IAC-AH-BW-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00558/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th October 2022	**On the 06 December 2022**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MR TOMASZ BOCIANSKI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: The appellant represented himself.
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 26th October 2022.

2. This is the remaking of the decision in the appellant's appeal against the respondent's decision on 12th June 2019 to deport him under the Immigration (EEA) Regulations 2016. The context of this remaking decision is my error of law decision which was sent to the parties on 26th February 2021.

Issues and concession

3. I am grateful to Mr Clarke for both the clarity of his submissions and his pragmatism, when assisting this Tribunal in ensuring that the appellant, as a litigant in person, was able to participate in this hearing. At the beginning of the hearing, I discussed with Mr Clarke the first issue before me, which was the level of protection to which the appellant was entitled under the 2016 Regulations. It had been in dispute as to whether he was entitled only to the basic level of protection, as opposed to what is termed 'serious grounds' protection pursuant to Regulation 27(3) of the 2016 Regulations.

4. Mr Clarke formally conceded that the appellant was entitled to the so-called 'serious grounds' level of protection, on the basis that the respondent accepted that the appellant had exercised EU treaty rights between 2006 and 2012 and had permanent residence. In those circumstances, the first contested issue that the First-tier Tribunal ('FtT') had considered was no longer in dispute.

5. I turn to the second question of whether the appellant's personal conduct represented a genuine, present and sufficiently serious threat for the purposes of regulation 27(5)(c) of the 2016 Regulations. This was in the context that the appellant had separately brought an appeal by reference to his right to respect for his family and private life under article 8 ECHR. Without making any formal concession on this issue, Mr Clarke referred to the narrowness of the issues that had been before the FtT. He accepted that he may be in substantial difficulties in resisting the appellant's appeal based on serious grounds of public policy. I canvassed with him if it would be appropriate to consider, as a preliminary question, whether the appellant's personal conduct represented a relevant threat, which Mr Clarke accepted must be at the date of this hearing. In assessing such a threat, I was mindful that the threat need not be imminent, and that that the appellant's previous criminal convictions do not in themselves justify the decision. Mr Clarke agreed that it was appropriate and proportionate to see if it were possible to resolve the appeal on the preliminary question of relevant threat first. If I concluded that the appellant's personal conduct no longer represents a relevant threat as a 'gateway' question, the appellant's appeal should succeed under the 2016 Regulations. He also agreed that if the appellant succeeded under the 2016 Regulations, it was unnecessary for me to reach a decision on the appellant's human rights appeal.

Evidence

6. I briefly heard from the appellant who gave oral evidence in Polish, via an interpreter, and also from his sister who gave evidence in English. Their evidence was not challenged. Without any intended discourtesy I do not recite all of their evidence but simply summarise its gist. The summary is that following his conviction, the appellant's licence period had ended in July 2021 and he had complied fully with the terms of that licence. Moreover, he had never been the subject of any prison adjudications whilst in prison and has never reoffended since the index offence. He had not undertaken any rehabilitation, because he was unaware of the opportunity

of doing so, either whilst in prison or on release. He did, however, candidly maintain his innocence in the index offence. For her part, the appellant's sister reiterated the pivotal role that the appellant played in assisting with the care of her children. Without that care, her circumstances would be very difficult and she would have to give up work. However as Mr Clarke points out the appellant had similar caring responsibilities for his child by a previous relationship which has now ended and that had not prevented him from committing the index offence.

The parties' submissions

7. I move on to the parties' submissions.

8. On behalf of the respondent, although there were no preserved findings and the FtT's reasons on the issue at §45 to 50, were very limited, I should consider the analogous case of Jarusevicius (EEA Regulation 21 – effective imprisonment) [2012] UKUT 120. To meet the test of a sufficiently serious threat, the personal conduct did not have to be one that either involved sexual or other violence. In Jarusevicius, the deportee had been sentenced to imprisonment for 42 months, for handling stolen goods, and the personal conduct was sufficiently serious to engage "serious grounds."

