



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00514/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*

Decision & Reasons

On 8 January 2021

Promulgated
On 19 January 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMED HOSHYAR KHIDAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms. S Cunha, Senior Presenting Officer

For the Respondent: Mr. J Dhanji, Counsel, instructed by M & K Solicitors.

DECISION AND REASONS

Introduction

1. The appellant in this matter is referred to as the 'Secretary of State' in the body of this decision, the respondent as the 'claimant'.
2. This is an appeal against a decision of the First-tier Tribunal (Resident Judge of the First-tier Tribunal Campbell and Judge of the First-tier Tribunal Malone) ('the panel') issued to the parties on 18 March 2020 by which the claimant's appeal against a

decision of the Secretary of State to deport him in accordance with regulations 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations) was allowed.

3. Permission to appeal on all grounds was granted by Upper Tribunal Judge Gill by means of a decision dated 3 July 2020.
4. The claimant continues to enjoy a right of appeal against the Secretary of State's decision following the United Kingdom's exit from the European Union consequent to Schedule 3, paragraph 5 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020.

Remote hearing

5. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Anonymity

6. The First-tier Tribunal did not issue an anonymity order and neither party sought one before me.

Background

7. The claimant is a national of Iraq and is presently aged 28. He entered the United Kingdom clandestinely in July 2007 and his application for international protection was ultimately unsuccessful.
8. In 2013, the claimant married his wife, a Polish citizen exercising EU Treaty rights in this country. They have a child. Consequent to his marriage the claimant was issued with an EEA residence card in November 2015 as a family member of an EEA national.

Index Offence

9. As a minor the claimant was reprimanded for affray in 2009. He was cautioned for possessing or controlling an article for use in fraud in 2012. He was fined £50 for resisting or obstructing a constable in 2014.

10. As for the index office, the claimant entered a guilty plea at a plea and allocation hearing before a Magistrates Court and was subsequently arraigned at Lewes Crown Court on 29 October 2018 where he entered guilty pleas to nine counts under the Proceeds of Crime Act 2002 ('the 2002 Act'). The offences were concerned with the unlawful sale of cigarettes and tobacco products. On 27 November 2018 he was sentenced to 27 months' imprisonment.
11. The nature and extent of the offending was detailed by HHJ Waddicor in her sentencing remarks:

'... The period concerned was 15 May through to 11 September 2017. What happened was this. Your wife ... who was a co-defendant, but against whom the Crown ultimately offered no evidence, was the person, in theory, running a corner shop ... an investigator from the Trading Standards team went to the convenience store on 15 of May and was sold, by you, or by your wife, some Golden Virginia tobacco, which didn't have the requisite health warning, nor is there the requisite photograph, or other details. ...

Exactly a week later, another offence is committed; this is supplying, or possessing for supply, 50g of Amber Leaf tobacco. No general warning 'Smoking Kills' and no warning in English. On the same day, there were a further five similar pouches possessed ready for supply. There were also cigarettes which appeared to be under the trademark of Gallaher Limited, maybe Mayfair, but they were counterfeit. On the same day, the 22 of May, at the shop, ready for sale, were 134 packets of Business Royal cigarettes. Those cigarettes were dangerous, because they did not comply with the provisions relating to extinguishment after a certain point. A similar offence is committed on the 24 May relating to Golden Virginia tobacco, another passing off offence. There was a repetition of the failure to ensure that products have the requisite warnings, again, on the same day, the 24 May.

You, of course, were aware as of 22 May, and I am sure long before that, that what you were doing was unlawful. You were aware that the premises have been investigated by the Trading Standards officers on 24 May and the officers went to your home address ... They searched the home under a warrant and found a stash of unlawful cigarettes concealed in a wardrobe. Someone in the team searching the premises had the bright idea to look at the sofa. Underneath the sofa was a deep shelf crammed with illegal tobacco products. It doesn't end there, because a search of the ... shop revealed, concealed in the ceiling above a light fitting, a further stash of illicit tobacco goods destined for sale. What is particularly troubling is that when the officers went back to the shop in September 2017, you were still trading - selling unlawful cigarettes and tobacco products some months after the search of your home. The amount seized in May at your home was 12,900 cigarettes and 6,250g of tobacco and - in the search conducted at the shop in May, the total amount seized, concealed in the shop, was 2,700g of tobacco and 660 cigarettes.

