IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001710
First-tier Tribunal No: DA/00116/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 26 March 2023

Before

THE HON. MRS JUSTICE HILL
UPPER TRIBUNAL JUDGE KEBEDE

Between

PIOTR KRZYSZTOF KOTARSKI
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Richardson, instructed by TMC Solicitors Ltd
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 18 January 2023

DECISION AND REASONS

1. This case involves an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Kotarski's appeal against a decision to deport him from the United Kingdom under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") and a cross- appeal by the appellant against the decision of the First-tier Tribunal dismissing his appeal against the decision to refuse his Article 8 human rights claim.

2. The appellant is a citizen of Poland, born on 12 August 1979. He claims to have arrived in the United Kingdom in 2000. From 1 May 2004 Poland joined the EU and he was thereafter not subject to immigration control. He married Lindi Muller, a South African national on 16 May 2005 and on 21 September 2005 he applied for a

registration certificate for himself and a residence card for Ms Muller, both of which were issued on 18 May 2005 until 18 November 2010. The appellant then entered into a relationship with a British citizen, Nabila Cherkaoui, in 2008, and he married her on 4 March 2014. On 5 June 2019 the appellant applied for a document certifying permanent residence in the UK. His application was rejected on 20 August 2019 as he failed to attend an appointment in relation to the application, the reason being that he had in the meantime been arrested and detained on criminal charges.

3. On 9 July 2019 the appellant was convicted of conspiring to supply a Class A controlled drug, cocaine and on 19 December 2019 he was sentenced to 12 years and 9 months' imprisonment. The sentence reflected the appellant's admitted role as the joint leader of a drugs conspiracy. According to paragraph 27 of the respondent's decision letter, the conspiracy included the appellant and six other people, and the group had engaged in the supply of at least 56kgs of cocaine with an estimated value of 6 and a half million pounds in the London area between October 2018 and May 2019. His sentence was later reduced to 9 years imprisonment.

4. As a result of the conviction the respondent, on 9 April 2020, notified the appellant that she intended to make a deportation order against him on grounds of public policy in accordance with regulation 23(6)(b) and regulation 27 of the EEA Regulations 2016. The appellant was invited to respond, which he did, by way of several representations made on his behalf by his solicitors.

5. The representations made on behalf of the appellant referred to and relied upon his relationship with his British wife and two British children, his son born on 12 December 2014 and his daughter born on 11 December 2019 whilst he was in prison. It was submitted that the appellant had acquired permanent residence status in the UK under the EEA Regulations 2016 and had completed more than 10 years of lawful residence before his incarceration. Since coming to the UK he had been working in the security industry as a security guard and had then worked in personal training and nutrition. The highest test in Regulation 27, of 'imperative grounds of public security' therefore applied. It was submitted that the appellant's deportation could not be justified on that high threshold, or on the lower threshold of 'serious grounds', due to his length of stay in the UK, his strong family life, the best interests of his wife and children, and his reformed character. He had undertaken active rehabilitation in prison, including taking several courses in prison and he was currently pursuing a course in Investigating Psychology with the Open University. It was submitted that the appellant was fully and socially integrated into the UK and had no ties or support network in Poland, his parents and brothers all being present and settled in the UK. It would be unduly harsh for his wife to relocate to Poland as she did not speak Polish and all her ties were in the UK. It would also be unduly harsh on the children. The appellant's representations also raised Article 8 grounds, asserting that the appellant's deportation would breach his Article 8 human rights.

6. With his written representations, the appellant produced his OASys report containing a categorisation assessment confirming that he had been re-categorised from a category C to a category B prisoner, together with various certificates of achievements for courses undertaken in prison. Further evidence provided included an Independent Social Worker's Report from Robert Forrester dated 20 December 2020.