9. Mr Clarke turned to remarks of the sentencing judge for the index offence, and the fact that the quantity of the tobacco which was seized, weighed some 14 metric tons, with a potential value of £6.8 million. In that context, the following fundamental interests of society, as per paragraph 7, Schedule 1 of the 2016 Regulations, were relevant: maintaining public order; preventing the evasion of taxes and duties; maintaining public confidence in the ability of relevant authorities to exclude or remove an EEA national with a conviction; tackling offences likely to cause harm to society, where there was wider societal harm such as offences with a cross-border dimension; and protecting the public. In this case, while there be no express reference in the sentencing remarks to cross-border issues, there must practically have been such a cross-border operation given the quantity of the tobacco seized.

10. The personal conduct potentially represented a sufficiently serious threat. The present nature of that threat was evidenced by the appellant's lack of remorse or even acknowledgment of his culpability. Mr Clarke could not add any further to the fact that following the appellant's release on 28th October 2019, he had not re-offended and was living with his sister.

11. I turn to the appellant's brief submissions, as a litigant in person. He candidly reiterated that he did not believe that he had been guilty of the crime for which he had been convicted, which is why he had not expressed his remorse. He and his sister reiterated the appellant's desire to contribute and support his daughter in the UK, with whom he wished to maintain contact. In essence, he invited me to consider that his personal conduct did not represent a present threat.

Discussion and Conclusions

12. I have considered, although I am not bound by, Judge Storey's analysis at §45 to 50 of his decision. Judge Storey had remarked on the relatively scant case law, but it was clear from the authority LG and CC (EEA Regs: residence; imprisonment; removal) Italy [2009] UKAIT 00024 that one of the purposes behind the hierarchy of protections was to ensure that due weight was attached in the assessment of justification for deportation and to the length of time a prisoner had spent in a member state. He also cautioned himself that Article 27(1) stated that previous criminal convictions shall not in themselves constitute grounds for taking deportation measures and that personal conduct must represent a genuine present and sufficiently serious threat. The provisions stood in stark contrast to the more rigorous proportionality test applied to "foreign criminals" in relation to Article 8 ECHR and as per Sections 117B and C of the Nationality, Immigration and Asylum 2002. Judge Storey reminded himself at §47 that further light was shed on how decision makers must approach the "serious grounds" threshold by Richards LJ in AA Nigeria v SSHD [2015] EWCA Civ 1249 where there was an interrelated approach.

13. Judge Storey went on to consider competing considerations. On the one hand, there were a number of factors pointing to the existence of serious grounds. They included the 42 month sentence; the cost to the public purse of the attempted smuggling; the fact that the appellant had refused to accept responsibility, still protesting his innocence; and his lack of remorse. In reply to the question in the OASys Report, "Does the offender recognise the impact and consequences of offending," the answer had been "no". The appellant had undertaken no rehabilitative work. Judge Storey did not accept that the appellant could not have sought other courses if he had felt motivated. He noted the fact of minor prior offending prior to the index offence. There was also no evidence of positive contribution to society or significant ties to the wider community.

14. On the other hand, Judge Storey considered that the appellant's crime had no direct victims and none of his offences had involved violence. At §50, Judge Storey considered that although the appellant continued to deny his guilt and did not understand the impact of his offending on the wider community, he continued to live and work in the UK, so that he could maintain close links with his daughter. The probation officer had made no comment to indicate that he had considered the appellant to continue to pose a present threat, or to be at risk of reoffending. On balance, Judge Storey concluded that the experience of prison and criminalisation was not one that the appellant wished to repeat. The appellant had learnt his lesson and was not likely to reoffend. That assessment was consistent with the OASys Report, which did not address the risk of reoffending.

