IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00402/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 22nd February 2022	**On the 29 March 2022**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

SHAMSUL ARAFIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: *Mr D Jones*, instructed by RLegal Solicitors
For the respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of his appeal under the Immigration (EEA) Regulations 2016 against his deportation. I also canvassed with the representatives whether the appellant also pursued an appeal by reference to his human rights as there was a suggestion in the appeal before the First-tier Tribunal that he was doing so. Mr Jones confirmed that I only needed to address the Regulations, as if the appellant failed to succeed under the Regulations, it was difficult to see how, as someone with a conviction resulting in prison sentence of five years, that he would

meet the "very compelling circumstances" test for the purposes of Section 117C(6) of the Nationality, Immigration and Asylum Act 2002.

2. It is accepted that the appellant, a Bangladeshi national born on 23rd February 1981 is the husband of, and in a genuine relationship with, an EEA (Italian) national, 'MG' whom it is unnecessary to name. The couple have two daughters, child 'Y' born on 18th June 2009 and child 'Z', born on 15th January 2012, both British citizens. MG also has a daughter by another man, child 'J', born on 15th July 2019, conceived while the appellant was in immigration detention. It is accepted that the appellant treats J as his own daughter.

3. The appellant entered into a relationship with MG in 2008, shortly after which they began cohabiting. They married on 19th February 2011. The appellant was granted an EEA residence card as MG's spouse on 15th February 2013.

4. On 10th December 2015, the appellant was convicted of assault occasioning actual bodily harm, false imprisonment and two counts of robbery, the circumstances of which are set out in the error of law decision annexed to these reasons and which I do not repeat here, but will discuss in further detail later in this decision. He was released on licence in June 2018, when he was transferred to immigration detention. He was granted immigration bail on 14th May 2019.

5. I do not recite the litigation history in full, suffice it to say that the most recent First-tier Tribunal decision, (of Judge Widdup), which was to refuse the appellant's appeal, was promulgated on 12th December 2019.

6. I set aside Judge Widdup's decision, whilst preserving his finding that the appellant was, as at 12th December 2019, only entitled to the basic level of protection under the Regulations.

The issues in this appeal

7. I identified and narrowed down the legal issues with the representatives. Both representatives assisted in their pragmaticism and their submissions were correspondingly focussed and helpful. Mr Jones accepted two points. First, the appellant was only entitled to the basic level of protection under the Regulations. He had canvassed the possibility at the error of law hearing of seeking to argue an enhanced level of protection but now accepted that the appellant was only entitled to the basic level of protection. Second, at the error of law hearing he had indicated a possible challenge to deportation on the basis that this would hinder the appellant's rehabilitation. However, the appellant's case now was that he was fully rehabilitated. I therefore agreed with the representatives that the remaining issues in remaking the FtT's decision, are:

    8. Whether the appellant's personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct and that the threat does not need to be imminent (regulation 27(5)(c)

of the Regulations), while also noting that his previous convictions alone do not justify deportation (reg. 27(7)(5)(e)) and paragraph 3 of Schedule 1 (the longer the sentence, the greater the likelihood that the individual's continued presence in the UK represents a relevant threat). The representatives had agreed at the previous error of law hearing that this was not a case where the appellant's offences fell within the scenario of R v Bouchereau [1978] ECR 732, namely where there was a present threat to the requirements of public policy, as evidenced by past conduct alone which has caused deep public revulsion. The representatives also agreed that if I was not satisfied that reg. 27(5)(c) was met, it was unnecessary for me to consider proportionality under reg. 27(5)(a), as re. 27(5)(c) was a necessary requirement for deportation taken on grounds of public policy.

9. If the appellant's personal conduct did represent a relevant threat, whether deportation complied with the principle of proportionality and considerations of public policy as set out in Schedule 1 of the Regulations.

The gist of the respondent's refusal

10. The deportation order was made on 24th of May 2018 with accompanying reasons. This was followed by supplementary letter dated 29th of November 2018 in response to a letter before action. The core points taken against the appellant were as follows:

11. The respondent did not accept that the appellant had been resident in the UK for a continuous period of five years prior to his imprisonment on 18th January 2016 as he had only been issued in his EEA residence card on 15th February 2013 and was therefore only entitled to the basic level of protection.

12. In relation to the index offences, whilst the appellant had not inflicted the violence on his victim himself, he had tied up the victim and interrogated him and was present throughout the whole incident. He had made no attempt to stop his victim suffering in a lengthy ordeal.

13. The appellant remained monitored under "level II" multiagency risk management during his license period, for the protection of the public. The nature of his offence may not have been the only contributing factor to the need for monitoring, which may have been influenced by mental health problems, accommodation issues and the appellant's continuing contact with other known offenders.

14. The OASys assessor had found that the appellant posed a medium risk of harm to known adults and children. The OASy assessment was, itself, internally contradictory, as the analysis of specific risks did not support the overall conclusion of a low risk of reoffending.

15. Although the appellant had only be convicted of offences relating to a single incident, there had been two reported domestic violence incidents within the former family home. The first was in December

2014 after which his children became subject to a child protection plan. The second was in February 2015, as a result of which the appellant had since moved out of the family home due to his turbulent relationship with MG, which was linked to his offending behaviour in May 2015.

16. The appellant lacked insight into, and did not accept responsibility for, his actions.

17. Whilst the appellant claimed to have abstained from drugs in prison he had failed to provide evidence of abstinence on release. He had also not undergone offending behaviour courses while in prison.

18. The deportation decision was proportionate. The appellant was 37 years old and had lived in the UK since he was 25 years old and had therefore spent his youth and formative years in Bangladesh. The respondent did not accept that the appellant was socially and culturally integrated into the UK noting the seriousness of his offences. He had not demonstrated that he had supported himself by legitimate employment nor had he provided evidence of significant ties to the UK, including subsisting family ties. There were not very significant obstacles to the appellant's integration into Bangladesh, where he could re-assimilate. He had a mother, father and sister living in Bangladesh with whom he maintained regular contact. He had failed to provide evidence of continuing family life with MG and the three children.

