Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00624/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 September 2017	**On 04 December 2017**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NATHANIEL MBU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr I Jarvis, Home Office Presenting Officer
For the Respondent: Mr B Malik, Counsel instructed by Calices Solicitors

DECISION AND REASONS

1. This appeal comes back before me following a hearing on 24 April 2017 whereby I decided that the decision of the First-tier Tribunal ("FtT") should be set aside for error of law. I also decided that the decision should be re-made in the Upper Tribunal.

2. The appeal was listed before me on 7 July 2017 but because the appellant's solicitors had not complied with my earlier directions, the appeal had to be adjourned. In correspondence, it was apparent that the appellant's solicitors failed to understand what was said in my further directions about Counsel at the hearing on 7 July 2017

not having been properly briefed. It is however clear from [24] and [33] of the error of law decision entitled "Decision and Directions" why I came to that conclusion.

3. I have included the Error of Law Decision as an Annex to this present decision. However, it is useful to provide a summary of the background to the appeal.

4. The appellant is a citizen of France, born in 1995. A decision was made on 12 November 2015 to make a deportation order against him pursuant to the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") because of his convictions for criminal offences.

5. On 9 September 2014 he was convicted of offences of having an offensive weapon and affray, for which he received a sentence of eight months' detention in a young offenders' institution. On 23 April 2015 he was sentenced to 16 weeks in a young offenders' institution for burglary, possession of a controlled drug, assault on a constable and criminal damage. His most recent conviction was on 15 October 2015 in the Crown Court at Basildon for offences of robbery and damaging property for which he received a sentence of 30 months' detention in a young offenders' institution.

6. As indicated in the error of law decision, some findings of fact made by the First-tier Tribunal Judge ("FtJ") can be preserved. Those preserved findings were the subject of agreement before me at the resumed hearing. They are as follows:

   - The appellant has been in the UK since 1997. By the time of his first custodial sentence in September 2014 he had lived in the UK for about 17 years.

   - The appellant had grown up in the UK and was (at the date of the hearing before the FtJ) aged 21. He came to the UK as a toddler and has known no other life. Although his late teens have been characterised by criminality, the appellant has no real connection with France beyond the fact of his nationality and that of his immediate family. He has no ties to France and his life has always been in the UK for as long as he can remember.

   - The appellant has a poor record of criminality over the last four years (at the time of the hearing before the FtJ). He was a relatively persistent offender across the criminal spectrum with offences of dishonesty and possession of street drugs and serious offences against the person involving robbery, assault on a constable, affray and possession of an offensive weapon. His offending appears to have escalated since he left home at the age of 16 and only to have been controlled when sentenced to a relatively lengthy period of imprisonment of 30 months.

7. For the avoidance of doubt, those preserved findings come from the decision of the FtJ and are, more or less, set out at [13] of the skeleton argument on behalf of the appellant prepared for the hearing on 7 July 2017 which, as already indicated, was adjourned. That paragraph of the skeleton argument suggests other preserved findings but as indicated to the parties at the resumed hearing, the only preserved findings are those which I have set out. Thus, for example, the FtJ's conclusion that

the appellant had demonstrated a change in his behaviour, or that he did not pose "a serious and present risk" to security or public policy, could not be preserved findings in the light of my conclusions as to the FtJ's error(s) of law.

8. At this, the resumed hearing, further documents were provided on behalf of the appellant in the form of supplementary bundles of documents consisting of 40 and 65 pages, respectively. I also had before me a skeleton argument on behalf of the appellant dated 20 September 2017. The respondent provided an OASys report with a date of 12 July 2017 but that date does not reveal much in terms of the date of the actual assessments in it, as distinct from it being a date when the report was accessed.

9. I heard oral evidence from the appellant and his father, Mr Ikwili Mbu, which I summarise below.

The oral evidence

10. The appellant adopted his witness statement dated 5 July 2017. He was asked in examination-in-chief about incidents recorded in the OASys report in relation to his having been placed on report for allegedly assaulting another prisoner (page 9). The appellant said that life in prison was tough and you have to defend yourself, otherwise people would attack you. People had tried bullying him and he was not happy. The authorities did not address those incidents. No-one ever spoke to him about that. If you are in a fight and officers know about it you would be put on the 'basic' regime with no association and no TV.

11. It was when he left prison that his problems with those people came to an end. He tried to talk to people about it. The incidents ended in December 2015 and into 2016.

12. In cross-examination he said that he was aware of the OASys report because the probation officer had told him about it. However, he was not aware of its content. As to why his witness statement at [6] did not deal with those incidents involving fights in prison, the appellant said that the deportation scenario and prison scenario are different. By the time he got into the immigration system he left all that behind him; fighting and so on. When he was at HMP Verne he was not involved in any fights. He tried to be a model prisoner. He had said, as per the OASys report, that he had been part of the YBC gang, but that was when he was 15 or 16 years old. As to what is recorded in the OASys report on page 8 about his having stolen knives and meat cleavers which he had been going to sell for £5 each, the appellant said that that was 100% correct. It was also correct that the 2014 offences of having an offensive weapon and affray were gang related.

13. In relation to the PNC report showing a racially aggravated offence, he agreed that he had said words he was not supposed to say to an Asian police officer.

14. As to when he ended his association with the YBC gang, he got arrested in 2013 and dealt with in 2014. By that time he had moved to Essex but he was still involved with crime, but not gang crime. His ties with the YBC had ended by that time.

15. In relation to the 2015 offences of burglary, theft, possession of controlled drugs, assault on police, robbery and being carried in a motor vehicle taken without consent, he was not associated with the YBC gang at that time. He was not connected to a gang but only connected to "low lifes" who were not doing anything with their lives, and so he kept getting into trouble. The YBC gang were just a bunch of kids being stupid. By 2016 he was already in Essex. The YBC gang were in the Stratford area, which is where he is living now (at the date of the hearing). That gang still exists in Stratford.

16. His father speaks French at home, and he, the appellant, understands French.

17. As to what is said at page 13 of the OASys report about his having refused to engage with the leaving care team, the appellant said that the only leaving care team that he was aware of were the social workers and they only help with housing.

18. It was true, as stated in the decision letter, that he had signed a disclaimer stating that he wished to return to France. However, he was feeling stressed after having finished a two-year sentence, and then realised that if he had to go to France he would have nowhere to go to.

