Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00878/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport
On 7 January 2015

Determination Promulgated
On 29 January 2015

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

M S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Nathan instructed by Veale Wasbrough Vizards LLP
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited us to rescind the order and we continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

© CROWN COPYRIGHT 2015

Introduction

2. This is a resumed hearing of an appeal by the appellant, a citizen of Lithuania who was born on 2 September 1982, against the decision of the First-tier Tribunal (Judge Y J Jones) dismissing his appeal against a decision to deport him to Lithuania in accordance with the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003 as amended) (the "2006 EEA Regulations") made on 30 April 2013.

3. Following the initial hearing of the appeal on 14 November 2013, the decision of the First-tier Tribunal was set aside by the Upper Tribunal (UTJ Grubb) in a decision dated 4 December 2013. The UT concluded that the First-tier Tribunal had erred in law in assessing whether the appellant represented a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" under reg. 21(5)(c) of the 2006 EEA Regulations.

4. The appeal was adjourned for a resumed hearing in order for the Upper Tribunal to remake the decision both under the 2006 EEA Regulations and Art 8 of the ECHR. Following a number of adjournments, principally to obtain information in relation to the family proceedings begun by the appellant for contact with his two children, the appeal was listed before us on 7 January 2015.

5. At the hearing, the appellant gave oral evidence before us. In addition, Mr Nathan, on behalf of the appellant placed reliance on a number of documents not before the First-tier Tribunal, including an expert report by Dr Freda Gardner, a Consultant Clinical Psychologist dated 6 October 2014 (at pages 15-56 of the appellant's bundle), court documents relating to the appellant's contact proceedings including an agreement between the appellant, his ex-partner and CAFCASS; a letter from the appellant's Probation Officer dated 2 October 2014; a CAFCASS report by Claire Lund dated 13 October 2014; an email dated 6 January 2015 relating the views of the CAFCASS Guardian, Claire Lund; and a number of witness statements for example from the appellant and his employer at sections B and D of the bundle. Mr Richards raised no objection to the admission of this additional evidence and we admitted it in our discretion under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

The Background

6. As we have indicated, the appellant is a citizen of Lithuania. He came to the United Kingdom in 2008 together with his partner and son ("F") who was born on 12 July 2002. On 7 November 2008, the appellant and his partner ("KV") had a daughter ("K") who was born in the UK. Both the appellant's children and his partner are also Lithuanian nationals.

7. On 2 November 2011, the appellant was arrested in connection with allegations of rape made by his partner, KV. On 13 February 2012, the appellant pleaded guilty at the Bristol Crown Court to two offences, namely rape of a female over 16 and attempted rape. The victim of those offences was the appellant's partner. On 23 April 2013, the appellant was sentenced to terms of three years' imprisonment in

relation to both counts to be served concurrently. Two further counts on the indictment were ordered to lie on the file and the appellant was ordered to sign the Sex Offenders Register indefinitely. He was also made the subject of a restraining order preventing him from contacting his (now) ex-partner.

8. The appellant served his prison sentence and was released on 20 May 2013.

9. On 18 May 2012, the appellant was notified that the respondent was considering whether to deport him on grounds of public policy. The appellant responded, setting out that he had lived and worked in the UK since 2008; that he had an ex-partner and two children in the UK; that he was not guilty of the crimes of which he had been convicted; and that he was working until his arrest in November 2011.

10. On 30 April 2013, the Secretary of State made a decision that the appellant should be deported pursuant to the 2006 EEA Regulations on grounds of public policy.

11. The appellant's appeal to the First-tier Tribunal (Judge Y J Jones) was dismissed in a determination dated 23 July 2013. Permission to appeal was granted by the Upper Tribunal (UTJ Eshun) on 2 September 2013. As we have already indicated, the First-tier Tribunal's decision was set aside by the Upper Tribunal in a decision dated 4 December 2013.

The Submissions

12. On behalf of the appellant, Mr Nathan submitted that the Secretary of State had failed to establish, as required by reg. 21(5)(c) of the 2006 EEA Regulations that the appellant's personal conduct represented "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". He submitted that, on the basis of the evidence, we should find that the appellant represented at worst a "low" risk to his ex-partner and future partners and, at best, no risk to them. In those circumstances, he submitted that the appellant's risk of re-offending did not fall within reg. 21(5)(c).

13. Mr Nathan relied upon the sentencing remarks of Her Honour Judge Hagen in sentencing the appellant on 23 April 2012 that, first his two offences were "entirely out of character" and secondly, "I am quite satisfied that when you are released you will be able to find employment and take up the threads of your life again and I am also very confident that you will never appear in any court again". Mr Nathan prayed those comments in aid in submitting that we should find that the appellant represented a low or no risk of re-offending

14. Mr Nathan relied upon [32] of the Upper Tribunal's determination in Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC) where Blake J (Chamber President) said:

> "We observe that for any deportation of an EEA national or family member of such national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present

threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. In such a case, if there is acceptable evidence of rehabilitation, the prospects of future rehabilitation do not enter the balance, save possibly as future protective factors to ensure that the rehabilitation remains durable."

