



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00008/2019

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, London
On 13 January 2020

Decision & Reasons Promulgated
On 11 February 2020

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ADAM NOWAK

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION

1. By a decision promulgated on 9 October 2019, Upper Tribunal Judge Plimmer found an error of law in the decision of First-tier Tribunal Judge Landes, itself promulgated on 17 June 2019. Judge Plimmer therefore set aside the First-tier Tribunal's decision. Her error of law decision is annexed to this decision for ease of reference.

FACTUAL BACKGROUND

2. The Appellant is a national of Poland. He was born on 10 April 1976. He came to the UK on 26 July 2007, then aged thirty-one years.
3. On 27 March 2013, the Appellant was sentenced to thirty months' imprisonment for possession of methylamphetamine, a Class A drug, with intent to supply. As a result, the Respondent sought to deport him. His appeal was however allowed in a decision promulgated on 19 May 2015, the First-tier Tribunal finding that the Appellant had acquired a permanent right of residence and that his conduct did not now present a genuine, present or sufficiently serious threat affecting one of the fundamental interests of society. Although the First-tier Tribunal found that the Appellant's social and cultural integration in the UK was strong, the Judge also found that he retained strong links with Poland, and that removal to Poland would not hinder his rehabilitation. However, since the Appellant did not pose a sufficient risk, the Tribunal concluded that removal would also be disproportionate.
4. On 22 February 2018, the Appellant was sentenced to a total of twenty-eight months' imprisonment. The offences were five of possessing an indecent image of a child, two of intentionally encouraging/ assisting the commission of an offence namely the distribution of indecent images of children (the Appellant was present in a chatroom where indecent images of children were being shown) and two offences of possession of extreme pornographic images of sexual images with animals as well as a separate offence of possession of MDMA. In addition to the sentence of imprisonment, the Appellant's computer was forfeit, he was made the subject of a sexual harm prevention order for five years and placed on the sex offenders' register for ten years. The Appellant's appeal against his criminal sentence was dismissed on 24 April 2018.
5. The Appellant was also later sentenced on 12 June 2018 for four offences of drug possession (two of possessing methylamphetamine and two of possessing cannabis) relating to offences prior to his sentencing for the sexual offences. He was sentenced to four weeks' imprisonment concurrent in relation to one of the Class A drugs offences and one week concurrent in relation to the remainder.
6. The Respondent again notified the Appellant of his liability to deportation on 7 March 2018. The Appellant made representations on 22 March 2018 based on his length of residence in the UK and social and cultural integration here. The Respondent refused those representations by letter dated 13 December 2018 against which the Appellant now appeals.

LEGAL FRAMEWORK

7. It is accepted that the Appellant has acquired permanent residence which has not been lost. For that reason, it is common ground that the Respondent needs to show that there are serious grounds for deporting the Appellant. The Appellant

accepts that he is not entitled to the highest level of protection. Although he has lived in the UK for over ten years, he has been in and out of prison since March 2013. His periods of imprisonment do not count in the ten years which he would have to show in order to benefit from that highest level.

8. The Respondent's decision is made pursuant to the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The relevant provisions of the EEA Regulations are as follows:

"Exclusion and removal from the United Kingdom

23. ...

(6) Subject to paragraphs (7) and (8), 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 -

...

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

..."

"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.

...

(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.

...

(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.

...

(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

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

...

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

...

(c) preventing social harm;

...

(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);

...

(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);

...”

9. The central issue for me to consider therefore is whether there are serious grounds for believing that the Appellant is a genuine, present and sufficiently serious threat to public policy or security. That must be based on the individual threat which the Appellant poses and does not incorporate considerations such as deterrence.

10. I must also consider principles such as the proportionality of the decision to deport in accordance with what is said in regulation 27. In so doing, I need to consider whether a decision to deport may prejudice the prospects of rehabilitation from offending and weigh that in the balance when considering proportionality (R (oao Essa) v Upper Tribunal (IAC) and another [2012] EWCA Civ 1718 in the event that this becomes relevant.

11. The point made by Judge Plimmer when finding an error of law finds resonance in the Court of Appeal’s judgment in Kamki v Secretary of State for the Home Department [2017] EWCA Civ 1715 as follows:

“35. ... In the context of analysing the OASys report the meaning of the FTT is clear: the offender manager’s view as set out in the report was in line with that of the judge, namely that the probability of the appellant reoffending is low (‘the appellant is at low risk of reoffending’), but was also that the overall risk in relation to the commission of similar offences against vulnerable young females was high (‘the risk *in relation to* committing similar offences [etc]’), in the sense of taking the probability of reoffending in combination with the serious harmful effects if it occurred. The FTT judge uses different language to reflect the two different senses of ‘risk’; it is not plausible to read the

decision in an incoherent way rather than so that it makes coherent sense; and reading it in this way corresponds with what the OASys report itself said, as the FTT judge had himself set out at [16] and [56] of his decision. As noted above, Mr Knafler accepts that such a combined approach to evaluation of risk under regulation 21 is legitimate”.

12. The Appellant says that this case is of no application as the appellant’s offence there was more serious as was therefore the sentence. However, that misses the point. The case concerned the differential assessment of risk of reoffending generally and the risk to particular sections of society of the commission of certain offences and the different levels of harm which would be caused if one or other of those risks eventuate (see in particular [13] of Judge Plimmer’s decision).