7. The respondent then made a decision to make a deportation order against the appellant on 12 March 2021, on the grounds of public policy, in accordance with regulation 23(6)(b) and regulation 27 of the EEA Regulations 2016. In that decision the respondent accepted that the appellant had resided in the UK in accordance with the EEA Regulations for a continuous period of five years and that he had therefore

acquired a permanent right of residence. The respondent did not, however, accept that he had been continuously resident in the UK for 10 years and considered that even if he had, he would not qualify for the highest level of protection as he did not meet the integration test in Tsakouridis (European citizenship) [2010] EUECJ C-145/09. The respondent therefore considered whether the appellant's deportation was justified on serious grounds of public policy or public security and, having considered the nature of the offending, the serious detrimental impact of drugs on the health and well-being of those addicted to them, and the significant role played by the appellant in the supply of drugs, concluded that he had not shown himself to be sufficiently rehabilitated and that despite the conclusions of the OASys report he continued to pose a risk of harm to the public. The respondent considered that the 'serious grounds' threshold was therefore met, and that even if the appellant benefitted from the highest threshold his deportation would still be justified on imperative grounds of public security. The respondent considered that it was reasonable to expect the appellant to return to Poland and concluded that the decision to deport him was proportionate. As for Article 8, the respondent did not accept that the appellant had been living lawfully in the UK for the majority of his life and did not accept that he was socially and culturally integrated in the UK or that there would be very significant obstacles to his integration in Poland. With regard to his family life, the respondent accepted that the appellant had a genuine and subsisting relationship with his wife and two children but did not accept that it would be unduly harsh to expect them to live in Poland or for them to remain in the UK without him. The respondent considered that there were no very compelling circumstances outweighing the public interest in the appellant's deportation.

8. The appellant appealed against that decision and provided an appeal bundle containing further evidence. His appeal was heard by First-tier Tribunal Judge Howard on 9 July 2021. Judge Howard heard oral evidence from the appellant and his wife and brother. He accepted, on the basis of the evidence before him, that the appellant had been continuously resident in the UK for more than 10 years, even before the sentence of imprisonment was imposed. He found that the appellant was entitled to the highest degree of protection, namely justification of his deportation on the 'imperative grounds' of public policy and public security and concluded that the appellant did not pose a risk of re-offending and that the obligation to deport him on grounds of public policy and public security did not arise. He accordingly allowed the appeal under the EEA Regulations 2016. The judge went on to consider Article 8 but found that there were no very significant obstacles to the appellant's integration in Poland and that it would not be unduly harsh for the family to relocate together to Poland and he therefore dismissed the appeal on human rights grounds.

9. Both parties then sought permission to appeal to the Upper Tribunal. The Secretary of State sought permission to appeal the decision under the EEA Regulations and the appellant sought to appeal the Article 8 decision.

10.The Secretary of State's grounds in relation to the EEA decision can be summarised as follows. Firstly, that the judge had failed, in finding that the appellant had acquired the highest level of protection, to have adequate regard to whether his integrative links to the UK had been broken by his offending, that even if it was accepted that the appellant benefitted from the highest level of protection, the judge failed to have regard to the fact that the ECJ in Tsakouridis (European citizenship) [2010] EUECJ C-145/09 found that the fight against crime in connection with dealing in narcotics as part of an organised group was capable of being covered by the concept of 'imperative grounds of public security' and that the judge, in finding that the appellant posed a low risk of reoffending, failed to consider the seriousness of the consequences of

reoffending in light of the serious nature of the appellant's offence. Secondly, that the judge erred in his reliance upon the OASys report in regard to the risk of reoffending given that the appellant remained in detention. Permission was granted on all grounds, but in particular on the first ground.

11.The appellant's grounds in relation to Article 8 are: firstly that the judge erred by committing the comparison of baseline harshness which was criticised in HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176, and secondly that the judge failed to give adequate reasons for finding that it would not be unduly harsh for the family to relocate to Poland. In granting permission the First-tier Tribunal observed that it was far from clear why Judge Howard went on to consider Article 8 at all having allowed the appeal under the EEA Regulations 2016.

12.The matter then came before us for a hearing.

Hearing and submissions.

