Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00534/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 January 2020	**On 20 January 2020**

Before
UPPER TRIBUNAL JUDGE SMITH

Between

A K W
[Anonymity Direction Made]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was made by the First-tier Tribunal Judge. The appeal involves a minor child. Accordingly, it is appropriate to continue the anonymity direction. Unless and until a tribunal or court directs otherwise, the Respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent.

Representation:
For the Appellant: Ms M Dogra, Counsel instructed on a direct access basis
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

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BACKGROUND

1. By an error of law decision promulgated on 1 November 2019, I found an error of law in the decision of First-tier Tribunal Judge G Clarke, itself promulgated on 31 May 2019. I therefore set aside the First-tier Tribunal's decision. My error of law decision is appended to this decision for ease of reference.

2. Some of the background history is set out at [2] and [3] of the Decision and I do not repeat those matters. I do though need to add to that for completeness. Following the Respondent's decision under appeal dated 5 January 2018, made whilst the Appellant was in the UK unlawfully in breach of the earlier deportation order, the Appellant was removed back to Poland on 5 April 2018 where he currently resides. I am told that he has made an application under the EEA Regulations from Poland to revoke his deportation order which is pending decision. Although Mr Jarvis was unable to confirm that this was the position, Ms Dogra said that this was made in early 2019. Nothing turns on that for reasons I will come to.

3. The Appellant returned to the UK at some point in 2019, again in breach of the extant deportation order. I was informed by Mr Jarvis that the Appellant was encountered in the UK by Border Force officials. He told them that he had entered the UK via Belfast but did not say when he had done so. On 25 October 2019, the Appellant was given a conditional discharge for assaulting a police constable. He made a voluntary departure back to Poland on 14 November 2019. Although Ms Dogra was unaware of this development, it was possible to deal with this development via evidence from the Appellant's partner, [SR]. I indicated that, if needs be, the Appellant could provide a written statement if this were disputed but, at the end of the hearing, it was agreed that this was not necessary.

4. The Appellant's mother-in-law [MA] made an application prior to the hearing to adjourn to a later date. She said that she had misread the directions previously given and had therefore not prepared for the hearing by obtaining updated medical evidence. The Appellant and his family members have been unable to pay a solicitor to prepare the case and instruct Counsel on a direct access basis. The application for an adjournment was refused on 8 January 2020 by an Upper Tribunal Lawyer on the basis that the medical evidence already before me may suffice and that this was a matter which it would be best for me to consider.

5. Although Ms Dogra intimated the need for an adjournment at the start of the hearing, it was agreed in discussions that this was not necessary. Mr Jarvis indicated that, although the Respondent did not concede that it would be unduly harsh for the Appellant's partner and children to go to Poland to live, he intended to present the case on the basis that they could not do so but that it was not unduly harsh for them to remain in the UK whilst the Appellant remains in Poland. I also indicated that I was prepared to deal with the updated position in

relation to the Appellant's partner and children based on [SR]'s oral evidence and did not immediately see the need for medical evidence of changed circumstances. I was told that the Appellant's eldest child, [LR], has now been formally diagnosed with dyslexia. Mr Jarvis pointed out that there is some evidence already before the Tribunal that this might be the case and, so long as it was not being asserted that this was coupled with mental health issues or had any such impact on [LR], he also considered that any changed circumstances could be dealt with by way of oral evidence from [SR].

6. A further issue arose as to [SR]'s vulnerability based on her mental health issues. This was a particular concern as her mother (the Appellant's mother-in-law, [MA]) could not attend the hearing with her. Ms Dogra indicated that, at the hearing before the First-tier Tribunal, [MA] had been outside the hearing room when [SR] gave evidence (although present at the hearing). She indicated that the only concern was as to the manner of questioning and that this should be done in a sensitive manner. If she had any concerns as to the nature of the questioning, Ms Dogra agreed that she would raise those with me. [SR] was told at the start of her evidence that, if she needed any breaks, she should feel free to ask. She did not do so, no concerns were raised and she gave her evidence without any incident.

THE LEGAL FRAMEWORK AND THE ISSUES

7. Before I set out the relevant evidence, it is appropriate to outline the legal context which applies. As I have indicated, the Respondent's decision under appeal is that dated 5 January 2018. Although the Respondent makes reference to the EEA Regulations ("the Regulations"), there is no appeal under those Regulations as the Appellant was not entitled to apply to revoke the deportation order under the Regulations until after he had left the UK, whereas the submissions made which led to the decision under appeal were made on 12 December 2017 whilst the Appellant was in the UK, in breach of the deportation order. There is no dispute that the only ground before me is that the Respondent's decision breaches the Appellant's human rights and those of his family under Article 8 ECHR.

8. For completeness, Mr Jarvis drew my attention to two relevant decisions on this issue: Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 00216 (IAC) ("Smith") and MS (British citizenship; EEA appeals) Belgium [2019] UKUT 00356 (IAC) ("MS"). Smith concerned the issue whether the First-tier Tribunal had jurisdiction to decide an appeal under the Regulations, having particular regard to regulations 34 and 37 (see [26] of that decision). That was of some relevance to the issues. Consistently with my error of law decision, the Tribunal in that case concluded that the only appeal was one on Article 8 grounds (see [33] to [42] of that decision).

9. The point is also developed in the Tribunal's guidance in MS in the following terms:

".. (3) If P is prevented by regulation 37 of the Immigration (European Economic Area) Regulations 2016 from initiating an appeal under those Regulations whilst P is in the United Kingdom, it would defeat the legislative purpose in enacting regulation 37 if P were able, through the medium of a human rights appeal brought within the United Kingdom, to advance the very challenge to the decision taken under the Regulations, which Parliament has ordained can be initiated only from abroad.
(4) In considering the public interest question in Part 5A of the 2002 Act, if P is an EEA national (or family member of an EEA national) who has no basis under the 2016 Regulations or EU law for being in the United Kingdom, P requires leave to enter or remain under the Immigration Act 1971. If P does not have such leave, P will be in the United Kingdom unlawfully for the purpose of section 117B(4) of the 2002 Act during the period in question and, likewise, will not be lawfully resident during that period for the purpose of section 117C(4)(a)."

Paragraphs [114] to [135] of the decision are worthy of note.

10. As Mr Jarvis submitted, based on those decisions, and I accept, the Appellant's Article 8 claim falls to be considered applying Sections 117A to 117D Nationality, Immigration and Asylum Act 2002 ("Section 117") notwithstanding that the Appellant is Polish and therefore an EEA national. Via the medium of Section 117C and Section 117D, paragraphs A398 to 399A of the Immigration Rules ("the Rules") are relevant. Mr Jarvis accepted, however, that, although Section 117C might be interpreted as slightly more generous than the Rules, it was nonetheless appropriate to apply Section 117C. As the Appellant is an EEA national, however, Mr Jarvis accepted that neither Appendix FM to the Rules nor paragraph 276ADE of the Rules applies and nor is it appropriate to consider the application to revoke the deportation order applying paragraphs 390 and 391 of the Rules. As Mr Jarvis pointed out, by reference to the Court of Appeal's judgment in Connell v Secretary of State for the Home Department [2018] EWCA Civ 1329 at [29] to [42], although the power to deport arises under domestic legislation, the exercise of the power is governed by the Regulations.