19. It was true that before he did use to act impulsively, but as he has grown up he had seen the light. The time he had spent in prison helped him to be more patient and understanding. The first time he had been in jail from the conviction in September 2014 was for eight months. That did not change his attitude because it was his first time in jail and he does not think that it was long enough. He also did not have a deportation order against him. He was thinking about how his actions affected people.

20. As to the proposition that there was a strong risk of impulsive behaviour if he were to win his deportation appeal and there was no deportation order for him to consider, the appellant said that that was a good question to ask. Since he has been out of prison he has been trying to better himself. He has become involved in the community and is volunteering in youth work.

21. As to the OASys report stating that he is a high risk to the public in the community and a medium risk to known adults, that was just their opinion and it would be up to the judge to decide.

22. He lives with his parents. Apart from voluntary work, he and his brother are doing martial arts. He does not want to waste his time.

23. In re-examination he explained the offence of racially aggravated harassment, which involved failing to pay for a fare on public transport. The staff tried to stop him. He had cannabis on him so he ran. He had pleaded guilty because he was at fault. He explained what words he had used. He is not proud of that and he is embarrassed about it.

24. YBC stands for Young Blood City. He could not even say what the gang is all about. He was a kid. You have to be pretty stupid to be in it. It had crippled his lifestyle

and in relation to his family. He kept getting arrested. He missed college and university. He has no friends. That is the sad thing about it. The only friends he has are his family.

25. He is not able to find paid employment at the moment because of "all this".

26. He understands French. When his mother tells him to do something in French he understands. They do not have a full conversation. They speak English. He gave examples of simple words he understands. He said that he understands the basics in French but is not fluent in conversation.

27. His time in adult prison was hard. That was when he got to find himself and the values of life and how precious it is.

28. In his late 20's he would want to be the CEO of a big charity whereby he could be helping people. He wants to be the founder of a music charity for people who have no funds but have talent. Otherwise, those people would end up like him, fighting deportation, and that is not the best place to be.

29. Mr Ikwili Mbu, the appellant's father, gave evidence with the assistance of a French interpreter. He adopted his witness statement. As to what he is able to do about the risk of the appellant reoffending, he said that the appellant had been influenced by other people and he has now become aware. One day he was in his bedroom in the house and the appellant was downstairs. He saw children making signs towards the appellant. He then saw him and he was crying. The appellant told him that he had realised what he had done and regretted that he had taken the wrong path. He regretted all his past actions. That was about a month after he left prison.

30. He was referred to P60 documents from page 42 of the 65-page bundle which he said were in relation to his work at Harmony House. The originals are at home because no-one asked him to bring them.

31. In cross-examination he said that that employment was his only form of income.

32. He was asked about his wife's employment and said that she had just started working. When asked what she earns he said that she worked at B&Q, then stopped working there and studied. She then started working for Eurostar. As to how much she earns, he said that sometimes she works and sometimes not. She earns between £1,500 - £1,800 per month. His youngest son sometimes works at weekends.

33. They live in a council flat. As to how much the rent is, his wife takes care of that type of thing, but it is about £600 (per month).

34. He was born in the DRC in Kinshasa and was brought up speaking French. He became a French citizen in 1999. He did not learn English in the DRC or in France. When he came to the UK he did not speak English.

35. When the appellant was growing up he would speak to him in French. As to whether he would talk to him in French about, for example, schoolwork and his daily life, it was different because he, the witness, grew up within the Belgian system.

Otherwise, he would speak to the appellant in French. At home they speak in French often. However, it is easy for his wife to speak English so she speaks English to the children and he speaks French.

36. When he was in prison in 2015 he often went to visit him. They used to have a conversation and he would ask him if he was alright. As to whether he was aware of any problems that the appellant was having in prison, he is a resilient child. He had told him that he tried to be better, to work and to try and help people in the gym.

37. As to whether he was aware of his son having fights in prison in 2015, he did not really talk about that. When he went to prison he, the witness, had some health issues. He had to go to the emergency department as he had a kind of crisis on two occasions. His son did not want to make his health any worse so did not talk to him about those things. He takes medication because he has a heart condition and diabetes.

38. He was aware of the appellant's offending from 2012 because they came to arrest him. As to incidents in prison, he was not aware of them.

39. As to whether the appellant was and is still impulsive and could not be controlled, he did not think he would reoffend. It is true that he had made mistakes in his young years. Today he could see that he is a transformed person.

40. In relation to the incident where he saw some children calling him, those children had nothing to do with gangs. They were children from the neighbourhood. He did not know any members of the gang. He knew that those children involved in that incident were from the neighbourhood as he had seen them growing up.

41. As to whether he and the family could provide financial support to the appellant if he was deported to France, that would be difficult because the only relative there is his mother-in-law but she is very sick. He does not know how to write French. It would be very difficult for him. He studied here and now he could find a job and make a living. It would not be possible to provide financial support. He would have to pay the appellant's rent and provide groceries for him.

42. His mother-in-law has a partner or sort of companion who lives with her. He does not believe that he would accept the appellant to come and stay with them. He had not asked them but the lifestyle they have means he does not believe that they would accept him.

43. In answer to my questions he said that he visited the appellant in detention on his own and then with his younger son and then his daughter. When speaking to him he spoke in French.

44. In further re-examination he said that he does speak a little English and speaks it at work. However, his co-workers know that he struggled to adapt to the language. When he speaks to the appellant the appellant replies in French or English. He would say that his French is about 35 or 40%. His French is average or below and he could detect some mistakes in his speaking and he corrects him.

45. When he came to the UK at about 18 months old he learnt French at home. He would assess someone who was born and grew up and studied in France as having 100% French language. The appellant mixes French and English when he communicates with him.

Submissions

46. Mr Jarvis submitted that the appellant does still constitute a risk of reoffending. Although the OASys report is not the clearest of documents in terms of when the views expressed in it were obtained, it does appear to post-date April 2016. It indicates that the appellant is a high risk to the public and the community and a medium risk to known adults. Nothing provided by the appellant displaces that expression of opinion.

47. Mr Jarvis referred to the appellant's history of offending, and the most recent offence resulting in a sentence of 30 months' imprisonment. That, it was submitted, was significant evidence that the appellant had not changed his ways. The range of offences adds to the respondent's view that the appellant acts on impulse and has no real regard for the general public or the consequences of his actions. As in the case of *Jarusevicius (EEA Reg 21 – effect of imprisonment)* [2012] UKUT 00120 (IAC) at [63(iv)] there was no positive evidence of insight into the appellant's offending. In his witness statement he had only referred to positive evidence from a person within the prison system. However, that post-dates the period when he was involved in fights and acts of aggression. Now he is back in his home area.