13.We had a skeleton argument prepared for us by Mr Lindsay on behalf of the Secretary of State, but the Secretary of State was represented at the hearing by Ms Ahmed, who formulated her grounds on a slightly different basis to those originally pleaded. She divided the first ground into three parts. Firstly, that Judge Howard had failed to consider the question of whether the appellant's integrative links had been broken and had failed by counting back from the date of the expulsion decision when calculating the relevant 10 years of residence in the UK. Secondly, that the judge had failed to consider the fundamental interests of society, as set out in Schedule 1 of the EEA Regulations 2016 and in line with the judgment in K. () and allegations de crimes de guerre) (Citizenship of the European Union - Right to move and reside freely within the territory of the Member States - Restrictions - Judgment) [2018] EUECJ C-331/16. Thirdly, that the judge had failed to consider the seriousness of the consequences of reoffending in line with Kamki v The Secretary of State for the Home Department [2017] EWCA Civ 1715 and failed to consider the serious harm that would occur if the appellant reoffended. With regard to the second ground, Ms Ahmed submitted that the judge, when relying upon the OASys report in his consideration of the risk of the appellant reoffending, failed to have regard to the fact that the appellant was still in prison. She relied upon the case of Restivo (EEA - prisoner transfer) Italy [2016] UKUT 449 in that regard. With regard to the appellant's appeal against the Article 8 decision, Ms Ahmed accepted that the judge's findings on "very compelling circumstances" were slim but she submitted that there was adequate consideration of the matter.

14.Mr Richardson conceded that the judge had erred by failing to count back from the date of the deportation decision when considering the appellant's ten years residence and had failed expressly to look at the consequences of the appellant's offending on his integrative links and whether those links had been broken. However he submitted that that was not material to the outcome of the decision. He referred to the judgment in B v Land Baden-Württemberg (C-316/16) and SSHD v Vomero (C-424/16) [2019] QBD 126 where the court at [73] and [74] referred to three factors which needed to be considered, namely the nature of the offence, the circumstances of the offence and the conduct during detention. With regard to the latter Mr Richardson submitted that the length of the period of incarceration prior to the deportation decision being made, which in this appellant's case was 15 months, was a relevant factor. Mr Richardson submitted that the judge had made findings relevant to the test and had considered all relevant matters, including the amount of time spent by the appellant lawfully in the UK, his employment history, his strong family life with his British wife and children, the fact that all his family members were in the UK and other significant ties to the UK. The judge was mindful of the seriousness of the offence and he also focussed on the

conduct the appellant in detention. The judge's findings were such that he did not consider the offending to have led to a disconnect from society such that the appellant's integrative links were broken. Therefore if the judge had asked himself if the period of offending had broken the appellant's integrative links he was bound, on the findings otherwise made, to conclude that it had not. There was therefore no material error of law in that regard. As for the other grounds, Mr Richardson submitted that the judge had engaged with the relevant issues. Even if he was wrong to find the highest threshold applied, the judge's findings were that the appellant was not a genuine, present and sufficiently serious threat. The judge considered the consequences of such offending on society and was entitled to conclude that this particular case was not one where there were imperative grounds of public security. As for the last ground, Mr Richardson submitted that the OASys report was an assessment of risk when the appellant was back in the community and the judge clearly had that in mind.

15.Mr Richardson also made submissions on the appellant's grounds of appeal in relation to the Article 8 decision. He submitted that the judge had made findings which were contrary to the guidance in HA (Iraq), he had failed to undertake a structured Article 8 consideration and he had failed to give proper consideration to the consequences for the children of relocating to Poland. If the appellant did not succeed under the EEA Regulations, the Article 8 case would need to be considered properly.

Legal Framework

EEA Regulations 2016

16. 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.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

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

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

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(17).

(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.

SCHEDULE 1

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

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.

Discussion and findings

17.As Mr Richardson properly conceded, Judge Howard's decision is flawed in so far as he failed to consider the relevant ten year period as being that immediately preceding the deportation decision, counting back from the decision, and he failed to make any specific reference to the question of the appellant's integrative links to the UK being broken by his period of imprisonment, in accordance with the guidance given by the CJEU in the joined cases of B v Land Baden-Württemberg (C-316/16) and SSHD v Vomero (C-424/16) [2019] QBD 126.

