Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00431/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 7 September 2022	**On the 12 October 2022**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

CC (BRAZIL)
(ANONYMITY DIRECTION MADE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 the appellant, her husband and her stepson are granted anonymity.

No-one shall publish or reveal any information likely to lead members of the public to identify the appellant, her husband or her stepson. Failure to comply with this order could amount to a contempt of court.

Representation:
For the Appellant: Mr. Z Malik KC, instructed by Julia & Rana Solicitors
For the Respondent: Mr. S Walker, Senior Presenting Officer

DECISIONS AND REASONS

Introduction

1. The appellant appeals against the decision of the respondent to deport her to Brazil under the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations').

2. The appeal was filed with the First-tier Tribunal in July 2019. Although the 2016 Regulations were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, many of its provisions are preserved for the purpose of appeals, including that of the appellant, pending as at 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations. The effect of the amendments is that the sole ground of appeal is now whether the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020. Therefore, the issue is not whether the decision is in accordance with the EEA Regulations, but whether the decision is in accordance with the appellant's Treaty Rights as expressed through Directive 2004/38 ('the Citizens' Rights Directive').

3. The appellant's appeal was initially dismissed by a decision of the First-tier Tribunal dated 17 December 2020.

4. She was granted permission to appeal to the Upper Tribunal and by a decision sent to the parties on 21 June 2022 I allowed the appeal to the extent that the decision of the First-tier Tribunal was set aside in its entirety, with the decision being remade by this Tribunal.

Anonymity

5. By my decision dated 21 June 2022 I issued an anonymity order. Whilst observing the clear public interest in the identification of the appellant, who has been convicted of serious criminal offences in respect of a child, I was mindful that consequent to the surnames of both the appellant and her husband being unusual in this country a 'jigsaw' identification could be undertaken by members of the public resulting in the victim being identified. In such circumstances, and based upon the victim's article 8 rights alone, I granted anonymity to the appellant, her husband and her stepson.

6. Neither representative requested that the order be set aside. In the circumstances, I confirm the order which is detailed above.

Relevant Facts

7. The appellant is a national of Brazil, aged fifty-two. She entered the United Kingdom as a visitor in April 2006 and subsequently overstayed.

8. She met her husband, 'VZ', a Romanian national who hailed from Moldova, in June 2008. Some twelve months later she applied for a certificate of approval to permit her to marry her husband. The respondent issued the

certificate of approval on 17 December 2009 and the couple married on 12 March 2010. The appellant applied for an EEA residence card in April 2010, which was issued to her on 25 October 2010. She was subsequently issued with a permanent residence card on 15 August 2012.

9. The appellant's husband was naturalised as a British citizen in September 2015.

Index offence

10. In the early summer of 2016, 'N', the son of the appellant's husband from a previous marriage, travelled to the United Kingdom and commenced living with the couple. After allegations were subsequently made by N to the police an investigation was undertaken, and criminal proceedings were commenced against both the appellant and her husband.

11. In January 2018 the appellant pleaded guilty to two counts of child cruelty in respect of a child aged between 13 and 14 at relevant times. The first count concerned abandonment and ill-treatment between 29 June 2016 and 1 November 2016. The second count concerned punishments by assault and other means between 20 October 2016 and 1 November 2016.

12. The appellant's sentencing hearing was transferred by a Magistrates' Court to Harrow Crown Court. In the meantime, having pleaded not guilty, her husband stood trial and was found guilty on three counts by a jury.

Sentencing remarks

13. The couple were sentenced together by HHJ Spiro at Harrow Crown Court on 5 October 2018, with the appellant receiving a sentence of two years and four months' imprisonment, and her husband receiving a custodial sentence of three years and three months.

14. It is appropriate that I set out HHJ Spiro's sentencing remarks in detail. She commenced by briefly addressing the victim's background:

> 'N was born on 16 July 2002 and is now 16 years of age. He was aged between 13 and 14 during the commission of these offences of child cruelty. By way of background, [VZ] and N's mother separated when N was about 3 years old. N was brought up in Moldova by his maternal grandmother and with his aunt and uncle. … [VZ] had very little to do with … N, until around 2015 …'
>
> ...
>
> 'When he went to school, he had to be home by 4pm. He was excited about starting school and he was excited about the prospect of meeting people and having things to do, but that was not to pass. He was not given any money and as I say, he had to be home by 4pm.'
>
> ...
>
> '… It is important to set out parts, at least, of N's personal statement. He says,

> ’I felt sad that I would have to leave my friends when I came to this country but excited at the thought of living in a new city. At first everything was good. [CC] would work and Dad would look after me. It was summer when I arrived so I had no friends. Dad would take me to the park in the evenings, about twice in the month. It was all right. He was trying to teach me English, the letters of the alphabet and a few words. I was also picking up things from the internet as he had given me one of his two tablets he had. Neither of them were hitting me at this point.’’

15. HHJ Spiro observed early efforts by the appellant and her husband to isolate N from others:

> ‘When he was about 12 or 13 it was decided that [VZ] would bring him to this country to live … so that he would have, supposedly, a better life. That unfortunately was not to be. You brought him to live in a small, cramped studio flat … [CC] worked as a night cleaner … From the autumn of 2015 you, [VZ], chose to do the same. As a result, N was left at home for 14 and a half hours per night, five nights per week, both of you leaving him at around 5.15pm and not coming back until after 7am the following morning. There was no consideration by either of you of N’s needs. He was made to come straight home from school. He talks of having made a friend, but that friendship, like all other types of social activity, were curtailed. He was not allowed to socialise or to spend any time outdoors. Despite there being a park he says about 10 minutes away, it was rare that he would be taken and he was never permitted to go there on his own.’
>
> …
>
> ‘When he went to school, he had to be home by 4pm. He was excited about starting school and he was excited about the prospect of meeting people and having things to do, but that was not to pass. He was not given any money and as I say, he had to be home by 4pm. ’They didn’t want me to stay at school after school or join in any after school activities.’ Neither was he permitted to foster the friendship with a boy who he met …'

16. The decision to isolate N was not restricted to impeding the developing of friendship and making ties with his community, but also as to his ability to talk freely to his natural mother who resided in Turkey:

> ‘He was not permitted to speak to his mother unless in your presence.’