48. It is not suggested that the appellant or his father's evidence was irrelevant, but of course the appellant wanted to avoid deportation and there is a significant chance of his manipulating the evidence. An example of this is his evidence about his ability to understand French. From his father's evidence it was plain that the appellant does not simply have a rudimentary or basic understanding of French as he had suggested. He had been brought up in a bilingual household and his father speaks to him all the time in French.

49. Even if he was not fluent in French, he was seeking to maximise the issue of language in terms of his ability to reintegrate on return to France.

50. It is not disputed that he may have been involved in charity work or that he has an interest in a music charity. However, the appellant's conduct showed that he was initially involved in a gang and then involved in escalating offending by deliberately associating with the wrong people.

51. His father and his family had not been able to control or influence his behaviour. His father did not even know about the incidents in prison. That does not mean that his father is not sincere about his view about the appellant's change in behaviour but the evidence tends to point in a different direction.

52. As to the level of protection from deportation under the EEA Regulations that the appellant is entitled to, there was no particular evidence to suggest that the P60's are forged. It may be that one could conclude that there was enough to accept that

evidence. However, the appellant and his family have had a number of opportunities to provide evidence of the appellant's compliance with EU law. If the P60's are reliable, they suggest that there is evidence of the appellant's father working in the UK since 2002.

53. It is 'possible' to rely in principle on the appellant's ten-year period of residence before his first custodial sentence, and even if there were gaps in that continuous residence by reason of other custodial sentences. That follows from the decision in *Warsame v Secretary of State for the Home Department* [2016] EWCA Civ 16. However, the appellant's criminal conduct shows no desire on his part to integrate. Prior to his first custodial sentence in 2014 the appellant was involved in criminality since at least 2012.

54. This was not a case in which the appellant was entitled to protection from deportation on 'imperative' grounds. If it is accepted that his father was in employment, it would be a case of protection from deportation on the lesser level of 'serious' grounds. It was conceded on his behalf that he would not be entitled to a permanent right of residence on the basis of having been a student.

55. It was proportionate to remove him despite his longstanding connections with the UK. His family, in particular his father, has a connection with France. There has been no enquiry of these family members in France in terms of their ability to assist the appellant were he to be returned there.

56. If the question of proportionality arose, it would have been decided that the appellant does represent a risk. Any rehabilitation in the UK has not been effective and does not outweigh the public interest because of the nature of the risk. Relying on the decision in *Secretary of State for the Home Department v Dumliauskas* [2015] EWCA Civ 145 at [54], Mr Jarvis submitted that the greater the risk of reoffending the greater was the right to deport an individual.

57. The appellant was not so disconnected culturally and linguistically from France as to suggest that his removal there would amount to exile. He would be able to adapt and his father's evidence was that he was resilient.

58. In his submissions Mr Malik contended that the appellant does have a permanent right of residence in the light of his father's oral evidence and the documentary evidence of his employment. Throughout that time, when his father was a qualified person, the appellant was his dependant. Although the originals of the P60's had not been brought to court, the appellant's father was not cross-examined in relation to those documents.

59. It was accepted that *prima facie* the authorities suggest that imprisonment breaks the continuity of residence. However, it was contended that the consequence of that would be that any period of imprisonment before the expiry of the ten-year period would break the continuity of residence.

60. Mr Malik submitted, and Mr Jarvis agreed, that if a continuous period of residence of ten years is made out, then imperative grounds could not, on the basis of this appellant's offending, be said to apply.

61. In terms of whether the appellant represents a genuine, present and sufficiently serious threat, previous convictions are not of themselves sufficient. Any assessment in relation to a young person that is not current, is of very limited value. It was contended that the OASys report is almost worthless because there was no evidence as to the date of the entries in it and it appears to be an out-of-date document. Although it was submitted on behalf of the respondent that the OASys report was an expert assessment, that contention goes too far, it was submitted. There is no detail of the qualifications of the person who prepared the report or the basis upon which the entries in the OASys report were made.

62. I was further invited to take into account the appellant's age, and the proposition that young people make bad choices. As they get older they make better choices. Gangs usually feature young people. The appellant's evidence was that he had grown out of that culture. The appellant had not sought to conceal his offending.

63. Even if the appellant does represent a genuine, present and sufficiently serious threat, in terms of proportionality he has no connections to France. He has only ever known his close family in the UK. He only has a grandmother in France. That evidence was not challenged. His only connection with France is through the language and that is not in any event a strong connection in his case. That is the only matter that the Secretary of State is able to rely on.

64. It was true that on the face of it the appellant and his father's evidence in relation to the appellant's French language ability was not the same. But even his father's evidence did not suggest that the appellant could meaningly communicate in French.

65. Although it was contended on behalf of the respondent that there was an absence of evidence in terms of the appellant's family's finances, documentary evidence had been provided in the form of the P60's. I was reminded of the appellant's father's evidence in terms of the likelihood that he would have to pay rent for the appellant in France, and for his food and other expenses.

66. In terms of rehabilitation, the appellant was only released in June 2017. He could rehabilitate. The respondent had suggested that there was no prospect of rehabilitation but that suggestion was "unduly harsh". Rehabilitation in France would be impeded because of the practical difficulties.

Analysis and Conclusions

67. It is clear from authority that a period of imprisonment (or its equivalent) 'in principle' breaks the continuity of residence when calculating the ten-year period necessary for protection from removal on imperative grounds (see *Secretary of State for the Home Department v MG* [2014] EUECJ C-400/12, and *Warsame*).

68. The ten-year period is to be calculated by counting back from the date of the deportation/expulsion decision, not in fact from the date of the sentence of imprisonment, which in some cases may make a material difference.