These matters led, inevitably, to an investigation by financial investigator. That revealed two Barclays bank accounts in your name with just under £36,000 in them, which could not be accounted for. ... Your explanation was that the shop in your wife's name wasn't making money and a Polish customer made you a

tempting offer to buy cheaper goods, I suppose. I note that you told the probation officer ... that this was the reason for you entering into this arrangement. However, your initial defence to the money-laundering charge was that the £36,000 had come from the sale of motor vehicles, but in any event, you have now accepted responsibility.

...

The aggravating factors in this case include the deliberate concealment of the items, particularly, in the ceiling space where they were found nine days after the original offence was committed, but I do not mean by that you went and hid them in the ceiling space in that nine days, but they were there after you have been warned about the offences and the fact that you were still offending in September only serves to highlight your willingness to ignore, completely, warnings that you had been given. Notices would have been left at your own on 22 of May from which date onwards you were well aware of the seriousness of your offending.'

Confiscation proceedings

12. At a subsequent confiscation hearing the claimant was ordered to pay £22,800, the assessed benefit of his crime, or to serve 10 months' imprisonment in default.

Deportation proceedings

13. The Secretary of State wrote to the claimant on 14 December 2018, notifying him that she intended to make a deportation order against him on the grounds of public policy in accordance with regulations 23(6)(b) and 27 of the 2016 Regulations.
14. By a decision dated 7 October 2019 the Secretary of State confirmed her decision to deport observing, *inter alia*, that whilst it was accepted that the claimant was the family member of an EEA national, it was not accepted that his wife had acquired permanent residence.
15. The claimant exercised his right of appeal to the First-tier Tribunal.

Hearing before the FtT

16. The hearing was held before a panel that included the Resident Judge at Taylor House. The claimant and his wife gave evidence and the panel found them both to be credible witnesses.
17. The panel found, *inter alia*:
 - (1) The Secretary of State had failed to adduce any reliable evidence to show that the claimant's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and so had failed to discharge the burden placed upon her: §30

- (2) The claimant's wife acquired permanent residence in this country in February 2018: §31
- (3) The claimant enjoyed a right to reside permanently in this country at the date of his conviction and so the Secretary of State was required to justify deportation on serious grounds of public policy: §34
- (4) The Secretary of State was not capable of discharging the burden upon her to establish that deportation was necessary on serious grounds of public policy: §34
- (5) In the alternative, the claimant's deportation would be disproportionate: §35

Grounds of Appeal

18. The Secretary of State was granted permission to appeal on four grounds, which can be summarised as follows:
 - (1) Inadequate reasoning, in particular a failure to explain why the claimant was not aware of the seriousness of the offence at the time of its commission.
 - (2) A failure to take relevant factors into account when assessing current threat.
 - (3) A failure to lawfully assess as to whether the claimant's wife enjoys permanent residence.
 - (4) Such errors led to an unlawful consideration of proportionality.

Law

19. At the relevant time a spouse would usually be a family member of an EEA national exercising EEA Treaty rights in this country. They could well acquire a permanent right of residence upon residing in this country with the EEA national in accordance with the 2016 Regulations for a continuous period of five years: regulations 7 and 15 of the 2016 Regulations.
20. Regulation 23 of the 2016 Regulations provides for the exclusion and removal of an EEA national or their family member if their removal is justified on the grounds of public policy pursuant to regulation 27. Protection from removal is enhanced if such person has a permanent right of residence, where 'serious grounds of public policy or public security' are required: regulation 27(3).
21. The relevant date for assessment is the date of consideration at appeal. The burden of proof rests upon the Secretary of State and the standard to be applied is the civil standard: *Arranz (EEA Regulations – deportation – test)* [2017] UKUT 00294 (IAC).

22. When considering whether serious grounds exist, focus is to be placed upon the propensity of the individual to re-offend rather than issues of deterrence or public revulsion, which have no part to play in assessment: *Secretary of State for the Home Department v. Straszewski* [2015] EWCA Civ 1245, [2016] 1 W.L.R. 1173.
23. Consideration of proportionality is only undertaken if the serious threat test has been made out. It is a holistic balancing exercise. The prospects of continuing successful rehabilitation can be relevant to proportionality.