17. HHJ Spiro concluded that the consequence of the determined efforts to isolate N was that:

> ‘N was effectively held as a prisoner, or like a caged animal, and what he was subjected to was a form of extreme emotional abuse.’

18. Save for cleaning the house and preparing food for the appellant and her husband, N was permitted little opportunity to occupy his time productively in a manner consistent with being a teenage child:

> ‘Apart from copying out text from a book, he was not given any other way of occupying his time. He had to turn in for bed at an inordinately early hour, for a teenage boy, with lights out at 6pm or shortly thereafter.’

19. The appellant and her husband took steps to subject N to constant monitoring in the family home during their absence from the property:

> ‘He was monitored by a 24-hour camera, supposedly for his safety. In fact, I find it was a way of ensuring that he did as you instructed him to do. You were both able to, and did, communicate with N via the camera to issue directions and orders via the system. He was monitored, made to clean, do laundry, and to report to the camera.
>
> There are at least one or two examples that I have seen, of him showing his hands to the camera and other communications. Fortunately, N reported the fact of the camera to the police. It and the hard drive were seized, and a month’s worth of footage has been retrieved and viewed.’

20. Deliberate action was taken by the appellant and her husband to isolate N, including depriving him of access to modern means of communication:

> ‘There was no childcare arrangement in place, not even to cater for an emergency. There was no television, no devices, including a phone, that was allowed, at least in the last two months or so. All of those were locked away. The wires on the laptop given to N by his mother were cut by you, [CC]. N had won a tablet at school, for his performance there, which you [CC] took from him and you can be seen using it for yourself on the camera footage. Whilst you were out cleaning, you locked that and all other devices away in a cupboard and padlocked it. There is reference in the pre-sentence report that N was punished as a result of either trying or managing to break the padlock. N had no phone. His smartphone and other phone were also taken from him and the purpose of that was that he could have no communication with the outside world. All communication with his mother and anybody else had to take place in the presence of either you, so that you could control what information he passed on. N became increasingly isolated. Having come to a new country, he needed to learn the language and socialise. He was not really allowed to do so.’

21. HHJ Spiro concluded from viewing CCTV footage that N undertook household chores imposed upon him by the appellant and her husband in a ‘robotic fashion’:

> ‘He woke in the morning, before you got back from work, and almost in a robotic fashion began to do household chores: cleaning, sweeping, doing the laundry and helping himself to a fairly meagre breakfast and getting himself ready for school on his own. His existence was, as I have said, like a prisoner or a caged animal. A prisoner, that is, being kept in solitary confinement.’

22. I note the conclusion drawn that N’s existence was likened to that of a prisoner being kept in solitary confinement.

23. HHJ Spiro addressed the cruelty inflicted upon N:

> 'There was minimal regard for N's welfare. When you were there, there was very little positive interaction from either of you. [VZ], it is said on your behalf that you cut your son's hair and showed him some affection. That is true. There is also mentioned on behalf of you, [CC], of a photograph in which he is shown to be kissing you. However, balanced against that was the neglect, ill-treatment and failure to stop the escalating abuse. Even an abused child, like a little animal, wants to love and be loved and will grab any affection that is offered and it is perhaps unsurprising that it is he who is kissing you, [CC], and not the other way around.
>
> [CC], you were not his mother, but you were nevertheless in *loco parentis*, a stepparent who took on and had legal and moral responsibilities towards your stepson. You hit and punished N over a significant period of time. It began, as I have said, at least several months before N reported the matter to his school on 1 November. The ill-treatment, when you were in the home, was a further reflection of the lack of affection and concern for his welfare that you both displayed. ...
>
> There is no doubt that the circumstances in the small studio flat were cramped and that life was difficult. There is, however, no excuse for the systematic and relentless cruelty that you both, in your own ways, inflicted and displayed towards your son, N, who was a child.'

24. HHJ Spiro found that the ill-treatment was conducted over several months.

25. The appellant adopted several forms of punishment towards N, who I again observe was a child at all relevant times living in the family home.

26. A common practice was to make N kneel for lengthy periods of time for having committed what would appear to be, at most, minor infractions of rules imposed by the appellant:

> '[CC], you would make N kneel in the corner of the room for long periods of time for helping himself for food from the fridge when he was hungry.'

27. The adoption of punishment by kneeling was, on occasion, accompanied by physical violence resulting in physical injury:

> 'Also, [CC] made him kneel for an hour and a half, or more, after he had deleted some footage of you singing in the church choir. He filmed you singing in the church choir and deleted some other footage, which could not be retrieved. He was trying his best to help you. The punishment for that was that you made him kneel for an inordinately long period of time. You assaulted him by punching him and slapping him, including with a flip flop, slipper. You grabbed his arm. You broke his skin. You twisted his ear, and he described those punches as being five or six out of ten, in terms of force used. You called him names and 'imbecile'. You shouted in his ear and in his face. You left finger marks and scratches around his neck and bruising to his left ear and ear lobe,

> and there are photographs of the injuries caused by the most recent assault on 30 October that are contained in the jury bundle.'

