Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00284/2020
(UI-2021-00467)

THE IMMIGRATION ACTS

Heard by way of a hearing	**Decision & Reasons Promulgated**
On 4 May 2022	**On 24 June 2022**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

GA
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Z. Young, Senior Home Office Presenting Officer
For the Respondent: Mr N. Paramjorthy, Counsel instructed on behalf of the respondent

DECISION AND REASONS

Introduction:

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal (Judge Monaghan) promulgated on 29 August 2021. By its decision, the Tribunal allowed the appellant's appeal against the Secretary of State's decision dated 24 August 2020 to deport him from the United Kingdom.

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

Preliminary issue:

3. The First-tier Tribunal did make an anonymity order. The Upper Tribunal in its written directions directed the parties to provide submissions on whether the direction should be continued. Both parties were in agreement that on the facts of the appeal and those matters set out in the FtT decision that it would be appropriate to make an anonymity direction.

4. I consider that it is appropriate to make such an order. There is no dispute between the parties that an anonymity direction should be made. The starting point for consideration of such a direction in this Chamber of the Upper Tribunal, as in all courts and tribunals, is open justice. On the other side of the balance, there are the interests of the children who are involved in these proceedings which require protection and having taken that into account, and in light of the submissions made that the decision concerns the circumstances of minors and also medical issues, I accept the submission made by both parties that the public interest is outweighed.

5. I therefore make an anonymity direction as follows: Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and his family members are granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (and/or other person) without that individual's express consent. Failure to comply with this order could amount to a contempt of court.

The background:

6. 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.

7. By a decision and reasons promulgated on the 29 August 2021 the FtTJ allowed the appeal, holding that the decision was in not accordance with the Regulations as he found that the respondent had not established that the appellant represented a genuine, present and sufficiently serious threat to public policy or security such that his deportation was justified. The judge also considered the issue of proportionality of the decision.

8. The appellant appealed and permission to appeal was granted by FtTJ Grant on 21 September 2021.

9. The hearing took place on 4 May 2022 at court but with Mr Paramjorthy attending by means of *Microsoft teams* which has been consented to and not objected to by the parties. 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.

10. I am grateful to Ms Young and Mr Paramjorthy for their clear oral submissions.

Factual Background:

11. The appellant was born in Iraq but left that country in August 1997 and in the Netherlands he made a claim for asylum and was granted status in 1998. He subsequently became a Dutch citizen. He was in a relationship with a Dutch citizen and a child was born.

12. The key factual background is set out in the decision of the FtTJ, the decision letter and the witness statements filed on behalf of the appellant. The appellant claimed to have entered the United Kingdom in 2008. He undertook employment and during his period of time in the UK his daughter came to live with him for a period of 3 years before returning to live in the Netherlands to study. The appellant met his present partner in the UK, and they were married in an Islamic ceremony on 13 April 2018.

13. On 27 September 2019, the appellant was convicted of 2 counts of money laundering and received a custodial sentence of 24 months imprisonment. Whilst in custody the appellant's second child was born.

14. On 07th October 2019 the Appellant was served with a decision to deport as an Iraqi national. On 31st October 2019, a response was received from his Legal Representatives. On 19th December 2019, an amended EEA Notice of Liability for Deportation Decision Letter was issued and served. The Appellant signed a medical disclaimer on 24th December 2019.

15. On 14th January 2020, the Appellant signed a disclaimer confirming that he wished to return to the Netherlands. On 12th May 2020, the Appellant advised that he no longer wished to be returned to the Netherlands.

16. On 09th and 10th June 2020 the Appellant's Legal Representatives submitted further submissions in support of his case.

17. The Respondent set out her reasons for refusing the Appellant's claim in her decision letter dated 24 August 2020.

The decision letter:

18. The decision letter began by considering his residence. From paragraphs 19 to 30 the respondent set out her reasons and conclusions relating to residence. Having reviewed the evidence provided by the appellant concerning his employment, the limited evidence that he has acted as a

carer for his Aunt and the evidence concerning his relationship with his partner, the respondent accepted that the appellant had been resident in the United Kingdom since 2013; he had gained over five years of permanent residence in the United Kingdom under the EEA regulations as a qualified person and he has therefore acquired permanent residence in the United Kingdom.