15. All of the above facts, as analysed by Judge Storey, are consistent with the circumstances as outlined to me today. There has been no relevant change in the appellant's circumstances. I accept Mr Clarke's submission that personal conduct need not involve violence, nor have direct victims, to engage serious grounds of public policy. I accept his submission that given the sheer value of the tobacco smuggled (£6.8 million), and the

appellant's role in the index offence (he had "equal importance" with his co-defendant), as reflected in his prison sentence, his personal conduct was capable of engaging serious grounds of public policy, by reference to the varying factors in Schedule 1 and identified in the decision to make a deportation order. The personal conduct represents a potentially sufficiently serious threat.

16. However, I turn to the question in regulation 27(5) of whether that threat is "present." Judge Storey had noted, as I do, that the OASys Report does not provide an assessment of present threat or risk of reoffending. I am conscious, on the appellant's unchallenged evidence, that since his release he has completed the terms of his licence, without any breach. There has been no further offending since the offence in question. He has also reiterated his desire to continue to engage with his young daughter, and to work to contribute financially to her upbringing, as well as to fulfil a role in supporting his sister's children. His sister has explained how his future absence would affect her (she could no longer work). I am conscious in that context that he was in a previous caring role for his step-children in the past, and still went on to offend. However, in the light of his lack of offending and the likely effect of a lengthy period of imprisonment on him, despite his lack of admission of guilt or remorse, I am satisfied that on the evidence before me, the appellant's personal conduct does not now represent a present threat.

17. In the circumstances, Mr Clarke agreed with me that if I were to answer this issue (genuine, present and sufficiently serious threat, as per regulation 27(5)(c)) in the appellant's favour, the appellant's appeal should succeed under the 2016 Regulations. He also accepted, in the same scenario, that it was unnecessary for me to make a separate assessment either on proportionality under the 2016 Regulations or by reference to the appellant's human rights.

Decision

18. The appellant's appeal under the Immigration (EEA) Regulations 2016 is upheld. It was unnecessary for me to determine the appeal under Article 8 ECHR.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **8th November 2022**

ANNEX: ERROR OF LAW DECISION

IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00558/2019 ('V')

THE IMMIGRATION ACTS

Heard at Field House and via Skype for Business On 22nd February 2021	**Decision & Reasons Promulgated On**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TOMASZ BOCIANSKI

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the respondent: Mr P Collins, representative, instructed by Zoi Bilderberg Law Practice

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 22nd February 2021.

2. Both representatives and I attended the hearing via Skype, while the hearing was also available to watch, live, at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is an appeal by the appellant, who was the respondent before the First-Tier Tribunal. I will refer to the appellant as the 'Secretary of State,' to avoid confusion. The respondent was the appellant before the First-tier Tribunal ('FtT'), but I will refer to him as the Claimant hereafter. The FtT (Dr H H Storey, sitting as a First-tier Tribunal Judge) allowed the Claimant's appeal, in a decision promulgated on 17th August 2020, against his deportation under the Immigration (EEA) Regulations 2016 and by reference to his Article 8 ECHR rights.

4. The Secretary of State had decided to make a deportation order in a decision dated 12th June 2019. In doing so, she did not accept that the Claimant had permanent residence under the EEA Regulations, to be entitled to any protection from deportation beyond the 'basic level' of protection under those Regulations. Whilst the Claimant had submitted tax records from 5th April 2007 onwards, in the Secretary of State's view, they showed little or no tax paid during the period in question (2006 to 2016). Whilst there was no threshold of earnings to qualify for permanent residence, an EEA national had to engage in economic activity (in this case, self-employed activity) which was genuine and effective and not marginal or ancillary. In 3 years, the Claimant paid no tax at all: 2007, 2008 2013 and whilst the Claimant claimed to have arrived in the UK in 2004, there were no records at all prior to 2007. The Secretary of State also noted that the Claimant had not provided evidence of how his income was generated or the amount of time spent on self-employed activities. These concerns were in the context that the Claimant was later convicted of fraudulently evading duty on cigarettes, as part of a sophisticated fraud over a two-year period between 2011 and 2013, namely the importation and processing of tobacco, with the evasion amounting to millions of pounds in unpaid customs duties.