Decision on Error of Law

Permanent residence

24. I proceed to initially consider ground 3, which is a challenge to the panel's finding that the claimant's wife secured permanent residence in February 2018. On this issue the panel reasoned, at §§31-33:

31. We are also satisfied that the evidence we had demonstrated that [the claimant's wife] had acquired permanent residence in the United Kingdom as at 13 February 2018. We were provided with a letter from HMRC dated 18 June 2019 setting out her income details for tax years 2013/14 to 2018/19. Those details showed she had been employed for the entirety of that period save for the period 30 September 2016 to 13 February 2018 ('the gap period').

32. [The claimant's wife] told us, over the gap period, she and the [claimant] had been running the [shop]. She acknowledged that no earnings had been declared to HMRC for that period. She told us that neither she nor her husband understood what to do in relation to the earnings made from running the shop. [The claimant's wife] told us that she and her husband ran the shop from the beginning of September 2016 to January/February 2018.

33. The authorities found a sum in excess of £36,000 in the [claimant's] bank accounts which could not be accounted for. A sum in excess of £22,000 was confiscated. Having heard the evidence of the [claimant] and [his wife], we are satisfied that, over the gap period, [the claimant's wife] was engaged in economic activities. We are satisfied that the shop generated an income from the legitimate sale of products usually to be found in convenience stores, other than the illegal cigarettes and tobacco. We find she was economically active over the gap period. We find that she was therefore engaged in economic activities throughout the period of tax years 2013/14 to 2017/18. In fact, the letter from HMRC, shows she was employed for tax years 2018/19 as well. We are satisfied that she has been economically active since he arrived in this country eight years ago.'

25. By means of ground 3 the Secretary of State complains:

'It is submitted first, that when assessing the wife's evidence of exercising Treaty rights the Panel fail to take into account the sentencing remarks [which] record that:

'Your explanation was that the shop in your wife's name wasn't making money and a Polish customer made you a tempting offer to buy cheaper goods, I suppose. I note that you told the probation officer, that that was the reason for your entering into this arrangement.'

It is submitted that it was not open to the panel to find that the wife was continuously exercising Treaty rights over a 5-year period, particularly in respect of the 18-month gap and in light of the fact that the store 'wasn't making money'. There was no independent evidence of how much money was earned during the gap period, when it was earned, whether earnings were derived from lawful means or whether employment was continuously '*genuine and effective*'. The panel completely fail to apply the requirements of the EEA 2016 Regulations, instead entering into pure speculation without reference to any actual evidence or law.

It is further submitted that the panel's inference @33 that because there was £36,000 in A's account and the authorities confiscated £22,800 that the difference must be lawful and can therefore underpin a finding of lawful, genuine effective employment, is completely unsustainable as set out. In the sentencing remarks (RFRL @42), '*Those matters led, inevitably, to an investigation by a financial investigator. That revealed two Barclays bank accounts in your name and just under £36,000 in them, which could not be accounted for.*' It is therefore self-evidence that first, the £36,000 could simply not be accounted for, there was no suggestion that it derived from lawful employment. Second, the £36,000 was in A's personal account, it is therefore wholly unclear how the panel associate this money with A's wife's alleged employment.

It is submitted in light of the criminal enterprise at the heart of the store and given that there was no corroborative evidence of lawful earnings during the gap period, it was not open to the panel to find that the wife had exercised Treaty rights for 5 years continuously.'

26. Ms. Cunha tentatively relied upon this ground, preferring to place weight elsewhere, and she was correct to adopt this approach.
27. There are two fatal flaws to the ground advanced, the first one being a clear example of the dangers in presenting only a partial reference to issues considered within a decision. As is made clear at para. 11 of this decision, above, HHJ Waddicor observed that the claimant had presented two, contradictory, reasons for his actions. The first explanation was that the money had come from the sale of a motor vehicle. This explanation was replaced by one where it was asserted that the shop not making money and the claimant acting upon an offer from an unidentified customer. The latter was not expressly accepted by the sentencing Judge. It formed no part of her subsequent assessment of mitigation.
28. Secondly, and unfortunately overlooked by the author of the grounds, there were subsequent confiscation proceedings and as recorded by the PNC print-out the claimant was subject to a confiscation order in the sum of £22,800 under the 2002 Act. Such order was therefore consequent to a judicial decision.