19. Consideration was therefore given to whether his deportation was justified on serious grounds of public policy or public security. The respondent undertook an assessment of threat and consideration was given to the principles set out in regulation 27 (5). From paragraphs 31 to 40 the Respondent had regard to the principles in Regulation 27(5) and Schedule 1 and at paragraph 33 decided that the appellant had shown a blatant disregard for the laws of the United Kingdom by committing a criminal offence, had shown no remorse and presented a further risk of committing criminal offences in the United Kingdom. He had been assessed as a medium term risk of re-offending. The respondent relied on the Judge's Sentencing remarks and the nature of money laundering. At paragraph 41 the Respondent concluded that the Appellant posed a significant threat to the safety and security of the United Kingdom and that deportation would be justified on serious grounds of public policy.

20. In terms of proportionality, from paragraphs 43 to 76 the respondent carried out her assessment of proportionality taking into account his age and that he could re- establish his life in the Netherlands. His medical evidence was considered but that treatment would be available in the Netherlands for managing his conditions.

21. As to his his relationship with his partner which he entered into in September 2015, it was noted that the appellant and his partner were married in an Islamic ceremony in 2018. Their daughter was born whilst he was in custody. As to friends, the appellant has submitted several letters of support from his friends living in the United Kingdom, his partner and his Aunt. The respondent considered that prior to entering the United Kingdom the appellant has maintained friendships in the Netherlands and he also has a daughter who are all considered to be able to provide support and assistance to him should the decision be made to remove him.

22. In summary it was considered that removing the Appellant was not disproportionate so far as his partner and child was concerned. His partner would be able support herself and the children in the United Kingdom and if they so wished they can join the appellant in the Netherlands. He had lived in other countries and had obtained employment there and could do so again.

23. Taking into account all the facts of the appellant's case including the factors which weighed against deportation and having considered less onerous measures the respondent considered it was appropriate and

necessary to deport the appellant in order to protect the United Kingdom from the specific threat to the United Kingdom's fundamental interests.

24. From paragraphs 77 to 85 the Respondent considered whether a decision to deport the appellant may prejudice the prospects of rehabilitation from offending in the host country and weighed that risk in the balance when assessing proportionality under regulation 27(5)(a). It was considered that there is no reason why the appellant could not work toward his rehabilitation in the Netherlands.

25. At paragraph 86 the respondent concluded that he posed a genuine, present and sufficiently serious threat to one of the fundamental interests of the United Kingdom and that deportation was justified on the grounds of public policy and that the decision is proportionate and in accordance with regulations 27(5) and (6).

26. The decision letter also addressed additional matters relevant to Article 8 of the ECHR. From paragraphs 87 to 157 the respondent carried out a full Article 8 assessment, using as her guideline, the requirements of the Immigration Rules, although acknowledging that these did not apply to the appellant as he is an EEA national. She considered family life and private life and reached her conclusions based on the same evidence as was available to her in the deportation.

27. The appellant appealed the decision, and it came before FtTJ Monaghan on 6August 2021.

28. In a decision promulgated on 29 August 2021 the FtTJ allowed the appeal.

Decision of the FtTJ:

29. The FtTJ began his factual assessment by considering the appropriate level of protection. It had been conceded by the respondent and the judge also found that the appellant had established that he had a right of permanent residence in United Kingdom as he had been able to show 5 years continuous residence as a qualified person. Thus he was entitled the middle tier of protection which meant that he could be excluded from United Kingdom only on serious grounds of public policy and public security. The judge set out his factual findings in this regard at paragraphs 44 – 57. In that assessment he did not find that the appellant met the burden that he had been in United Kingdom for 10 years continuously and that he had made out his case for the highest level of protection.

30. As to whether the appellant constituted a genuine, present and sufficiently serious threat, the judge took into account the evidence and placed strong weight in the appellant's favour on the evidence submitted on behalf of the probation officer (which was described as "an almost contemporaneous assessment of the risk that the appellant poses as at the date of the hearing"). The judge found that the probation officer had worked with the appellant for almost 11 months since his release from