5. The Secretary of State went on further in the deportation decision to consider the principles set out in regulation 27(5) the EEA Regulations, including the proportionality of deportation; and the seriousness of the Claimant's offence, in the context of 2 previous convictions for drugs offences. The Secretary of State concluded that the Claimant represented a genuine, present and sufficiently serious threat to the public to justify his deportation. The Secretary of State also considered the Claimant's right to respect for his private and family life under Article 8 of the ECHR, including with his then-partner and biological child and stepchildren in the UK. The Secretary of State concluded that that there was not sufficient evidence that the Claimant's children in the UK were British citizens; or that it would be unduly harsh for them to live in Poland, the Claimant's country of origin; or for them to remain without him in the UK; and there were not very compelling circumstances over and above 'Exception 2' as set out in Section 117C of the Nationality, Immigration and Asylum Act

2002. While the Secretary of State accepted that the Claimant then had a British citizen partner, the Secretary of State did not accept that it would be unduly harsh for the partner to live in Poland, should she wish to do so or to remain in the UK without the Claimant. In respect of the Claimant's private life, he was now 42 and had entered the UK, on his account, aged 27 years old and so had not lived in the UK for most of his life. The Secretary of State did not accept that the Claimant was socially and culturally integrated into the UK or that there would be very significant obstacles to his integration into Poland, where he had family and children.

The FtT's decision

6. The FtT concluded that the Claimant had established the right of permanent residence by virtue of having been continuously resident and exercised treaty rights for 5 years in the period from July 2006 to 2011 (§32). The FtT noted at §33 that the Claimant had not produced evidence to show how much he had earned. The tax records that were available showed that he had paid no tax in 3 of the tax years in question but there was correspondence from HMRC dated March 2010 stating that the Claimant had started self-employment on 12th July 2006. Whilst the FtT was not prepared to accept that from late 2012, when the Claimant was engaged in the criminal activities, he was engaged in genuine economic activity (despite there being HMRC records from 2012 to 2016), there was no evidence of illegal activity prior to 2012. The FtT based his conclusions on the HMRC correspondence; National Insurance Contribution records; the Claimant's sister's oral evidence that the Claimant had always worked; and a reference in an OASys report to the Claimant telling the Probation Officer that he had worked in a business partnership from 2006 to 2012.

7. The FtT concluded that the Claimant's imprisonment in 2018 to 2019 broke his integrative links in the UK (see §44). However, on the basis that the Claimant had established the right of permanent residence, he was entitled to what may be termed "serious grounds" protection. The FtT carried out an analysis at §§45 to 56 and concluded that there were not such serious grounds of public policy or public security for deporting the Claimant. At §48, the FtT expressed the view that had the Claimant only had the basic level of protection under the EEA Regulations, the FtT would have dismissed his appeal. However, given the enhanced level of protection, the Claimant's EEA appeal succeeded and succeeded under Article 8 ECHR.

The grounds of appeal and grant of permission

8. The Secretary of State lodged grounds of appeal which are essentially on 2 grounds:

   8.1. First, the FtT had failed to give adequate reasons for finding that the Claimant had acquired the right of permanent residence and his findings were irrational. Payment of minimal amounts of national insurance contributions did not demonstrate self-employment, as for example, payments could be made by way of voluntary contributions.

The contributions were minimal, and, in some years, no tax was paid at all. There was no evidence before the FtT capable of enabling him to reach the conclusion that any self-employment was not marginal or ancillary. Whilst at §34, the FtT had noted that an EEA national does not cease to be self-employed solely because they are in between work and the requirements of cessation under Regulation 5 of the EEA Regulations were not met, for example by reference to permanent incapacity to work, there was simply insufficient evidence to show that the Claimant had acquired a permanent right of residence.

8.2. Second, the FtT had erred in his assessment of proportionality by reference to the Claimant's past conduct which was relevant to future risk. In particular, the FtT had failed to consider the seriousness of the consequences of offending in line with the authority of Kamki v SSHD [2017] EWCA Civ 1715. The Claimant's offending was strongly indicative of a propensity to reoffend and the consequences of reoffending were serious. The Claimant continued to deny responsibility for the serious crime which had resulted in a period of imprisonment of three and half years.