29. I am satisfied that the Crown Court undertook an examination as to whether the claimant had a criminal lifestyle, and if he did not whether he benefited from his particular criminal conduct. The statutory power for the latter are sections 6(4)(c) and 8 of the 2002 Act. Upon concluding that the claimant benefitted from his conduct or had a criminal lifestyle, to the civil standard, the Court was mandatorily required to make a confiscation order requiring him to pay the recoverable amount. For the purposes of section 6 of the 2002 Act, such amount is equal to the claimant's benefit from the conduct concerned: section 7(1).
30. The financial investigator's report, relied upon by the Secretary of State, would have been placed before the Crown Court and considered during the confiscation proceedings. However, it is not determinative of the issue, as understood by the Secretary of State in her ground of appeal. The decision of the Crown Court as to the order is the basis upon which the panel was to commence its consideration.
31. In light of the confiscation proceedings, the Tribunal could properly consider the residue of the £36,000 that was not confiscated to be attributable to legitimate sources and it was reasonably open to the Tribunal to consider that it came from legitimate sales at the shop. HHJ Waddicor had given no indication of accepting the claimant's assertion that the shop was not making money, and it was reasonably open to the Tribunal to decide that money was coming into the business through sales of legitimate goods. It is unfortunate that the author of the grounds has sought to assert that it is 'wholly unclear' as to how a bank account held by a husband could contain money flowing from a business jointly run by his wife. There is no merit in this ground of appeal.
32. In any event, the ground is misconceived as to there being a requirement that a business must be profit-making for the purpose of a self-employed person exercising Treaty rights. As observed by the Upper Tribunal (AAC) in *SSWP v JS (IS)* [2010] UKUT 240 (AAC), at §5, when considering whether an EEA national's self-employed status led to her having a right to reside, self-employment may be affected by 'feast and famine':
 5. I do not accept that a claimant who is for the moment doing no work is necessarily no longer self-employed. There will commonly be periods in a person's self-employment when no work is done. Weekends and holiday periods are obvious examples. There may also be periods when there is no work to do. The concept of self-employment encompasses periods of both feast and famine. During the latter, the person may be engaged in a variety of tasks that are properly seen as part of continuing self-employment: administrative work, such as maintaining the accounts; in marketing to generate more work; or developing the business in new directions. Self-employment is not confined to periods of actual work. It includes natural periods of rest and the vicissitudes of business life. This does not mean that self-employment survives regardless of how little work arrives. It does mean that the issue can only be decided in the context of the facts at any particular time. The amount of work is one factor. Whether the claimant is taking any other steps in the course of self-employment is also relevant. The claimant's

motives and intentions must also be taken into account, although they will not necessarily be decisive.'

33. By means of this ground of appeal, the Secretary of State entirely fails to engage with the fact that Trading Standards officials were attending the shop, which was clearly open and selling a wide range of goods as would be expected in a convenience store. Rather, she identifies the exercise of Treaty rights solely through the prism of profit. Such approach is misconceived. The relevant question is whether self-employed activities are on such a small scale as to be purely marginal and ancillary. That is clearly not the case if an EEA national's business involves running a convenience shop with regular opening hours.
34. The panel's decision on this issue was therefore lawfully reasoned and entirely rational.
35. I observe in this matter that the claimant had been married to his wife for five years prior to his imprisonment in November 2018 and so, as he had enjoyed five years' continuous legal residence prior to the commencement of his term of imprisonment, he had secured permanent residence by, at the latest, the fifth anniversary of his marriage in April 2018: *Secretary of State for the Home Department v Vomero* [2019] UKSC 35, [2019] 1 W.L.R. 4729.

Adequate reasoning

36. The Secretary of State contends that the panel's 'complete acceptance' of the claimant's evidence is inadequately reasoned, accompanied by a failure to take into account evidence material to the issue of credibility.
37. The first complaint is that the panel gave no reasons as to why they found the claimant and his wife credible at §21 of the decision, merely stating it as a bare fact.
38. It is unfortunate that the bald assertion made by the Secretary of State fails to identify within the grounds the clear reasoning given in subsequent paragraphs as to why the positive credibility finding was made. Ms. Cunha appropriately conceded that the sole reliance by the grounds of appeal upon §21 failed to engage with the reasoning detailed elsewhere.
39. The second complaint is identified, *inter alia*, as follows:

'In this regard at paragraphs 21 and 28 the Panel expressly accept the Appellant was unaware of the seriousness of his index offence whilst it was committed. The Panel then use this erroneous finding to first justify why A continued to offend between May - Sept 2017 (despite A having already been caught by Trading Standards in May) and second, to perversely reject A's continued offending after the visit in May as evidence of a propensity to reoffend.