11. Ms Dogra did not dispute the applicability of Section 117. I therefore set out the relevant parts of the statutory provision:

"**117A Application of this Part**
(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
(a) breaches a person's right to respect for private and family life under Article 8, and
(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
(2) In considering the public interest question, the court or tribunal must (in particular) have regard—
(a) in all cases, to the considerations listed in section 117B, and
(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
117B Article 8: public interest considerations applicable in all cases
(1) The maintenance of effective immigration controls is in the public interest.
(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.
(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.
(4) Little weight should be given to—
(a) a private life, or
(b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.
(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
…
117C Article 8: additional considerations in cases involving foreign criminals
(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where—
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
…"

12. Although Section 117C(5) appears to relate only to those sentenced to a period of four years or more, it is common ground that this applies equally to those who are sentenced to a lesser period if they are unable to meet either Exception 1 or Exception 2 (see also in this regard the Court of Appeal's judgment in NA

(Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 - "NA (Pakistan)"- at [24] to [27]). As was made clear by the Upper Tribunal in MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC) "[i]n determining pursuant to section 117C (6) of the Nationality, Immigration and Asylum Act 2002 whether there are very compelling circumstances over and above those described in Exceptions 1 and 2 in subsections (4) and (5), such as to outweigh the public interest in the deportation of a foreign criminal, a court or tribunal must take into account, together with any other relevant public interest considerations, the seriousness of the particular offence of which the foreign criminal was convicted; not merely whether the foreign criminal was or was not sentenced to imprisonment of more than 4 years." As Ms Dogra submitted, and I accept, however, if the Appellant meets either of the two exceptions, that is the end of the matter and I would not then go on to consider whether there are very compelling circumstances above the exceptions.

13. The Supreme Court, in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 ("KO (Nigeria)") held that, when considering whether the impact of deportation is "unduly harsh", I should not balance the effect against the public interest; the issue is simply whether that threshold is met. As I have already noted, however, when considering whether there are very compelling circumstances over and above the exceptions, that balance does come into play (see also Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 as to the "balance sheet approach" which should then be followed).

14. In terms of the threshold which applies to the "unduly harsh" test, the Supreme Court in KO (Nigeria) approved what was said by the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015]UKUT 223 (IAC) as follows:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

15. In relation to the question whether the impact of deportation is "unduly harsh" as the Court of Appeal pointed out in Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213 one is looking for "a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation" ([38]). The Court of Appeal in that case went on to apply the test in the following way:

> "[39] Formulating the issue in that way, there is in my view only one answer to the question. I recognise of course the human realities of the situation, and I do not doubt that SAT and the three children will suffer great distress if PG is deported. Nor do I doubt that their lives will in a number of ways be made more difficult than

they are at present. But those, sadly, are the likely consequences of the deportation of any foreign criminal who has a genuine and subsisting relationship with a partner and/or children in this country. I accept Mr Lewis's submission that if PG is deported, the effect on SAT and/or their three children will not go beyond the degree of harshness which is necessarily involved for the partner or child of a foreign criminal who is deported. That is so, notwithstanding that the passage of time has provided an opportunity for the family ties between PG, SAT and their three children to become stronger than they were at an earlier stage. Although no detail was provided to this court of the circumstances of what I have referred to as the knife incident, there seems no reason to doubt that it was both a comfort and an advantage for SAT and the children, in particular R, that PG was available to intervene when his son was a victim of crime. I agree, however, with Mr Lewis's submission that the knife incident, serious though it may have been, cannot of itself elevate this case above the norm. Many parents of teenage children are confronted with difficulties and upsetting events of one sort or another, and have to face one or more of their children going through "a difficult period" for one reason or another, and the fact that a parent who is a foreign criminal will no longer be in a position to assist in such circumstances cannot of itself mean that the effects of his deportation are unduly harsh for his partner and/or children. Nor can the difficulties which SAT will inevitably face, increased as they are by her laudable ongoing efforts to further her education and so to improve her earning capacity, elevate the case above the commonplace so far as the effects of PG's deportation on her are concerned. In this regard, I think it significant that Judge Griffith at paragraph 67 of her judgment referred to the "emotional and behavioural fallout" with which SAT would have to deal: a phrase which, to my mind, accurately summarises the effect on SAT of PG's deportation, but at the same time reflects its commonplace nature.

As also emerges from this case and paragraph 399 of the Rules, the Tribunal must consider whether it would be unduly harsh for the Appellant's partner and children to go to Poland to be with him and whether it would be unduly harsh for them to remain in the UK whilst he remains in Poland.

16. When considering whether there are "very compelling circumstances over and above" the two exceptions in Section 117C, the Court of Appeal in NA (Pakistan) approached the test for "medium offenders" such as the Appellant in the following way

"[32] Similarly, in the case of a medium offender, if all he could advance in support of his Article 8 claim was a "near miss" case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal,

must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.
[33] Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.

17. Finally, Mr Jarvis also drew my attention to the case of IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932 where, at [52] of its judgment, the Court of Appeal made plain that "the word 'deportation' is being used to convey not just the act of removing someone from the jurisdiction but also the maintaining of the banishment for a given period of time: if this were not so, section 117C(1) would achieve very little".

THE EVIDENCE

18. Having set out the legal framework against which the evidence must be assessed, I turn now to what the evidence shows in this case. [SR] gave oral evidence before me. I do not set that out separately but incorporate that evidence where relevant into my assessment of the remainder of the documentary evidence.

19. I begin by dealing with [SR]'s own situation. Her own evidence is to be found in a letter dated 9 December 2017, a statement and letter dated 28 April 2018 and a statement dated 27 February 2019 as well as the oral evidence which she gave at the hearing.

20. [SR] is a British citizen. She was born in 1992 and is now aged twenty-seven years. She has known the Appellant from a very young age. She says in her 2018 statement that she had known him for ten years. They had been a couple for that period save for a separation when she was aged sixteen. It was at that time that she fell pregnant with [LR]. As such, [LR] is not the Appellant's biological child. However, [LR] has no contact with her biological father and is to all intents and purposes the Appellant's daughter.

21. [SR] suffers from various medical conditions which are best explained by the report dated 26 February 2019 from Dr D S Rattan, MRCS, LRCP as follows:

"[SR] has established diagnosis of the following mental health conditions and was last seen by Consultant Psychiatrist 23rd May 2016. Since then she has been reviewed by her GP.
1. Emetophobia
2. Agoraphobia
3. Obsessional Compulsive Disorder
4. Depression
5. Severe Anxiety disorder
Her condition was most severe during 2011-2013 and she had significant postnatal problems. During this time she was unable to leave the house due to her agoraphobia.

During her pregnancy when she was given formal 'homecare' to meet her needs, her partner cared for her constantly. [SR] has been on antidepressants only since 2016, which have helped her cope better.
However, without her support network (her parents, partner and close friends) she has in the UK she would not be able to manage due to her severe multiple psychiatric conditions. Without her support network it is very likely she would revert back to her severe state of phobia and depression.
[SR] relies on her support network to manage all her day to day activities including taking her children to hospital appointments and to the GP. Her daughter [LR] is under the Royal London Hospital for investigations of seizures and under a gastroenterologist.
She was recently reviewed at her GP and her medication (Citalopram 40mg) anti-depressant does was increased.
Unfortunately, [SR] has not received any CBT therapy yet for her condition.
[SR] is unable to use public transport due to her agoraphobia and anxiety disorder. She relies on her mother for most things.
In summary, [SR] has lifelong multiple severe debilitating psychological issues that has required psychiatric involvement. She remains under her GP for review and is currently on medication. Without her immediate support network it is very likely that she will relapse and her condition will worsen, which will have a detrimental effect on her children and her family."