19. Since the two challenged decisions, the areas of factual dispute had narrowed. Ms Ahmed accepted that the appellant had a close family life with MG and the three children, with whom he was co-resident. There was evidence of negative drugs tests since the appellant's release from prison. The appellant had not offended since the index offences.

Documents

20. The parties each provided a bundle which I refer to respectively as "AB" for the appellant's bundle and "RB" for the respondent's bundle. A feature of this appeal is that there was extensive documentation and, as already noted, very limited factual dispute between the parties. Mr Jones also provided a detailed skeleton argument and Ms Ahmed also referred to the two cases of MC (Essa principles recast) Portugal [2015] UKUT 00520 (IAC) and SSHD v Dumliauskas & Ors [2015] EWCA Civ 145. Both representatives also made oral legal submissions which I do not recite in full but have considered and only refer to them where necessary. Both sets of submissions were of great assistance to deciding the case.

The hearing

21. The appellant and MG adopted their written witness statements on which they were cross-examined. I do not recite their evidence in full except where it is necessary to make findings, as set out later in these reasons. I also set out only briefly the gist of the representatives' submissions which,

once again, I will only otherwise refer to where necessary, in reaching my conclusions.

The law

22. I do not add any gloss to the relevant provisions of Regulation 27 and Schedule 1 of the Regulations, which are as follows:

> "Decisions taken on grounds of public policy, public security and public health
>
> 27.- (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends…..
>
> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles —
>
> (a) the decision must comply with the principle of proportionality;
>
> (b) the decision must be based exclusively on the personal conduct of the person concerned;
>
> (c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
>
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
>
> (e) a person's previous criminal convictions do not in themselves justify the decision;
>
> (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.
>
> (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.
>
> …
>
> (8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

SCHEDULE 1 CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

Considerations of public policy and public security

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

Application of paragraph 1 to the United Kingdom

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

(a) the commission of a criminal offence;

(b) an act otherwise affecting the fundamental interests of society;

(c) the EEA national or family member of an EEA national was in custody.

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including—

(a) entering, attempting to enter or assisting another person to enter or to attempt to enter, a marriage, civil partnership or durable partnership of convenience; or

(b) fraudulently obtaining or attempting to obtain, or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

The fundamental interests of society

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

...

(b) maintaining public order;

(c) preventing social harm;

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);

(j)protecting the public…"

The respondent's submissions

23. The respondent relied upon the original reasons for deportation and supplementary letter. Ms Ahmed accepted that there were a number of points in the appellant's favour. First, and whilst she would come on to the seriousness of the offences which were the subject of the deportation order, the appellant had only offended on the single occasion. Second, she accepted that the appellant was at low risk of reoffending, as assessed by a consultant forensic psychologist, Lisa Davies. However, there was a pattern of the appellant previously having abstained from drugs between when he started his relationship with MG in or around 2008 and 2015, only to return to using drugs. The expert report had referred at §3.2.21, page [97] AB, to a well-documented history of using illicit substances including heroin, crack cocaine and marijuana. In addition, the appellant was described as having a history of problematic peer relationships and had committed the index offences with co-defendants (§6.1.1, page [208] AB). The fact that upon the breakdown of his marriage in 2015, the appellant had rapidly progressed from smoking marijuana to becoming addicted to heroin within one month suggested that he was easily influenced and, were there to be any future difficulties in the marriage, the problems may well resurface. Negative peer pressure was a relevant factor in assessing whether the appellant's personal conduct represented a relevant threat.

24. The appellant had sought to minimise both the offence in question and his domestic violence against MG. In particular, the appellant had used a false alibi to unsuccessfully defend the prosecution against him and even now maintained that he was unaware in advance of the crime he eventually participated in notwithstanding the sentencing judge's remarks that it was pre-planned.

25. With regard to domestic violence, both MG and the appellant denied that there had been any domestic violence in relation to an incident in December 2014, despite an ambulance being called in December 2014, as a result of which Y and Z became subject to a child protection plan. It may well have been that MG was downplaying that incident out of her love for the appellant.

26. In relation to the second incident of February 2015, which both parties accepted had taken place, even on the appellant's account he had thrown a vacuum cleaner at or near to MG, as a result of which she had injured

herself in seeking to avoid being it by it. MG's perception that domestic violence did not occur unless the appellant physically struck her or touched her was plainly not correct. This incident had been witnessed by the couple's children and the OASys Report at internal page [21], (page [K25] RB), at §11.10, had referred to the appellant having temper control issues with concerns about violent behaviour towards MG.

27. Even where, as here, the risk of reoffending or harm to MG was low, the consequences if that risk materialised were serious. That, coupled with only the basis level of protection, meant that the appellant's personal conduct did meet the relevant test. The threat did not need to be imminent. The seriousness of the index offences was reflected by the lengthy prison sentence of five years. Whilst Ms Davies had assessed the appellant's family as being a mitigating factor in relation to the threat which the appellant's personal conduct represented, the appellant and MG had not received any marriage guidance counselling. The appellant had only returned to the family home for a year since he was released from immigration detention. There was limited evidence that he had attended rehabilitation courses to adequately address the relevant threat in that period. Whilst he had referred to attendance with an external organisation, the Forward Trust, linked with a course that he had attended in prison, there was limited evidence of ongoing engagement. Even though it was accepted that he had since obtained periodic negative drugs results, they were not conclusive.

28. In respect of the proportionality, the more serious the consequences of the relevant threat, the greater the weight to be attached to the public need to interfere with the appellant's EEA rights. This was emphasised in headnote (10) of MC (Essa principles recast) Portugal.

29. In terms of integration, noting the authority of SSHD v Franco Vomero (Italy) [2019] UKSC 35, the weight to be attached to the appellant's integration in the UK was reflected in the basic level of protection to which he was entitled, in circumstances where he did not have permanent residence in the UK.