It is submitted that the FTT failed entirely to take into account the fact that the Crown Court found (as set out @ RFRL 42) that A was aware of the seriousness of his offending when considering the credibility of A's claim:

'The aggravating factors in this case include the deliberate concealment of the items, particularly in the ceiling-space where they were found nine days after the original offence was committed, but I do not mean by that that you went and hid them in a ceiling-space in that nine days, but they were there after you had been warned about the offences and the fact that you were still offending in September only serves to highlight your willingness to ignore, completely, warnings that you had been given. Notices would have been left at your home on the 22nd of May from which date onwards you were well aware of the seriousness of the offending.'

40. Upon careful consideration of the evidence presented to the panel and its subsequent assessment as detailed in the decision, it is clear that the panel is referring to the claimant not believing at the relevant time that his offending was such as to likely lead to a serious penalty, for example a custodial sentence. The panel was not, as asserted by the Secretary of State in her grounds, accepting that the claimant was not aware that he was acting in a criminal way. The claimant was wrong in his belief, as confirmed by the sentence imposed. However, that does not mean, *per se*, that he is being untruthful as to his erroneous understanding as to the serious consequences of selling illegal cigarettes. The panel's consideration of this issue does not engage with the issue of 'seriousness' in the manner asserted by the Secretary of State and so this complaint must fail.
41. There is no merit in the Secretary of State's final complaint as advanced by ground 1, namely that by observing that the claimant had '*only one set of significant offences*' the panel failed to take into account the escalating seriousness of the claimant's offending over a number of years, including that he had previously been cautioned for a fraud offence. I observe that the offence in 2012 was for using a Bluetooth device in a driving test and a caution was considered the appropriate sanction. As observed above, the claimant was reprimand for affray in 2009, when a minor, and the conviction in 2014 was for resisting or obstructing a constable which resulted in a fine of £50. It is clear upon reading the decision that the panel clearly had in mind the claimant's previous offending and the assertion that there was an escalating seriousness to the offending is simply not borne out on the facts of this matter.

'Genuine, present and sufficiently serious threat'

42. The Secretary of State complains by means of ground 3:

'It is further submitted in respect of the FTT's approach to 'genuine, present and significantly serious threat, that the findings @26 that:

'It is also relevant to bear in mind, when assessing the imminence of any threat the appellant might pose, that he will continue to be subject to licence, which will involve him living in approved premises under the supervision

and with the support of a probation officer', is an irrelevant consideration when assessing 'current threat'.

In *Restivo (EEA – prisoner transfer)* [2016] UKUT 00449 (IAC) the Upper Tribunal found in respect of a present threat:

'Where the personal conduct of a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, the fact that such threat is managed while that person serves his or her prison sentence is not itself material to the assessment of the threat he or she poses. The threat exists, whether or not it cannot generate further offending simply because the person concerned, being imprisoned, has significantly less opportunity to commit further offences.'

It is therefore submitted that the FTT has fallen into error by treating the management of the threat posed by A as evidence that the threat does not exist.

It is further submitted that the FTT, when assessing risk in the absence of an OASys report or probationary report, fail to take into account that the appellant was in prison until 10/1/20 and has been in Immigration Detention ever since; the appellant therefore has no track record of abiding by the terms of a licence and no track record of abiding by the law outside of detention since the index offence.'