THE EVIDENCE AND SUBMISSIONS

13. I have before me the Respondent’s bundle to which I refer as necessary below as [RB/xx]. I also have the full PNC printout relating to the Appellant. The Appellant has written a number of letters setting out his case to which I have regard. He also eloquently set out his case orally at the hearing before me and I have taken into account what he said. The Appellant has produced some documents and he also produced a small number of additional documents at the hearing which were adduced without objection by Mr Kotas and to which I refer below as relevant.
14. Before I turn to the evidence before me, I begin by noting the basis on which errors of law were found as appears at [11], [16] and [17] of Judge Plimmer’s decision. Judge Plimmer found that Judge Landes had failed adequately to reason her finding that the Appellant had no desire to have sexual contact with children (and/or that there is no risk that he would have such desire in the future) and that Judge Landes failed to carry out a combined risk assessment, taking account not only of the likelihood of further risk occurring but also the nature and seriousness of the risk should that eventuate (having particular regard to the nature of the most recent offences). Judge Plimmer did not preserve any findings made by Judge Landes.

The Appellant’s Oral Evidence/Submissions

15. The Appellant represented himself and I have therefore taken his submissions both as such and also as his evidence. He was not cross-examined. Although as Mr Kotas pointed out, when an appellant is in person it is difficult to ascertain what is submission and what is evidence, he confirmed that he had no need to cross-examine the Appellant. Although the Appellant said that he was disadvantaged by the lack of representation, he spoke eloquently (in English) and at some length in submissions. I have regard to everything he said. He began by noting that the Respondent had abandoned some of the reasons given in the decision under appeal for deporting him. The focus now is on risk of return and rehabilitation. Those were the matters which he addressed.

16. The Appellant said that his portrayal as a dangerous individual did not tell the whole story. He accepted that he had been involved with drugs. He said though that being involved with drugs did not of itself mean that a person was of bad character. He had not become addicted to drugs because he was bad but because of his social and health background.
17. In that regard, the Appellant said that he suffered from anxiety. He struggled with his self-confidence and had considered himself an unworthy individual. He came to this country drug-free but “was not right emotionally” and had turned to drugs to get him through. He went downhill and became addicted to crystal meths. Support for drug addicts had been closed due to austerity measures and he therefore “disconnected from society”. There is no medical report relating to the Appellant’s mental health. There is confirmation in the Respondent’s bundle that the Appellant is HIV+ for which he receives treatment and that he has also been diagnosed with hepatitis C.
18. The Appellant accepted that he had made “wrong judgements” which led to his offending. The Appellant also accepted that, following his last release, he had relapsed. However, he said that curing oneself of drug addiction does not “happen overnight” or without some relapses. Support was needed to cure the addiction. He had not intended to use drugs when he was last released. However, that he had turned back to drugs was a “learning opportunity” and a “test run for the future”. He had “not been able to face life” at that time but that was due to his drug addiction.
19. What had changed on this occasion was that he had support whilst in prison and he now had the “tools to avoid” re-addiction. He is subject to mandatory drugs tests which have all been negative. He said that drugs are freely available in prison and immigration detention and he would have found them if he wanted them. He had however been drug-free for 23 months. He pointed out that he had not had the opportunity to show that he had changed. He could not test himself as to his ability to remain drug-free because he remained detained and had been kept in detention for nine months beyond the custodial part of his sentence.
20. During his current sentence, the Appellant said that he had engaged with substance misuse courses and could now identify triggers which would lead to a relapse. He had learnt coping strategies.
21. The Appellant also said that he had now identified possible reasons why he had become addicted. These were signposted to his mental health issues, in particular his anxiety. As an example, he said that two years ago he would not have been able to speak as he was doing in court. He was still anxious but was much better. He had undergone one to one sessions and cognitive behavioural therapy.
22. The Appellant denied that he had not addressed his offending behaviour. He directed my attention to the OASys report where the supervisor had praised his enthusiastic approach and willingness to take courses. He had a meeting with his

probation officer at which he had agreed that there were two things he needed to address – mental health issues and drug use. After release, the Appellant said that he intended to undertake a victim awareness course. None was available in prison.

23. The Appellant referred to the Respondent's reasons for deporting him and to the matters in Schedule 1 to the EEA Regulations which she said were relevant to his case. He pointed out that Schedule 1 indicated that it was less likely to be proportionate to deport someone who could show that they had reformed or rehabilitated. He "had no interest in offending; he never had."
24. The Appellant also pointed out that he had behaved well whilst in prison. He was respectful of the rules and had no warnings. He worked with and had gained the trust of prison officers. He was now allowed to work unsupervised and between wings.
25. As to the sexual nature of his most recent offences, the Appellant said that this was not in his nature. He said that he had seen prisoners sexually harassing female officers and grooming younger offenders and had reported such incidents. He referred me to a leaflet which he handed in during the hearing which referred to him having done so. The Appellant accepted that he had made an error of judgement, but he would not harm anyone and the thought of doing anything like that "made him sick".
26. The Appellant said that the Crown Court Judge had accepted that there were 250 different cameras on the internet platform and there was only one showing inappropriate content and no way of knowing if he was watching it. He said that the other recordings did not show inappropriate material. I did not fully understand this submission. The sentencing remarks as appear at [RB/E1-6] are obviously limited to a discussion of sentence as the Appellant pleaded guilty to the offences. However, the sentencing Judge did note that he took "full account of the fact that there are a relatively small number of items unlike many cases, but the pictures themselves show a great deal of penetrative sex amongst young children. Some of these children are very young." I also note the sentencing Judge's remarks accepting that "there was no positive attempt or desire to persuade others not interested in videos such as these to view them". However, he went on to point out that "group activity like this does encourage this practice and causes more children to suffer".
27. The Appellant pointed out that the Criminal Court Judge had assessed the seriousness of the offence and sentenced him to 28 months. The Appellant said this was "two months less than usual". The sentencing remarks show that the starting point was 42 months but that the Appellant was given full credit for his guilty plea, leading to the sentence. He also pointed out that he was categorised as a Category C prisoner and that his probation officer thought that basic licence conditions were enough. The Appellant is categorised as MAPPA level 1 because of the nature of his offence and he cannot therefore be housed in approved

premises. He says that he would not have any interaction with children. He also said that because he would be subject to a harm prevention order and would have to sign the sex offenders register, those measures would provide sufficient prevention and safeguarding to reduce the risk of reoffending and the possibility of harm.