22. [SR] accepted in oral evidence that her conditions were a bit more stable with the medication which she currently takes (Citalopram). However, she is still heavily reliant on family support for her condition which she currently receives from her mother, [MA]. She accepted that her conditions are lifelong. She was diagnosed when she was a teenager, aged fifteen, sixteen or seventeen. The conditions had become easier to cope with as she got older and with medication but were still debilitating. She still struggles. She does not have anxiety as much but that is because she does not leave the house. She stays at home and watches TV. She tries her best for the sake of the children.

23. Although [SR] accepted that she receives a lot of help from [MA], she said that she did not consider that she could depend on her mother all of the time. Her mother has a life as well. She also works full-time. She said that the Appellant knows how to relax and calm her. She feels anxious because she does not know what the future is. She is very nervous. In her 2018 statement, [SR] says this about the support she receives from the Appellant:

"6. [AW] has supported me in ways no one else could and has helped me cope so much better. I have come such a long way because of him. I can honestly say that he has been more help to me and my progress than the mental health services ever were and I would not have come this far without his continued support.
7. [AW] was able to help me in every way possible, from calming down my anxiety attacks, and helping me to get out of the house, by my knowing he is there with me every step of the way, to the more normal things like cleaning, cooking etc."

24. [SR] suffered a difficult pregnancy with her younger child, [J]. She says this in her 2018 statement about that period:

> "19. When I got pregnant with [J], it was one of the worst stages of my life. As much as we looked forward to meeting our little baby, the struggle I went through kept me in my bed once again like before and [AW] yet again cared for me, [LR], and my sister [N] so my mum could work.
> 20. [AW] was there every single day and nearly every night. He sat up with me in the night when I was terrified to sleep because of my fear of vomiting and being pregnant. Knowing I could vomit was scaring me due to my Emotophobia.
> 21. [AW] would hold my hand and calm me down night after night. He made sure we all had a healthy meal and all the care we needed.
> 22. When [J] was born I became very depressed and relapsed, my OCD had worsened. [AW] was there helping me through it and giving me the best advice he could.
> 23. [AW] is the one that encouraged me to take the medication, which was the best thing I could have done. Taking medication made me feel much better and I finally let go of many things that held me back in the past."

25. [SR]'s eldest child, [LR] (the Appellant's stepdaughter), also has medical problems. [LR] was born in 2009 and is now aged ten years.

26. There were concerns that [LR] suffered from epilepsy. This is the subject of a medical report dated 9 November 2017 written by Hia Thu, a locum consultant paediatrician at Whipps Cross University Hospital who outlines the concerns as follows:

> "The main concern from her mother is that she is having a few prolonged staring episodes. The first time the family started realising was in July 2017. [LR] was in the car and she was sleeping. When she woke up her eyes were wide open and staring straight to the front. There was a bit of blue colouration on her lips. She was not responding to the surroundings and she kept staring for 10-15 minutes. There was no association with a jerky movement. At that time her body was floppy. Then she was taken to the Accident and Emergency Department. In Accident and Emergency, she still had a bit of a floppy episode. She had a whole set of blood tests, including an ECG, and the parents were told it was normal. One month after that episode she had another episode. At that time she was unwell with a viral illness. In the morning, she was sick and her father took her to the toilet. At that time, she felt sick but there was no history of vomiting and after the sickness she was staring and became unresponsive and floppy for 5-10 minutes. These are the two main incidents that the parents and grandmother thought were prolonged seizures.
> Previously, the family were querying similar episodes, for example, two years ago, she had an episode of vomiting then she had a very similar staring episode for nearly 2 minutes. A year ago, she had one which lasted for 1 minute. Other than that she had a chronic history of constipation for which she is under the paediatrician at the Homerton University Hospital and she has been referred to the Royal London Gastroenterologist for further investigations."

A further report dated 15 August 2018 confirms that [LR] does not have epilepsy. The "staring episodes" are said to be "related to having a fever or viral illness". [LR] was therefore discharged from the epilepsy clinic. [SR] confirmed that [LR] had not suffered from any seizures since then.

27. [LR] does suffer from what is described in the medical report as "a chronic history of constipation". That is controlled by medication although reports in the bundle suggest that [LR] has been resistant to taking her medication at all times. [SR] said in her oral evidence that [LR] can now take one of her medications in milkshake and is therefore more compliant but continues to struggle with one of the other medications. [LR] may need hospital admissions very so often if she does not take that medication. Otherwise, she requires regular hospital appointments to review her condition every few months.

28. [SR] in her oral evidence attributed [LR]'s learning difficulties in part to the fact that she has missed school due to her medical problems and the need to attend hospital appointments on a regular basis. [LR] has now been diagnosed with dyslexia. She is said to be about two years behind her class. As a result, she now receives extra classes with a lot of one to one time. Although [SR] said that [LR] was not coping "massively well" she did say that [LR]'s reading skills were improving. I do not have a formal report from an educational psychologist or [LR]'s teachers, but Mr Jarvis did not dispute [SR]'s evidence. There is some limited evidence that [LR] has problems. For example, in the report dated 9 November 2017, it is said that she "is far behind her peer group" and was at that time "receiving extra support from school".

29. [SR]'s evidence is that [LR] has been particularly badly affected by the Appellant's absence. She said that [LR] is a "daddy's girl" and that the Appellant is "everything to her". She says in her 2018 statement that [LR] has called the Appellant "Daddy" ever since she could talk and that "one of her first words was 'Dada'". [SR] says that [LR] has been "angry all the time" since she was separated from the Appellant. [SR] says in her 2018 statement that "[LR] is struggling in all aspects of her life without him and wants to be wherever her daddy is".

30. [SR] also confirms that the Appellant attended almost all [LR]'s hospital appointments. He also took [LR] to and from school most days and attended school trips to ensure that [LR] could go on them.

31. There is limited evidence about [J]. Contrary to what is suggested in the 2019 medical report concerning [SR]s medical conditions, [J] was not born in 2013 but in late 2015. He is now aged four years. He has attended pre-school since January 2018. He is not said to have any medical problems.

32. [SR] said that [J] "gets on with it as he is very young. He is not the emotional type. He gets a bit sad and angry because he doesn't understand".

33. [SR] said that she and the children speak to the Appellant on a daily basis, often more than once a day. [LR] has a mobile phone and can therefore contact the Appellant directly. [SR] said that whilst [LR] is sometimes happier once she has spoken to the Appellant, she is often unhappy, and she cries a lot for the Appellant when she is down. [LR] needs reassurance and extra help also at home and when she becomes stressed, that stress has an effect on [SR] herself.

34. I have already alluded to the evidence that the Appellant has been in the UK unlawfully on two occasions. [SR] was unable to put a date on when the Appellant had returned to the UK following the first and second deportations. She said that "she was in a very bad place" when the Appellant was first deported in March 2013 and she had no idea when he had returned. She accepted however that he must have been back in the UK by the early part of 2015 as [J] is the Appellant's biological child and was born in late 2015.

35. In relation to the Appellant's return following the deportation in April 2018, she thought that he had been in the UK for only a few weeks when he returned voluntarily to Poland in November 2019. She denied that the Appellant was living with his parents. He had been living with her and the children at her mother's house.

36. [SR] was able to confirm that the Appellant had been arrested on that occasion. From her evidence, it appears that the arrest was in order to effect deportation. She said that the police officer who arrested him had done so whilst she and the children were in the car and that the children had been particularly upset by the experience. She suggested that the police officer had been unduly aggressive and even went so far as to suggest that it was he rather than the Appellant who had been responsible for an assault. I do not need to deal with that evidence since, as Ms Dogra accepted, in order to qualify for an unconditional caution, the Appellant would have to admit to the offence with which he was charged. It does appear however that the assault arose from a resistance to arrest and that the arrest was for the purposes of deportation rather than arising from any other criminal offence.