69. The FtJ in this case concluded that the appellant's period of continuous residence had been broken by the terms of imprisonment beginning with the eight months imposed in September 2014 in the Crown Court at Snaresbrook for which he received a sentence of eight months' detention in a young offenders' institution for having an offensive weapon, and on the same occasion being sentenced to 18 weeks' imprisonment to run concurrently for an offensive of affray. However, as I indicated in the error of law decision, the FtJ's assessment in that regard did not reflect the more nuanced approach reflected in the decisions in *MG* and *Warsame*. Revisiting the issue, I am satisfied that the custodial sentence imposed in September 2014 did break the continuity of the appellant's continuous residence. It reflects a break in his integrating links with the UK when considered in the context of the fact that the offences were committed in February 2013 and that a year earlier, in March 2012, he had already committed offences of theft, having an offensive weapon (a knife), possession of controlled drugs (being an offence committed whilst on bail) and handling stolen goods.

70. Furthermore, the appellant accepted that he had been involved in gang crime, which he accepted in evidence was at the time of the offences in 2012. That is reflected in the OASys report. It is also clear from the OASys report at page 9 that whilst detained in 2015 the appellant was involved in numerous incidents of fights with other prisoners, with the report also stating that there were numerous incidents of poor compliance with the prison regime. He is said in the report to have posed a risk to other prisoners.

71. In all those circumstances, I am satisfied that whatever integrating links the appellant had established in the UK in his pre-imprisonment years, those integrating links had been broken by his imprisonment.

72. As to whether the appellant has acquired a permanent right of residence, different considerations apply. It was implicitly accepted that if the appellant was for a period of five years a dependant of a person exercising Treaty rights, then he will have acquired a permanent right of residence. The appellant arrived in the UK in 1997. His period as a student, for the reasons explained in the error of law decision, and there being no further evidence on the issue, cannot be counted as a period during which he could be said in his own right to have been exercising Treaty rights. However, there are P60's in the name of the appellant's father relating to his employment going back to 2001, and up to 2017. The evidence from the appellant before the FtJ was that he left home at the age of 16. Even if it could reasonably be said that on leaving home he ceased to be dependent on his father, by that time, assuming that the appellant's father had been exercising Treaty rights since 2001, the appellant will have acquired a permanent right of residence.

73. I have already referred to the fact that the originals of the P60's were not provided. I also indicated at the hearing that in the absence of anything on the face of the copies

that revealed some anomaly or irregularity (in which event I said would invite further submissions) I would not reject the reliability of the P60's simply on the basis that they were only copies. Mr Jarvis did not make any submissions in relation to the P60's in terms of their content or the detail in them, and it was not suggested to the appellant's father that he had not given a truthful account of his employment.

74. In those circumstances, I am satisfied that the appellant's father has been employed since 2001 until the present day and that the P60's are reliable evidence of that employment. Thus, the appellant has acquired a permanent right of residence.

75. It follows therefore, that in this case that means that he may only be removed on serious grounds of public policy.

76. A crucial assessment to be made is whether the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In making an assessment of that issue, I have taken into account all the evidence, including that in the OASys report. In that analysis, I do not consider that any conclusions in either direction can be drawn from the incident referred to by the appellant's father when some apparently local children are said to have been beckoning to or waving at the appellant after his last release from custody, at least not in terms of whether the appellant was apparently continuing to associate with gang members. Whilst the appellant's father did his best to describe the incident, the evidence was not clear in demonstrating that those young people were gang members, or that they were calling the appellant to become involved in some activity related to gang membership or criminality. By the same token, I do not find that the appellant's father actually knew, or was able to know, whether they were or were not gang members. Thus, neither can it be said that the appellant was continuing to associate with gang members on that occasion, nor could it be said that he was refusing to engage with gang members.

77. What I do take from that evidence given by the appellant's father is that on that occasion the appellant did express remorse for his previous criminality and the effect that it had had on others.

78. I turn now to deal with the OASys report. That assesses the appellant as presenting a high risk to the public in the community and a medium risk to known adults. There was also a medium risk to prisoners whilst in custody.

79. The information in the OASys report about the appellant's bad behaviour and poor compliance with the prison regime was not disputed by the appellant and is otherwise consistent with his behaviour prior to his imprisonment. There is a date on the OASys report in the top right-hand corner of each page, being 12 July 2017. However, it seems to me to be likely that that is the date that the report was accessed. It was sent to the Tribunal as an attachment to an e-mail dated 12 July 2017 from the Presenting Officer's Unit. There is no date on the report as to when it was compiled, although there is a date for the completion of the self-assessment questionnaire, being 18 April 2016. The appellant was not released from custody until 19 June 2017, according to his most recent witness statement at [5]. The OASys report refers to his being due to be released on 16 September 2016, which may be an indication that the

appellant's earliest release date was put back because of his behaviour whilst detained, although no information in that regard was before me. But reverting to the issue of the date of the report, it must have been compiled some time between 18 April 2016 and 16 September 2016, the former of the dates being the date of the self-assessment questionnaire, and the latter being a date for his release which by the date of the compiling of the report had not yet taken place.

80. Therefore, there is an assessment which is relatively recent in relation to the risks that the appellant poses in terms of reoffending and the harm that he may cause, that assessment having taken place in 2016.

81. It is true that the author of the report is not identified. Mr Malik submitted that without the detail of any qualifications of the author of the report, it could not be regarded, as suggested on behalf of the respondent, as an expert assessment. Indeed, his submission was that the OASys report was "almost worthless". I disagree.

82. It can reasonably be assumed that, albeit that the author of the report is not identified, the report was the result of an assessment by someone qualified to make that assessment, a person from the National Offender Management Service. It would seem to me to be inconceivable that a person without the necessary expertise would be permitted to compile an OASys assessment. Furthermore, I doubt very much whether, had the author of the report been identified, any submission would have been made to the effect that the author's qualifications had not been provided. It is the mere absence of a name that prompted the contention that the expertise of the author was not known.

83. In addition, whilst it has been necessary to make some deductions from the content of the report to establish the date upon which it was compiled, or at least within what approximate period, a time period can be deduced, as I have indicated, of between April and September 2016.

84. It is true, as suggested on behalf of the appellant, that assessments in the life of a young person may, in effect, become dated rather more quickly than would otherwise be the case. However, I do consider that the OASys report in this case, dated relatively recently, does have evidential value and I accept what it says about the risks that the appellant represents.

85. It is not just the OASys assessment which indicates the risk that he poses, but the fact that the appellant has been involved in criminality of one sort or another within a spectrum of offences, since 2012. It is evident that his offending was escalating. It is similarly evident that his period in custody failed to bring about any modification in his behaviour judging by his conduct whilst detained. He has only been at liberty for a relatively short period of time.