28. As to the risk of reoffending, the Appellant pointed out that this was said to be 11% over two years. He has asked for a reassessment (confirmed by his documents as sought on 21 October 2019). He said that it was evident from his presentation in the appeal that he was able to be employed and had turned his life around. He would get help with employment and establishing himself in the community and would engage with society. He wanted to find a partner.
29. The Appellant said that he is culturally integrated in the UK. He treats the UK as his home. He supports UK football teams. He has adapted to British food. He likes British comedy. He said in short that he was not “one of those from abroad who struggles to communicate and integrate”. He communicated “99% of the time” in English. He has been in the UK for twelve years.
30. In conclusion, the Appellant said that he was not a reoffending risk. He had rehabilitated. It would be disproportionate to deport him.

The Respondent’s Submissions

31. In reply, Mr Kotas clarified the issues. The Respondent accepts that the Appellant is permanently resident and that therefore serious grounds are required to be established. She also accepts that the reasons for deportation are confined to risk. That has to be assessed on a cumulative basis, taking together the risk of reoffending and the harm which would be caused if the commission of further offences did occur.
32. Mr Kotas pointed out that the Appellant had reoffended after his last allowed appeal. Although the Appellant had eloquently addressed the reasons for this, Mr Kotas submitted that I should be concerned about the following factors:
 - (a) The Appellant had said that he was “not ready to face life” on the last occasion.
 - (b) The Appellant showed no understanding of the cause of his offending. He said that he had engaged with mental health treatment in relation to possible causes and he says that the cause was his anxiety. That was however undermined to some extent by the OASys report. There was no medical report in relation to the Appellant’s mental health.
 - (c) The most recent offences were not only drug related but also child related. The attempt to downplay the reason for such material being on his computer was not borne out by the OASys report which assessed the reason for having the material was sexual gratification. There was a medium risk to children in the community and a 22% risk of reoffending in that regard.

- (d) It was not appropriate to assess the risk on the basis of it being reduced by the harm prevention order and the signing of the sex offenders register. The whole point of such measures was to control the risk. Without that risk, such measures would not be necessary.
33. If I accept that the Appellant remains a genuine, present and sufficiently serious risk, then Mr Kotas said that the issue of proportionality does not arise. He submitted that the Appellant is a risk and the risk is one of serious harm. The factors at (c) and (g) of Schedule 1 are of particular relevance. The best interest of children is also relevant as is the protection of the public.
34. If proportionality were to be in issue, Mr Kotas pointed out that the Appellant has no partner or other family members in the UK. He submitted that there was little prospect of employment.

Documentary Evidence

35. I have set out the Appellant's convictions at [3] to [6] above and I do not need to repeat those. They are confirmed by the PNC printout.
36. The OASys report in this case dates back to 15 November 2018 ("the OASys Report"). That appears at [RB/J1-51]. The Appellant said he has asked for an updated assessment but that has not been produced. As the Appellant points out, because he has not been released since the last report, the outcome of a further report might not be any different. However, a further report would allow the relevant authorities to consider the extent to which the risk has diminished based on the Appellant's behaviour in prison and whether his motivation to change is genuine and sustainable. It is not for me to speculate on what the maker of a further report might say. I can consider the case only on the evidence before me.
37. The circumstances of the child and pornographic offences and the reasons behind them are set out in considerable detail at section 2 of the OASys Report. Those took place over a period from December 2015 to April 2017. In summary, the convictions were for the possession of images, in one case an "Extreme Pornographic Image" of a sexual act with a dog, and a number of indecent photographs of children. In relation to the latter, the Appellant had compiled videos and still images of the photographs. He had also been present in a chat room "which was capable of encouraging or assisting the distribution" of indecent images of children.
38. The Appellant's explanation for the downloading and storage of the images was that he intended to report the incidents to the police. However, the OASys Report notes that he had not reported them during a period of two years. He sought to explain this by the fact that others in the chat room were aware of his drug use and he did not wish to implicate himself. That of course does not explain why he continued to view the images if, on his own explanation, he would not be able to fulfil what he said was his purpose in so doing. The maker of the OASys Report did not accept his explanation; it is described as "spurious". The offences were

considered to be motivated by sexual gratification. The writer also noted that the Appellant said that when he visited the chat room, he was under the influence of drugs “which he feels acted as a disinhibitor”.