prison, she had had regular detailed contact with the appellant and they had discussed "a wide range of matters within including his employment, change of address, sharing information and checking what he can and cannot do whilst on licence" (at [60]). At [61] the judge recorded the evidence that the appellant was focused on wanting to make changes to his life and live a law-abiding life had expressed remorse for his previous behaviour. At [62] the probation officer had not been made aware of any further offending or concerning behaviour; there were no "risk flags for him" and he was noted to be "low risk of harm in all areas indicated that he presents no risk to anyone and took into account that that professional assessment supported the contents of several letters provided by the appellant from friends who knew him well and for a long period of time. The judge found that this was a "detailed professional risk assessment by the probation officer" and ascribed positive weight to that report in favour of the appellant. At [64] the FtTJ found that the professional risk assessment was supported by the letters provided by the appellant from friends who knew him well and for a long period of time. They had written that they were shocked when they discovered he had committed the offences having been a person of previous impeccable good character. They also referred to him having expressed remorse. Later in his judgement, the FtTJ set out that he had found the appellant's evidence to be "generally credible" and that his offending took place around 4 years ago and that he had been out of prison for almost a year and there was no suggestion of reoffending (at [70]). At paragraph [71] the judge found that the appellant had sought and obtained employment immediately on release and he had remained in that employment. The judge found that it was of "very significant weight" the circumstances had changed since he undertook his offending, and a 2nd child was born to his partner and that he cared now for a young child as part of the family unit.

31. In relation to the offences committed, the FtTJ summarised them between paragraphs 65 – 69 and did so by reference to the sentencing remarks. The appellant pleaded guilty at the pre-trial preparation stated 2 counts of money laundering in that a little short of £250,000 had been paid to bank accounts under the appellant's control and largely dissipated. The judge found that the appellant was aware that the money was to be paid in dishonestly and that he was required to deal with it and pay it out to the direction of a dishonest manner for the purposes of dishonesty. The judge found that whilst the respondent referred to the global sum of money involved, the sentencing remarks recorded that money was not recovered relating to the first count but that £126,000 from £160,000 was recovered. The sentencing remarks recorded that the appellant had no previous convictions and was entitled to be regarded as a positive good character, a family man and had largely worked during his time United Kingdom. It was accepted that he was a carer and that his personal gain was limited. In the light of his guilty plea and the appellant's good character the judge felt able to reduce the sentence from the starting point of 3 years to 24 months.

32. The FtTJ was provided with an independent social worker's report carried out by 2 experienced social workers (see paragraphs 74 – 81). The report set out the mental health circumstances of the appellant's partner, and the strong bond between the appellant and his youngest child alongside the caring duties he undertook as a result of his partner's mental health and dependency upon him . The FtTJ set out the risks to the appellant's child in the light of his deportation; the child would lose 1 of her primary caregivers and would not be able to maintain a relationship and that it was possible the professional intervention will be needed to ensure that the needs of the appellant's partner and child were met. The report made reference to the adverse effects upon his partner in terms of emotional and behavioural development. The FtTJ placed strong weight on that report for the reasons that he gave and made a finding that the appellant's family situation and the effect that deportation was to have on his youngest child was a strong factor in his favour. Whilst deportation separates children and their parents, the judge found that on the facts of this case the ISW report confirmed that there were "exacerbating factors in separating this particular child from this particular parent over above the normal effects of deportation." Thus the judge placed strong weight in the appellant's favour on his family situation in the overall assessment when dealing with proportionality. Further factors were set out at paragraphs 83.

33. Other issues identified by the judge were given less weight in his assessment of risk and of proportionality. At paragraph 85 the judge set out his reasons for placing less weight on the appellant's claim to be the permanent carer for his aunt and the requirement for support. At paragraph 86, the judge gave reasons why he gave little weight to the medical evidence relevant to the appellant. At paragraph 87, the judge set out the circumstances of his eldest child and her circumstances.

34. The judge set out his omnibus conclusions at paragraph 88 as follows. The appellant lived in the Netherlands for around eleven years. His daughter is a Dutch citizen, lives in the Netherlands and he remains in contact with her. There is no evidence to support any other friends or ties to the Netherlands other than his daughter. It is thirteen years since he left the Netherlands. He did not spend his formative years in the Netherlands. He has no contact with the Dutch diaspora in the United Kingdom. The appellant has lived and worked in the United Kingdom since 2011.He has formed a wide circle of longstanding friends in the United Kingdom in the Kurdish diaspora. His partner owns and works in a business. She employs one other individual. His partner has never lived in the Netherlands. His partner has been present in the United Kingdom for seven years. She has no family in the United Kingdom save for the Appellant and her child. She has formed strong bonds with the Appellant's friends who supported her and cared for her whilst he was in prison and upon the birth of her child. Both the Appellant and his partner are strongly integrated in the United Kingdom. Whilst their social ties are limited to the Kurdish community, they have both worked extensively outside the Kurdish community in the United Kingdom. They speak English and Kurdish. It is not reasonable to

expect the Appellant to rely on his only known tie in the Netherlands, who is still a minor, to help him re-integrate there.