9. First-tier Tribunal Judge Grant-Hutchinson initially refused permission on 12th May 2020, but on renewal, permission was granted by Upper Tribunal Judge Jackson on all grounds on 25th June 2020. She also issued directions for written submissions on the issue of whether the FtT erred in law. Both parties have complied with those directions.

The hearing before me

10. I summarise first the skeleton arguments of the representatives and then the additional oral submissions that were made before me.

The Secretary of State's submissions

11. In essence there was simply not sufficient evidence, nor was it analysed adequately, to explain why the FtT, while highly experienced, had concluded on the evidence before him that the Claimant had been exercising treaty rights in an effective and committed way to the extent that such exercise was more than minor or ancillary. In 2006 to 2007 and in 2007 to 2008, two years running, there had been no tax paid at all. There had also similarly been no tax paid in 2012 to 2013 and at its highest, the tax paid was £480.24 in one year. I was invited to exercise extreme caution in concluding that the Claimant had been exercising treaty rights between 2006 to 2011 to qualify for permanent residency. There did not appear to be any cross-appeal, so if I found that the FtT had erred in his findings about permanent residence, the FtT had made clear his view that on a basic level of protection, the Claimant's appeal would have failed.

12. Mr Clarke developed his oral submissions, referring to an Upper Tribunal case in the Administrative Chamber of DV v Secretary of State for Work and Pensions (European Union law – free movement) [2017] UKUT 155 AAC and in particular §§2 to 6. In that case, the Upper Tribunal had

applied the CJEU case of Jany v Staatssecretaris van Justitie Case C-268/99, [2001] ECR I-8615. Self-employment exists where there is sufficiently independent economic activity, including the provision of services in return for some form of remuneration and provided that the work performed is genuine and effective rather than marginal or ancillary.

13. §4 of DV emphasises that to decide whether work is genuine and effective what is required is an overall assessment of the circumstances of the case relating to the nature of the activities in issue. The level of remuneration and hours worked may be relevant factors to the overall assessment, (see §5 of DV) noting that there may be indicators of self-employment other than actual work or remuneration such as administration, marketing and business development but the issue can only be decided in the context of the facts at the time. The Claimant's intentions may also be considered.

14. In the Claimant's case, there were several evidential considerations as to whether the work in question was effective and genuine, or instead marginal and ancillary. This was where the heart of the error of law by the FtT lay. The analysis at §33 was extremely limited. The FtT accepted that the Claimant had not produced any evidence to show how much he earned during the period and that for 3 years, no tax was paid at all. Instead FtT had placed reliance on four sources. First there was a letter from HMRC dated 23 March 2010, stating that the Claimant had registered as self-employment on 12 July 2006. Second, there was a limited NIC record starting at page [97] of the Claimant's bundle, which was not a full record (showing only whether NICs had been made throughout the period or there were missing weeks), which was equally consistent with minimal voluntary contributions. Taken together, this evidence confirmed no more than that the Claimant had registered for NICs and had then gone on to make minimal payments, quite possibility on a voluntary basis, purely to generate a record of contributions. The FtT had not considered the nature or the quality of work; the hours worked; the rate of pay or the level of income. There was no evidence before the FtT to do so; no receipts or invoices, and no detail of any work. In the context where the Secretary of State had made it clear that this was a central issue in her deportation decision, it was unfathomable, in Mr Clarke's words, as to why the Claimant had not adduced such evidence, and while the bar of a perversity challenge was high, the FtT had simply taken the Claimant's word for it, along with the third source of evidence, the oral assertion of the Claimant's sister that the Claimant had "always worked" (without further detail); and fourth, a single sentence reference in an OASys report to a business partnership, without further elaboration or description.