30. In that context, he had left Bangladesh aged 25 and had parents and a brother still living in Bangladesh. His mental health was stable. There was no suggestion that he would not be able to return to Bangladesh and thrive. There was no corroborating evidence that while he was in prison, his children had been bullied. They and MG would have the support of her family in the UK, in the event of the appellant's removal.

The appellant's submissions

31. As already agreed, the risk of the appellant reoffending was low and at the time of the OASys Report of May 2018, the appellant was assessed as posing a medium risk to known adults. Even that higher risk was in 2018 was historic and had since decreased further, as assessed by Ms Davies. She did not anticipate the appellant experiencing future difficulties in abstaining from drugs. He had responded well to interventions, over a

prolonged period. Even in a custodial setting where access to drugs was easy, the appellant had positively abstained from drugs.

32. Ms Davies had produced three reports, updated over time, which assessed the appellant before and after his return to the family home. Ms Davies therefore had particularly detailed insight into the appellant's progress and the stability of his rehabilitation. She now considered the risk that the appellant posed to be in the low range and she identified protective factors as being high in number, including his development of empathy and motivational factors; his acknowledgement of the importance of employment; the realistic life goals that he had set; and his adherence to monitoring and licence conditions. He was in a stable intimate relationship with MG.

33. The appellant did not in any way downplay the seriousness of his offending but the appellant was rehabilitated. The respondent had failed to assess the appellant's integration, in the UK, citing merely his criminal offences as the sole justification for deporting him. As now accepted, the respondent's assessment ignored the existence of family life, which had now endured for many years, including before the impugned decisions.

34. The appellant had not offended since the index offences and had abstained from drugs since being imprisoned. He had been a model prisoner and had engaged with the probation services and the Forward Trust, a drugs rehabilitation charity, on release from prison. He had completed the terms of his licence successfully. He did not associate with previous negative peers and had rediscovered his Muslim faith. When initially released from prison, he had found employment and was only prevented from continuing to work by the terms of immigration bail. He did not have a "criminal career" lifestyle. He lived in the family home and supported MG in looking after their children.

35. In terms of the threat posed beyond the risk of the appellant reoffending, namely harm to MG or their children, Merton Borough Council had carried out 47 assessments and no longer had nay concerns. They had permitted him to return to the family home and had closed their files.

36. As assessed by Ms Davies, the appellant was in the low range in terms of risk of committing further categories of serious harm; at low level of risk for future violent offending; at low level of risk for future intimate partner violence; and at low risk of causing serious harm.

37. This was not a Bouchereau case, as already accepted. While not downplaying the seriousness of the index offences, the sentencing judge had accepted that the appellant was a hardworking family man, without previous convictions and that the offences were wholly out of character.

38. The respondent had carried out a flawed assessment of the appellant's rehabilitation, only focussing on negative factors which Ms Davies had quite properly included in her assessment but had nevertheless reached the conclusion that he was at low risk. Moreover, the respondent had

impermissibly applied too high a test, requiring a "guarantee" that the risk of recidivism was reduced.

39. The respondent's assessment of the appellant's lack of remorse was also inadequately reached, when, as was clear, the pre-sentencing report of 15th January 2016 at page [180] AB clearly recorded that the appellant said that he felt ashamed and embarrassed by the index offences.

40. The respondent had changed her position, since the impugned decisions, and had accepted the existence of family life. The decisions had therefore failed to engage with the impact on family life. Even if the appellant had family members in Bangladesh, that ignored the impact on the appellant's UK family.

41. Whilst the appellant recognised the permissibility of considering the severity of the index offences, the respondent's decisions did not reflect the circumstances at the time or now. The respondent had not considered the mitigating factors in relation to the appellant's family, his substantial rehabilitation and she had focussed only om the negative risk factors, not the overall assessment in the OASys report.

42. It was right to focus on the breakdown of the appellant's family life, which had led to the appellant becoming a heroin addict, but there was no suggestion that despite the references to a "history of drug use," that he had taken class A drugs before the family breakdown. Ms Davies and the OASys assessor had referred to the appellant's cannabis use, when he was a child, aged 16 to 17 and occasional cannabis use up to the period when his relationship with MG became serious in 2008. That was in a different category to the appellant becoming addicted to heroin and crack cocaine, which was the context of the index offence in May 2015, following the family breakdown in February 2015. The appellant himself had volunteered his occasional cannabis use in the past. He was now entirely abstinent from all drugs and had been so for six years. The respondent's previous assertion that there was no evidence of rehabilitation was contrary to the clear chronology of rehabilitation over many years. This began when the appellant was on remand, as detailed in the pre-sentencing report at page [352] AB, which described the appellant as having promptly undertaken methadone treatment (§3.2.24 of Ms Davies' first report dated 31st August 2018, page [195] AB). He had managed to abstain from drugs notwithstanding the obvious availability of drugs in prison, even affecting those who had not previously taken drugs. The ready availability of drugs was confirmed in the report by the Centre for Social Justice, at page [399] AB. The fact that the appellant had abstained both during and after imprisonment suggested a genuine rehabilitation, that should not be minimised. His engagement in rehabilitation was corroborated by the glowing references from the prison authorities at pages [285] to [287] AB. He had become an "enhanced prisoner," who was given a position of authority including assisting other prisoners to read.

43. The fact that the authorities regarded it as no longer necessary to test him for drugs on release from prison, while still on licence, was testament to their assessment of the low risk that he would return to drugs use. The appellant had, of his own initiative, subsequently taken drugs tests, which was further testament to his rehabilitation. The period in which he had not been tested, following his release, until he sought drugs testing, should nor fairly be held against him.