35. In his decision the judge took into account and made a finding that in his mind there was "no doubt that money laundering is a serious crime" and set out his agreement with the respondent having identified in the refusal letter that such conduct was critical to the effective operation of the reform of organised crime and that the appellant by committing the index offences had "helped to contribute those harms" (at [90]).

36. The judge also found that due to the extensive history of work United Kingdom and despite having extensive familial and societal links to the Kurdish community, he found a "degree of wider cultural and societal integration and therefore may be regarded as integrated in United Kingdom" (see paragraph 91). He did not find the appellant to be a persistent offender noting there was no suggestion that he had reoffended since leaving prison; he had expressed considerable remorse with close family, friends and the probation officer, to the experts and to the tribunal and whilst his index offences "are serious therefore, not only due to their nature but due to the amount of money involved, he cannot be said to be a person who has numerous convictions" (at [92).

37. The judge also found that he had already strongly established his integrative links to the United Kingdom 2 years of work, friendships and to a lesser extent his relationship with partner before his offending and therefore found that it could not be said that his "integrative links were formed at or around the same time as the commission of the offences."

38. The judge concluded that there was "stronger evidence" which led him to the view that the appellant did not present a genuine, present and sufficiently serious threat. The judge found that the "evidence taken in the round shows that he has and continues to rehabilitate and is focus on the best interests of his child. He has expressed appropriate remorse, found work immediately on his release which is maintained and played a pivotal role in the well-being of both his partner and child." Thus the judge found that the respondent had not justified the threat to the appropriate standard given the level of protection the appellant had acquired and had not shown that there were serious grounds of public policy to exclude the appellant. Nor that he find on the factual assessment made that it would be proportionate to exclude him from the UK.

39. The judge therefore allowed the appeal under the EU Regulations.

40. The respondent sought permission to appeal, and permission was granted on 21 September 2021 by FtTJ Grant for the following reasons:-

> "The Grounds mistakenly assert the Judge found that the appellant had acquired 10 years continuous residence but in fact she found the opposite at 557 finding that he has not made out his case for the highest level of protection.

The Grounds submit the Judge should have taken into account that the appellants' risk of reoffending is medium and should he reoffend this amounts to serious grounds of public policy for his exclusion. However the Judge notes at 562 that the probation officer's evidence is that he is at low risk of reoffending.

The grounds submit the Judge arguably erred in law in failing to apply and follow Chege ("is a persistent offender") [20161 UKUT 187 (IAC) with reference to length of time his offending covered (see S92) , and arguably may have erred in finding the appellant to be socially and culturally integrated into the United Kingdom.

Save for the points at 2 and 3 above, the grounds may be argued."

The appeal before the Upper Tribunal:

The submissions:

41. Before the Upper Tribunal, the Secretary of State was represented by Ms Young, Senior Presenting Officer and the appellant was represented by Mr N. Paramjorthy of Counsel. At the outset of her submissions she referred the Tribunal to the written submissions dated which clarified the grounds of challenge.

42. The written grounds of challenge are set out as follows:

1. While it is accepted that the appellant has acquired a permanent right of residence, it is submitted that the FTTJ has given insufficient evidence for accepting that the appellant has lived in the IJK for ten years, tax records do not start until 2014. Therefore inadequate reasons for accepting that the appellant has acquired 10 years residence, such that he may only be excluded on imperative grounds of public security.

2. 'MC' (Essa principles recast) Portugal [20151 UKUT 00520 — (Para 4, 8 and 9) The issue of rehabilitation is not relevant if already concluded, it is not to be assumed in the absence of evidence that rehabilitation would be less likely in the member state, even if it were known they would not have access to a probation officer there. There is no evidence that the appellant would not have access to a probation officer in the Netherlands, nor that his rehabilitation may not take place there.

3. SSHD v Dumliauskas and Others [20151 EWCA Civ 145: It is essential to establish a propensity to reoffend, otherwise there is no risk to the community or security. Similarly in respect of rehabilitation, it is not to be assumed that the Appellant's prospects are materially different in that other Member State in the absence of evidence, Dumliauskas [46], and [59].

4. The FtTJ has failed to pay adequate regard to the fact that the appellant's risk of reoffending has been assessed as medium. Given the large sums of money concerned it is submitted that should the appellant reoffend that this amounts to serious grounds of public policy such as to justify the appellant's exclusion.