37. [SR] said that as a result of this incident, [J] had become angry and had not spoken to her for a few days, apparently blaming his mother for allowing the police to take his father away.

38. [SR] says that she cannot leave the UK for her own medical reasons as well as because of the children. In particular, she points out that [LR] is reliant on medical services and help with her education which she is now receiving in the UK.

39. As to the position if she and the children remain in the UK and the Appellant remains in Poland, she says this in her 2018 statement:

> "26. Living outside of the UK is not an option for me or my children but living without [AW] and leaving my children without their father, does not seem like an option to me either.
> 27. There is not a day that goes by that I have not had to deal with heartache. Dealing with [LR]'s tears that she misses and wants her daddy back and watching my son call for his daddy to come, not understanding that he cannot suddenly appear. Not knowing what is going through his mind when he is calling out, and probably wondering why daddy is not coming.
> 28. They miss him and want him back and so do I. It is heart breaking to see the effect this is having on my children from having their father in their lives to him suddenly not being here."

40. [SR] said in her oral evidence that she and the children love the Appellant; "he is [their] world". She said that the Appellant gives the family the support they need and she should not be relying on her mother who could not be there for her and the children the whole time.

41. That brings me on to the evidence of [SR]'s mother, [MA]. She was unable to attend the hearing as she was working. However, without objection from Mr Jarvis, I permitted the production of a document from her entitled "Written witness statement for hearing 9th January 2020". In addition, she has written a letter dated 9 December 2017 and an earlier statement dated 28 April 2018 to which I have also had regard.

42. [MA] confirms the support which the Appellant has given to [SR]. She confirms the deterioration of her daughter's condition when [J] was born. At that time, [SR] and [LR] moved back to live with [MA] but the Appellant was there every day and most nights. The Appellant cared for [SR], [LR] and [SR]'s sister, [N] while [MA] went to work. She also says that the Appellant has supported other of their family members at difficult times.

43. In her 2018 statement, [MA] says the following about the Appellant's relationship with [SR] and the children:

> "22. I swear to you that [AW] and my grandchildren have a very strong bond. My grandchildren deserve both their parents and [AW] has earned his right to call himself father to [LR]. To everyone who knows him, he is [LR]'s real father as he is the one that has been there for her. He has changed her nappies, fed her as a baby, attended her hospital appointments, and so much more. She is lost without him and this is having a very serious effect on her. She is sad every day and misses him so much. She does not deserve this and I pray you will allow him to return."

44. In her recent statement, [MA] speaks of [SR]'s current circumstances. She says that [SR] stays home most days and "is extremely depressed". She says that [SR] and the children are "in turmoil"and that [SR] and the Appellant "are not able to function without each other".

45. The Appellant's parents are in the UK. His mother, [IW] attended the hearing with [SR] but Ms Dogra confirmed that she did not consider it necessary for me to

hear from her orally. [IW] is aged forty-seven years. She suffers from "seropositive rheumatoid arthritis" as is confirmed by a report dated 4 November 2017. She has "widespread joint pain and swelling with morning stiffness lasting 45 minutes". The Appellant accompanied her for review on the occasion which led to this report (in October 2017). [IW] is said to have difficulties with daily living. She is in receipt of personal independence payment. The Appellant's father [GW] is not said to have any medical problems. [SR] indicated in her evidence when asked whether the Appellant had been working during his recent stay in the UK that he might have been helping out his father who works in the construction industry.

46. [IW] wrote a letter dated 12 December 2017 in support of her son's case. That sets out her medical problems and confirms that the Appellant was assisting her which allowed some respite for [GW] who also cares for her. She also confirms the strength of the Appellant's relationship with [SR] and the children. [GW] has also provided a letter of the same date which confirms that relationship.

47. In addition to the above evidence, there are letters of support from friends and other family members. Those attest to the Appellant's family relationships and also confirm some support which the Appellant has given to others, for example, to [SR]'s cousin's son who has ADHD.

48. Before I turn to the Appellant's own evidence, I set out the evidence about his criminal offences. Those are as follows:

> 24 November 2010: convicted of resisting/obstructing a police constable. Sentenced to a conditional discharge of twelve months.
>
> 25 January 2011: convicted of robbery. Sentenced to a twenty weeks' custodial sentence and remanded at a HMP Youth Offenders Institute. Also convicted of attempted robbery and three other theft offences. Sentenced to forty weeks consecutively in custody in a Youth Offenders Institute.
>
> 27 July 2012: convicted of robbery. Sentenced to twelve months' youth custody.

49. The circumstances of the last of those offences are set out in the sentencing remarks as follows:

> "..You have pleaded to a joint offence of robbery which took place earlier this year on the 24th April. It was quite literally daylight robbery. You went up to another young man, approached him with your friend and accomplice, used some moderate force towards him and stole his Blackberry and other items. The Blackberry was recovered, which is a factor I take into consideration. What troubles me is you are a repeat offender. You appeared in front of this Crown Court in January last year and were given a 10-month sentence for no fewer than four attempted robberies and one robbery. Anyone who doesn't learn their lesson once is going to find a court less merciful on the second occasion, and you will find that trend repeated. If you carry on committing robberies, the sentences will get longer and longer…There are points

to be made on your behalf. First, you pleaded guilty at the first available opportunity. Two, you've written a letter to the complainant, which I have read, which I have ordered to be passed onto him, which expresses regret and remorse. Three, I have read a number of positive features about you which I hope mean that this trend will stop. I have read from tutors at Feltham and I've read from college tutors, I have read personal letters from you to me, and from your family. I have taken them all into consideration as I do the encouraging comments made by the Probation Officer who has written the report on you. All these factors enable me to reduce the sentence but I can tell you that on a plea of not guilty, which is the starting off point, that for this repeat offence, it would have been 21 months of detention in a Young Offenders Institute. I shall deduct one third for your plea of guilty, reducing it to 14 months, and I will reduce it by a further 2 months to reflect the positive features about your character which I have read about.

The sentence of the court for this robbery, 12 months in a Young Offenders Institute. Time served already counts, I reduce that sentence by 75 days, and you will serve half the sentence I have just passed, the other half will be on licence in the community…"

50. The Appellant appealed against the deportation order which was signed following that index offence. That appeal was under the Regulations (the 2006 version in force at that time). The appeal was dismissed by the First-tier Tribunal in a decision promulgated on 5 February 2013. The Tribunal accepted that the Appellant had acquired permanent residence. An OASys assessment was carried out in August 2012 as a result of the index offence. The Appellant was assessed as presenting a medium risk of serious harm to others and having a medium likelihood of reconviction ([81]). The Appellant is said to have frequently drunk alcohol, smoked drugs and "behaved anti socially to relieve his boredom". He said that he had distanced himself from his peers ([83]). Based on the risk which the Appellant was said to pose, the Tribunal upheld the deportation order under the Regulations. It also found that deportation was proportionate both under the Regulations and applying Article 8 ECHR. It did not accept that, at that stage, the Appellant had formed a family relationship with [SR] and [LR] ([99]).

51. The Appellant came to the UK from Poland with his parents in August 2005. He was born in 1992 and was at that date aged thirteen years. The offences of which he was convicted were committed whilst he was a young man, but he was over the age of eighteen when he committed most of them. I also note that these were committed when he was already in a relationship with [SR] and the index offence occurred after [LR]'s birth.