44. Contrary to Ms Ahmed's submissions, there was evidence of the appellant's involvement with the Forward Trust, both documentary (it was accepted that this was more limited) and the appellant's oral evidence. The absence of documentary records about the appellant's attendance at these regular events did not make his oral evidence unreliable. Moreover, his engagement in rehabilitation via the Forward Trust was consistent with his activities whilst in prison and his abstinence from drug use within that setting. It was also consistent with, and in the context of, his renewed relationship with MG and his children and the pattern of him turning his life around. The records at page [288] AB onwards showed the various qualifications he had obtained and the courses that he had attended. All corroborated his determination to address the consequences of his actions. Ms Davies had been able to assess him as early as 2018 through to 2022. She had been able to assess the reduction in his risk from an already low level.

45. Moreover, it was not as if the appellant had returned straight from imprisonment to the family setting. Ms Davies had recognised that his return to that family setting might not be best straight away and instead, the appellant had a period of reflection whilst he was living in a separate location but visiting the family regularly. MG herself had attempted over an extended period to have the family reunited, which was initially put on hold. Nevertheless, Merton Borough Council had allowed the couple to reunite and had carried out a large number (47) of family visits to satisfy themselves that it was appropriate for the appellant to return to the family home.

46. Ms Davies had also assessed the possibility not only of reoffending but in particular the risk of domestic violence to MG, which she had assessed as being of low risk. There was no concern that MG was vulnerable and would be put under pressure to conceal abuse. Whilst MG may have a narrow view of what domestic violence meant for the purposes of the law, nevertheless she was very clear that the incident in question had not recurred since 2015 and that the relationship was now a good one. Ms Davies herself had concluded that the family unit would benefit from the appellant's return. This was corroborated by London Borough of Merton's own assessment at page [150] to [151] AB.

47. The two factors raised validly by the respondent as of concern, namely the context of family breakdown and domestic violence, and previous drug use and return to that drug use after a period of time, were answered by compelling evidence. Indeed, the appellant not only relied upon the stable family relationship and abstinence from drugs over an extended period,

but also his changed attitudes, cultural connections, a renewed adherence to his faith, meditation and mindfulness, all which provided him with coping mechanisms even if the family relationships became fraught.

48. Finally, if the appellant's personal conduct represented a relevant risk, it would be disproportionate to deport the appellant. The reality was that MG could not be expected to leave the UK and given the couple's limited financial means, the appellant would be separated from his children. They had predictably suffered during the appellant's imprisonment even where, during that period, they had regularly visited him in person. Were he deported such physical visits would not be possible and the family would, in reality, be fractured. Finally, were the appellant's appeal to succeed he would be living under a "sword of Damocles" in a sense that if he committed any further offence, the respondent would have the right to revisit his previous offending under domestic law.

Findings and conclusions

49. On a preliminary point, I regarded the appellant and MG as credible witnesses, careful to clarify and correct where they did not understand questions and measured in their responses. The appellant did not in any way before me seek to minimise the index offences and reiterated his embarrassment and shame at them. Whilst the sentencing judge had described the offences in question as being pre-planned, I did not regard the appellant's dispute of knowledge that the offence was pre-planned as minimising his offence. I accept Mr Jones's submission that, without condoning the offence in any way, he was not the lead actor in the offence albeit, as he accepts, he could and should have called the police or asked for help rather than actively bind his victim and then question him, while standing by and watching his victim being subjected to a terrifying ordeal, including physical violence. As Mr Jones accepts, the gravity of the appellant's offence is reflected in his substantial prison sentence.

50. I also similarly did not accept Ms Ahmed's submission that MG sought to minimise the domestic violence against herself. Whilst MG was under a misapprehension that there was not domestic violence unless she were physically assaulted in some way, she was nevertheless able to describe in detail, after some initial confusion about which event she was referring to, the events in question. It is clear from the OASys report that child protection proceedings were instigated in December 2015 as a result of an ambulance crew attending the family home and I accept MG's evidence that this was in the context of her having suffered a panic attack. The appellant himself called the ambulance and the ambulance crew were concerned about the state (or disarray) of the home setting, rather than domestic violence against MG. The appellant accepts that the event of domestic violence took place in February 2015, as a one-off instance.

51. Merton Borough Children's Services initially were not willing for the appellant to return to the family home and were concerned about MG declining an assessment and the couple lacking the insight into possible risks of domestic violence (see their report at page [147] AB).

Nevertheless, the report also assessed the children as having strong bonds with the appellant (page [151] AB) with age-appropriate, responsive and warm interaction between them. The assessment continues at page [154] AB that the Probation Service had not raised any concerns after a two-year monitoring period, that the appellant was a risk to the community. There was no risk in the view of the Children's Services' author that the appellant would be a risk to his family. The report continues (page [154 AB):

> *"I therefore conclude that I have found no information or evidence to suggest that Mr Arafin's return home would place his family or Mrs Arafin at risk and it would appear that he could return may be of support to his family. However, as DV is reported to have occurred in the police report - I have asked the parents to agree how they will manage disputes going forward (which they have shared above) and I have shared our bottom lines with both parents and if DV had ever occurred I would not expect this to continue and that if a concern was received of that nature Merton Social Care would review this against the child protection threshold."*

52. The author's recommendation was therefore to close the case and the assessment was completed on 11th January 2021. They recorded that the children had reported no concerns regarding their father's visits and they were looking forward to him coming home. Overall, no concerns had been identified during 47 investigations and during the assessment. The author's manager (a more senor social worker) was in agreement with the social worker's recommendation.

53. I also accept the clear evidence that the appellant has abstained from all illicit drugs use since the index offence in early 2016. The respondent has not substantively challenged this, and at its highest, Ms Ahmed points out that the subsequent negative drugs tests may not be determinative. The tests in question are 15th June 2021 at [16] to [19] AB and 6th October 2021 at pages [10] to [15] AB. Whilst the appellant was in prison before transfer to immigration detention, he also was regularly drugs-tested and was found to be negative. I do not draw any adverse inferences from the lack of drugs tests between the appellant's transfer to immigration detention and subsequent release and the voluntary drugs tests on 15th June 2021. These are a reflection of the lack of concern by the Probation Service about the risk posed by the appellant and not one for which he can be criticised.