5. At [921 the FTTJ finds that the appellant is not a persistent offender, however in making this finding it is submitted that s/he has failed to have regard to the fact that while the appellant's offending may have resulting in only one conviction the offending took place over a substantial period of time [18]. It is submitted that the FTTJ has failed to have regard to Chege ("is a persistent offender") [2016] UKUT 187 (IAC)

   The question whether the appellant "is a persistent offender" is a question of mixed fact and law and falls to be determined by the Tribunal as at the date of the hearing before it.

   The phrase "persistent offender" in s.117D(2)(c) of the 2002 Act must mean the same thing as "persistent offender" in paragraph 398(c) of the Immigration Rules.

   A "persistent offender" is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or that the continuity of the offending cannot be broken. A "persistent offender" is not a permanent status that can never be lost once it is acquired, but an individual can be regarded as a "persistent offender" for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. The question whether he fits that description will depend on the overall picture and pattern of offending. Each case turns on its own facts.

6. At [91] the FtTJ found that the appellant was socially and culturally integrated. The grounds seek to challenge this(this part of the grounds was missed off the uploaded document and it was not possible to find a full copy. Ms Young submitted it was not necessary to do so as it was the contents of the paragraph related toa general submission made that the FtTJ failed to give reasons for his finding that the appellant was socially and culturally integrated).

43. At the outset of her submissions she referred the Tribunal to the written submissions dated 16 February 2022 which clarified the grounds of challenge. The relevant submissions are set out below:

44. (10) The SoS continues to rely on the grounds of appeal as settled but acknowledges that FtT Judge Monaghan has approached the appeal on the correct basis that the appellant is entitled to enhanced protection it having

been accepted that Mr A had acquired 5 years of Permanent residence in the UK (Decision letter p29-30) but not accepted that Mr A had been continuously resident for 10 years that would give him the highest level of protection from deportation. In light of the above the SoS accepts that the reference to imperative grounds is erroneous and that p1 of the GoA cannot now be relied upon.

(11) The SoS notes that prior to the decision letter that the appellant had been assessed as a medium risk of reoffending [35] but accepts the latest report by Probation that now have assessed his risk of re-offending as low.

(12) The SoS continues to rely on the Grounds of appeal as settled whilst accepting the deficiencies set out above.

(13) The JSR [RB A5 (D)] reveals the extent of the criminal activity continuing over a period of several months.

45. Ms Young therefore submitted that in light of the written submissions paragraphs 1 and 4 of the grounds were not pursued and indicated that paragraphs 2 and 3 were also not pursued further. In essence she relied upon paragraphs 5 and 6, which related to whether the appellant was a persistent offender and the challenge made to the finding that the appellant was socially and culturally integrated in view of his conviction.

46. Ms Young submitted that in respect of paragraph 5 of the written grounds, and the issue of whether he was a persistent offender linked to the issue of whether the appellant was a genuine, present and sufficiently serious threat. She directed the tribunal to the decision of the FtTJ and submitted that the judge had muddled the 2 issues on whether he was a genuine, present and sufficiently serious threat and the issue of proportionality as one. She submitted that whilst the grounds could be clearer, the judge had erred in law by failing to be clear about those findings.

47. As to the point raised that the appellant was a persistent offender, she submitted that the appellant had one conviction which was not disputed. She did not seek to expand on that submission further.

48. Dealing with the last ground which relates to the finding made by the FtTJ that the appellant was socially and culturally integrated, she submitted that those findings were set out in brief terms at paragraph 91 and that the FtTJ gave no adequate reasons as to how the appellant had demonstrated a significant degree of cultural integration by reference to schedule 1 paragraph 2. She conceded that this was not specifically set out in the grounds however she submitted that when looking at paragraph 91, the judge had given brief reasons and did not set out why he found the appellant to be socially and culturally integrated in the UK and that was an error of law as it was a material factor in the assessment of proportionality.

49. Mr Paramjorthy confirmed that there was no rule 24 response in behalf of the appellant. He provided the tribunal with his oral submissions.

50. He submitted that when assessing paragraph 5 of the grounds, paragraph 92 of the FtTJ's decision was a reasonable conclusion after having undertaken a very detailed examination of the appellant's criminality and a proper application of schedule 1. He directed the tribunal to paragraph 58 where the decision engaged with the responsibility to apply schedule 1. He submitted that the difficulty with paragraph 5 of the grounds is that it failed to engage with the present facts of this particular appeal and in essence the grounds are a statement of interpretation based on case law but identify no error of law. Mr Paramjorthy submitted that the grounds appeared to suggest that the appellant is a persistent offender and that the judge failed to have regard to the offending having taken place over a long period of time. However that was not the case, and the judge was aware of the timing of the conviction and also considered the probation officers evidence. The citation of the decision in Chege in the grounds could not be considered to particularise an error of law.