39. Although the maker of the OASys Report accepted that the offences did not involve contact, and it is accepted that his behaviour was not “manipulative or predatory”, it is noted that the children and animals used to make the photographs and videos “would have sustained both physical and psychological trauma at the hands of adult offenders”. The Appellant is said to have demonstrated “victim empathy and remorse”. He also said that he would volunteer to help children who were survivors of sexual abuse if that were possible. Due to the nature of his offence, that option is unlikely to be open to him.
40. As to the Appellant’s circumstances at the time of the offences, he is described as unemployed, supported financially by his mother and “over reliant on friends”.
41. Due to the link between the Appellant’s drug use and the sexual offences, it is also necessary to say something about the Appellant’s earlier conviction even though, following that conviction, his deportation appeal was allowed. The risk of further drug abuse clearly remains relevant. The Appellant was arrested in January 2013. A search of his home revealed a large amount of methamphetamine, “other paraphernalia” and £9,000 in cash. The Appellant claimed that some of the money had been brought back from a visit to Poland in November 2012. The Appellant pleaded guilty to the charge of possession with intent to supply. He had been using the money to feed his addiction. As his drug habit became more expensive, he bought the drugs in larger quantities which “worked out cheaper for his friends and himself”. It is noted that the Appellant was aware that, by taking and supplying drugs, he was not only killing himself but that “he was inadvertently helping to destroy [his customers] and the wider community”.
42. The OASys Report records that, at that time, his offending was triggered by his lifestyle and accommodation. He was living in what is described by the Appellant as a “drug den” and was unemployed.
43. As to employment, the OASys Report records that the Appellant was previously employed in graphic design which would be unsuitable as it is computer related. He had also been employed as a stockroom manager, a chef and a doorman. He is said not to possess any formal qualifications. The maker of the OASys Report notes the Appellant’s positive attitude towards gaining employment after release. It is said that the Appellant was “very keen” to undertake vocational courses whilst in prison although I was not shown any evidence that he has done so or obtained any qualifications. The OASys Report records the need for the Appellant to be kept busy to avoid a relapse into drug addiction.
44. The OASys Report also sets out details of the Appellant’s family relationships. He is said to have a good relationship with his mother who sends money to him. That

is confirmed in evidence by her in a letter where she says that she “was supporting him financially” between 2014 and 2018 to prevent him resorting to crime to find money. The Appellant’s mother lives in Warsaw. The Appellant’s father is dead. The Appellant attributes his addictions and mental health problems to some extent on the behaviour of his father who is said to have been an alcoholic and physically abusive. The Appellant reports that he has not had a meaningful relationship with a partner for about ten years. Before he came to the UK, he was in a relationship with another man for five years but reports that the relationship was “toxic”. All of the Appellant’s associates before going to prison are said to be drug users.

45. The OASys Report assesses that the Appellant poses “a medium risk of serious harm to children in the community” but a low risk in all other areas. The assessed probability of proven reoffending is 6% in the first year and 11% in the second year based on an equivalent risk of proven violent-type offending and 13%/22% probability of proven non-violent reoffending. A medium risk is assessed where there are “identifiable indicators of risk of serious harm. The offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse”. In this case, the obvious potential change in circumstance is further drug misuse.

46. The summary of the risk appears at section 10 of the OASys Report as follows:

“Who is at risk?”

Mr Nowak currently poses a low risk as he is in custody. Mr Nowak’s future risk is to children and animals that are victims of sexual abuse shared on line in the community. Mr Nowak is a risk to himself and his peer group should he partake in the use of or dealing in narcotics once released into the community.

What is the nature of the risk?

Mr Nowak poses a low risk as he is currently in custody. The nature of the risk in the community is serious as Mr Nowak is supplying the demand for sexual abuse images on line. The long term effects of sexual abuse are damaging to the victims on emotional, physical and psychological level. Mr Nowak has not committed a contact offence if he were to continue his interest in child abuse this may escalate to a contact offence. The nature of the risk in the community is serious again as Mr Nowak was a daily drugs user prior to custody who supplied drugs to his friends causing damage to the local community.

When is the risk likely to be greatest?

Mr Nowak is currently in custody so poses a low risk. However, there is a chance that Mr Nowak could have access to child abuse images as he is currently located in a sex offender prison. Mr Nowak’s risk is likely to be greatest if he begins to associate with his former peer group, or is unemployed and as a result is bored so turns to narcotics.

What circumstances are likely to increase risk?

Mr Nowak poses a low risk as he is currently in custody. Mr Nowak's risk of serious harm is likely to increase if he participates in drug use. Mr Nowak is keen to cure his addiction and is working to combat his addiction in custody. Mr Nowak is aware that his peer group in the community was a major contributor to his drug use, as well as lack of purposeful employment. If he lacks getting purposeful employment or he begins to use drugs, associate with other drug users and has unmonitored use of the internet.

What factors are likely to reduce the risk?...

Completion of offending behaviour interventions whilst in custody to address the risk of sexual offending. Compliance with sexual offending notification requirements to ensure full police monitoring of community residency and its suitability. MAPPA level 1 management of potential risk factors on a single agency basis to ensure effective risk management currently assessed as medium risk to children in the community. Robust risk management plan on release and licence conditions that seek to minimise risk factors. Full engagement with professionals whilst in custody and on release to ensure meaningful and effective sentence management, to understand offending behaviour, triggers and warning signs. Accepting responsibility for offending behaviour and developing victim awareness to prevent further offending. Challenging distorted sexual thinking and behaviour."

47. The Appellant produced at the hearing a small bundle of updated evidence which I permitted to be adduced in fairness to the Appellant (as he is detained and in person). That consists in the main of character references. Prison Officer Stradling commends the Appellant's as a considerate and positive individual always willing to help others. Other inmates also speak of the help he has given them and of the respect he has shown to officers and inmates alike. The Appellant has offered his services as a healthcare representative. His "kind, caring, non-judgemental approach" is commented upon.
48. I also have within that bundle evidence from Ms Steiger, a Drug & Alcohol Recovery Case Manager employed by Phoenix Futures Integrated Substance Misuse Team. She confirms that the Appellant has been meeting with her periodically since April 2018. She says the following:

"... We have discussed his previous drug use and his aims for the future. He informs me that his intent is to remain abstinent and we have been working on ways to achieve this. He also informed me that he had been in contact with community drug services before his sentencing as he had decided to make changes in his life. Mr Nowak has been completing work on his substance misuse, awareness, ways to deal with cravings, managing high risk situations and motivation to change. He has also looked at emotional management and ways to address his anxieties. Mr Nowak has presented as highly motivated to make changes and has been setting goals for his future. He has been engaging well, both with ISMT and with the prison regime. He currently works as the Healthcare trainer and this is a position of responsibility."
49. In similar vein, an undated letter from the Mental Health Inreach Team at the prison confirms that that Appellant has been undertaking 1-1 work with that team

in order to address his difficulties with anxiety and low mood. There is also a letter dated 11 October 2018 indicating that, following a triage assessment, he has been placed on a waiting list for the Anxiety Management Group. However, those letters say nothing about what progress has been made. Nor, as I have already noted, is there any medical report providing any formal diagnosis of the Appellant's mental health condition and, more importantly for my purposes, the impact of that on his risk of reoffending and the risk of resumed or continuing addiction to drugs which forms a large part of the basis for the risk of reoffending.