86. I accept the appellant's father's evidence as to what he was told by the appellant in terms of his expressions of remorse and regret for his offending. I similarly accept that the appellant has insight into how his offending has affected others, and himself. I see no reason to doubt the appellant's present commitment not to reoffend; he readily accepted his involvement in gangs and criminal offending, although it would

have been difficult for him to do otherwise in the light of the evidence. However, his evidence of the impact of his offences on himself and others was both thoughtful and insightful.

87. I also bear in mind the courses that the appellant has completed whilst detained, evidenced by certificates ranging from art and design to drugs awareness courses. There is also a positive report from HMP Verne which is undated but which relates to a period from his reception there on 22 September 2016, and his behaviour there, at least from that single report, was very different from that revealed in the OASys report in the period 18 April 2016 and 16 September 2016.

88. However, I do consider that there was some element of minimisation of his behaviour in relation to his conduct whilst detained, notwithstanding what the appellant said about the difficulties and hardships of serving a custodial sentence and the pressures that may be brought to bear by other offenders. It must be the case however, that not all those detained behave in the way that the appellant did during his last custodial sentence in the period referred to in the OASys report, that is in resisting or failing to comply with the detention regime.

89. A not unrelated issue is in relation to what I regard as a different attempt by the appellant to shape the evidence to his advantage, concerning his ability in the French language. His and his father's evidence was inconsistent in terms of the appellant's ability to speak French, and the appellant sought to minimise that ability. I do not need to repeat the evidence that was given. Suffice to say, the appellant's father said that French is spoken at home, and that when he visited the appellant in custody he spoke to him in French. I do not conclude that the appellant is fluent in French, but my assessment of his evidence is that his French is better than he would have me believe.

90. Whilst I have indicated that I accept the appellant's present expression of intention not to reoffend, I have considerable doubt about whether that commitment can be sustained for more than a very short period, indeed for more than the period during which the deportation proceedings hang over him. There is in my judgement merit in the submissions made on behalf of the respondent to the effect that the appellant has poor impulse control. That is evident in his offending and in his behaviour whilst detained. It is also apparent in the offence which he himself described of racially aggravated harassment whereby he ran away from transport staff because he had evaded the fare, was in possession of cannabis and then racially abused a police officer seeking to detain him. More than that, his offending overall demonstrates that poor impulse control. His family have not in the past been able to exercise much, if any, control over him once he started offending and the appellant allowed himself to become involved in gang culture. Indeed, even on the appellant's own evidence, when he ceased associating with the so-called YBC gang he still continued offending.

91. It is clear that offences of robbery, having offensive weapons and assault are serious offences. They clearly do affect one of the fundamental interests of society which need not be spelt out. In all the circumstances, I am satisfied that the appellant does

represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

92. However, that is not to say that there are no prospects for rehabilitation. Rehabilitation is a factor to be taken into account in the assessment of proportionality. It is the case that the appellant has very little connection with France, although as I have said the appellant sought to minimise his French language ability. He would be able on return to France to communicate effectively and whatever limitations there are in his French language ability are likely, at his young age, to be quickly improved.

93. There is little however, to indicate that there are family members in France who themselves could assist the appellant in integrating there and rehabilitating himself. The FtJ found, without error, that the appellant has very little connection with France, beyond the fact of his and his family's nationality, and I would add language.

94. I have taken into account the extent to which the appellant's family may be able to provide for him financially in France whilst he establishes himself. There is evidence that the appellant's father is in employment, as is his mother. I consider it likely that at least some financial support would be provided to the appellant sufficient to allow him to be accommodated and for his basic needs to be provided for, even if he would not be able to live with his father's relatives because of their age or infirmity.

95. However, the UK is for practical purposes the only country that the appellant has known, and he is still relatively young. He came to the UK when he was no older than two years of age. The prospects for rehabilitation in France in my judgment are not very promising at all, whereas in the UK he will have family support, albeit that in the past that has not prevented him from reoffending. I accept his evidence that he is undertaking voluntary work and that he is spending more time with his (law-abiding) brother. His brother attended the hearing. The appellant does have a commitment not to reoffend, notwithstanding the limitations on that commitment to which I have referred.

96. I have considered the issue of rehabilitation in the light of the authorities, for example *Essa V Secretary of State for the Home Department* [2012] EWCA Civ 1718, and *Dumliauskas*, and what was said in those decisions about the relative prospects of rehabilitation.

97. I have also taken into account the factors set out in reg 21(6), some of which I have already referred to. The appellant has resided in the UK for 20 years and is now aged 22 years. There is nothing to indicate that he is in anything other than good health. His family situation is apparent from the evidence I have referred to above. The evidence does tend to show that the appellant has become closer to his family since his, albeit recent, release from custody. He is not in employment given his present circumstances.

98. His social and cultural integration has been significantly impeded by his offending since 2012, although having come to the UK at a very young age, he will have

achieved a level of integration up to that point, when he was 15 years of age. I have already made an assessment of the links that he has with France.

99. Reflecting on all the circumstances, notwithstanding that the appellant represents a genuine present and sufficiently serious threat affecting one of the fundamental interests of society, I cannot conclude that the decision to remove him to France, a country in respect of which he is effectively a stranger, is a proportionate measure. Unlike deportation of nationals from non-EEA States, deportation of EEA nationals cannot be effected simply as a means of deterrence to others, and such a person's convictions alone cannot in law justify a decision to deport. Proportionality of course, is an entirely separate consideration from the risk of reoffending, as is clear from reg 21(5)(a) and (c) of the EEA Regulations, and the decision to deportation must comply with the principle of proportionality.

100. In coming to the conclusion that the appellant's deportation is not a proportionate measure, I have had regard to the nature of the appellant's offending and the nature of any potential future offending which is likely to be of the same or similar nature to the offences he has committed to date. It is undoubtedly serious offending, but the proportionality balance nevertheless falls in favour of the appellant in the light of the comparative rehabilitative prospects that I have referred to, and his lack of sufficiently meaningful connections with France.

101. It should not need to be said, but further offending by this appellant, regardless of explanations or excuses, is likely to result in an adjustment of the assessment of the extent to which the appellant is willing or able to rehabilitate himself in any country. Therefore, the effect of further offending is very likely to mean his expulsion to France and his removal from the UK, his family and the society to which the appellant is used.