51. Dealing with the last issue, he submitted that the criticism made is that the judge had found the appellant to be socially and culturally integrated and that he had not given adequate reasons for that finding. Mr Paramjorthy submitted that paragraph 91 was a concluding paragraph where the judge considered and referred to an extensive history of work and his societal links to the Kurdish community, that the appellant had been a carer to a family relative and also the length of time working in United Kingdom. Furthermore paragraphs 47 – 57 exhaustively detailed the appellant's working history and private life in the UK which supported the overall conclusion at paragraph 95 that the appellant was socially and culturally integrated. In addition at paragraphs 64 to 81 the FtTJ considered the detailed risk assessment by the probation officer and also the offending and the independent social work report. He submitted that those findings were open to the judge and was crucial to his assessment of the evidence.

52. He further submitted that paragraph 91 was a concluding paragraph having already undertook the quantitative assessment in the preceding paragraphs. In summary he submitted the grounds failed to particularise any error of law by reference to the decision.

53. Ms Young indicated that she had no further reply she wished to make .

54. At the conclusion of the hearing I reserved my decision which I now give.

The applicable legal framework:

55. 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.

56. The deportation of EEA nationals 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.

57. By virtue of Regulation 23(6) of the 2016 regulations 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) that person does not have or ceases to have a right to reside under these Regulations; or
>
> (b) the Secretary of State has decided that the person's removal is justified on the grounds of public policy, public security, or public health in accordance with regulation 27; or
>
> (c) the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3).

Regulation 27 of the EEA Regulations provides as follows: -

> '**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

(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 concerned 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.

...

(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.).

SCHEDULE 1

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

Considerations of public policy and public security

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."

Conclusions:

58. 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.

59. As set out above the respondent's grounds were modified at the hearing. In respect of paragraph 1, it is now accepted that this paragraph which referred to the FtTJ accepting that the appellant had acquired 10 years residence, is entirely erroneous. When assessing the present hierarchy of levels of protection the FtTJ carefully undertook an analysis of this issue within paragraphs 44 – 57 of his decision and plainly reached the conclusion that the appellant had not met the burden on him to establish that he had been in the UK for 10 years continuously and had not made out his case for the higher level of protection. Thus he found that the more specific criterion applicable to those with a permanent right of residence applied and that the appellant may not be removed "except on serious grounds of public policy or public security." There is no error of law in that assessment as now conceded on behalf of the respondent.

60. As to paragraph 4 of the written grounds, it was asserted that the FtTJ failed to pay adequate regard to the appellant's risk of reoffending as assessed as medium and that his offending amounted to serious grounds of public policy to justify his exclusion.

61. Whilst Ms Young indicated that this particular paragraph was not advanced now on behalf of the respondent she sought to argue that paragraph 5 (which referred the appellant as a persistent offender) was linked to the issue of whether the appellant was a genuine, present and sufficiently serious threat. In this respect she stated that the judge had in essence "mixed up" this issue with that of proportionality.

62. When looking at the relevant law, Regulation 27(5) (c) requires that the decision to expel the appellant must be based exclusively on his personal conduct and such conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The onus is placed on the respondent to establish such a serious threat and the standard to be applied is the civil standard (see Arranz (EEA Regulations-deportation – test)[2017] UKUT 00294 (IAC) at paragraph [81]). That the burden of proof lies on the SSHD has recently been accepted by the Inner House of the Court of Session in *SA v SSHD [2018] CSIH 28*. The person concerned must also be a present threat, Orphanopoulos and Oliveri v Verwaltungsgericht Stuttgart, [2004] ECR 1999 and previous convictions are relevant:

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

63. Thus the FtTJ was required to be satisfied that the appellant is a present threat to the interests of society, and so his past record is not in itself sufficient (see B (Netherlands) v SSHD [2008] EWCA Civ 806,[2009] QB 536 at paragraph [16]). Therefore when considering whether serious grounds exist, focus is to be placed upon the propensity of the individual to reoffend rather than the issues of deterrence or public revulsion, which have no part to play in the assessment (see decision in Secretary of State for the Home Department v Straszewski [2015] EWCA Civ 1245, [2016] 1 WLR 1173.