28. On at least one occasion the appellant used physical violence to impose upon N an understanding that she was master, and that he was to act subservient:

> 'There is an incident which you dispute, which I accept, as recounted by N, where you put a belt around his neck, pulled him down to the floor, to be your servant, wrestled him to bed and made him bow his head and go to the corner, as a result of which he says he was in physical pain all day. The psychological and emotional pain, of course, has lasted much, much longer.'

29. HHJ Spiro was satisfied that the appellant was knowingly imposing both significant, long-lasting physical pain as well as psychological upon N.

30. A further punishment adopted was the restriction of food:

> 'As part of the general background, there was also punishment of restriction of food. He can be seen in the last days also eating dry sliced bread and white cooked rice, but I accept that there was no malnourishment.'

31. Having viewed CCTV footage, HHJ Spiro noted that the appellant required N to eat meals facing a wall.

32. HHJ Spiro addressed one incident where a punishment imposed by the appellant was to 'smear' toilet water on N's face:

> '... [N] urinated in the communal toilet and there was urine on the floor. You, [CC], decided that it was deliberate and punished him by making him not only clear up the urine, but then smearing the toilet water on his face. Every teenage boy, no doubt, has moments where they are less careful and the punishment was completely disproportionate and obscene. '

33. HHJ Spiro addressed the husband's behaviour:

> 'You, [VZ], failed to act and throughout the trial and even afterwards sought to blame [CC] for everything. You did not take responsibility for your inaction to protect your son. N struggled to get up after kneeling for long periods. His legs were shaking and buckling. Instead of helping him, you mocked him, imitating his stumbling. In relation to the assaults, you were aware of some, if not all, and at least two of the most serious assaults which happened right in front of you. They were sustained and repeated. You knew of the abuse that had gone on for much longer than that weekend and it is clear that you did nothing to stop it and stop the escalation in the last period.'

34. The couple exacerbated, and then worked upon, N's insecurities:

> 'Both of you threatened N; that he must not report your conduct. You told him that he would go to a children's home. It was particularly

> pernicious given his unstable upbringing and his fear that he would be abandoned.'

35. By means of his victim statement, N informed the Crown Court, *inter alia*:

> '[CC] would tell me off. She would be hitting me with the flat of her hand or her slipper. She would tell Dad and then he would be bad to me too. He then wouldn't treat me nice either. They installed the camera and they both started working in the evenings. The camera would be working 24 hours a day even in the day when they were at home. I felt isolated. I couldn't talk to no-one. They took away my tablet and my phone so I couldn't talk to my mum even. They would only allow me to speak to my mum using their Skype when they were inside the room. They would make fun of me saying, 'your mum is not coming to get you N. What are you going to do about it?'. [CC] would make it clear she didn't want me living there. It was mental as well as physical. Other children would be happy going home. I wasn't. I was depressed. I didn't want to go on living no more. Dad didn't really care. He didn't do anything. He was in the room with [CC] when [CC] was hitting me and having arguments with me and he did nothing. I was very sad. He is my biological father. He never done anything for me. I think strangers would do more for me. I know what was happening was wrong and so I told the school when [CC] hit me and tried to strangle me. I felt relieved that people knew. I am happy to be living with my family now. I wasn't happy giving evidence in Court but it was the right thing to do. I feel happy now, as I won't get punished by them again. They won't be able to mentally and physically abuse me anymore. They won't be able to interfere in my life anymore. I would like them to think about what they have done'.

36. I observe that the appellant and her husband engaged over time in mocking N, a child.

37. N was eventually able to bring his suffering to a close:

> 'Fortunately, N finally had enough and, despite those threats, he reported the abuse to his school on 1 November 2016. He was taken into police protection and has not seen either parent since. He was looked after by a kind foster carer for a short period before being placed with a maternal aunt and uncle. He has, once again, had to relocate but remains in the United Kingdom.'

38. In sentencing the appellant to a custodial term of imprisonment, HHJ Spiro observed:

> 'In relation to you, [CC], there are two reports. You arrived in this country in 2006. You too have worked hard and have a good work ethic. Although you have expressed remorse, there has been some attempt to justify your behaviour as a result of N's wayward behaviour and again, attempting to justify the punishment for urinating on the floor. I accept in your case that you had particular difficulty in coping with the situation that you found yourself to be in. In the main, because of two particular issues. The first, the grief that you experienced as a result of the death of your father and also as a result of health problems (gynaecological and other). Your father died from cancer and

> you were fearful that you too had cancer although thankfully that is not the case. You accept in the second report that you lost control. You had no patience with N anymore and that you, in some ways, loved him and you needed to apologise to him.'
>
> …
>
> 'Each case, of course, turns on its own facts. … There was repeated and sustained isolation coupled with systematic control of the victim, N, to ensure that he had no communication with others. There was a deprivation of all forms of access to the outside world and no stimulation through television, games or social media. In addition, he was treated as a skivvy, there to serve the needs of others with no regard to his welfare. …'
>
> You, [CC], as his stepmother, confiscated the tablet and prevented contact with his mother. You inflicted punishments that made the period that he was isolated all the more difficult for him to endure. Although the assaults were inflicted by [CC] and not you, [VZ], you stood by and watched while she did that and inflicted other punishments. You knew about the assaults and yet you left N in [CC]'s care. It is right that the most serious of the assaults occurred over the last few days but there was a pattern over a period of time of degradation and punishment including beating, standing against the wall, eating facing the wall and finally kneeling for long periods.'
>
> …
>
> '[CC], you behaved in a wicked way to a child who was vulnerable and in your care. You were the one who inflicted punishments and controlled the regime. The shortest sentence commensurate with the offence, taking account, as I have said, of all the mitigating and aggravating factors, including the difficult circumstances that you found yourself to be in and remorse, would have been three and a half years after trial, reduced by a third, is 28 months and that is immediate imprisonment. That is concurrent on each of the two charges, again, taking account of totality and in respect of both there will be a victim surcharge of £170.'