18.The correct approach was discussed in the Court of Appeal case of Hussein v Secretary of State for the Home Department [2020] EWCA Civ 156, at [18]:

> "However, what does emerge clearly from *MG (Portugal)* is that whether or not a period of imprisonment can count towards the ten years, an individual claiming enhanced protection who has served time in custody must prove *both* that he had ten years' continuous residence ending with the date of the decision on a mathematical basis *and* that he was sufficiently integrated within the host state during that ten year period."

19.The Court, at [11], referred to the approach at [24] of Secretary of State for the Home Department v MG (Judgment of the Court) [2014] EUECJ C-400/12, which in turn was confirmed by the CJEU in the joined references in B v Land Baden-Württemberg (C-316/16) and Vomero (C-424/16) [2019] QB 126 at [65]:

> "It follows, in particular, that the 10-year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of the decision ordering that person's expulsion (judgment of 16 January 2014, *G.*, C-400/12, EU:C:2014:9, paragraph 24).."

20.The Court also confirmed, at [20], the approach set out at [70] in B v Land Baden-Württemberg (C-316/16) and Vomero (C-424/16) [2019] QB 126:

> "As to whether periods of imprisonment may, by themselves and irrespective of periods of absence from the host Member State, also lead, where appropriate, to a severing of the link with that State and to the discontinuity of the period of residence in that State, the Court has held that although, in principle, such periods of imprisonment interrupt the continuity of the period of residence, for the purpose of Article 28(3)(a) of Directive 2004/38, it is nevertheless necessary — in order to determine whether those periods of imprisonment have broken the integrative links previously forged with the host Member State with the result that the person concerned is no longer entitled to the enhanced protection provided for in that provision — to carry out an overall assessment of the situation of that person at the precise time when the question of expulsion arises. In the context of that overall assessment, periods of imprisonment must be taken into consideration together with all the relevant factors in each individual case, including, as the case may be, the circumstance that the person concerned resided in the host Member State for the 10 years preceding his imprisonment (see, to that effect, judgment of 16 January 2014, *G.*, C-400/12, EU:C:2014:9, paragraphs 33 to 38)."

21. As Mr Richardson submitted, with reference to [72] to [74] and [83] of B v Land Baden-Württemberg (C-316/16) and Vomero (C-424/16), what was required was a fact-sensitive assessment which included consideration of particular factors:

> "72. As part of the overall assessment, mentioned in paragraph 70 above, which, in this case, is for the referring court to carry out, it is necessary to take into account, as regards the integrative links forged by B with the host Member State during the period of residence before his detention, the fact that, the more those integrative links with that State are solid — including from a social, cultural and family perspective, to the point where, for example, the person concerned is genuinely rooted in the society of that State, as found by the referring court in the main proceedings — the lower the probability that a period of detention could have resulted in those links being broken and, consequently, a discontinuity of the 10-year period of residence referred to in Article 28(3)(a) of Directive 2004/38.
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> 73. Other relevant factors in that overall assessment may include, as observed by the Advocate General in points 123 to 125 of his Opinion, first, the nature of the offence that resulted in the period of imprisonment in question and the circumstances in which that offence was committed, and, secondly, all the relevant factors as regards the behaviour of the person concerned during the period of imprisonment.
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> 74. While the nature of the offence and the circumstances in which it was committed shed light on the extent to which the person concerned has, as the case may be, become disconnected from the society of the host Member State, the attitude of the person concerned during his detention may, in turn, reinforce that disconnection or, conversely, help to maintain or restore links previously forged with the host Member State with a view to his future social reintegration in that State…
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> 83. In the light of all the foregoing, the answer to the first three questions in Case C-316/16 is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that, in the case of a Union citizen who is serving a custodial sentence and against whom an expulsion decision is adopted, the condition of having 'resided in the host Member State for the previous ten

> years' laid down in that provision may be satisfied where an overall assessment of the person's situation, taking into account all the relevant aspects, leads to the conclusion that, notwithstanding that detention, the integrative links between the person concerned and the host Member State have not been broken. Those aspects include, inter alia, the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed and the conduct of the person concerned throughout the period of detention."