54. I also accept Mr Jones's submission that the appellant cannot be fairly criticised, for example, in not adducing evidence of fortnightly discussions with members of the Forward Trust. In particular, Ms Ahmed's criticism was that the documentary evidence of his post-release engagement was limited to two particular documents, pages [172] to [173] AB which referred to the Forward Trust reunion event which was remote via Zoom on 4th December 2021 and a subsequent email between the appellant and somebody working for the Trust of 4th January 2022. However, first, that criticism takes the two documents out of context and it is clear that the appellant is unlikely to have been invited for the first time to these two events but rather will have been part of an ongoing engagement between the appellant and the Trust.

55. Second, those two documents are in the context of the appellant's wider positive engagement with various different services and support networks whilst in prison and upon release. For example, there is the correspondence from the drug and alcohol practitioner for the Forward Trust of 19th January 2018 at page [285] AB where this described his having shown a very good reflection on the link between his substance misuse and his index offences and being due to start a family ties group programme. It described the appellant as keen to engage with all of the groups that the Forward Trust provided and working in the kitchen prisons full-time, where he had been helpful, and was studying for a management qualification. There was earlier correspondence from the catering manager whilst the appellant was in prison of 4th September 2017, describing the appellant as very hardworking and reliable (page [287] AB) and from the Open School Trust dated 20th October 2017 at page [288] AB which confirmed the appellant's enrolment in a management training course. He was also involved in restorative justice training courses for which he received various employment-related qualifications relating to food hygiene and preparation.

56. I further accept Mr Jones's submission that the appellant's engagement in rehabilitation goes beyond mere abstinence from drugs and his return to the family home. Ms Davies, a consultant whose expertise is unchallenged, describes the sustained change in the appellant's motivation and insight and the quality of the relationships with his family. I place particular weight on her report, noting that she has had the opportunity of assessing the appellant over a number of years. She has assessed not only the appellant but also MG and describes at §3.3.4 (page [28] AB) the happiness of the couple and their children in being reunited as a family. At §3.3.5, she describes the appellant as visibly brightening when discussing his children and in particular the role he took in supporting them, as well as their achievements at school. She assessed his engagement with supervision and monitoring which he had completed on 9th December 2020 (§3.3.7, page [29] AB); his work before the imposition of immigration bail conditions (§3.3.8); and his close positive peer relationships. She analysed these friendships in detail, noting that these friends were hardworking with families of their own and he was not in touch with those negative peer associates which had resulted in his previous offending. He had clear goals and plans including wishing to buy a house in a number of years' time. The couple were saving for a deposit, and he had plans to start a specific business relating to food for which he had training. Ms Davies also analysed any cross-addictive behaviours, in a level of detail right down to the appellant's diet, caffeine consumption, exercise, sleep patterns, meditation, book reading and spending time with his children.

57. I accept too Mr Jones's central criticism of the respondent's analysis of the expert reports, that the analysis had focussed only on the negative factors and not Ms Davies' overall conclusions that the appellant presented a low risk. Ms Davies discusses, for example, at §4.4.1 (page [33] AB) the appellant's past use of violence and history (which I infer to mean historic) of problematic peer relationships as well as the infidelity and violence in

his relationship with MG. Nevertheless, MG went on to consider the significant factors which mitigated the relevant risks. In relation to MG, Ms Davies is clear at §5.3.2 that MG was not considered to have any known barriers to security and did not live in an unsafe domestic situation. She was not socially isolated and she did not lack access to inter-personal resources and was in contact with her family. She had the capacity to take self-protective action and did not condone or support the use of violence. She had no mental health concerns that would interfere with her ability to take self-protective action should the appellant become abusive towards her. Ms Davies identifies further protective actions as including the appellant's development of empathy, coping and self-control; his prospective ability to work, with no current financial concerns; the appellant's engagement in mindfulness and meditation; no negative attitudes towards authorities; and clear goals. The appellant has positive social support from peers in his local community, has distanced himself from people with whom he had associated when offending, has reconciled with his wife and has returned to worship at his mosque.

58. In conclusion, Ms Davies assesses the appellant's risk as significantly reduced whilst he remains abstinent from drugs and any problematic peer associations. She notes that he has demonstrated the ability to do both, including having abstained from drugs since 2016. In that context, she assesses the likelihood of him returning to drugs use as low (§8.2, page [43] AB) and the risk of further acts of serious harm as being within the low range. She assesses there to be a similarly low risk of future intimate partner violence. There are a high number of protective factors as already outlined.

59. I accept Ms Ahmed's submission that the statutory assessment of personal conduct goes beyond an assessment of whether a person is likely to reoffend or not. Clearly, the context of domestic violence as to which there has been no prosecution would be one such factor. I also accept her submission that even where there may be a low risk, where, as here, the seriousness of the offending if the risk crystallises is significant it is potentially capable of amounting to a relevant risk. This is reflected in the length of the appellant's prison sentence, noting paragraph 3 of Schedule 1 of the Regulations.

60. However, having considered all of the evidence in the round, I am satisfied that the respondent's personal conduct no longer represents a genuine, present and sufficiently serious threat, so as to meet the requirement of regulation 27(5)(c). I accept that the threat does not need to be imminent and I also accept that the appellant's index offences were of a gravely serious nature. However I accept, without excusing the nature of those offences in any way, they were in the context of specific circumstances, namely the breakdown of the appellant's relationship with his family, and his starting to use class-A drugs, in circumstances where he had never taken drugs of that nature. As the sentencing judge remarked, the appellant had previously been of good character. I am satisfied that he is rehabilitated, as demonstrated by his long journey, over many years, to address not only his substance addiction also the risk factors that might

otherwise exist in the event that there are further strains on the family relationship. I am satisfied that notwithstanding the seriousness of the index offences, that the appellant's personal conduct, namely the domestic violence in February 2015 and the index offences in May 2015, no longer represents a genuine, present and sufficiently serious threat.