15. The FtT's analysis was in the context of the NIC records being throughout the period from 2006 to 2016. The FtT had concluded that the Claimant had not exercised treaty rights as a self-employed person after 2012, because of his involvement in the large-scale tobacco fraud, but the absence of criminal offending and the lack of evidence of permanent abandonment of economic activity between 2006 to 2012 was consistent with the exercise of treaty rights. However, that ignored the reality of

being a self-employed person; effectively reversed the burden of proof; and critically sidestepped the nature of the activities and the fundamental requirement of remuneration, as per DV. It might also be said, although this was not a ground before me, that in referring in §34 to it being "*reasonably likely that the [Claimant's] self-employment was always more than marginal and ancillary,*"the FtT might even have been applying a protection standard of proof.

The Claimant's submissions

16. In response, Mr Collins said that any errors of law were not material. I needed to consider the evidence as a whole and Mr Clarke had not, in substance, pursued the second ground of appeal. The FtT had carried out a balancing exercise which could not be criticised.

17. In relation to the first ground, there was no minimum threshold of income required to exercise treaty rights as a self-employed person, to gain permanent residence under the EEA Regulations. The fact that the Claimant paid limited or even no tax did not mean that he had not worked. The HMRC letter at page [93] of the Claimant's bundle referred to him being registered as self-employed and the schedule of national insurance contributions referred to national insurance records for the full 52 weeks on a self-employed basis and not through voluntary contributions.

18. The FtT had never had DV or Jany cited to him. The crucial weakness in the Secretary of State's challenge was that whilst there seemed to be a challenge based on the absence of documentary evidence, there was no challenge to the FtT's conclusion, which he was unarguably entitled to make on the evidence before him as to the credibility not only of the Claimant, but also the record of the OASys report and the oral evidence of the Claimant's sister. In the circumstances therefore the absence of any real challenge to that credibility finding undermined the Secretary of State's challenge. Somebody could be self-employed even if they were not working at the time, as reflected in Regulation 6(4) of the EEA Regulations by reason of illness or accident, or involuntary unemployment.

Discussion and conclusions

19. First, in relation to the second ground of appeal, Mr Clarke accepted before me that he had nothing further to add beyond the ground of appeal and did not seek to pursue it to any great extent. By virtue of my conclusions in relation to the first ground, which I will come on to, it is unnecessary for me to deal with it further.

20. The focus of the Secretary of State's challenge was to the analysis, explanation, and irrationality of the conclusion reached by the FtT that the Claimant had been exercising treaty rights to an extent that was more than marginal or ancillary in the period between 2006 and 2011.

21. The FtT's analysis and reasons were clearly structured, so that at the heart of this appeal was a perversity challenge. I am acutely aware that there is a high bar for such a challenge, and that in essence, the Secretary of State

argues that the conclusions, based on a flawed analysis, were not open to the FtT to reach on the evidence before him. I am also aware that I am not able to hear all the evidence, in a way that he FtT was, so that I am one-step further removed from it. Whether I would or would not have reached the same conclusions as the FtT is not relevant.

22. On the one hand, the FtT did not reach his conclusions based solely on the Claimant's oral assertions. He considered the oral evidence of the Claimant's sister; the reference (albeit brief) in the OASys report; and the NIC records and HMRC correspondence. The FtT's reasoning needs to be read holistically, and not with a focus on the FtT's reasoning, out of context.

23. On the other hand, I accept the force of Mr Clarke's submission that there was a fundamental gap in the FtT's analysis. There was no substantive assessment of the nature and the quality of the self-employed activities carried out by the Claimant, including consideration (or an analysis of why it was unnecessary to consider) the rate of any remunerative work or the hours work, such that the FtT could, on the evidence before him, reach the conclusion at §34 that the Claimant's activities between 2006 and 2016 had always been more than marginal or ancillary. In fairness to the FtT, he partly recognised the gap in evidence at the beginning of §33, where he stated that the Claimant "*has not produced evidence to show how much he earned [during 2006 to 2011] or any specific documentation about the nature of the self-employed work during that period. I also except that for three years his tax record shows that he has paid no tax*."