22.It was Mr Richardson's submission that, whilst the judge erred by failing to count back from the date of the deportation decision in considering the relevant ten year period and whilst he did not expressly refer to the question of the appellant's integrative links being broken by his offending and imprisonment, such an error was not material to the outcome of the appeal since he effectively undertook the relevant test and carried out a fact-sensitive assessment in any event, considering all the relevant factors as referred to in B v Land Baden-Württemberg (C-316/16) and Vomero (C-424/16) and referred to above.

23.We agree with Mr Richardson that that is indeed the case. We agree that that was what the judge was effectively doing at [25] and [27] to [40]. At [25] he had regard to the fact that the appellant had already completed ten years of residence prior to his imprisonment, which the CJEU in B v Land Baden-Württemberg (C-316/16) and Vomero (C-424/16) at [70] had considered to be a relevant factor. At [25] he found that the appellant had been working and exercising treaty rights up until the year of his arrest and imprisonment and had accordingly been lawfully present in the UK for the majority of his time here. At [28] to [30] he considered the appellant's conduct during his detention, noting that he had undertaken rehabilitative work in prison, that the OASys report was entirely positive and that he posed a low risk of reoffending. At [35] he noted that his qualifications were all attained in the English language and at [36] to [40] he took account of the appellant's strong family life with his wife and children. Finally at [42] he referred to the appellant's conduct as a prisoner and as a husband and father. The judge therefore addressed, in substance if not in form, the aspects of integrative links forged with the UK which the CJEU considered were necessary in order for the higher threshold to be engaged. In the circumstances we conclude that the first part of the Secretary of State's grounds is not made out.

24.The Secretary of State also asserts that even if the judge was right to find that the appellant was entitled to the highest level of protection, he failed to consider the nature of the appellant's crime and to recognise that drug dealing as part of an organised group was capable of being covered by the concept of 'imperative grounds of public security', as found in in Tsakouridis (European citizenship) [2010] EUECJ C-145/09. Ms Ahmed submitted that that tied in with the requirement to consider the fundamental interests of society, as set out in Schedule 1 to the EEA Regulations 2016, which she said the judge failed to do. In that respect she also relied upon the case of K. () and allegations de crimes de guerre) (Citizenship of the European Union - Right to move and reside freely within the territory of the Member States - Restrictions - Judgment) [2018] EUECJ C-331/16 which, at [44], referred to the necessity to ensure the protection of the fundamental values of society in a Member State and maintaining social cohesion, public confidence in the justice and immigration systems of the Member States and at [56], referred to the possibility of past conduct alone constituting a threat to the requirements of public policy.

25.Mr Richardson, in response, relied upon the case of Hafeez v The Secretary of State for the Home Department [2020] EWCA Civ 406 where, at [47], reliance was placed on Carnwath LJ's guidance in LG and CC (EEA Regs: residence; imprisonment; removal) Italy [2009] UKAIT 00024 emphasising that the focus must be on the individual's present and future risk to the public, rather than on the seriousness of the individual's offending:

> "110. ...[We] cannot accept the elevation of offences to "imperative grounds" purely on the basis of a custodial sentence of five years or more being imposed... [T]here is no indication why the severity of the offence in itself is enough to make the removal "imperative" in the interests of public security. Such an offence may be the starting point for consideration, but there must be something more, in scale or kind, to justify the conclusion that the individual poses "a particularly serious risk to the safety of the public or a section of the public". Terrorism offences or threats to national security are obvious examples, but not exclusive. Serial or targeted criminality of a sufficiently serious kind may also meet the test. However, there needs to be some threat to the public or a definable section of the public sufficiently serious to make expulsion "imperative" and not merely desirable as a matter of policy, in order to ensure the necessary differentiation from the second level."