Decision

102. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, I allow the appeal with reference to the Immigration (European Economic Area) Regulations 2006 (as amended).

Upper Tribunal Judge Kopieczek 30/11/17

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00624/2016**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice
On 24 April 2017

Promulgated

……

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NATHANIEL MBU

Respondent

Representation:

For the Appellant: Mr I. Jarvis-Senior Home Office Presenting Officer
For the Respondent: Ms H. Alexander-Counsel instructed by Calices Solicitors

DECISION AND DIRECTIONS

1. The appellant in these proceedings is the Secretary of State. However, I refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of France, born in 1995. A decision was made on 12 November 2015 to make a deportation order against him pursuant to the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") following his convictions for criminal offences.

3. His appeal against the respondent's decision came before First-tier Tribunal Judge Eldridge ("the FtJ") on 31 January 2017 following which the appeal was allowed.

The decision of the First-tier Tribunal

4. The FtJ summarised the appellant's offending history as set out in the respondent's decision. This is to the effect that on 9 September 2014 he was convicted of offences of possessing an offensive weapon and affray for which he received a sentence of eight months' detention in a young offenders' institution. On 23 April 2015 he was sentenced to 16 weeks in a young offenders' institution for burglary, possession of a controlled drug, assault on a constable and criminal damage. His most recent conviction was on 15 October 2015 in the Crown Court at Basildon for offences of robbery and damaging property for which he received a sentence of 30 months' detention in a young offenders' institution.

5. Under a subheading entitled "credibility and findings" the FtJ referred to the appellant's account of having come to the UK with his mother on 24 April 1997 and having remained here ever since. He apparently left home at the age of 16, became involved with gangs and began to commit criminal offences, starting with a conviction for theft by shoplifting in March 2012 and culminating in repeated offences leading to the offences already described. He apparently has had problems with drink and drugs.

6. The FtJ referred to the supplementary decision letter dated 23 January 2017 whereby the respondent accepted that the appellant had lived in the UK for at least 10 years but not that the appellant had acquired a permanent right of residence. That was because the respondent concluded that it had not been shown that the appellant had comprehensive sickness insurance for the period during which he was attending school. The FtJ was satisfied that the appellant had been living in the UK since 1997.

7. The FtJ concluded that by the time he first went to prison in September 2014 he had lived in the UK for about 17 years, and that it was only for about 18 or 19 months from birth that he had not lived in the UK. He said that the appellant's continuous residence had however, been broken by the terms of imprisonment, beginning with the eight months' sentence imposed in September 2014 in the Crown Court at Snaresbrook (possession of an offensive weapon and affray). Therefore, on the "counting back" principle, his continuous residence was broken and he could not meet the requirement of 10 years' residence, the FtJ concluded.

8. At [21] the FtJ identified the issue as being whether the appellant has a permanent right of residence, meaning that his removal could only be justified on serious grounds of public policy or public security. He said that it would appear that the appellant had an argument to the effect that he had acquired that permanent right of residence after living in the UK for five years, that is, in 2002 at the age of 6½ years.

9. However, he referred to the respondent's decision which sought to argue that the appellant was a student, attending school, over a period of 11 years or more and that he needed to have comprehensive sickness insurance in the UK. The FtJ did not accept that argument. He said as follows:

> "That was a provision on my understanding that did not come into force until 2012, by which time the Appellant had long since acquired a permanent right of residence. He is thus entitled to the additional protection afforded by Regulation 21(3) as I have just quoted".

10. He then referred to the appellant having grown up in the UK and at the time of the hearing being aged 21. He came to the UK as a toddler and has known no other life. He found that although his later teens had been characterised by criminality, the appellant had nevertheless no real connection with France beyond the fact of his nationality and that of his immediate family. Although he may have visited France, he had no ties there and his life had always been in the UK for as long as he could remember.

11. At [23] he said that the appellant had a poor record of criminality over the last four years. He was a relatively persistent offender across the criminal spectrum with offences of dishonesty and possession of street drugs and the serious offences against the person involving robbery, assault on a police constable, affray and possession of an offensive weapon. He concluded that the appellant's offending appeared to have escalated since he left home at the age of 16 and only to have been controlled when sentenced to a relatively lengthy period of imprisonment of 30 months.

12. At [24] he referred to what he said was a considerable contrast between the principles of deterrence and public revulsion that are pertinent in the deportation of "foreign criminals" under the UK Borders Act 2007 and the position of EEA nationals. He stated that issues of deterrence can play no part in the decision to remove under the regime applying to EEA nationals. Except in respect of the most serious of offences, no perceived need to reflect public revulsion can have any part to play in the removal decision.

13. He identified the further issue as being whether the appellant "presents a genuine and sufficiently serious threat to the fundamental interests of society". At [26] he noted that the respondent had not provided any report from the National Offender Management Service ("NOMS") to demonstrate that the appellant represented a particular risk of reoffending "in a manner prejudicial to the fundamental interest of society". He acknowledged that extracts from the sentencing remarks in relation to the offence in 2015 resulting in 30 months' detention had been provided. He noted that a weapon had been used but that the sentencing remarks did not deal with the issues of future threat. He then said however, that the propensity of offending over a relatively short period of time may be taken to indicate some future risk.

14. In the next paragraph he nevertheless said that the appellant had produced some evidence to counter the assertion of future risk, being evidence of working, in the tax year ending 5 April 2016, and that he had provided payslips for most of the rest of 2016. He had also provided evidence of courses attended whilst in detention, noting

in particular a two-week Intensive Group dealing with drug and alcohol awareness, the impact of drugs on the community and strategies for avoiding the risk of drugs, and the impact on others. He referred to prison officers having spoken positively of the appellant and the trust that could be reposed in him.

15. The FtJ concluded at [28] that factors pertinent to reg 21(6) of the 2006 Regulations, had not been adequately weighed by the respondent and the respondent's decision did not appear to demonstrate the very plain need to balance the principles of the freedom of movement against the factors that the respondent relied on.

16. Again, in that same paragraph the FtJ referred to the appellant having lived in the UK for almost all his life from about the age of 18 months, that his family is in the UK and he knows only the life to be enjoyed by residing here. He stated that the appellant has a permanent right of residence and must be seen as being wholly culturally integrated into the United Kingdom, with no effective ties to France. His offending had been as a young man in his late teens. He then stated that "There is, and can be, no firm assessment of future risk", but he has demonstrated a change in behaviour and an apparent willingness to learn, albeit within the constrained and safe environment of detention.