50. In terms of the Appellant's risk following release, the Appellant has provided a letter from his Probation Services Officer, Ms Naraine. She indicates that her manager has informed her that the Appellant cannot be housed by the Probation Service as he is not allowed to access public funds and cannot be housed in Approved Premises because his risk level does not meet the criteria. The Home Office is also unable to accommodate him because of the type of offence and because the Appellant is a MAPPA case based on the type of offence.
51. Finally, the Appellant has produced a newsletter entitled "One Voice" produced within the prison as part of a survey in August- September 2018. It appears from the content that the purpose of the newsletter is to identify and respond to LGBTQ+ issues. The Appellant's contribution appears at page [15] as follows:

"We have had a lot of positive feedback about the events we held for Pride month. However, one of our reps, Adam Nowak, has raised concerns about 'Call Me By Your Name', which we felt were worth opening up to debate.

Essentially, his concern surrounds the suitability of showing a film, which depicts a relationship between an adult male and a teenager. His concerns were twofold: Is it appropriate, in a sex offenders' prison, to show intimate relations between an adult and a teenager, given some of the offences people are here for? (With a possibility, he suggests, of stimulating inappropriate fantasies). Secondly, is this the message we want to be using to promote Pride to non-LGBTQ+ residents who come to our events?

He argues that there are more suitable films to show, which demonstrate the struggles and determination shown by the LGBTQ+ community over the years, to get us to where we are in today's society. He also has serious concerns about how our film choice may not be helpful in the rehabilitation of certain people and could actually be damaging in some instances. He says that the work of promoting understanding and acceptance of LGBTQ+ people is already made more difficult in prison by virtue of factors such as poor education levels, high numbers of mental health issues and longstanding stereotypes. For these reasons, he feels strongly that extra attention must be paid to the films shown so that we do not perpetuate misconceptions and don't miss a great opportunity to further our cause."

I note for completeness from what follows that the characters in the film are said to be seventeen and twenty-four and that "[t]here is no suggestion of coercion, grooming or illegality at any time". However, the Appellant evidently relies on this as showing that he would not have committed the offences he did for sexual

reasons as the OASys report suggests and that this represents and is corroborative of his view of such activity.

52. As I have already noted, the Appellant's previous appeal against deportation was allowed by the Tribunal. The Tribunal's decision was promulgated on 19 May 2015 and appears at [RB/C1-12]. At that time, the likelihood of reconviction was similarly assessed as low and the Appellant was also said to be a medium risk of serious harm (although his Probation Service Officer had since reassessed him as at low risk of serious harm). Then as now, the Appellant recognised the negative impact of his drug addiction and confirmed that "he had now changed for the better". He had not used drugs since his arrest and was said to have the support of the Probation Service; "there was no reason for things to go wrong again". Doubtless the Tribunal accepted the Appellant's evidence in that regard as the Judge found that the Appellant did not pose a sufficient risk.

DISCUSSION AND CONCLUSIONS

Serious Grounds; Genuine, Present and Sufficiently Serious Threat

53. In light of the Appellant's permanent residence, the Respondent has to show that there are serious grounds for deporting the Appellant to Poland. My assessment of that issue requires me first to consider whether there are serious grounds for believing that the Appellant remains a genuine, present and sufficiently serious threat. The assessment of the threat must be based on the Appellant's personal conduct and does not include factors such as deterrence. Obviously, whilst what I have to assess is whether the threat is a present one, the Appellant's past actions are or may be highly material to his propensity to reoffend.
54. I begin with the Appellant's first offence. As I have noted before, based on the Tribunal's decision, then, as now, the Appellant professed to have stopped using drugs and as having no intention to resume his drug use. However, within months of that decision, the offences of which the Appellant was later convicted began. Although it is not clear from the PNC printout when he started taking drugs again, since his first internet offence was in December 2015 and those offences were said to be committed under the influence of drugs, it is reasonable to infer that the Appellant had by then resumed his drug abuse. That was notwithstanding the evidence from his mother that between 2014 and 2018 she was providing him with financial support to ensure that he did not turn to drugs. There is no evidence that the Appellant was able to find employment again and he returned to his previous associates.
55. Turning then to the index offences, the sexual offences are said to have occurred because of the Appellant's drug abuse which enabled the loss of his inhibitions. The first question therefore is whether the Appellant is likely to remain abstinent from drugs on this occasion following release when he did not do so previously.
56. The Appellant says that the difference this time is that he has been supported whilst in prison and will be supported following release. However, the previous

Tribunal decision also indicates that the Appellant was receiving support at that time from the Probation Service but that did not prevent him becoming readdicted. I am also very concerned by the Appellant's own evidence that, as he said himself, rehabilitation from drug abuse does not occur overnight and not without some relapses.