26.We agree with Mr Richardson that the judge had full regard to the necessary considerations in relation to the fundamental interests of society, referring to relevant authorities at [20] to [22]. He went on, at [23], to assess the nature of the appellant's offence and the seriousness of his offending in that context. He correctly focussed on the appellant's wider personal conduct and the future risk to the public and concluded that the evidence before him did not show that the appellant was a dangerous person who posed a risk to society, despite the nature of his offending. It is clear from the findings of the judge that the appellant did not fall within the category of dangerous persons envisaged in cases such as K and Hafeez whose removal was justified on imperative grounds of public security and we consider that the judge gave adequate reasons for concluding as such.

27.The third and final part of the Secretary of State's first ground concerned the judge's asserted failure to consider the seriousness of the consequences of the appellant reoffending. Ms Ahmed submitted that the judge failed to consider the seriousness of the harm that would be caused if the appellant reoffended and she relied on the case of Kamki v The Secretary of State for the Home Department [2017] EWCA Civ 1715 in that respect. In that case the decision of the First-tier Tribunal was upheld where it dismissed the appeal of an appellant who, although found to pose a low risk of reoffending, was considered to pose a risk of causing serious harm if he reoffended. However not only do we find that case to be quite specific on its facts but we agree with Mr Richardson that that was a matter properly considered by the judge at [27] to [31]. At [27] the judge specifically referred to the question of the serious harm caused by similar offences if the appellant were to reoffend, as raised by the respondent in the refusal decision, and in the ensuing paragraphs he specifically addressed the matter by reference to the appellant's rehabilitative work in prison and the conclusions reached in the OASys report as to the risk of reoffending.

28.That in turn leads on to the second ground of appeal which challenged the judge's assessment of risk arising from the OASys report. The grounds assert that the judge erred by relying on the assessment of risk in the OASys report as an indication of the risk the appellant posed to the community within a certain period when he would still

be in prison during that time. In that respect, Ms Ahmed relied upon the guidance in Restivo (EEA - prisoner transfer) Italy [2016] UKUT 449 which established that the fact that the threat posed by the appellant was managed while he was serving his prison sentence was not itself material to the assessment of the threat he posed to society. However we consider that challenge, and the reliance upon Restivo, to be misconceived. Clearly the OASys report assessed the risk the appellant posed in the community and related to the position following his release into the community. Further, the judge did not simply adopt the statistical outcome provided in the OASys report but he had careful regard to the substance of the risk assessment, noting that the appellant had been assessed by two different people, in a categorisation assessment as well as the overall OASys assessment and had been recategorized to a lower security category not only because of the reduction in his sentence but also because of his positive behaviour, his work as a gym orderly and his completion of various courses. The judge therefore had careful regard to the appellant's rehabilitative work, his conduct and behaviour and all other relevant factors when making his assessment of the threat he posed to society and provided a fully and properly reasoned conclusion which he was perfectly entitled to reach on the evidence before him. We note as an additional point, as we mentioned at the hearing, that the evidence before the judge also included a psychiatric report at page 56 of the appellant's bundle of evidence which also made a very positive assessment as to the low risk he posed to the community. The judge did not specifically refer to the report but clearly it was evidence before him which he would have considered and which lends further support to his conclusions.

29.For all of these reasons we consider that the judge provided adequate reasons for concluding that the appellant was entitled to benefit from the highest level of protection under the EEA Regulations and that it had not been shown that there were imperative grounds of public security for his expulsion from the UK. The judge was entitled to allow the appeal under the EEA Regulations 2016 on the basis that he did and the grounds do not demonstrate that he made any material errors of law in so doing. We therefore upheld the decision of Judge Howard in relation to the EEA Regulations 2016.

30.That then leaves us with the appellant's cross-appeal in relation to the decision on Article 8. We understood Mr Richardson's case to be that the challenge was only pursued in the event that the appellant did not succeed under the EEA Regulations 2016, since Article 8 would not be engaged if the appellant succeeded under the EEA Regulations. Given that we have upheld the judge's decision under the EEA Regulations we conclude that the appellant does not pursue his case in relation to the Article 8 grounds and Judge Howard's decision therefore stands.

31.Accordingly we find no material errors of law in the judge's decision requiring it to be set aside and we uphold the decision.

Notice of Decision

32.The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. We do not set aside Judge Howard's decision and his decision therefore stands.

Signed: S Kebede

Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 January 2023