17. He therefore concluded that the appellant had not been shown "to pose a sufficiently serious threat to public policy to justify his deportation", notwithstanding the nature and character of his previous offending.

Submissions

18. In submissions Mr Jarvis argued that in order for the appellant to be able to rely on 10 years' residence he would have to first of all have acquired a permanent right of residence. In that respect I was referred to the decision of the Court of Appeal in *Warsame v Secretary of State for the Home Department* [2016] EWCA Civ 16, in particular at [9] and [10].

19. Even if that was wrong, and the appellant does not need first to establish a permanent right of residence, it was submitted that there still needed to be an assessment of the extent of the appellant's integration in the UK, in terms of what he has been doing and whether he has been exercising Treaty rights. In this case the appellant is unable to show any period of qualifying residence, albeit that that was not determinative.

20. The FtJ in this case did not decide positively in the appellant's favour in terms of whether he represented a genuine present and sufficiently serious threat affecting one of the fundamental interests of society, although that could perhaps be inferred by [29] of the decision where the FtJ said that the appellant had not been shown to pose a sufficiently serious risk to public policy. In terms of the imperative grounds, the substance of the 10 year period had not been assessed.

21. The conclusion that the appellant as a student did not need to show comprehensive sickness insurance cover, because that requirement only came into force in 2012, is

wrong. I was referred to the Immigration (European Economic Area) Order 1994 at article 6(2)(h).

22. It was further submitted that the FtJ needed to have engaged with the appellant's conduct prior to his imprisonment, in terms of an assessment of whether he had integrated.

23. In addition, it was submitted that it appears from [29] that the FtJ concluded that the appellant was only entitled to the lowest level of protection, because he referred to the appellant not posing a sufficiently serious risk to "public policy". If that is the case, it was submitted that the FtJ had not explained why the offences the appellant had committed do not meet the public policy threshold in terms of that lowest level of protection from deportation.

24. Ms Alexander made her submissions with the disadvantage of not having been properly briefed by her instructing solicitors. It appears that she understood that the hearing before me was an oral renewal of an application for permission to bring judicial review proceedings, which is how her skeleton argument is described. Similarly, at the start of the hearing she did not have before her a full copy of the FtJ's decision. Nevertheless, those deficiencies in the information provided to Ms Alexander were made good during the course of the hearing and she did not suggest that she was unable to proceed and there was no application for an adjournment.

25. It was submitted on behalf of the appellant that he was able to benefit from his having been in the UK for a 10 year period, thus entitling him to the highest level of protection. The respondent's assertion that the appellant needed to establish a permanent right of residence first was rejected.

26. In any event, at all times the appellant's parents had been in full-time employment, although Ms Alexander was not able to demonstrate that evidence to support that assertion was before the FtJ.

27. It was argued that the respondent had a duty to make enquiries (in relation to the exercise of Treaty rights by the appellant's parents). Although a subject access request could have been made, that would have taken 40 working days. The appellant's solicitors had sought from the respondent certain documents, including a pre-sentence report, the appellant's antecedents and a MAPPA report. The witness statements state that his parents had been in employment and had never resorted to benefits. Enquiries in that respect could have been made by the Secretary of State.

28. It was submitted that even if the appellant was not entitled to resist removal on imperative grounds, he was entitled to the next level of protection, that is serious grounds of public policy. It was also submitted that the respondent had not considered the proportionately issues that needed to be assessed.

29. As to whether the FtJ was wrong to say that for a student the requirement of comprehensive insurance was only introduced in 2012, Ms Alexander said that she was not able to answer the question posed without "further details".

30. Reliance was placed on the decision in *Secretary of State for the Home Department v MG* [2014] EUECJ C-400/12, it being submitted that in that case the offending by the individual was much worse than that of this appellant.

31. In reply, Mr Jarvis submitted that it was simply wrong to say that there was no challenge on behalf of the respondent to the issue of the exercise of Treaty rights, as this is referred to in the respondent's decision. Furthermore, the decision letter does deal in detail with the issue of proportionality.

32. There was no duty on the respondent to make any enquiries. The appellant was told that it was intended to deport him and he was asked if he wanted to make any representations. There was no duty on the respondent to delve into the parents' records in terms of their employment, and indeed his parents may not have wanted them to do so. The burden of proof was on the appellant.

Conclusions

33. The skeleton argument on behalf of the appellant was not directed to the matters in issue at the hearing before me. It is expressly stated as being grounds in support of an application for permission to bring judicial review proceedings in respect of the deportation decision and in relation to removal directions.

34. Indeed, the submissions of both parties at times strayed beyond the relevant issues. For example, both parties made submissions in relation to the extent to which the appellant was entitled to the benefit of the highest level of protection of imperative grounds of public security, by reason of 10 years' residence. In fact, this is a matter that was resolved against the appellant by the FtJ and there has been no cross-appeal on behalf of the appellant in respect of his conclusions to that effect. Thus, at [20] the FtJ said that the appellant's period of continuous residence had been broken by the terms of imprisonment beginning with the eight months imposed in September 2014 in the Crown Court at Snaresbrook. He said that on the "counting back" principle, the period of continuous residence was broken and that he therefore could not meet the 10 years' requirement.

35. Neither party suggested to me that the imperative grounds issue was relevant to the materiality of any (other) error of law on the part of the FtJ. In other words, it was not suggested that even if the FtJ was wrong in his assessment of the appellant's entitlement to protection on the ground that he has permanent residence, such an error was not material given that the appellant was entitled to the highest level of protection of imperative grounds.

36. It may have been open to the appellant to argue that the FtT's conclusion that he was not entitled to the highest level of protection on imperative grounds was in error because his decision does not reflect the more nuanced approach reflected in the decisions in *MG* and *Warsame*. The argument would be that imprisonment may break the continuity of his residence 'in principle' but would not necessarily do so depending on an assessment of his integration in the UK.

37. I am satisfied that there is an error of law in the FtJ's in relation to the issue of the appellant having acquired a permanent right of residence, and that that error of law is not 'saved' by any argument in terms of materiality with reference to the imperative grounds point.