61. Ms Ahmed accepted that were I to reach this conclusion, that this would be determinative of the appellant's appeal in his favour. Nevertheless, had I concluded differently, I would have concluded that the deportation order was disproportionate. Whilst on the one hand I accept the significant weight in the public policy considerations, bearing in mind the seriousness of the appellant's offending, I accept Mr Jones submission that the appellant is significantly integrated both culturally and societally in the UK, not only as part of a close family network, but noting paragraph 2 of Schedule 1 of the Regulations, having worked for many years; and with close friendship groups in his immediate environment and with the wider community. That integration has been re-established during the appellant's rehabilitation since 2016. It is evidenced by his engagement with the Forward Trust after his release from prison. These integrative links were formed before the index offences. As already discussed, the threat that the appellant's conduct represents has been substantially reduced. The fundamental interests in maintaining public order and preventing societal harm are correspondingly reduced. Moreover the consequences of the appellant's deportation would be to sever the appellant's relationship between MG, his children and himself, in circumstances where the family's resources mean that they would be unable to travel to visit him in his country of origin, Bangladesh with which they have no connections. They have maintained a close family relationship throughout the period of the appellant's imprisonment including with regular face-to-face visits. I accept that the consequence of deportation would be akin to a bereavement in all meaningful senses. While no specific vulnerabilities have been identified in respect of the children, the impact on them of the appellant's deportation would be of significant and enduring emotional distress.

Conclusions

62. On the facts established in this appeal, the appellant's personal conduct does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It follows that his deportation would breach his rights under the Regulations. It is unnecessary to reach any conclusions in respect of the appellant's rights under the ECHR.

Decision

63. The appellant's appeal under the Immigration (EEA) Regulations is allowed.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **2nd March 2022**

ANNEX: ERROR OF LAW DECISION

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00402/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd November 2021	**On**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

SHAMSUL ARAFIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: *Mr D Jones*, instructed by RLegal Solicitors
For the respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 2nd November 2021.

2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Widdup who, in a decision and reasons promulgated on 12th December 2019, dismissed the appellant's appeal against the

respondent's decision to refuse his human rights claim. The appellant had made his human rights claim in the context of a deportation order having been made against him on 24th May 2018, under regulation 23(6)(b) of the Immigration (EEA) Regulations 2016. The respondent made a deportation order after the appellant's conviction and subsequent sentence on 18th January 2016 to five years' imprisonment. The index offences were assault, false imprisonment and robbery. The appellant had a "basic" level of protection under the Regulations. He is a Bangladeshi national who was previously an overstayer in the UK, but who had married an Italian national, said to be exercising treaty rights in the UK, in 2011. He had never obtained a residence permit and the parties accepted that the appellant's continuity of residence, for the purposes of the level of protection under the Regulations, was broken because of his imprisonment.

3. The gist of the issue under the Regulations before the judge was whether the appellant's personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, considering the appellant's past conduct, and noting that the threat did not need to be imminent (regulation 27(5) of the Regulations). The appellant asserted that his conduct did not represent such a threat. He relied, amongst other evidence, on an independent expert psychologist's report, by Ms Lisa Davies. She had had assessed the risk of the appellant committing further violence, including against his wife and the wider community to be moderate, if he abstained from taking drugs and his wife did not confront him about his suspected infidelities. The respondent's position was that the appellant had played a significant role in the index offence, a pre-planned and prolonged incident, which involved tying up his victim and interrogating him, while others mistreated his victim, which the appellant made no attempt to stop.

The judge's decision

4. The judge considered the sentencing remarks of HHJ English and an OASys assessment. The judge reminded himself of regulation 27(5) at §69 of his decision and that a person's previous convictions do not in themselves justify deportation. The judge identified at §71 that the personal conduct which was the subject of the appeal was the appellant's violence, as demonstrated in his offending in 2016. At §72, the judge referred to the sentencing remarks, which described the appellant's role in what his victim was subjected to, during an ordeal lasting eight hours. At §73, the judge noted that an aggravating sentencing feature was that the appellant pleaded not guilty and called witnesses to provide a false alibi. At §§76 to 86, the judge considered the OASys report as well as the report of Ms Davies. The appellant had not taken responsibility for his offences, as he had suggested that the victim was "exaggerating". The OASys assessment indicated a low risk of reoffending, in the context of the appellant's abstinence from drug use since his sentencing in January 2016. At §86, the judge noted the appellant's past drug use and the possibility that he might use drugs again in the future. The judge had no hesitation in finding that the offence was a matter of great seriousness and the

appellant's conduct constituted relevant threat, in view of the risk of repetition of violence. The criteria in regulation 27(5)(f) applied, as the appellant's deportation was said to be preventative.

5. Having considered the evidence, the judge found that the appellant's deportation was proportionate, by reference to his human rights. In doing so, he considered the appellant's relationship with his children but also noted that following the breakdown in the appellant's marriage to their mother in February 2015, in the context of domestic violence, their interests were met by their mother caring for them in the UK. It would not be unduly harsh for the children to live in the UK without the appellant. He continued to pose a moderate risk to them, particularly if he resumed his use of drugs.

The grounds of appeal and grant of permission

6. The appellant lodged grounds of appeal that were initially rejected by both the First-tier and of the Upper Tribunals. However, the last refusal was the subject of a 'Cart' judicial review application and following the order of Holman J, case reference CO/1335/2020, who granted permission to apply for judicial review on one ground only, the Vice President, Judge Ockelton granted permission to appeal but on one ground only, namely the ground identified by Holman J. In his order dated 3rd February 2021, Holman J had stated: "The application for permission to apply for judicial review is granted on ground 1 only". His observations noted:

> "1. I am just [original emphasis] persuaded that the claimant has raised a sufficiently arguable case that the judge misapplied the relevant regulation 27(5) and that permission should be granted on ground 1. But for the reasons given by each of the First-tier Tribunal Judge and the Upper Tribunal Judge [in relation to the permission applications] I am not persuaded that the judge's consideration of the domestic Immigration Rules gives rise to any discrete ground under ground 2."