39. I note the observations of HHJ Spiro, who read all relevant documentary evidence, viewed the CCTV footage and heard oral evidence in the husband's trial: that the appellant behaved in a 'wicked' way, that she 'inflicted punishments' and 'controlled the regime', there was 'repeated and sustained isolation' imposed upon N, that N was treated as a 'skivvy' - similar to *trabalho servil* in Portuguese – and that he was deprived of 'all forms of access to the outside world'.

Evidence

40. The appellant filed a bundle running to 242 pages prior to the hearing before the Upper Tribunal. I have considered all the documents in the bundle, even if not expressly referred to in this decision. I have also considered documents previously filed with the First-tier Tribunal that were not placed in the latest bundle. I accept that their absence was inadvertent on the part of the appellant's legal representatives and not

deliberate. Mr. Malik KC was able to secure relevant missing documents before the hearing commenced.

41. The appellant relied upon two witness statements dated 23 April 2020 and 31 August 2022. She identified her close relationship with her husband and detailed the circumstances in which N came to live at the family home. She stated that N was happy when he moved to the United Kingdom and that he would stay and enjoy quality time with his father while she was at work. Some months after his arrival in this country he enrolled in a school and commenced his education. As N was a new addition to the family and had commenced school, the family expenses rose, and it became difficult to meet such expenses from her income alone as a cleaner. She was also experiencing health concerns. Consequently, her husband started to work as a cleaner for the same company. As both of them had to work nightshifts they were required to leave N alone at the family home.

42. In respect of the use of CCTV cameras, the appellant detailed in her statement of August 2022:

> ’8. As there was no alternative and we were worried about my stepson’s security, we decided to install CCTV cameras, so we could supervise him while being away for work. The CCTV cameras were for his security.
>
> 9. We both were working hard during those night shifts and would get him ready for school once back from work in morning. I used to ask him to do daily tasks, such as doing homework, having dinner, shower, etc. We were not aware that such supervision, i.e., through CCTV, was adversely affecting our child and we couldn’t understand it as we had no other choice except for continue doing the job in order to survive and meet the expenses.’

43. By means of her witness statement the appellant stated that she is regretful and apologetic as to the maltreatment and neglect she inflicted upon N ‘by punishing him, assaulting him and supervising him through CCTV’. Contrary to the indictment, to which she pleaded guilty, she identified the events as occurring during ‘a short span of time’. She detailed that she was depressed and unable to control herself, in part through her working at night coupled with depression and the loss of her father. She stated that she would become paranoid when N spoke to his mother in their own language. She confirmed that ‘these continuous events got me frustrated. These events rapidly occurred in such a short span of time that I couldn’t control myself and because of this I did wrong to my stepson, for which I am very much ashamed of.’

44. She explained by means of her statement that whilst in prison she spent a lot of time coming to terms with her parental shortcomings and realised that she was unable to control her emotions. She stated ‘it may be because of the lack of emotional support which I needed’ that her shortcomings arose but identifies that no-one else should be blamed for her actions. She identified that her actions were, in part, a result of her not

addressing the emotional pain that she was suffering and not displaying appropriate anger management skills. She was clear as to her opinion that her actions flowed from a lack of consequential thinking.

45. At paragraph 27 of her August 2020 witness statement the appellant detailed:

> ’27. I have never been involved in any crime. I am not a habitual criminal. I committed an offence for which legally I have completed my punishment. I am sure God has accepted my repentance and I request that this court also does.’

46. I take this opportunity to observe that this assertion is incorrect. The appellant was engaged in criminal activity for several months, between June and November 2016. She was cruel to, abandoned, and ill-treated her stepson, contrary to domestic law.

47. At the hearing before me she was asked questions about her interview with the Probation Service conducted in 2019, several answers to which are to be found in an OASys report dated 26 April 2019. In particular, she reported to a probation officer that she had ‘separated’ from her husband and was renting a room in a shared house away from the former family home. She stated that whilst they had separated, they remained ‘friends’. She explained that the reason why she had left the family home was that it was hoped that N would be committed to return to live with his father. Such possibility would be aided by her not living in the property, so she lived with a neighbour and saw her husband during the day. However, the relationship was ongoing, and they continued to remain in contact whilst they were both serving their custodial sentences. They resumed living together after the appellant’s husband was released from prison in May 2020. The appellant had previously been released from prison but had been placed in immigration detention until February 2020 and lived with a friend before her husband’s release. Both her licence and sentence expiry dates were 4 February 2021.

48. The appellant confirmed to Mr. Walker that when separated from her husband prior to their sentencing she resided with a friend. When she left prison, she went to live with another friend, who attended the hearing to give evidence on her behalf.

49. When asked as to the circumstances that led to the numerous acts of cruelty to N, the appellant identified her regret as to what she had done. She stated that she had been very impatient at the time, due to poor health and having lost her father to cancer. Consequently, she lost control, in part, because she was very tired from working at nights. She stated that she did not know how to be the mother that her stepson needed. When reminded that the evidence considered by HHJ Spiro was very clear in identifying that she had been in control of her actions on many of the occasions of neglect and cruelty, the appellant replied, “I would go outside of myself, I would only think about myself”.