24. The FtT's analysis sought to bridge that gap by referring to the HMRC letter dated 23rd March 2020, confirming that the Claimant registered as self-employed in 2006; and referring to consistency of NICs contributions in what the FtT regarded as a detailed HMRC document at page [97] in the Claimant's bundle, although upon review, both representatives accepted in the Hearing before me that the records could by no means be described as the full NIC records. The document did not set out clearly the class of NIC contributions, which might give some indication of annual profits (if any), or whether, even as a self-employed person, they were made as voluntary contributions under Class 3 (which would also be consistent with no economic activity at all). There was no analysis by the FtT of whether full tax records would have been available, and if available, why they had not been produced to the FtT.

25. The FtT's analysis further relied on the oral evidence of the Claimant's sister (§27) and the OASys report reference (§34) for the conclusion that the Claimant's economic activities were not marginal or ancillary. That begs the question of why, if the evidence (particularly of the Claimant's sister) was of continuing activity throughout the Claimant's presence in the UK, supporting the conclusion that his self-employment between July 2006 and July 2016 had "*always been more than marginal and ancillary"* (§34), the FtT concluded that economic activity ceased after late 2012. The only different between the two periods is the fact of the Claimant's involvement in criminal activity from late 2012 onwards. The FtT's

reasoning that there was economic activity in the period up to 2012 was based on the absence of criminal offending, whereas after that date, the (limited) NIC records, and the Claimant's sister's evidence, was discounted. While they were discounted entirely after 2012, the FtT provided no explanation for their sufficiency to show exercise of treaty rights before late 2012. The only explanation, namely the lack of offending, cannot equate to the exercise of treaty rights in a way that was more than marginal or ancillary. I accept Mr Clarke's submission that the FtT's reference to the abandonment of self-employment as needing to be permanent, could not resolve the gap in the FtT's analysis about the nature and quality of the economic activities, about which virtually nothing is known. The gap in that analysis undermined the explanation for the conclusion reached, and meant that the decision was, regrettably, perverse.

26. I considered whether it was appropriate that the FtT's views on whether the Claimant would have succeeded with a 'basic level' of protection under the EEA Regulations and the FtT's conclusions on the proportionality of the Claimant's deportation, in the context of his rights under the ECHR, could safely stand. I concluded that they could not, despite there being no cross-appeal. The FtT's analysis in respect of the Claimant's human rights was necessarily limited (§58) because the Claimant had succeeded before the FtT for other reasons. There was, for example, no analysis of whether the Claimant would meet 'Exception 2' of Section 117C of the Nationality, Immigration and Act 2002 in respect of his qualifying child. I am also conscious that the qualifying child's circumstances may have changed since the FtT's decision. The FtT's view of whether the Claimant would have failed to meet the test for the 'basic' level of protection was just that – a view, at §58, without further detailed explanation or analysis.

Disposal

27. I considered paragraph 7.2 of the Senior President's Practice Statement. While I have not preserved any findings of fact, Mr Collins urged me to retain remaking in the Upper Tribunal. The issues between the parties are narrow and the evidence is limited (any updated evidence could be provided swiftly). Given the limited scope of the issues, it is in my view appropriate that the Upper Tribunal remakes the FtT's decision which has been set aside.

Directions

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

    28.1. The Resumed Hearing will be listed, at the request of the parties, for a face-to-face hearing at Field House, for **1 day**, no interpreted needed, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

    28.2. The parties are expected to co-operate in the production of a joint, indexed and paginated bundle, which shall include all the evidence on which the parties intend to rely. Any application for

additional evidence should be made in the normal way appropriately pursuant to Rule 15(2A) with an explanation for why that evidence was not adduced before the First-tier Tribunal previously.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside, without preserved findings of fact. The Upper Tribunal will retain remaking of the appeal. No anonymity direction is made.

Signed J Keith Date: 26th February 2021

Upper Tribunal Judge Keith