7. As a consequence of the appellant's success in his 'Cart' judicial review application, the Vice President granted permission in a decision dated 30th August 2021. In his decision, he stated:

> "1. Permission is now granted in the light of the remarks of Holman J.
>
> 2. I direct that the application for permission to appeal does not stand as the notice of appeal.
>
> 3. The appeal is limited to the issue identified as arguable in Cart terms in §1 of the decision of Holman J.
>
> 4. The parties are reminded that the Upper Tribunal's task is that set out in Section 12 of the 2007 Act."

Preliminary issue

8. Mr Lindsay identified at the beginning of the hearing a preliminary issue, namely that the appellant had not served any further notice of appeal. As the application for permission did not stand as the notice of appeal, there was no notice before me. However, he was neutral on whether any application for an extension of time should be granted and was similarly

neutral on whether such a written notice had to be in a particular form. He accepted that the respondent would not suffer any prejudice if time were extended and we proceeded today, as the respondent was fully aware of the nature of the appeal. Mr Jones therefore wrote put in manuscript a notice of appeal, which was handed to Mr Lindsay and me. The explanation for the failure to apply earlier was an innocent error, and there was no prejudice to the respondent. I granted his application to extend time to file and serve the notice of appeal, and we proceeded with the hearing.

The appellant's challenge

9. The appellant's ground was sub-divided into three grounds, as they had been before Holman J, all of which had been permitted to proceed. My summary of these sub-grounds is as follows.

10. First, the judge had erred in his analysis at §86 of his decision, in relying upon the seriousness of the appellant's past offence to inform his conclusion that the conditions of regulation 26(5)(c) were met. Past conduct may constitute a threat to the requirements of public policy only where the most "heinous" of crimes, which are especially horrifying and repugnant to the public, had been perpetrated. He referred me to the authorities of SSHD v Robinson (Jamaica) [2018] EWCA Civ 85, §17 and R v Bouchereau [1978] ECR 732. The judge nor the respondent had characterised the index offence as falling within the Bouchereau scenario, namely one where there might be a present threat to the requirements of public policy, which, in an extreme case, was evidenced by past conduct alone which has caused deep public revulsion.

11. Second, the judge was irrational in assessing the risk posed by the appellant's conduct on the mere possibility that the appellant may use drugs again, which was also indicative of the judge applying a standard of proof incompatible with the usual civil standard of the balance of probabilities.

12. Third, the judge's decision was contrary to all the evidence before him, with which he had not engaged, namely the appellant's abstinence from drugs since the index offence, including during his imprisonment, despite drugs being rife there. The evidence was also of the appellant undergoing rehabilitation courses relating to drugs use and offending behaviour courses. He had undertaken tests throughout his imprisonment which were consistently negative. The Prison Service itself had written to the appellant's probation officer on the point of release, advising that because of his positive progress, there was no further need for drugs tests. The judge's conclusion on the risk that the appellant would return to drugs use was contrary to the available evidence. Where the judge had reached such a contrary conclusion, it was incumbent on him to explain why, engage with the evidence to the contrary and resolve that contradiction in his findings.

The hearing before me

The appellant's submissions

13. While I summarise Mr Jones's submissions, I have considered them in full. He reiterated that the weight that the judge attached to the seriousness of the index offence implied a reliance on past offending alone. While that was possible in a case analogous to Bouchereau, this was not such a case. When I canvassed with Mr Jones whether the judge had referred not only to the seriousness of the offence, but the risk of reoffending, he pointed out that the second and third errors applied to the judge's analysis, as the risk was said to relate to the risk that the appellant would return to his use of drugs, which was insufficiently analysed or explained in the context of contrary evidence, and where the findings were made applying the wrong standard of proof.

14. I canvassed with Mr Jones whether he was suggesting that the judge had erred because for conduct to represent a genuine, present and sufficiently serious threat, it must be more likely than not that an offender would reoffend, absent a Bouchereau scenario? He did not go that far but said that it had to be more than a "possibility based on a possibility" – in this case, the possibility that the appellant would take drugs, which in turn would result in the possibility that he would reoffend. The judge needed to grapple with the position advanced in direct opposition to that, namely no evidence of historic use prior to the immediate circumstances of the index offence and the breakdown of the appellant's marriage; and no evidence following the appellant's conviction for the index offence, while the appellant was in prison for two and a half years; no evidence of dependency; and abstinence despite the ready availability of drugs in prison and the appellant's substantive engagement with various rehabilitation programmes. None of that evidence had been analysed or explained.

15. In summary, the judge had failed to engage in the evidence. He had assumed a return to drugs use, without informing his assumptions. That was not a proper basis for regulation 27(5) being met.

The respondent's submissions

16. Also in summary, Mr Lindsay accepted that this was not a Bouchereau case. The judge had never treated it as such. He had not assessed whether the appellant's conduct represented a genuine, present and sufficiently serious threat, based on past conduct alone. The judge had clearly considered not only the seriousness of the index offence, but also the risk of the appellant reoffending. The judge was entitled unarguably to consider both factors in an holistic assessment. Indeed, making such an holistic assessment, he had considered factors which were favourable to the appellant. These included the lower risk while the appellant was clean from drugs and the rehabilitation courses undertaken by the appellant when in prison. The judge was nevertheless entitled to consider, and be concerned by, the lack of drugs tests after the appellant's release from prison, to confirm that the appellant was drugs-free.