64. Consideration of proportionality is only undertaken if the serious threat test has been made out and this has been described as a "holistic balancing exercise". The prospects of continuing successful rehabilitation can be relevant to proportionality.

65. Evidence as to risk and proportionality is to be considered at the date of the hearing and not at the date of the expulsion (see MG (prison: article 28 (3) (a) of Citizens Directive: Portugal)[2014] UKUT 392(IAC).

66. The criticism mounted that the FtTJ erred in law by conflating the issues of risk proportionality is not made out. Having considered the decision of the FtTJ, it is plain that he undertook a cautious and analytical approach to the particular facts of this appeal and did so by considering all the points and evidence advanced on behalf of the Secretary of State. Under the heading "genuine, present and sufficiently serious threat" the judge set out the relevant law between paragraphs 58 and 59 and no challenges have been made to that.

67. His overall factual assessment is set out at paragraphs 60 – 94 which encompassed his assessment of the threat/risk in light of the probation officers report (60 – 64, the appellant's remorse (paragraph 61), the serious nature of the offences committed (65 – 69, the period and lack of reoffending (paragraph 70) and the change in his circumstances (paragraph 71). At paragraph 89, the judge stated that he had regard to the matters outlined in schedule 1 and those factual findings properly read together underpinned his conclusion set out at paragraph 92 and 94, was that the appellant had provided "strong evidence as already outlined that he does not present a genuine, present and sufficiently serious threat" and that " the evidence taken the round shows that he has and continues to rehabilitate and is focused on the best interests of his child. He is expressed appropriate remorse, found work immediately on his release she has maintained and plays a pivotal role in the well-being of both his partner and child. The respondent does not justify the threat to the appropriate standard given the level of protection the appellant has acquired."

68. The respondent now accepts that there is no error of law in the FtTJ's factual assessment that the appellant represented a low risk of harm in light of the evidence analysed by the judge in detail between paragraphs 60 – 63 where he placed "strong weight" on the evidence provided by the

probation officer which was described as an "almost contemporaneous assessment of the risk that the appellant poses as at the date of the hearing given that it was written so close to it".

69. Thus it is accepted that the judge was entitled to place weight and reliance on that report given that the probation officer worked with the appellant for almost 11 months since his release and had undertaken "regular and detailed contact." At paragraph 61 it was recorded that the appellant had been "very focused on wanting to make changes to his life and live a law-abiding life. He has expressed remorse with previous behaviour and is more aware of how we can be vulnerable in his own right and how he has been taken for granted previously by others". At paragraph 62 the judge set out that the probation officer had not been made aware of any further offending or concerning behaviour and that there were "no risk flags for him" and that he was noted to be "low risk of harm in all areas indicating that it presents no risk to anyone else or himself". The judge concluded at paragraph 63 that this was a "detailed professional risk assessment by the probation officer" thus he ascribed "positive weight in the appellant's favour". At paragraph 64, the judge found that the risk assessment was consistent with and provided support for the letters provided by the appellant from friends who knew him well and prolonged period of time he described the shock upon discovering he had committed those offences and that he had been a person of previous impeccable character and had expressed remorse for what he had done.

70. As set out in the decision of SSHD v Straszewski [2015] EWCA Civ 1245 at paragraph [25], it required an evaluation to be made of the likelihood that a person concerned would offend again and the consequences if he did so. In addition, the need for the conduct of the person concerned to represent a "sufficiently serious" threat to one of the fundamental interests of society required the decision maker to balance the risk of future harm against the need to give effect to the right of free movement. This was the evaluation carried out by the FtTJ.

71. The point taken on behalf of the respondent is at the FtTJ was wrong not to find the appellant to be a "persistent offender" (see paragraph 5 of the written grounds). In this respect I accept the submission made by Mr Paramjorthy that the grounds do no more than cite the decision in Chege with no attempt to particularise why the judge was wrong not to find the appellant was a "persistent offender". At best, it has been submitted that the appellant's criminal conduct was over a lengthy period. However when looking at the FtTJ's decision, he gave adequate and sustainable reasons for reaching the conclusion that the appellant could not be characterised as a "persistent offender" on the particular factual matrix that applied. There was no attempt on the FtTJ's part to minimise the serious nature of the appellant's offending (see paragraph 66, 69 and 90) and it was open to the FtTJ to find on the facts that he was not a persistent offender, that he had previously been of good character and had committed the offences over a period of months and had not reoffended since leaving prison over a year previously. The judge took into account that the appellant could not

be said to be a person with numerous convictions. Consequently, there is no error of law in reaching the finding that the appellant was not a persistent offender.