50. The appellant's husband gave evidence and relied on two witness statements dated 25 September 2020 and 31 August 2022. He confirmed his immigration history and explained how he met the appellant and the subsequent development of their relationship. He provided limited detail as to the circumstances that arose in relation to the criminal convictions other than to say that he was regretful and apologetic that he neglected his son and his attendant failure to provide N with the actual care and attention he required. He stated that the events occurred during a short span of time. He observed that the appellant was in severe depression and in his opinion she could not control herself. He accepted that he did not notice the appellant's worsening depression at the time and did not imagine that severe depression could result in such actions. He observed in his August 2022 witness statement, 'those events rapidly occurred in such a short span of time that I didn't even realise and when I did realise, it was already too late, for which I am very much ashamed.'

51. He identified various reasons as to why he could not relocate to Brazil and reside there with his wife.

52. He was asked by Mr. Walker as to the separation detailed by his wife to the Probation Service in 2019. He replied that they had not separated. Rather, they continued to live as man and wife though she lived at a different address. It was simply a means by which there would be encouragement for his son to return to the family home. His desire was for N to return so that they could live as a family. He accepted that the separation occurred sometime before his criminal trial, at a point in time after his wife had pleaded guilty to child cruelty.

53. He was asked why in his witness statement he stated that the relationship had never broken down and had not mentioned their living apart in 2018. He again replied that as far as he was concerned, though they were living apart they were not separated.

54. The appellant relies upon several character statements from various friends, two of whom attended the hearing.

55. Pastor Ivonete Silva, President of Bethel Mission Charity, attended the hearing and relied upon a letter dated 13 August 2022. She gave oral evidence confirming that the appellant had been a member of her church for over ten years and was an active member. She identified the appellant as 'a loved and cherished member of the church and we have nothing but praises for her'. She was asked as to whether she knew about the appellant's criminal offending, to which she replied, "Yes". When asked as to whether she knew the substance of the offences leading to the appellant's conviction, she replied that all she knew was that the appellant had punished her stepson. She did not know the details and had only heard that from others. She accepted that she had not spoken to the appellant about the circumstances of her conviction, beyond knowing that the appellant had done something wrong.

56. Ms. Rosa Honorio de Almeida, a friend of the appellant, attended the hearing and relied upon a letter dated 19 August 2022. She explained that

she had known the appellant only since 2017, so after the offences were conducted, but before the appellant went to prison. She identified by means of her letter that the appellant is a kind person who is very close to her family, and that 'I never felt an alarm about her, she is overall loveable and a person who is helping and not showing any dangerous in society'. In answer to questions Ms. Honorio de Almeida accepted that she knew very little about the circumstances leading to the conviction, beyond the appellant having "some issues" with her stepson and having had "problems" with him. She understood that N was "not an easy person", and this led to fighting between the appellant and her stepson. When asked whether she knew of the substance of the events leading to the conviction she stated that all she was aware of was that the appellant had lost her father and was herself sick. During this time the appellant fought with her stepson and "she pushed him". When asked whether she thought it odd that a person would be sent to prison for simply pushing their stepson, she said that there was an additional problem which is that they had left their son alone in the house to go to work, although she had only heard that from other people and not from the appellant.

57. A letter was provided by Jackline de Sousa Barbosa, who explained that she attended church with the appellant and her husband and that they had been friends since 2010. Ms. de Sousa Barbosa detailed, inter alia:

> 'My daughter is already 6 years old now, [CC] often comes to my house, she is lovely with us and very kind to my child.
>
> [My daughter] loves her and I have no concern about [CC] being around us.'

58. Mr. Daniel Kremer stated by a letter dated 26 August 2022 that he has known the appellant for over three years and that:

> 'She has never come across threatening and I would not mind having her around of my own children if I had any.'

59. By a letter dated 13 August 2022, Mr. Gerson Silva confirmed that he knew the appellant through their church, and that:

> 'She is a very kind person who is very close to my family including to my daughter. I have never felt any concern or worry about herself or her behaviour.'

60. Two OASys assessments were placed before the First-tier Tribunal. Both confirm the identification of the appellant as being of low risk to the public, known adults and staff whilst in the community and of being a medium risk to children in the community. In the April 2020 assessment factors identified as likely to reduce her risk include the appellant accepting her poor behaviour and the appellant not having unsupervised contact with children under the age of 16.

Decision

61. The appellant continues to benefit from the transitional arrangements concerned with the 2016 Regulations.

62. The Citizens' Rights Directive, as transposed into domestic law by the 2016 Regulations, provides additional protection against expulsion where an EEA national has residence in the host state.

63. By virtue of regulation 23(6) an EEA national, or a dependant of an EEA national exercising EEA Treaty rights, who has entered the United Kingdom may be removed if the respondent has decided that such removal is justified on the grounds of public policy, public security or public health in accordance with regulation 27.

64. Schedule 1 of the 2016 Regulations provides as follows, so far as is relevant:

> 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—

(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;

…

(j) protecting the public.

65. The present hierarchy of levels of protection, based on criteria of increasing stringency, is identifiable as:

(1) A general criterion that removal may be justified ‘on the grounds of public interest, public security or public health’;

(2) a more specific criterion, applicable to those with permanent rights of residence, that they may not be removed ‘except on serious grounds of public policy or public security’;

(3) the most stringent criterion, applicable to a person ‘who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision’, who may not be removed except on ‘imperative grounds of public security’.

66. Both Mr. Malik and Mr. Walker confirmed their agreement that the second criterion applies in this matter.

67. Regulation 27(5)(c) of the 2016 Regulations 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.

68. The onus is placed on the respondent to establish such serious threat and the standard to be applied is the civil standard: *Arranz (EEA Regulations - deportation - test)* [2017] UKUT 00294 (IAC), at [81].

69. I am required to be satisfied that the appellant is a present threat to the interests of society, and so her past criminal record is not in itself sufficient: *B (Netherlands) v. Secretary of State for the Home Department* [2008] EWCA Civ 806, [2009] QB 536, at [16].