43. Again, the grounds of appeal fail to provide the true context of the panel's reasoning, instead adopting an approach of presenting a partial picture. §26 of the decision must properly be read with §§25 to 30:¹

25. We were not provided with an OASys report on the Appellant. We had no expert assessment as to the likelihood of the Appellant re-offending. We are satisfied, on the evidence we had, in particular the oral evidence of the Appellant, that he had no intention of re-offending. He furnished us with certificates showing the courses he had undertaken while in prison. He followed two courses entitled 'Gateway Qualifications Entry Level Award in ESOL Skills for Life (Reading) (Entry 1)'. The most significant courses he followed were those evidenced by the certificates he obtained entitled 'Sycamore Tree – Restorative Justice & Victim Awareness Programme' dated 13 May 2019 and 'Sycamore Tree – Restorative Justice' dated 18 June 2019.²

26. The certificates the Appellant produced show he has used his time in prison to develop skills that will assist him in re-integrating into society on release. It is also relevant to bear in mind, when assessing the imminence of any threat the Appellant might pose, that he will continue to be subject to licence,

¹ §27 simply details a paragraph of the refusal letter

² Sycamore Tree is a volunteer-led victim awareness programme that teaches the principles of restorative justice. Participants on the programme explore the effects of crime on victims, offenders, and the wider community, and discuss what it would mean to take responsibility for their personal actions.

which will involve him living in approved premises under the supervision and with the support of a probation officer.

...

28. We find there is no justification for that statement. We reiterate that it is for the Respondent to demonstrate that the Appellant's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The Appellant only has one set of significant convictions. Mr. Blennerhassett sought to argue that the fact that the Appellant continued to sell illegal products after the first visit by the authorities shows he has a propensity to re-offend. We do not accept that argument. We have already recorded the Appellant's evidence that he carried on selling the products because he did not appreciate the seriousness of what he was doing or the seriousness of the consequences that would ensue. He made it clear in his oral evidence that he has no intention of re-offending.

29. The fact that the Appellant has committed the offences he has, does not evidence a propensity to re-offend. Moreover, Regulation 27(5)(e) reads:

'A person's previous criminal convictions do not in themselves justify the decision.'

30. After careful consideration, we have come to the conclusion that the Respondent has failed to discharge the burden on her. She has failed to adduce any reliable evidence to show that the Appellant's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct and that the threat posed does not need to be imminent. We therefore allow the appeal on that basis.'

44. It is unfortunate that at §26 the panel presumes that the claimant would be subject to a licence condition requiring him to initially reside at approved premises upon release. As someone with a home to return to, not convicted of a serious violent or sexual offence, not convicted of a domestic violence offence, and someone not requiring monitoring for drink or drug concerns underpinning criminal behaviour, it would be very unlikely that the Probation Service would require the claimant to be subject to such licence condition. Indeed, this proved to be the case as he returned home upon being released from immigration detention.

45. Further, the observation at §26 that probation supervision can be considered when assessing imminence of threat is not in accordance with the confirmation in *Restivo (EEA – prisoner transfer)* [2016] UKUT 00449 (IAC), [2017] Imm. A.R. 188, at [24] that the fact that whether the personal conduct of a person is managed while they serve their criminal sentence is not itself material to the assessment of the threat they pose. As observed by the Tribunal in *Restivo* this conflates the existence of risk of reoffending with the management of risk.

46. However, upon reading the decision it is clear when it is considered in context that such errors were not material, as §26 enjoyed only limited influence in the overall decision as to serious risk. Several other reasons were provided, including the panel's acceptance that the claimant now possesses an informed understanding as to the risks to his liberty flowing from criminal offending and its further acceptance, consequent to considering all of the evidence presented, that the claimant has no intention of re-offending. These findings were reasonably open to the panel and stand apart from the consideration at §26. Consequently, the errors identified above are not capable of being considered to be material errors of law and so this ground of challenge must fail.

Proportionality

47. Ms. Cunha accepted before me that if the Secretary of State was unable to succeed on her challenge to the panel's conclusion as to the serious threat test, then the ground of challenge as to the assessment of proportionality was moot.
48. For the sake of completeness, I address ground 4 which details in its entirety:

'It is submitted in light of the above that the FTT's proportionality [sic] also falls into error, as it is erroneously predicated upon a false factual matrix.'

49. As observed above, the panel did not proceed on a false factual matrix and so this ground enjoys no merit.

Notice of decision

50. The decision of the First-tier Tribunal did not involve the making of a material error of law.
51. The decision of the First-tier Tribunal sent to the parties on 18 March 2020 is upheld and the Secretary of State's appeal is dismissed.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 11 January 2021

TO THE RESPONDENT
FEE AWARD

As no fee has been paid, no fee award can be made.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 11 January 2021