72. In summary and in my view, the judge took into account all of the relevant factors including the seriousness and nature of the offence and evaluated the appellant's propensity to reoffend taking into account the probation officers report to which he ascribed great weight and the seriousness of the offence, the harm it caused, that this was a single incident although carried out over period of a few months and that he had previously been of good character, he took into account his remorse and his background. Thus the judge was rationally entitled to reach the view that the appellant did not pose a genuine present and sufficiently serious threat to the public.

73. Dealing with the last point raised on behalf the respondent, it is submitted that the judge was an error in finding that he was socially and culturally integrated and that the judge had failed to give adequate reasons and those he did give were brief.

74. On this issue I accept the submission made by Mr Paramjorthy. The decision of the FtTJ was a detailed and cautious assessment and is one that should be read as a whole. He set out a number of factual findings concerning the appellant's social history when present in the United Kingdom. Those factual findings were set out in detail and were summarised in point form at paragraph 88 as follows: the Appellant lived in the Netherlands for around eleven years. His daughter is a Dutch citizen, lives in the Netherlands and he remains in contact with her. There is no evidence to support any other friends or ties to the Netherlands other than his daughter. It is thirteen years since he left the Netherlands. He did not spend his formative years in the Netherlands. He has no contact with the Dutch diaspora in the United Kingdom. The Appellant has lived and worked in the United Kingdom since 2011.He has formed a wide circle of longstanding friends in the United Kingdom in the Kurdish diaspora. His partner owns and works in a business. She employs one other individual. His partner has never lived in the Netherlands. His partner has been present in the United Kingdom for seven years. She has no family in the United Kingdom save for the Appellant and her child. She has formed strong bonds with the Appellant's friends who supported her and cared for her whilst he was in prison and upon the birth of her child. Both the Appellant and his partner are strongly integrated in the United Kingdom. Whilst their social ties are limited to the Kurdish community, they have both worked extensively outside the Kurdish community in the United Kingdom. They speak English and Kurdish. It is not reasonable to expect the Appellant to rely on his only known tie in the Netherlands, who is still a minor, to help him re-integrate there.

75. Those findings of fact relate to the appellant's private life and take account not only of the issue of social and cultural integration in the UK, but also other issues identified in the Regulations that concern links to the

country of nationality or lack of such links and also the length of residence in the UK.

76. At paragraph 91 the judge stated as follows:

> "91. I do find however as above that due to the extensive history of working United Kingdom in particular, despite the appellant having extensive familial and societal links to the Kurdish community, there is a degree of wider cultural and societal integration, and he may therefore be regarded as integrated in the United Kingdom."

77. It is plain from reading paragraph 91 that this was a concluding paragraph and should be read in the light of the earlier factual assessment that he had undertaken. That assessment could not be described as a "brief assessment" as Miss Young submitted and the submissions do not identify any inadequacy of reasoning.

78. Furthermore at paragraph [93] the FtTJ considered his criminality in the context of the issue of integration. At that paragraph, the judge found that the appellant had already strongly established his integrative links to the United Kingdom through years of work, friendships and to a lesser extent his relationship with his partner before he offended. The judge concluded "it cannot be said therefore that his integrative links were formed at or around the same time as the commission of the offences".

79. I remind myself I can only interfere with the decision of a judge if it has been demonstrated that there was an error of law. The question whether the decision contains a material error of law is not whether another Judge could have reached the opposite conclusion but whether this Judge reached a conclusion by appropriately directing himself as to the relevant law and assessing the evidence on a rational and lawful basis.

80. As also 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. The respondent did not seek to assert that the decision of the FtTJ was irrational. The test of irrationality is a high one and requires a tribunal to be satisfied that no reasonable tribunal properly directing itself could have reached the conclusions or findings challenged. The judge undertook a detailed assessment and balanced the relevant factors that he identified; it is clear from his decision as to why he reached his overall conclusions which he set out in a coherent and balanced way.

81. For those reasons, the grounds are not made out. Consequently the decision of the FtTJ did not involve the making of an error on a point of law and the decision to allow the appeal stands.

Decision

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

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or his family members. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Upper Tribunal Judge Reeds
Dated : 5 May 2022