70. I observe that it was not suggested in the respondent's decision that the appellant fell within the exceptional category identified in *R v. Bouchereau* (30/77) [1978] 1 QB 732, to be read in conjunction with *Secretary of State for the Home Department v. Robinson* [2018] EWCA Civ 85, namely that it is 'possible that past conduct alone may constitute such a threat to the requirements of public policy'. Mr. Walker did not advance reliance upon the principle before me.

71. When considering whether serious grounds exist, focus is to be placed upon the propensity of the individual to re-offend rather than issues of deterrence or public revulsion, which have no part to play in the assessment: *Secretary of State for the Home Department v. Straszewski* [2015] EWCA Civ 1245, [2016] 1 WLR 1173.

72. Consideration of proportionality is only undertaken if the serious threat test has been made out. It is a holistic balancing exercise. The prospects of continuing successful rehabilitation can be relevant to proportionality.

73. Evidence as to risk and proportionality is to be considered at the date of hearing, not at the date of the expulsion decision: *MG (Prison: Article 28(3)(a) of Citizens Directive: Portugal)* [2014] UKUT 392 (IAC), [2014] UKUT 392 (IAC), [2015] Imm AR 128.

74. In his short but helpful submissions Mr. Walker requested that both the appellant and her husband be considered as lacking credibility in respect of their evidence. He accepted that in light of the appellant's conduct since leaving detention in May 2020 and her level of protection under the 2016 Regulations, the respondent may have an uphill struggle, but it was in the public interest that the appellant be deported. He noted a lack of adequate engagement by the appellant as to the underlying reasons for offending, her lack of true acknowledgment as to her actions towards N and that there was no cogent evidence suggesting that her risk towards children in the community had reduced to low.

75. Mr. Malik accepted in his submissions, and he was correct to do so, that this is a troubling case both from the position of public policy and also as to the concerns arising in respect of N. He accepted that the appellant committed serious crimes and that she committed them against a child. He accepted, and the evidence is clear on the point, that the crimes were committed deliberately and over a period of time. He accepted that the appellant could not assert that the offending behaviour had only been over a short period of time. As observed by HHJ Spiro, the charges to which the appellant pleaded guilty concerned events between 29 June 2016 and 1

November 2016. However, he submitted that the respondent was incapable of meeting the burden placed upon her that the appellant was a genuine, present and sufficiently serious risk to the fundamental interests of the United Kingdom.

76. I conclude that the fact that both the appellant and her husband came before this Tribunal seeking to assert that the appalling behaviour towards N was only for a short period of time is strongly suggestive of efforts to minimise their behaviour. The ill-treatment and abandonment occurred for over four months.

77. I further note that in her evidence before this Tribunal there was no real engagement by the appellant at all with the numerous episodes of coercion, cruelty and neglect that arose during the months of June and November 2016.

78. I do not find either the appellant or her husband to be impressive witnesses. At the core of her evidence before me the appellant sought to assert that consequent to the loss of her father and her existing personal health concerns she lost control, on occasion, through anger alone and that she is remorseful for having lost her control in such circumstances.

79. Contrary to the appellant's assertion that she only acted when she lost her temper, I am satisfied that there was a common theme of implementing deliberate and planned punishments, which provide no indication of having been imposed consequent to sudden, uncontrolled anger. I note HHJ Spiro's conclusion that the appellant 'controlled' the regime of punishments.

80. The deliberate establishment of control and coercion to deny the ability of N to turn to anyone else can be identified over time by the denial of access to phones or computers. The deliberate effort to isolate N was established by denying him the ability to form close personal friendships, denying him the ability to talk to his mother in private, denying him access to television and social media and the accompanying use of mockery and demeaning behaviour to undermine his confidence and self-esteem. These acts have the hallmark of being considered, planned and designed for a purpose, not consequent to a loss of temper.

81. That the appellant locked phones and all other devices away in a cupboard which was then padlocked when she left for work evidences the adoption of a calculated approach in respect of controlling, coercing and isolating N.

82. It is striking that in her witness statements she seeks to portray the use of CCTV cameras in the home as having been intended for positive reasons; to ensure N's safety. Such evidence entirely fails to grapple with the evidence before the Crown Court that the CCTV cameras ran over the weekend when she was present at the family home with her husband. It is abundantly clear that there was a controlling element to the use of the CCTV cameras.

83. Whilst HHJ Spiro concluded on the evidence available to her that N was not malnourished, she found that he was being kept hungry. I am satisfied that this was a deliberate act conducted over time by the appellant, again to control and coerce a child.

84. Punishments imposed upon N by the appellant, such as kneeling for lengthy periods of time for even the most minor infraction of rules that she set, were deliberate and not imposed in anger. There was a consistency in their application, and their length of operation; deliberate in application rather than flowing from a loss of temper.

85. I find that the regular requirement that N face the corner to eat his food was controlling and coercive behaviour designed to diminish his self-worth.

86. I am satisfied that N was victim to physical violence, but in addition was subjected to verbal intimidation and demeaned, to remind him that he had nowhere else to turn. I am satisfied that the behaviour of the appellant was deliberate and was purposively designed to exercise control over N and to demean him.

87. That a person entrusted with a parental role could take from a child a tablet computer which he had earned through his own efforts at school simply to deny him the benefit of it whilst at the same time requiring him to see her using it for her own benefit is a clear example of the appellant using controlling behaviour to demean and inflict emotional harm.

88. The incident with the cleaning of the toilet and washing N's face in toilet water is, I find, yet another example of controlling behaviour designed to degrade the child's self-worth. It was clearly adopted as a deliberate means of diminishing his self-respect.