38. In relation then, to permanent right of residence, the FtJ said at [18] that the respondent's decision was that the appellant had not acquired a permanent right of residence because it had not been shown that he had comprehensive sickness insurance for the period he was attending school. In fact, the respondent's supplementary decision letter dated 23 January 2017, to which the FtJ was making reference in this respect, also states that there was no evidence to show that the appellant's parents were exercising Treaty rights, *or* that he had comprehensive sickness insurance whilst he was attending school, in accordance with reg 4(1).

39. Ms Alexander submitted that the appellant's parents had been working throughout that time. However, it is not apparent that any evidence to that effect was put before the FtJ, and even if it was, there was no assessment of it.

40. On the question of the need for comprehensive sickness insurance, the FtJ's understanding that that requirement did not come into force until 2012 is in error. Indeed, it may even be that the appellant did not come within the definition of student for other reasons. The FtJ at [18] referred to a letter from a primary school in relation to the appellant's attendance there, although the dates given in the FtJ's decision are slightly muddled. The letter is from Carpenter's Primary School apparently confirming his attendance from 11 February 2000 to 14 October 2005. There is another letter from Kingswood Community School in relation to attendance between 3 September 2007 and 20 July 2012.

41. The Immigration (European Economic Area) Order 1994 ("the 1994 Order") to which I was referred, at article 6(2)(h) provides as follows:

> "a student" means a person who -
>
> (i) is enrolled at a recognised educational establishment in the United Kingdom for the principal purpose of following a vocational training course,
>
> (ii) has sufficient resource to avoid his becoming a burden on the social assistance system of the United Kingdom, and
>
> (iii) is covered by sickness insurance in respect of all risks in the United Kingdom".

42. That Order came into force on 20 July 1994. The Immigration (European Economic Area) Regulations 2000 ("the 2000 Regulations") came into force on 2 October 2000. So far as the definition of a student is concerned, in the 2000 Regulations reg 3(1) contains an almost identical definition of 'student' to that in the 1994 Order, the only difference being that whereas in the 1994 Order a person needs to have sufficient resources etc., the 2000 Regulations require an assurance by way of declaration to that effect.

43. Accordingly, both when the appellant started his schooling, and from 2 October 2000, there was the need for sickness insurance in order to come within the definition of student.

44. The 2006 Regulations came into force on 30 April 2006. Those Regulations governed the period of time up until the appellant ceased schooling on 20 July 2012, according to the evidence before the FtJ.

45. In reg 4(1)(d) the term 'student' means a person who:

> "(i) is enrolled, for the principal purpose of following course of study (including vocational training), at a public or private establishment which is -
>
> (aa) financed from public funds; or
>
> (bb) otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located;
>
> (ii) has comprehensive sickness insurance cover in the United Kingdom …".

46. In other words, the requirement of sickness insurance "in respect of all risks" in the 1994 Order and the 2000 Regulations, and "comprehensive sickness insurance" in the EEA Regulations 2006, has always existed. It may be that where the FtJ suggested that the requirement of sickness insurance was only introduced in 2012, this may be because of amendments to the EEA Regulations 2006 brought in from 16 July 2012 by SI 2012/1547, but those amendments were not in respect of the issue of sickness insurance.

47. I mentioned earlier that in fact the appellant may not have come within the definition of student at all, at least in relation to his earlier schooling, because a student prior to the 2006 Regulations was a person enrolled at a recognised educational establishment "for the principal purpose of following a vocational training course". That would not have included primary education. The 2006 Regulations would, it seems, include such education because the *requirement* for a student to be following a vocational course was no longer present, although a vocational course was included in the definition.

48. There is no evidence that the appellant had sickness insurance of any sort covering the period when he was a student. He could not therefore, have come within the definition of student. Likewise, there was no evidence before the FtJ of the exercise of Treaty rights by the appellant's parents. In all those circumstances, the FtJ was in error in concluding that the appellant had established that he had acquired a permanent right of residence. The evidence simply did not support that conclusion.

49. Although not specifically a matter raised in the written grounds, I am satisfied that the issue of the assessment of risk of further offending is related to the written grounds as advanced. This was a matter which was touched on in submissions on behalf of the respondent before me. The risk of reoffending is a matter that needed

to be assessed in the context of whether the appellant represents a genuine, present and sufficiently serious threat, affecting one of the fundamental interests of society.

50. At [26] the FtJ said that the respondent had not provided any NOMS report, although pointing out that the propensity to offend over a relatively short period of time may be taken to indicate some future risk. He referred at [27] to the appellant's employment and the courses he had undertaken, as well as the positive comments from prison officers. On the other hand, he said this at [28]:

> "There is and can be no firm assessment future risk (sic) but he has demonstrated a change in behaviour and an apparent willingness to learn, albeit within the constrained and safe environment of detention".

51. I cannot see in those aspects of the FtJ's decision, or from the decision as a whole, a clear assessment of whether the appellant does or does not represent a 'genuine and present threat'. In other words, there is no clear assessment of the risk of reoffending. He referred to the information that may have a bearing on that issue, but came to no clear conclusion. I consider that in this respect also, the FtJ erred in law.

52. The errors of law are such as to require the decision to be set aside. I canvassed with the parties the question of whether, if I set aside the decision of the FtJ, the matter should be retained for re-making in the Upper Tribunal or remitted to the FtT. I have concluded that it is not appropriate for the appeal to be remitted to the FtT given the fact that there are some findings which are not infected by the error of law and the further fact-finding exercise is not such as to require remittal. I also bear in mind that the appellant is presently detained.

53. Accordingly, the appeal will be retained in the Upper Tribunal for the re-making of the decision. To that end, the parties are to have careful regard to the directions set out below.

DIRECTIONS

(i) In respect of any further evidence that either party seeks to rely on, that evidence must be filed and served no later than seven days before the next date of hearing.

(ii) In respect of any witness whom it is proposed to call to give oral evidence, there must be a witness statement drawn in sufficient detail to stand as evidence-in-chief, such that there is no need for any further examination-in-chief.

(iii) If further evidence is relied on on behalf of the appellant, there must be a comprehensive paginated and indexed bundle to be filed and served no later than seven days before the next date of hearing.

(iv) At the next hearing, the parties must be prepared to make submissions as to what findings of fact are to be preserved.

(v) The parties are to note that at the resumed hearing consideration will be given afresh to the level of protection from deportation under the Immigration (European Economic Area) Regulations 2006 (as amended) that the appellant is entitled to.

Upper Tribunal Judge Kopieczek dated 23/05/17