57. I accept that the Appellant is genuinely motivated to abstain from drugs and has undertaken some courses, but the question is whether the position on release will be any different to that which arose when he was released on the last occasion. He is on his own evidence a drug addict who has been unable to remain abstinent on release into the community.
58. Whilst I accept that the Appellant has sought help with his addiction and the causes of it, I am unpersuaded on that evidence that the Appellant will not return to drugs. As the OASys Report makes clear, the early causes of his drug addiction may have been his upbringing, but he tends to turn to drugs if he is not "purposefully employed". In that regard, although the Appellant said that he wished to undergo vocational courses whilst in prison, I have no evidence that he has done so or, more importantly, that he will be able to find employment following his release. I of course appreciate that the Appellant can only undergo such courses as are made available to him and there is evidence that he has participated fully in activities whilst in prison which may give him some skills which he can utilise following release. However, although he may have some qualifications and experience which would serve to obtain employment, there is little evidence that he is likely to find a job on release. That is particularly concerning given the link in the OASys Report between lack of employment and drug abuse.
59. The assessment of the medium risk which the Appellant poses to children is based on the potential for the Appellant to cause "serious harm" if he returns to his activities. That potential is unlikely to occur without a change in circumstances but one of those changes is drug misuse. That is the more so in this case given the evident link between the sexual offences and drug misuse.
60. Whilst I accept that the Appellant expressed empathy for the child victims involved in the offences, and a commitment to help if he could, I heard very little from the Appellant during the hearing about these offences. He still says that such offences against children make him feel sick which suggests that he still does not accept his guilt for these offences. That is concerning. The writer of the OASys Report reaches the conclusion that the Appellant committed the offences for "sexual gratification".
61. If he returns to drugs, therefore, the Appellant has the very real potential to return to these sorts of offences. I give little weight to the material on which the Appellant relied as intending to show that he has no interest in children in this way. The film to which he objected did not involve young children (according to the newsletter). Further, it is the Appellant's continuing denial of his guilt in the

commission of the previous offences which I find most concerning. If anything, his submissions reinforce that lack of acceptance which in turn is relevant to future risk.

62. Whilst I accept that the offences were not ones involving direct contact with the child victims, the OASys Report notes the potential for this to occur were the Appellant's interest in children to escalate. Even if further offences were limited to indirect contact of the nature of the previous offences, those still involve serious harm to children who are abused in order to provide the images which the Appellant downloaded and reproduced.
63. I do not accept the Appellant's submission that, in weighing the risk, I should take into account the fact of the sexual harm prevention order and the placing of him on the sexual offenders' register. Those measures are intended to safeguard against further risk but, if anything, reinforce the fact that such risk continues.
64. I accept that, on the evidence of the OASys Report, the Appellant is of low risk of reoffending, based on the general risk. The proven risk of non-violent reoffending is itself higher than the overall risk and nearly one in four over a period of two years. I accept the Respondent's submission that the nature of the Appellant's past offending indicates that, if he were to offend again, particularly in the commission of similar sexual offences, the consequences of harm could be very serious indeed.
65. In light of my conclusions about the very real risk that the Appellant will again turn to drugs on release and the link between his drug abuse and the sexual offences, I am satisfied that there are serious grounds for believing that the Appellant poses a genuine, present and sufficiently serious risk to the fundamental interests of society. That risk is the more acute because of the vulnerability of the particular sector of society impacted by that risk, namely children who are abused for the purposes of providing the images which the Appellant downloaded.
66. I do not consider that the Appellant's prospects of rehabilitation will be any less if returned to Poland. His mother still lives there and still supports him, as evidenced by the financial contributions which she has sent him whilst he has been in the UK. On the Appellant's own evidence, his drugs problems did not start until he came to the UK. I received no evidence to suggest that he is any more or less likely to resort to drugs in Poland but on the other hand, his past history would indicate that he may be able to avoid returning to his addiction there. He would be free from his previous associates in the UK and would have family support to aid rehabilitation.
67. Given my conclusions as to risk, I do not need to say much about proportionality. For completeness, however, I do so briefly. There is evidence that the Appellant has adopted the English culture. However, on his own evidence, he has become "disconnected from society" in certain periods due to his drug addiction.

Although the Appellant has been in the UK for over twelve years, at least four years of that time has been spent in detention. Although I accept that the Appellant has integrated in the UK to some extent, particularly at times when he has been drug free, there is no evidence that he has any partner or other family connections in the UK. There is no evidence from friends who he has made outside the prison environment. His previous associates are noted to be other drug users. Conversely, he has family in the form of his mother in Poland. Although the Appellant has health issues, there is no evidence that those could not be treated in Poland in the same way as they are here. For those reasons, the decision to deport the Appellant is not disproportionate.

CONCLUSION

68. For the foregoing reasons, the Appellant's appeal fails. There are serious grounds justifying the Appellant's deportation. He poses a genuine, present and sufficiently serious threat to public policy and public security.

DECISION

The Appellant's appeal is dismissed.



Upper Tribunal Judge Smith
Dated: 7 February 2020

APPENDIX: ERROR OF LAW DECISION



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00008/2019

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice
On 7 October 2019

Decision & Reasons Promulgated

9 October 2019

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADAM NOWAK

Respondent

Representation:

For the appellant: Mr Lindsay, Senior Home Office Presenting Officer

For the respondent: None

DECISION AND DIRECTIONS

1. The appellant ('the SSHD') has appealed against a decision of First-tier Tribunal ('FTT') Judge Landes, sent on 17 June 2019, in which she allowed the appeal of the respondent, a Polish citizen and therefore EEA citizen, against a decision dated 13 December 2019 to deport him pursuant to the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations').

