a particular program at the appellant was about to commence which formed part of his licence conditions which was designed to address his offending behaviour. As the FtTJ pointed out, the appellant had not had any proper therapeutic assistance previously due to lack of funding. This issue was also considered in the light of the assessment made by the judge of his ability to proactively engage with relevant services based on the previous evidence following the supervision undertaken by the probation service. I accept the submission made by Mr Georget that the assessment made was consistent with the decision of Essa. He further made the point that it had not been raised by the respondent at the FtT hearing that the licence conditions would in fact follow the appellant to the Netherlands in the event of any deportation action.

125. Drawing those matters together, the FtTJ did not seek to minimise the earlier assessment concerning risk but did have regard to them in the assessment of the prospects of rehabilitation. As I have set out it is important to note that the respondent's grounds do seek to elevate the assessment as one to which the judge afforded significant weight in the overall proportionality balance and in my judgement that is not reflected in his decision given the express statement that he made at [59] that the issue merited "limited weight" and in his final conclusion in balancing exercise at [65] that this should only be given "some limited weight" in the overall balance.

126. The FtTJ's finding that the appellant's personal conduct represented a genuine present in sufficiently serious threat affecting the fundamental interests of society were not an end of the analysis the FtTJ was required to carry out. It was necessary to undertake a wide-ranging holistic assessment of the factors identified in Regulation 27 which involved the striking of the balance in seeking to protect public policy and having regard to the relevant factors. Whilst the respondent has sought to challenge two of those factors identifying the social and cultural integration and issue rehabilitation, there were other factors which the judge gave significant weight which included the strong family life of the

appellant which he had established with his family members in the UK and in the light of and against the background of the traumatic and difficult circumstances that the judge had recorded from the evidence set out in paragraphs [38 – 47]. The judge found that the appellant's strong emotional and practical ties were also relevant factors in the assessment of proportionality.

127. Mr Georget submitted that the grounds as drafted were a "reasons "challenge. Where that is advanced there are two bases upon which the case can be made. Firstly, based on where the reasons are inadequate so that it is not possible to understand the judge's conclusion and do not show that he properly engaged with the relevant issues including the evidence (see decision in Budhathoki (reasons for decision) [2014] UKUT 00431. The Court of Appeal stated in English v Emery Reimbold and Strick Ltd [2002] EWCA Civ 605 at [16]:

> "justice will not be done if it is not apparent to the parties why one has won and the other has lost."

Secondly, the reasons given do not rationally support the conclusion or findings reached.

128. The grounds relied upon by the respondent fall into the first category, i.e., a "reasons challenge". However, the FtTJ did give adequate reasons as explained above and it cannot be said that it was unclear why the FtTJ found in his favour. Thus, as Mr Georget submitted it was a challenge to the rationality of the reasons give by the FtTJ. The test of irrationality is a high one and an onerous one to meet. It requires the tribunal to be satisfied that no reasonable tribunal properly directing itself could have reached the finding or conclusion challenged. The fact that a tribunal has reached what might be characterised as a generous view, for example in striking the balance between the public interest and individual circumstances does not in itself necessarily establish an error of law.

129. At [65] the judge summarised the balancing factors in his overall decision and the relative attribution of weight to the particular factors identified giving very significant weight to the appellant's strong family life, significant weight to his private life and some limited weight to the issue of rehabilitation which he then weighed against his earlier assessment of risk but concluded that having weighed up those identifiable and relevant factors, the decision to deport was disproportionate and thus not justified on grounds of public policy. I agree with Mr Georget's characterisation that the decision is not one that is inadequately reasoned as the respondent submits but that it was clear from the decision as to why he reached the conclusion is that he did and that he did so in a coherent and balanced way.

130. As stated in the decision of Straszewski, in any given case an evaluative exercise of this kind may admit of more than one answer. If so, provided all the appropriate factors have been taken into account, the decision

cannot be impugned unless it is perverse or irrational, in a sense of falling outside the range of permissible decisions.

131. As Mr Georget submits it has not been advanced on behalf of the Secretary of State that the decision of the judge or his findings of fact were either irrational or perverse and in light of the foregoing, the judge properly considered the appropriate factors and made findings of fact based on the evidence before him. It may well be that this was not the only outcome possible on the facts in this particular appeal but the FtTJ directed himself correctly in law and that his conclusion, even if properly characterised as one that might be thought to be a generous one, does not disclose any legal error.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal to allow the appeal stands.

Signed Upper Tribunal Judge Reeds

Dated: 13 May 2021