89. A significant example of ill-treatment is N having a belt placed around his neck, being pulled down to the floor, to act as the appellant's 'servant', being made to 'bow his head' before being required to stand in the corner, such actions leaving him in physical pain for the rest of the day. I dismiss as fanciful the assertion that this flowed from a loss of temper. The only reasonable conclusion to be drawn is that this was a calculated act of cruelty upon a child.

90. Of concern is the appellant's effort to portray her instructions to N to undertake daily tasks such as having his dinner, having a shower and completing his homework as being positive and healthy. Again, it is abundantly clear from the evidence before the Crown Court that N, a child aged 13 or 14 at the relevant times, was to all intents a skivvy in his own home, being required to undertake menial household tasks and at risk of punishment if there was a failure to meet the standards imposed by the appellant. The CCTV evidence confirms that N was undertaking the directed tasks in a 'robotic' manner. I am satisfied that the appellant continues to seek to minimise her actions. Indeed, having read her statements, her interviews with the Probation Service and heard her evidence I am satisfied that the appellant does not believe that she has done anything wrong. Her regret, to the extent that she has any, is

directed to her having been arrested, convicted and imprisoned. Her limited expressions of sorrow directed to N are hollow, as is clear when her evidence is considered in its totality.

91. Whilst I accept that on occasion the appellant acted through anger, and consequently lost personal control, most of the harm inflicted on N, whether physically or emotionally, was deliberate.

92. An unhealthy aspect of her present relationship with her husband is that having stood by and allowed the appellant to act cruelly towards his son, he now asserts that her actions were solely consequent to the death of her father and attendant depression.

93. A further concern arising as to insight are the actions of the couple in the run up to her husband's trial and their subsequent sentencing at Harrow Crown Court. The appellant pleaded guilty to the two counts in January 2018. Her husband, placing the blame entirely upon the appellant, stood trial. He was unsuccessful in his defence before a jury. However, prior to the trial the couple thought that if the appellant moved out of the family home, whilst continuing their relationship, there was a real chance that N would be permitted to reside with his father. I have considered whether this was an inept effort to manipulate N in the run-up to his giving evidence as the main prosecution witness at his father's trial. However, the only reasonable conclusion to be drawn from this illusory scheme is that neither of them possessed a real understanding as to the abhorrent nature of their behaviour. That they had been charged with serious criminal offences in respect of N appears to have bypassed them in their understanding of both the trial process and the likely sanction to be imposed. I conclude that neither of them truly believed that what they had done was wrong save for accepting, on the appellant's behalf, that it was against domestic law, and that in the circumstances as they understood them to be they both genuinely believed that N and the State would be willing for N to return to the family home. I am satisfied that the failure to understand the controlling, coercive and planned nature of much of what went on during the months N resided at the family home continues to exist both for the appellant and her husband. Their remorse is primarily directed to the fact that they went to prison, and not to how they treated their son. I am satisfied that I can rely upon the appellant's own evidence as establishing that she possesses no true insight into the abhorrent use of control, degradation, fear and isolation inflicted upon N.

94. The appellant may, for understandable reasons, not wish her local community, including her local church, to be fully aware as to the circumstances that led to her conviction. She has provided very limited information as to her criminality to others. However, the narrative that has been provided to others – that N was not an easy person to live with, that she was suffering personal turmoil and the criminal act amounted to pushing N – is consistent with the appellant's personal assessment of events, namely a sanitised version where, in part, she was the victim of circumstances.

95. Whilst there may be understandable reasons of shame and concern, particularly when discussing with people that she has a conviction for child cruelty, there are real concerns that she is not being truthful as to her conviction with her friends who are the parents of young children. I have concerns with the contents of Ms. de Sousa Barbosa's letter. The appellant regularly meets Ms. de Sousa Barbosa and her child, and such engagement has resulted in the child being said to 'love' the appellant. Ms. de Sousa Barbosa goes as far as to say that she has no concerns about the appellant being around both herself and her child. This beggars the question as to what Ms. de Sousa Barbosa's views would be if she was aware of the full extent of the harm inflicted upon N by the appellant and whether with such knowledge, she would wish for the appellant to have any engagement with her own child. A parent will expect to be informed as to whether a person may or may not be a risk to their child. What is abundantly clear from the evidence presented to this Tribunal is that the appellant is not being truthful as to events with N to those she meets and with whom she has friendships.

96. I have significant concern as to the evidence of Pastor Silva. Her lack of interest in the appellant's conviction, beyond acknowledging that it involved a child, was striking. Her disinterest in knowing anything more than the limited information she has been provided with - the appellant punished her stepson – appears to be wholly contrary to the safeguarding duties placed upon her and her church in respect of child congregants, which is of grave concern. The expectation is that church authorities will take care to identify where a person may present a risk to others and offer pastoral care and support to them whilst taking steps to mitigate such risks. Where people may pose a risk to others, their position in a congregation will need to be carefully and sensitively assessed to decide whether they pose a present risk to others and to put in place arrangements to ensure that these risks are mitigated. There appears on behalf of Pastor Silva a clear unwillingness to take even basic steps in respect of safeguarding.

97. The appellant continues to engage with families and to be present around children. I have considered whether the appellant has exercised manipulation in her dealings with others, which requires something more than simply not explaining her criminal history for reasons of shame and embarrassment. Having read the letters of support from fellow congregants, and heard the evidence of Pastor Silva and Ms. Honorio de Almeida, I am satisfied that the appellant has not sought to be manipulative. Rather, there appears to have been a collective lack of natural curiosity by members of her church and she has been aided by such ambivalence, with no effort undertaken by others to make detailed enquiries as to events underpinning her conviction.