Background

2. On 27 March 2013, the respondent was sentenced to 30 months imprisonment for possession of class A drugs with intent to supply. At that time the respondent had a serious addiction to Class A drugs and was involved in their supply in order to fund his drug habit. The respondent completed his sentence of imprisonment in June 2014. In a decision dated 19 May 2015, FTT Judge Boardman considered that the respondent was 'drug-free' and allowed his appeal against a decision to deport him, on the basis that the SSHD was unable to displace the 'serious grounds' test. By the end of 2015, the respondent had once again become a regular user of Class A drugs. On 22 February 2018 and 12 June 2018, he was sentenced to 28 months imprisonment and four weeks imprisonment respectively, having pleaded guilty to a series of offences which took place between 15 December 2015 and 4 November 2017. These included: possession of indecent images of children; intentionally encouraging / assisting the distribution of indecent images of children; possession of extreme pornographic images of sexual activity with animals; possession of Class A drugs.

FTT's decision

3. Judge Landes concluded that although there was a meaningful (albeit low) risk of the respondent reoffending such as to pose a threat to the fundamental interests of society, he did not pose a 'sufficiently serious' threat in order to meet the 'serious grounds' of public policy threshold. It was not in dispute that the respondent acquired permanent residence but had not been resident for the requisite 10 years, in order for the 'imperative grounds' test to apply.

Appeal to the Upper Tribunal ('UT')

4. In wide-ranging grounds of appeal, the SSHD appealed against the Judge Landes' decision. The FTT refused permission to appeal in robust terms but this was granted by the UT.
5. At the hearing before me, Mr Lindsay acknowledged that when the FTT's decision is read as a whole, it is carefully drafted, comprehensive and detailed. He nonetheless maintained that the FTT erred in law in three material respects and identified three grounds from the written grounds of appeal.
6. The respondent relied upon a clearly drafted rule 24 notice, in which he invited me to uphold the FTT's decision. As he was unrepresented, I summarised each of the three grounds of appeal that Mr Lindsay relied upon and gave the respondent a full opportunity to address each. The respondent was able to articulate his position in relation to each carefully and clearly. He maintained he had no sexual interest in children and that the FTT had taken into account all relevant matters before reaching its decision.
7. After hearing submissions from both parties, I reserved my decision. Both parties agreed that in the event that I found there was an error of law, the decision should

be remade by the UT at an adjourned hearing, in order to provide the respondent with an opportunity to provide updated evidence from the probation service on his risk to the public.

Error of law discussion

8. Mr Lindsay accepted that some of the SSHD's written grounds of appeal do no more than disagree with the FTT's factual findings and assessment of risk, and for this reason deliberately withdrew reliance upon certain paragraphs in the written grounds of appeal and recast the remaining paragraphs in order to support three grounds of appeal. I am satisfied that each of these grounds is to be found (albeit not as clearly as articulated by Mr Lindsay) in the written grounds of appeal and deal with each of these below.
9. Mr Lindsay also correctly conceded that the submission that the respondent has not demonstrated acceptance of responsibility for his offending by appealing the length of sentence awarded to the Court of Appeal is without any merit. As the respondent pointed out in his rule 24 notice, an appeal against the length of sentence is not inconsistent with fully accepting guilt and responsibility for offending.

Ground 1

10. Mr Lindsay submitted that the FTT's acceptance at [55] that the respondent has "*no desire to have sexual contact with children*" is inconsistent with the FTT's earlier acceptance at [48] that his explanation for having indecent images of children on his computer is spurious. The FTT accepted the probation officer's assessment in the pre-sentence report dated 22 February 2018 that the respondent's motivation was sexual gratification. Mr Lindsay invited me to find that the former finding is inadequately reasoned and at odds with the latter finding.
11. The FTT also accepted at [48], the evidence of the probation officer that the respondent's behaviour was not manipulative or predatory and there were no contact offences. This is of course based upon the respondent's past behaviour and his own self-disclosure. As Mr Lindsay pointed out, the respondent's self-disclosure on this issue is not necessarily reliable, because the FTT acknowledged that his denial of sexual gratification motivation was spurious. It does not necessarily follow that past proven behaviour of non-contact means that there is no future risk of contact. As the author of the Offender Assessment System report dated 15 November 2018 ('the OASYS'), states at R10.2: "*Mr Nowak has not committed a contact offence. If he were to continue his interest in child abuse this may escalate to a contact offence.*" In these circumstances, the FTT was obliged to explain why it accepted at [55] that the respondent has no desire to have sexual contact with children or the implicit acceptance that there is no risk of this. The intervening paragraphs, particularly [50-54] address the respondent's risk of returning to using illegal drugs and do not address his risk of accessing indecent images of children or having sexual contact with children. The FTT has noted the evidence of the probation officer that the respondent only looked at child

pornography whilst under the influence of drugs but has not addressed the possibility of the risk of escalation. I therefore accept the submission that the FTT's finding that this respondent has no desire to have sexual contact with children is inadequately reasoned.

Ground 2

12. Mr Lindsay submitted that the FTT did not take into account the full extent of the manner in which the respondent posed a threat to the fundamental interests of society. He pointed out that this is a case in which the respondent's personal conduct and risk is such that it will affect more than one of the fundamental interests of society for the purposes of Schedule 1(7) of the 2016 Regulations. At [55] the FTT made it clear that the respondent's behaviour "*is certainly a threat to the fundamental interests of society*" and made specific reference to [24] of the SSHD's decision letter. This sets out five aspects of Schedule 1, paragraph 7. The FTT appears to have accepted the SSHD's position that the respondent's personal conduct is a threat to many aspects of the matters identified by the SSHD as being fundamental interests of society. I am satisfied that when the decision is read as a whole the FTT did not leave out of account the fact that the respondent posed a threat to many of the fundamental interests of British society.