52. The Appellant has provided the following written evidence:

(1) Undated statement (apparently from around December 2017)

(2) Statement dated 28 April 2018 and e mail on which that statement is based

(3) Undated letter written after deportation on 5 April 2018

(4) Statement sent on 28 February 2019

I have read and taken account of what is said in those statements. There was no application on behalf of the Appellant for him to give oral evidence by video link.

53. The Appellant confirms the relationship with [SR] and his two children. He says that he has "a very strong bond" with the children and "would love to carry on being in their lives and help them grow up into adults". In his statement from 2017, he says that he "doesn't see a point to live my life and would rather be dead than not to have them in my life" and that he loves his children and "would do anything for them". He says that he has turned his life around and cut ties with his previous acquaintances. He says that he is "a family man who wants to provide moral and financial support for [his] children." Of his relationship with [SR], he says that "she has got me through a lot of dark times in [his] life and helped [him] become the man [he is] today".

54. None of the Appellant's evidence nor indeed that of any of the other witnesses deals with the dates when he returned to the UK after deportation in 2013 and again in 2018.

55. As to his circumstances in Poland, the Appellant says that he was unable to find a job there. He says that he did not complete any education in Poland and therefore cannot secure any trade there. He says that his training for the Passive Fire Protection trade was all completed in the UK and that Polish employers will not accept the certificates obtained. There is no supporting evidence in that regard. He says that his past experience and training would allow him to obtain employment in that trade in the UK.

56. There is some evidence of the Appellant's training and employment in the UK. The Appellant has produced tax returns which show the following:

Tax year 2011/12: did not work, was not self-employed and did not trade

Tax year 2012/13: did not work, and did not earn any money from self-employment

Tax years 2013/14, 2014/15 and 2015/16: not employed but was self-employed although no figures are given (I note also that the front page which would give the Appellant's address at the time is missing)

There is also a P45 form showing that the Appellant left a job on 8 August 2014 although no other details (concerning pay and tax to date) are completed.

57. The Appellant has also provided a document relating to a Vodafone contract which is dated 20 December 2013. I note that the address given for the Appellant is in

Enfield. Similarly, there is a letter from NatWest bank to the Appellant dated 24 September 2013 also at the same address in Enfield.

58. The Appellant has provided a number of certificates in relation to qualifications obtained and training courses undertaken prior to his first deportation. There is also confirmation that he attended school in North London between April 2006 and July 2008.

59. It appears that the Appellant also undertook courses in the UK following his first deportation. In particular, there is a certificate issued on 1 October 2013 in relation to the operation of "Mobile Elevating Work Platforms" and that he attended training courses in September and December 2013. There is also a sub-contractor agreement between the Appellant and "Red Contractors Ltd" dated 9 December 2013. The Appellant's address is the same address as above in Enfield. I note that [SR]'s address given on various of the documents dating between 2009 and the present is in Leytonstone (her mother's address).

DISCUSSION AND CONCLUSION

60. The starting point for my assessment, as both parties accept, is the Appellant's relationships with [SR] and his children.

61. Mr Jarvis did not dispute that the Appellant has a genuine and subsisting relationship with his partner and their children, including [LR] even though she is not his biological child.

62. The Appellant has been deported on two occasions in March 2013 and April 2018 but has on both occasions returned in breach of the deportation order. As I have noted, there is no direct evidence as to when the Appellant returned on each occasion and I therefore have to do the best I can on the indirect evidence to establish how long he was in Poland and therefore apart from his family. Based on the evidence as set out above, it appears that the Appellant returned to the UK shortly after his first deportation. There is evidence that he had returned by as early as September 2013. However, that evidence suggests that he was not living with [SR] and [LR] at that time. He was giving an address in Enfield whereas [SR] has been living with her mother in Leytonstone. It is not clear what degree of contact the Appellant had with [SR] and [LR] at that time as both [SR] and the Appellant are silent on this topic and [SR] said she could not remember when the Appellant returned on this occasion.

63. Be that as it may, the couple were evidently reconciled by early 2015 at the latest as [J] was born in late 2015 (although I note that his birth certificate also shows that the Appellant was not at the same address as [SR] at that time; he gave his parents' address in Enfield).

64. It is also not entirely clear where the Appellant was living when he returned to the UK in 2019. Mr Jarvis put it to [SR] that the Appellant gave his parents' address on this occasion also but she said that this was not correct; he had been staying

with her and the children. I am prepared to accept this was the case as the Appellant was arrested when she and the children were in the car with him.

65. However, the above evidence does cast doubt whether the Appellant and [SR] were cohabiting at all relevant times. That is supported by [MA]'s evidence which indicates that [SR] and the children live with her but that the Appellant has spent much of the time with them. It is also consistent with the Appellant's parent's evidence that he has been able to provide support to his mother prior to his deportation.

66. That the Appellant may not have been living with [SR] and the children all the time does not mean that their relationship is any less close. I accept [SR]'s evidence that the Appellant has been a support for her and that the children have a very strong bond with him. However, [SR] and the children do have a great deal of support from [MA].

67. Mr Jarvis did not dispute that it is in the children's best interests to have both parents in the UK. I accept that is so. Although Mr Jarvis did not concede that it would be unduly harsh for [SR] and the children to go to Poland to live, he did not suggest that this would be anything other than very difficult. Based in particular on [SR]'s and [LR]'s medical conditions and the support on which they are reliant to deal with those conditions as well as the substantial reliance on their family, in particular [MA], I conclude that it would be unduly harsh for them to go to Poland to live with the Appellant.

68. However, I do not reach the same conclusion in relation to the UK. It may well be, based on the indirect evidence to which I have had regard, that the Appellant and [SR]/[LR] were not in fact separated for that long following the first deportation. The Appellant may well have been out of the UK for only a matter of months. Even though I do not accept that he then went to live with [SR] and [LR] at that time (given the differences of address and lack of evidence that he did so), I am prepared to accept that the relationship continued in the UK during the period between late 2013 and April 2018 when the Appellant was deported for the second time. I also accept that the Appellant and [SR] were in a continuing relationship from early 2015 at the latest based on the birth of their child [J] at the end of that year.

69. I do not downplay the difficulties which [SR] faces in her life. I also accept the evidence about the impact of the Appellant's deportation on the children. Whilst [J] has not apparently been greatly affected, based probably on his young age and adaptability, I accept that the absence of the Appellant has been very difficult for [LR] who has been significantly upset by his deportation. However, that is to be expected where a child is separated from his or her parent and I do not accept that this is anything other than the normal consequence of deportation. Similarly, whilst I accept that the impact on [SR] has been very difficult and may even be described as harsh, it is not at a level which can be described as unduly harsh. It is to her credit that she admitted in evidence that

she is a bit more stable with the benefit of medication. She is also able to depend on support from her mother and other friends and family members. I recognise that her mother is not able to be there for her all day because she works. However, [SR] is able to do some things for herself. I note that she was able to attend the hearing even though her mother could not accompany her. [SR] said that she tries to be strong for the children and, whilst that is clearly a struggle for her, the impact is not of the high level which is required to meet the unduly harsh threshold.