'Genuine, present and sufficiently serious risk to the fundamental interests of the UK'

98. In *BF (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 923 the Court of Appeal identified the approach to what is now regulation 27(5) of the 2016 Regulations at [3]:

> '... The Tribunal had to determine (1) what was the relevant personal conduct of the respondent? Having determined that question, it had to decide (2) whether that conduct represented a genuine, present and sufficiently serious threat and, if so, (3) whether that threat affected one of the fundamental interests of society. It also had to stand back and consider (4) whether the deportation of the respondent would be disproportionate in all the circumstances. ...'

99. I am satisfied that appellant has an unedifying offending history, which I am required by regulation 27(5)(c) and paragraph 3 of schedule 1 to the 2016 Regulations to take into account. However, it is only if she presents a genuine, present and sufficiently serious risk to the fundamental interests of the United Kingdom that my enquiry need proceed any further: *MC (Essa principles recast) Portugal* [2015] UKUT 520 (IAC); [2016] Imm AR 114.

100. As confirmed by the Court of Appeal in *Straszewski*, at [25], an evaluation is required to be made of the likelihood that the appellant will offend again and the consequences if she did so. In addition, there is a need for the appellant's conduct to represent a sufficiently serious threat to one of the fundamental interests of society. The risk of future harm is to be balanced against the need to give effect to the right of free movement.

101. Thus, my focus is to be placed upon the propensity of the appellant to re-offend.

102. I have been careful above to address my concerns as to the appellant's insight as to her behaviour in respect of the criminal convictions, and the concern that exists through the lack of adequate support offered by her husband. I am concerned that the appellant simply seeks to explain her behaviour as arising from uncontrolled emotions at a time when she had difficulties with personal issues in her life. However, the contrary is true. Her actions, in the main, were planned, controlled, and designed to secure the ends she desired.

103. However, the application of the test requires a careful examination of the personal facts arising and, in this matter, there are highly relevant nuances to be considered. I note the concerns identified by OASys as to the appellant being a medium risk in respect of children. However, this is an actuarial assessment last updated in 2019, and the identification as to children is general in nature. Whilst there is a concern as to how church leaders and congregants have approached safeguarding issues, there is a consistency in evidence that since her release into the community in February 2020, there has been no evidence at all of her acting in a concerning manner towards children. Indeed, there are no complaints as to her general behaviour, despite being tested in the community for over two-and-a-half years.

104. My conclusion is that if there is a risk remaining, and I consider the existence of such risk below, it relates to children residing with her, and potentially to children left in her care for days, and not hours.

105. I am satisfied, on the evidence before me, that the appellant was personally resentful towards N for entering her life, which she was contentedly sharing with her husband, and that her actions flowed from such animus. It is not the respondent's case that she exhibited cruelty towards children either before N's appearance at the family home in the early summer of 2016, or after his removal from the home in November 2016.

106. Turning to the facts of this matter, I am satisfied that she is not a real risk to children outside of the family home or in unsupervised circumstances. Such conclusion is consistent with the two OASys assessments. Neither the appellant nor her husband have indicated a desire to have a child, and they are of an age where parenthood would be unexpected. There was no evidence before me, and Mr. Walker did not contend, that efforts had been undertaken by the appellant to spend time with children at her home unsupervised by their parents since February 2020.

107. I acknowledge that a low risk can, in certain circumstances, constitute a present threat, especially where the consequences of any offence could be serious. I further note that whilst a threat must exist, it does not need to be imminent.

108. However, I conclude that the very particular circumstances arising in respect of the appellant's conviction, namely her animus towards her stepson following his arrival in the family home, will not arise again. The appellant has given no outward indication of wanting to care for a child, unsupervised, in her home, and she has exhibited no concerning behaviour to parents of children with whom she is in regular contact.

109. Noting Schedule 1 of the 2016 Regulations, I observe that the appellant has served a custodial sentence. However, she has accrued only one conviction, for two offences, during her twelve years residing in accordance with EU law and has not been convicted since her release from detention in February 2020.

110. I observe the respondent's concern in her decision letter of 14 June 2019 as to the risk of harm upon reoffending that the risk was that if the appellant 'should re-offend' her offence would be of a 'similar' nature and so deportation was justified on serious grounds of public policy. Having considered the evidence filed with this Tribunal with care, I conclude that the appellant presents no risk to children in the narrow circumstances from which previous considerations of risk arose. She therefore presents no risk of re-offending or at most such minimal risk of re-offending that is incapable of establishing a present threat.

111. In *Case C-67/74 Bonsigniore v v Oberstadtdirektor der Stadt Köln* [1975] 1 CMLR 472 the ECJ observed that a finding that a threat to public security exists implies the existence in the individual concerned of a propensity to

act in the same way in the future. The Court of Appeal held in *Secretary of State for the Home Department v. Dumliauskus, Wozniak and ME (Netherlands)* [2015] EWCA Civ 145; [2015] Imm AR 773 that where there is no real risk of re-offending, then the power to deport does not arise.

112. Taking all factors into account, including Schedule 1 to the 2016 Regulations and viewing the evidence in the round, I find that the appellant does not present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and that in all the circumstances, bearing in mind the extent to which her right to free movement would have been impaired, it would not be proportionate to deport her.

113. I therefore allow the appeal on the grounds that the decision was contrary to the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.

114. In the circumstances, there is no requirement for me to proceed to consider proportionality, or in the alternative the appellant's appeal on article 8 ECHR grounds.

Notice of Decision

115. By means of a decision dated 21 June 2022 this Tribunal set aside the Judge's decision promulgated on 17 December 2020 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

116. The decision is re-made, and the appellant's appeal is allowed.

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

Date: 20 September 2022