Ground 3

13. Mr Lindsay submitted that the FTT failed to take into account the overall risk in relation to the commission of similar offences against children and the wider public, in the sense of taking the probability of re-offending *in combination* with the likelihood of serious harmful effects if it occurred – see [35] of Kamki v SSHD [2017] EWCA Civ 1715. I accept that when assessing risk in the context of determining whether there are 'serious grounds' of public policy for the purposes of regulation 27(3) of the 2016 Regulations or whether the accepted threat to the fundamental interests of society is a 'sufficiently serious' one for the purposes of the regulation 27(5)(c) of the 2016 Regulations, the FTT was obliged to consider risk in the round. In other words, the FTT was required to balance the risk of re-offending with the nature and extent of the harm that would be caused as a result of the commission of further offences. That follows logically. A low risk of re-offending that will cause relatively minor harm to one victim can be distinguished from a low risk of reoffending that will cause very serious harm to a wide group of potential victims.
14. As the respondent pointed out to me, the FTT gave detailed reasons for accepting the conclusions reached in the OASYS that the respondent's risk of re-offending can be categorised as 'low' (22%) notwithstanding his previous offending at [42-54]. In reaching that conclusion, the FTT accepted the OGP score and overall assessment in the OASYS to be reliable. The FTT also accepted that notwithstanding the respondent's failure to remain 'drug-free' after his first release from prison, there were now better prospects of him remaining drug-free. The FTT was entirely aware that the respondent had not proven himself outside of

prison where he remained, but accepted that there would be adequate safeguards and positive features upon his release such as to justify the 22% risk of re-offending. Pausing there, that assessment is based upon the FTT's inadequately reasoned finding that the respondent has no desire to have sexual contact with children and the implicit acceptance that there is no risk of re-offending involving contact with children – see the discussion in relation to ground one above. Even assuming that I am wrong about this, I am satisfied that the FTT's decision contains a discrete error of law in that there has been a failure to assess the composite risk in the light of the risk of re-offending together with the seriousness of the likely harm. The FTT makes clear findings regarding the risk of re-offending at [42-54] and [56-58] and outlines the nature of the threat, if the respondent offends again at [55] and [57], but the FTT has not undertaken a composite risk assessment that draws all these matters together.

15. I have considered whether a composite risk assessment is implicit when the decision is read as a whole. However, the FTT appears to have focussed upon two discrete assessments: first, the risk of re-offending and second, the harm that will be caused if there is further offending without marrying the two together and assessing composite risk. Indeed, the FTT emphasised at [56] that it is only if the respondent re-offends that he will be a threat. This is reflected at [62] wherein the FTT highlights that the risk of re-offending and “*therefore*” or “*thereby*” causing harm is not “*significant enough*” or not “*so great*” that it is justified by reference to the ‘serious grounds’ test. The FTT has not gone on to assess risk by reference to a third and necessary step: combining the risk of re-offending with the level of likely harm. In other words, the FTT has not directed itself to whether or not the low risk of re-offending when combined with the risk of serious harm to children and the wider public as a consequence of the two separate but inter-linked types of propensity to re-offend (use and supply of Class A drugs / possession of indecent images motivated by sexual gratification) is capable of giving rise to ‘serious grounds’ of public policy or a ‘sufficiently serious’ threat.
16. In summary, the particular features of this case are such that it demanded a combined risk assessment:
 - (a) Although the FTT was prepared to categorise the risk of re-offending as ‘low’ at 22% [57], this was at the higher end of the ‘low’ risk banding in the OASYS report – the ‘low’ risk extending to 33% [49]. As the FTT observed the risk is a ‘meaningful’ one [62] and the chances of reoffending are between 1 in 4 and 1 in 5 [58]. After all, the FTT accepted that the respondent was genuine in his intentions about remaining ‘drug-free’ in the past, yet returned to drugs in the absence of full-time employment and anxiety issues [44, 51]. The FTT accepted that the respondent now has better prospects of remaining drug-free [52] but acknowledged there remain stressors [54].
 - (b) The OASYS identified the risk of serious harm to children as ‘medium’. This is defined as appertaining to circumstances where ‘the offender has the potential to cause serious harm but is unlikely to do so unless there is a

change in circumstances, for example...drug or alcohol abuse.' Relapsing to drug abuse is a meaningful risk in this case, as recognised by the FTT at [57].

- (c) In addition to there being a risk of serious harm to children, there is a risk of serious harm to adults by reason of the respondent's drugs misuse over an extended period in the past (which on his own admission led to him supplying Class A drugs and possessing indecent images of children) and the fact that his recent drug-free period has not been tested in the community. The FTT has not quantified the degree of serious harm vis a vis the respondent's drug habit, but given its past link to serious harm to others, it is difficult to see how the potential serious harm is not medium given the chance that circumstances may change.
 - (d) Although the risk of re-offending has been categorised as 'low' generally, this risk and the risk of serious harm is double layered given the dual nature of the respondent's offending.
17. It follows that in failing to draw these matters together in order to assess risk on a composite basis, when determining whether there are 'serious grounds' of public policy or a sufficiently serious threat to the fundamental interests of society, the FTT erred in law.

Conclusion

18. Although the FTT's decision is carefully drafted and reasoned in many respects, I am satisfied that it contains two material errors of law as identified in the discussion above.

Disposal

19. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided, with the agreement of the parties, that this is an appropriate case to be remade in the UT, at an adjourned hearing.

Decision

20. The FTT decision contains an error of law and is set aside.
21. The decision shall be remade in the UT.

Directions

- (1) The SSHD shall file and serve an updated PNC sheet and any other updated evidence before 4 November 2019.
- (2) The respondent shall file and serve all updated evidence (including as much evidence assessing his risk) before 16 December 2019.
- (3) The SSHD shall file and serve a position statement three weeks before the hearing.

- (4) The respondent shall file and serve an updated position statement one week before the hearing.
- (5) The hearing shall be listed before any UT judge on the first date after 2 January 2020. If the respondent remains in detention he must be produced at the hearing.

Signed: *UTJ Plimmer*

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
9 October 2019