70. For those reasons, applying Section 117C, Exception 2 is not made out.

71. I turn then to Exception 1 but only for the sake of completeness. As Ms Dogra accepted, the Appellant is unable to meet all three limbs of that exception. He has not been in the UK lawfully for half his life. Even assuming the period from 2005 to his first deportation in 2013 could all be considered to be lawful (which is doubtful given his periods of imprisonment), that amounts to only eight years. I also do not accept that there is evidence of very significant obstacles to integration in Poland. There is no evidence that he does not speak the language. Both his parents are from that country and he lived there until he was aged thirteen and must therefore have learnt to read and write the language. Although he says that he has been unable to find work there due to a lack of relevant qualifications, he has provided no evidence as to the efforts made. He has not provided evidence about where he has been living and with what support. In reality, it is probably the case that he did not stay in Poland for very long at all given the indirect evidence that he returned to the UK within months after his first deportation and stayed in Poland for no more than about eighteen months on the second occasion. However, he has failed to show that there are very significant obstacles to his integration there.

72. Neither do I accept that the Appellant has shown that he is socially and culturally integrated in the UK. He arrived in the UK when he was aged thirteen. By the time that he reached the age of twenty, he had already committed a number of crimes. He was deported on the first occasion aged only twenty-one years and although it may well be the case that he has managed to live in the UK undetected for a number of years since, that has been whilst he has been here unlawfully and in breach of a deportation order. The flouting of immigration laws does not evidence integration.

73. For those reasons, Exception 1 is not made out.

74. I turn finally to consider the circumstances as a whole to assess whether there are very compelling circumstances over and above the two exceptions. I do so taking into account my conclusions, in particular in relation to Exception 2. Whilst I do not accept that it is unduly harsh for [SR] and the children to remain in the UK without the Appellant I have accepted that the consequences are harsh for them. I have accepted that they have a genuine and subsisting relationship as a family. I have accepted that it would be unduly harsh for them

to go to Poland to live with the Appellant. Unless the Appellant is able to find another route to return to the UK lawfully, therefore, the consequence of this decision will be a permanent, physical separation of the family. [SR] and the children will have to rely as they have done recently on regular telephone contact and perhaps visits to Poland if [SR]'s medical conditions improve to the extent of being able to travel.

75. The evidence indicates that the relationship with [SR] was formed initially when the Appellant was here lawfully, in around 2008. However, the couple were separated for a time. The Tribunal in 2013 did not accept that the Appellant had by then formed a family life with [SR] and [LR]. Even if it is the case that the relationship was formed initially when the Appellant was here lawfully, it has been restored and strengthened at a time when the Appellant has returned and remained here unlawfully and I give it less weight for that reason.

76. The Appellant also has a relationship with his parents, [GW] and [IW] who also live in the UK. I accept that [IW] suffers from health problems. There is however limited evidence about the support which the Appellant can provide which his father cannot. His father is said to work but I have limited evidence that this has any effect on his ability to care for his wife and, in any event, if the Appellant were to remain in the UK, it is his evidence that he would seek and probably find work himself. I have no evidence whether the Appellant has any siblings in the UK who could assist with his mother's care. There is limited evidence about the level of care which she requires in any event. She is not said to be housebound. I observe that she was able to attend the hearing before me without apparent assistance from anyone other than [SR]. Even if I were to accept that there was any dependency between mother and son which amounts to a family life (as to which there is limited evidence), I can give little weight to this relationship when dealing with the interference with the Appellant's family life or, if family life is not established, his private life.

77. Turning then to the Appellant's private life, I accept that he has lived in the UK on and off for a number of years and since he was a child. Assuming the indirect evidence is reliable, he lived here from August 2005 to March 2013 and then from about September 2013 to April 2018 and then for a few weeks in October/November 2019. That amounts to about twelve years. However, pursuant to Section 117B (4) and (5), I can give little weight to that private life. Much of it was formed whilst the Appellant was here precariously or unlawfully. After January 2011, the Appellant was in detention, subject to a deportation order and/or here in breach of the deportation order. Furthermore, there is limited evidence about the Appellant's private life outside his relationships. There is some evidence of having undertaken some education in the UK and having obtained some qualifications. There is some evidence that he has formed friendships, mainly with friends and relatives of [SR]. He is said to have helped some of those people with their problems. There is however limited evidence of the formation of social relationships establishing any strong private life in the UK. There is very little evidence that the Appellant has ever

worked in the UK, other than possibly for a short period when he was self-employed.

78. I have already dealt with the issue of the Appellant's private life in Poland. I have limited if any evidence about his circumstances there other than that he has had difficulty finding employment and there is no evidence that he has tried. It may well be the case that he has no relatives there. His parents are in the UK. However, he is a young and healthy man who has obtained qualifications in a number of fields whilst in the UK and says that he has experience in a number of areas of employment. He has shown resourcefulness in obtaining jobs in the UK in the absence of very much education here. I am not prepared to accept that he could not adopt the same resourcefulness to find employment in Poland.

79. Turning then to the other side of the balance, I recognise that the index offence was committed over seven years ago. Even prior to that, though, the Appellant had committed offences. The two offences for which he was detained were ones of robbery; the first offence was of resisting/obstructing a police officer. They did not apparently involve any serious violence. However, the Appellant started to commit offences after only five years in the UK. His conduct showed blatant disregard for the laws of this country. I have already concluded that his conduct overall shows that he has not become socially or culturally integrated here.

80. Moreover, as Mr Jarvis points out, the Appellant has re-entered the UK now on two occasions in breach of the deportation order against him. He may consider he has good reason to do so given his family relationships with [SR] and the children but, nonetheless, he has acted unlawfully in doing so and that is something which I take into account. It is yet more evidence that the Appellant pays no heed to the law. His most recent re-entry was late last year and whilst this appeal was ongoing. That he left voluntarily is not something to which I give credit. It appears that he did so only after being arrested for being here unlawfully.

81. I also take into account the offence committed whilst he was here on that occasion. I note [SR]'s evidence about the circumstances in which that offence was committed. I accept that it may well have been because the Appellant was concerned about the effect of the arrest on [SR] and the children that he resisted that arrest. However, the fact remains that he committed that offence and this too shows that he continues to ignore the laws of this country.

82. I also take into account the maintenance of effective immigration control. I make clear as I did at the outset that I am not here concerned with an appeal under the Regulations. An EEA national is not ordinarily subject to immigration control (Immigration Act 1988). However, the Appellant is the subject of an extant deportation order and for the purposes of an Article 8 assessment, the maintenance of effective immigration control is a factor in favour of the public interest which I can and indeed must take into account.

83. As Mr Jarvis also pointed out, the Appellant, as the subject of a deportation order, is not allowed to work. Although I did not hear direct evidence about this, Ms Dogra did not dispute that the Respondent was entitled to rely on the Appellant having illegally worked. Some of the documentary evidence to which I have made reference above certainly suggests that he has worked at times in the UK when he has not been permitted to do so. That is also a factor which favours the public interest.

84. Although I did not hear evidence from the Appellant, I accept Ms Dogra's submission that the Appellant speaks English. His statements and letters are in English and there is nothing to suggest that those were translated for him. I also accept that he has not had recourse to public funds whilst in the UK. Given his unlawful presence, it is understandable that he would not have sought benefits. However, those factors are in any event neutral when weighing up the public interest.

85. Balancing the interference with the Appellant's family and private life, including the impact of deportation on the Appellant's partner, children and family members, against the public interest in maintaining deportation, I conclude that the public interest outweighs the interference. I have some sympathy for the situation facing [SR] and the children for whom this decision will doubtless be difficult to accept. However, they have others who can support them in the UK. The consequences for them arise from the Appellant's past conduct. The impacts are no more than are to be expected in a deportation case. The Appellant's conduct is such that this impact, whilst harsh, is proportionate when the public interest is taken into consideration.