17. The judge was entitled to assess whether so-called "dynamic factors" relevant to offending (in this case, drugs use) might change. That was not a misapplication of the standard of proof. The standard of proof was that the appellant's conduct met the relevant test on the balance of probabilities, but what the judge had considered was a chance of reoffending; and in the event of reoffending, the serious consequences of that offence. That was not an error. The appellant's reference to the evidence which supported his abstinence was a mere disagreement with the judge's findings. There was no need for the judge to refer to each part of the evidence.

Discussion and conclusions

18. I am conscious that I will have not heard the evidence and had the ability to analyse it in the same way as the judge. The assessment of the evidence and the weight to be attached to it is inherently fact-sensitive. Provided that findings or conclusions are adequately explained, mere disagreement with the weight a judge attaches to evidence, or his conclusions, does not amount to an error of law. A judge does not need to refer to all the evidence they have considered.

19. The parties accept that the appellant's index offence, of the utmost seriousness though it was, has never been argued to be so "heinous" that the fact of it alone meets the test under regulation 27(5). I accept the force of Mr Lindsay's submission that the judge did not regard the offence as such, nor can such reasoning be implied. The judge expressly referred to both the seriousness of the index offence and the risk of the appellant reoffending, at §86, having considered evidence said to relate to the risk of reoffending:

> "I take those assessments into account. In light of the Appellant's past drug use, and the possibility that he might again use illicit substances, I have no hesitation in finding that the offence committed by the Appellant was a matter of great seriousness and the Appellant constitutes a genuine and genuine and present threat in view of the risk of repetition of violence by the Appellant. There is a consequent need to protect the public."

20. The first aspect of the challenge, namely that the judge implicitly considered the offence to be analogous to Bouchereau, so that the index offence alone was treated as a sufficient reason, is plainly unsustainable. The judge's reasoning expressly follows on from his consideration of the evidence in relation to risk and refers expressly to risk as a relevant factor.

21. The second aspect of the challenge, that the judge had impermissibly applied too low a standard of proof, ignores the judge's consideration of risk based on the "dynamic factor" of drugs use. Such an assessment may be carried out in an OASys analysis, which in turn may provide an assessment of the chances of reoffending, and in the event of reoffending, the level of harm. The judge expressly acknowledged the dynamic nature of the risk posed by drugs use at §83:

> "Causing serious harm to another was said to be unlikely whilst the appellant was abstinent."

22. The judge was also manifestly alive to the distinction between the risk of reoffending and the level of harm caused in the event of reoffending, also in §83:

> "…the likelihood of the appellant committing further acts of serious harm falls into the moderate range at the current time."

23. In referring, as the judge did, to the future possibility of drugs use, I do not accept that the judge applied an impermissibly low standard of proof – the test being, as Mr Lindsay accepted, whether, on the ordinary civil standard the respondent has shown that the appellant's personal conduct represents a genuine, present and sufficiently serious threat. That is not the same as an assessment of whether it is more likely than not that the appellant will reoffend, and Mr Jones cited no authority to that effect. The judge was unarguably entitled to consider the dynamic factor which could lead to future reoffending; and the consequences of harm if that risk manifested. That aspect of the ground is not sustained. This is also not a case where a judge could never conclude that the personal conduct represented a relevant threat, and that any conclusion to the contrary was perverse.

24. The aspect of the ground that I do find is sustained, and where the judge erred in law, is in his engagement with, and explanation for disagreement with, the evidence of abstinence from drugs and the likelihood of future drugs use, which in turn fed into the future risk of violence. All the evidence referred to by the judge suggests the appellant's abstinence from drugs while in prison (§80), since his release in May 2019 (§82) and the consequential low risk of reoffending (§80). The only further point the judge engages with is the apparent absence of testing after the appellant's release from prison (§82), for which the appellant had provided an explanation, with which it does not appear that the judge engaged, or the evidence to the contrary, including Ms Davies's exploration in her expert report about factors which might present risks for future drugs use and the appellant's management of those factors (for example, no longer associating with other drugs users). While it is not incumbent on a judge to refer to each and every aspect of the evidence, the judge did err when he failed to engage with the evidence, which at least on the face of it, supported the appellant's assertion that he had been clean from using drugs since January 2016, other than to note the absence of tests since May 2019, when the appellant was released from prison. As a result, the judge did not sufficiently explain why he concluded that there was a possibility that the appellant would use drugs in the future. In the circumstances, the judge's overall conclusion at §86 is unsafe and cannot stand.

Decision on error of law

25. I conclude that the judge erred in failing to explain adequately his conclusion that the appellant's personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I do not conclude that such a decision was not open to the judge, so as to be perverse; or that the judge applied an erroneous

standard of proof; or that the judge erred in implicitly applying a test of the seriousness of the past offence alone.

26. I preserve the judge's finding (as to which there has been no appeal) that the appellant was only entitled to the 'basic' level of protection under the Regulations. While Mr Jones has indicated that, by analogy to Devaseelan, (Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702) he may argue that continuing residence since the judge's decision may provide a greater level of protection, that will be a matter for further submissions at remaking.

27. Having considered paragraph 7.2 of the Senior President's Practice Statement, the error is not such that it deprived the appellant of a fair hearing before the judge. The issues, while serious, are also narrow, with limited fact-finding. It is appropriate that the Upper Tribunal remakes the appellant's appeal.

Directions

28. The following directions shall apply to the future conduct of this appeal:

    28.1 The Resumed Hearing will be listed face to face at Field House for one day on the **first open date after 18th February 2022,** to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal. No interpreter is needed.

    28.2 The appellant shall have leave to serve and file an addendum report of Lisa Davies, together with supplemental witness statements, in a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which he intends to rely, **not later than 21st January 2022**. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

    28.3 The parties shall serve and file written skeleton arguments not later than **4th February 2022.**

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside, subject to the preserved finding that the appellant was, as at 12th December 2019, only entitled to the basic level of protection under the Immigration (EEA) Regulations. The re-making is retained in the Upper Tribunal. No anonymity direction is made.

Signed J Keith Date: 9th November 2021

Upper Tribunal Judge Keith