CONCLUSION

86. For the above reasons, I dismiss the Appellant's appeal. I make clear once again that I am considering this appeal only on the ground whether deportation is proportionate under the Human Rights Act 1998 and nothing I say above is or is intended to affect any decision or later appeal based on the Regulations which may involve different considerations.

DECISION

The Appellant's appeal is dismissed on human rights grounds (Article 8 ECHR) which is the sole ground of appeal.

Signed Dated: 16 January 2020
Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00534/2018

THE IMMIGRATION ACTS

Heard at Field House
On Tuesday 15 October 2019

Determination Promulgated

On Friday 1 November 2019…

Before
UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

A K W
[Anonymity Direction Made]

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was made by the First-tier Tribunal Judge. The appeal involves a minor child. Accordingly, it is appropriate to continue the anonymity direction. Unless and until a tribunal or court directs otherwise, the Respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent.

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Ms M Dogra, Counsel instructed on a direct access basis

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DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against a decision of First-tier Tribunal Judge G Clarke promulgated on 31 May 2019 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 5 January 2018 maintaining a deportation order signed against him on 12 March 2013. The Respondent's decision is a refusal of a human rights claim, as I will come to below.

2. The Appellant is Polish. He claims to have come to the UK with his parents in 2005. His parents live in London. Between June 2010 and April 2012, the Appellant was convicted of a number of offences and sentenced to three terms of custody (in a Young Offenders Institute on account of his age). The Respondent signed a deportation order against him, applying the EEA Regulations then in force. The Appellant appealed. His appeal was dismissed on EU law grounds and human rights grounds by the First-tier Tribunal (First-tier Tribunal Judge Cooper and Mrs L R Schmitt, JP) by a decision promulgated on 5 February 2013. Onward appeal rights failed. The Appellant was deported to Poland on 23 March 2013.

3. On 6 December 2017, the Appellant was arrested by police in the UK for driving related matters. The Appellant was noted to be an illegal entrant, having returned in breach of a deportation order and he was detained and served with an enforcement notice for his removal to Poland. He made further submissions on 12 December 2017 based on his family and private life and therefore raising Article 8 ECHR. As the Respondent noted in her decision, under regulation 34 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), the Appellant may only apply to revoke his deportation order on EU law grounds whilst he is outside the UK. The Appellant accepts that this is so. As such, the Respondent indicated that she would not treat the submissions made as an application to revoke the deportation order under the EEA Regulations. Nonetheless, the Respondent also considered the Appellant's case applying EU law. The Respondent did not accept that the Appellant had acquired a sufficient period of residence in order to qualify for permanent residence or that the need to show imperative grounds arose. She concluded that the Appellant represented a genuine, present and sufficiently serious threat and that his deportation continued to be proportionate in EU law.

4. The Respondent also addressed the Appellant's Article 8 claim. Although she indicated that the Immigration Rules ("the Rules") and Part 5A Nationality, Immigration and Asylum Act 2002 do not directly apply to EEA nationals ([57] of the decision), she nonetheless applied the same approach when assessing

Article 8. She went on to consider the claim on the basis that the Appellant needed to show very compelling circumstances over and above paragraphs 399 and 399A of the Rules which apply to deportation cases and Section 117C (4) and (5) Nationality, Immigration and Asylum Act 2002 ("Section 117C") because he was unable to meet either of those provisions.

5. The Appellant's human rights claim is based on his life with his parents who continue to live in the UK, his partner, [SR], son ([J]) and his partner's daughter, [L]. The Respondent concluded that the Appellant would fail under the suitability requirements of the Rules. She did not accept that the Appellant was in a genuine and subsisting relationship with [SR] or his children but indicated that family life could continue in Poland in any event; alternatively, the Appellant could apply for entry clearance to re-join his family (although of course, as an EEA national such requirements do not apply).

6. At [138] of the decision, the Respondent said this:

> "Your further submissions on human rights grounds have been examined but it is considered your removal pending the outcome of any appeal would not be unlawful under section 6 of the Human Rights Act 1998 and therefore your case has been certified under regulation 24AA of the Immigration (EEA) Regulations 2006 on 15 November 2012"

7. The Respondent went on to consider whether deportation pending the Appellant's appeal would cause serious irreversible harm. At [144] of the decision, the Respondent decided to maintain the earlier decision to deport applying regulation 27(5) of the EEA Regulations. The earlier deportation order was therefore maintained in force. Following a reference to the earlier unsuccessful appeal, the Respondent went on at [146] of the decision to say the following:

> "If you decide to bring an EEA appeal under regulation 36(7) from outside the United Kingdom, and section 82 human rights appeal from outside the United Kingdom, it is your responsibility to bring this to the attention of the First Tier Tribunal (Immigration and Asylum Chamber) in order that they can consider linking the appeals to be heard at the same time."

8. By the time of the appeal, the Appellant had already been deported to Poland. The Appellant was invited to consider giving video evidence from Poland but indicated that he did not wish to do so due to lack of funds and wished the hearing to proceed in his absence.

9. I will come to the relevant paragraphs of the Decision below. The Judge considered the appeal on human rights grounds only, noting at [47] of the Decision that neither the Rules nor Section 117C applied because the Appellant is an EEA national. He assessed the Article 8 claim outside the Rules. He made findings that the Appellant was in a genuine and subsisting relationship with [SR] and the children. Due to [SR]'s mental health condition, there would be insurmountable obstacles to family life continuing in Poland. The Judge applied

Section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") at the stage of assessing proportionality. He found that it would not be reasonable to expect the children to leave the UK but accepted at [80] of the Decision that Section 117B (6) did not apply because this is a deportation case. Having balanced the factors for and against the Appellant when his family and private life were weighed against the public interest, he concluded that the deportation was disproportionate and allowed the appeal on human rights grounds.

10. Something appears to have gone awry with the application for permission to appeal to the First-tier Tribunal. That was refused by First-tier Tribunal Judge O'Brien on 19 June 2019 on the basis that the Respondent's grounds appeared to be a challenge to a decision in a different appeal and accordingly did not disclose any error of law in the Decision. Permission to appeal was however granted by Upper Tribunal Judge Grubb on 16 July 2019 in the following terms (so far as relevant):

> "…2. Although the appellant is an EEA national, he was appealing against a decision to refuse his human rights claim under Art 8. He was not appealing against an EEA decision to which the EU regime in the Immigration (EEA) Regulations 2016 applied. It is more than arguable that in the context of an appeal against a refusal of a human rights claim the provisions of Part 5A of the NIA Act 2002, in particular s.117C, applied to the appellant. He is, on the face of it, a "foreign criminal as defined in s.117D(2) – not as the grounds contend as defined in s.32(1) of the UK Borders Act 2017 which is only relevant to the 'automatic deportation' provisions in that Act. If it is suggested that his sentence of 12 months detention in a YOI is not a "period of imprisonment" – it is (see s.117D(4)(c)).
> 3. For these reasons, permission to appeal is granted."

11. The matter therefore comes before me to consider whether the Decision contains a material error of law and if I conclude that it does, either to re-make the decision or remit the appeal to the First-tier Tribunal for redetermination.

DISCUSSION AND CONCLUSIONS

12. The Respondent raises only one ground of challenge – that the Judge failed to apply Section 117C. The Respondent also draws attention to what she says is an attempt by the Appellant to circumvent the EEA Regulations by returning to the UK in breach of a deportation order and making a human rights claim. It is not said how that relates to any error of law in the Decision.

13. Before turning to consider this ground of appeal, however, I need to deal with a point not raised in the grounds, but which Mr Melvin made in oral submissions concerning the Tribunal's jurisdiction in relation to the appeal. He submitted that there was no decision giving rise to a right of appeal. Although he appeared to accept that the Respondent had refused a human rights claim, his argument seemed to be that the Appellant had not made an application to revoke the deportation order made under the EEA Regulations until after he

had returned to Poland. That application was still pending. There was no decision refusing to revoke on Article 8 grounds.

14. Ms Dogra pointed out that this had not been raised in the grounds. I accept Mr Melvin's point that whether the Tribunal has jurisdiction is a matter of law and not a matter on which either party need make submissions. I can deal with the point however very shortly.

15. The Respondent's decision which the Judge accepted was that under appeal contained a refusal of a human rights claim. By implication, the assertion at [138] of the Respondent's decision which I have cited at [6] above, that removal of the Appellant pending the outcome of any appeal would not be unlawful under section 6 of the Human Rights Act, amounts to a refusal of a claim by the Appellant that his removal would occasion that breach. The Respondent did not purport to certify under the 2002 Act (whether under section 94 or section 94B which was probably intended). Instead, she certified under the EEA Regulations having regard to the earlier deportation decision. That did not have the effect of preventing an appeal under the 2002 Act nor even probably suspending its effect. However, I do not need to consider that latter point as the Appellant was outside the UK at the time of his appeal hearing.

16. I also note that at [146] of the Respondent's decision (cited at [7] above), she expressly refers to the Appellant's option of bringing a "section 82 human rights appeal" from outside the UK, thereby indicating an acceptance that such an appeal existed. As I have already indicated, whether a party considers that the Tribunal has or does not have jurisdiction is not determinative. That reference is however a clear indication of what the Respondent intended by the decision – namely to refuse a human rights' claim but to certify it so that the appeal had to be brought or continued from outside the UK as has since occurred.

17. I therefore turn to the only ground of appeal, namely whether Section 117C applies.

18. I begin by noting that the Judge allowed the appeal on Article 8 grounds outside the Rules but applying Section 117B (with the exception of Section 117B (6) which he found not to apply). He concluded though that Section 117C did not apply because the Appellant is an EU national. There is an evident contradiction in that position for reasons which I now set out.

19. Both Section 117B and Section 117C form part of an overall scheme which begins with Section 117A. That reads as follows:

> "(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
> (a) breaches a person's right to respect for private and family life under Article 8, and
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—
(a) in all cases, to the considerations listed in section 117B, and
(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

20. As such, the entire part of the 2002 Act comprising both Section 117B and Section 117C applies where the Tribunal is asked to determine an Article 8 claim. The fact that such a claim is made by an EU national makes no difference. In any event, either both sections apply or neither does. Here, the Judge found that one section did but the other did not. There is no basis for such a distinction unless it can be said that the case did not concern the deportation of a foreign criminal.

21. In order to answer that latter question, one must turn to Section 117D which also forms part of the overall scheme set out in this part. That section states as follows, so far as relevant:

"117DInterpretation of this Part
..
(2) In this Part, "foreign criminal" means a person—
(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c)who—
(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender.
…
(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—
…
(c)include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

…"

22. That definition applies to the Appellant. He is not a British national nor does he assert that he is. As I understand the position, he was sentenced to a period of twelve months. That appears to be the position from what is set out at [9] and [45] of the Decision and as set out at [76] of the decision in the earlier appeal. That detention was in a Young Offenders Institution due to the Appellant's age makes no difference.

23. It is not clear to me why the Judge considered that Section 117C did not apply. The closest one comes to a reason is that given at [47] of the Decision that "the

Appellant is an EEA national and his deportation falls under the Immigration (EEA) Regulations 2016 as distinct from the Immigration Rules in relation to the deportation of foreign criminals. The implication of this is that Section 117C of the Nationality, Immigration and Asylum Act 2002 does not fall to be considered as it relates to the deportation of non-EEA nationals". The Judge provides no analysis in support of that assertion. As I have already indicated, in any event, if the Judge were right to say that Section 117C did not apply then nor would Section 117B.

24. It may be that the Judge thought that the Appellant was not a foreign criminal on the basis that he would not fall within the definition of such in section 32 UK Borders Act 2007. However, first, whilst I accept that the deportation regime for EU nationals is the EEA Regulations and not either the Immigration Act 1971 or the automatic deportation provisions of the 2007 Act, in principle the Appellant does not fall outside the terms of the definition in the 2007 Act either as he is not a British national and he has been sentenced to a term of imprisonment of twelve months. The definition there is in similar terms to that in Section 117D. However, I do not need to deal with this point as the Appellant's deportation is squarely based on the EEA Regulations as a result of the earlier deportation decision.

25. For the reasons I give therefore, the Judge has erred by failing to apply Section 117C. Ms Dogra asked me to conclude that such error is immaterial if I accepted there was an error, based on the family and private life which the Appellant has in the UK and the Judge's assessment. I am unable to so conclude. The thresholds in Section 117C are very different from those in Section 117B. Even I were to accept that [SR] and the children cannot be expected to relocate to Poland for the reasons given at [73] of the Decision (and for the present I am not inclined to do so given the difference in the thresholds which apply to that question), there is no consideration whether it would be unduly harsh for [SR] and the children to remain in the UK without him (assuming that is the test which applies depending on their qualifying status). There is also a nuanced difference in relation to the level of the public interest which applies to deportation cases due to the additional public interest in preventing crime and disorder.

26. For those reasons, I find that there is an error of law disclosed by the Respondent's grounds. I find that error of law to be material. I therefore set aside the Decision.

27. I have given consideration to the directions required in this case. I would wish to receive evidence from [SR] at the very least (if she feels able to give oral evidence) and for that reason I consider it appropriate to convene a resumed hearing. I have also considered whether it is necessary to make any directions about the pending application under the EEA Regulations to revoke the deportation order. I have decided not to do so. Although there is some artificiality about considering the Appellant's position only under the Human

Rights Act 1998 and not also EU law, there is as yet no decision which the Appellant is able to appeal on EU law grounds. The Appellant's current appeal is firmly pleaded only on the basis of Article 8 ECHR. Any appeal on EU law grounds against a decision under the EEA Regulations would have to be dealt with first by the First-tier Tribunal. Accordingly, I see no purpose in delaying the consideration of this appeal pending the outcome of the application to revoke made under the EEA Regulations.

CONCLUSION

28. For the above reasons, there is an error of law disclosed by the Respondent's grounds. For the reasons given above, I set aside the Decision. I make directions below for a further hearing prior to re-making the decision.

DECISION

I am satisfied that the First-tier Tribunal Decision of Judge G Clarke promulgated on 31 May 2019 contains a material error of law. I therefore set aside the Decision. I make the following directions for a resumed hearing:

1. **Within 28 days from the date when this decision is sent, the Appellant is to file with the Tribunal and serve on the Respondent any further evidence on which he relies.**
2. **The resumed hearing will be relisted on the first available date after 6 weeks from the date when this decision is sent with a time estimate of ½ day. The Appellant's representative is to inform the Tribunal within 28 days from the date when this decision is sent whether an interpreter is required (and for which language) so that one can be booked and confirm whether any further arrangements are required for the hearing (for example if the Appellant wishes to give evidence by video-link from Poland).**

Signed Dated: 31 October 2019
Upper Tribunal Judge Smith