15. Mr Nathan submitted that the risk posed by the appellant, if any, did not establish a "propensity to re-offend" or "an unacceptably high risk of re-offending".

16. Secondly, Mr Nathan submitted that even if the requirement in reg. 21(5)(c) was met, the appellant's deportation would not be proportionate for the purposes of EU law or under Art 8 of the ECHR. He relied upon the expert report of Dr Gardner and the views of the CAFCASS Guardian that it was in the best interests of the appellant's children, F and K, to maintain direct contact with him in the UK. Mr Nathan relied on the fact that the appellant has, pursuant to a court order, begun first, indirect contact with the children and more recently supervised direct contact. He submitted that it would be "potentially devastating" for F and K to now lose the contact with their father that had so recently begun. .

17. On behalf of the respondent, Mr Richards submitted that the appellant's personal conduct did represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". He accepted that it was necessary to take into account the sentencing judge's remarks but he relied upon Dr Gardner's report that expressed concerns about the appellant's attitude and his continued denial of his guilt: his lack of awareness that when under threat he was not aware or in control of his behaviour and that he should attend a number of programmes to develop insight. Mr Richards relied upon the appellant's own evidence that he had not yet attended any courses and despite his own evidence that he did not believe he needed to, the professional view was that he did.

18. Mr Richards invited us to find that the appellant did pose a risk to his former and future partners. He accepted that he could not establish that there was a "high" risk but, consistently with what was said in [32] of Essa, Mr Richards invited us to find that, given the seriousness of any harm caused by the appellant's future offending, that risk was "unacceptable".

19. In relation to proportionality, Mr Richards invited us to find that, even though deportation would put an end to any supervised contact between the appellant and his two children, the seriousness of his offending was such that even taking into account the best interests of his children, the appellant's deportation was proportionate both under the 2006 EEA Regulations and also under Art 8 of the ECHR.

The Legal Framework

20. The appellant is an EU citizen and so his deportation is governed by the provisions of the 2006 EEA Regulations giving effect to Directive 2004/38/EC.

21. The basis for the appellant's deportation is found in reg. 19(3)(b) of the 2006 EEA Regulations which provides as follows:

> "An EEA national who has entered the United Kingdom ... may be removed if –
>
> ...
>
> (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21; ..."

22. Where a decision is taken to remove an individual under reg. 19(3)(b), reg. 24(3) states that:

> "The person is to be treated as if he were a person to whom section 3(5)(a) of the 1971 Act (liability to deportation) applied, and section 5 of that Act (procedure for deportation) and Schedule 3 to that Act (supplementary provision as to deportation) are to apply accordingly."

23. Hence, once a lawful decision under the 2006 EEA Regulations is taken to remove an individual, then the power to deport found in the 1971 Act can be applied as it was in this case.

24. Regulation 21 is central to this appeal and, so far as relevant, provides as follows:

> "21(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) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
>
> (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.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

......"

25. We have omitted the provisions dealing with EU nationals who have a "permanent right of residence" who may only be removed on "serious grounds of public policy or public security" and those who may only be removed on "imperative grounds of public security" (see respectively reg. 21(3) and (4)). It is accepted in this appeal that the appellant does not have a permanent right of residence or cannot only be removed on "imperative grounds of public security". His removal and deportation has to be justified on the lowest threshold, namely that of "public policy".

26. In BF (Portugal) v SSHD [2009] EWCA Civ 923, the Court of Appeal at [3] identified the four questions that must be addressed in applying the 2006 EEA Regulations to an individual's removal or deportation:

(1) What was the relevant personal conduct of the appellant?

(2) Having determined that question, does that conduct represent a genuine, present and sufficiently serious threat?

(3) If so, does that threat affect one of the fundamental interests of society?

(4) Will the appellant's deportation be proportionate in all the circumstances?

27. As will shortly become clear, we consider that this appeal is resolved by answering questions (1)-(3).

Discussion and Findings

28. It was common ground between the parties that the appellant's deportation could not be justified simply on the basis of his previous criminal conviction even of such a serious nature as rape and attempted rape. In order to represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society", it was at least necessary to establish a future risk of re-offending. Only then could the individual present a "present" threat. Of course, past offending may be relevant in assessing future risk but, unlike deportation of a non-EU national, the seriousness of past offending cannot in itself justify the deportation of an EU national.

29. We begin with the evidence of the appellant's conduct (BF Question (1)).

30. We are in no doubt that the appellant's offending is very serious. The convictions for rape and attempted rape, in themselves, justify such a characterisation which is not

diminished by consideration of the particular circumstances described by the complainant in the criminal proceedings involving forced vaginal penetration and attempted oral penetration and which led to the appellant's conviction.

31. We turn now to consider the evidence relating to whether the appellant represents a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" (BF Questions (2) and (3)).

32. In sentencing the appellant, Her Honour Judge Hagen said this:

> "It is clear to me that these two offences are entirely out of character. You were living with the complainant, the mother of your children, in very difficult circumstances. You were both working very hard and working very long hours and it was in the summer and autumn of last year that the relationship between you broke down; and it is plain from everything I have read you found that very difficult to come to terms with.
>
> These two offences were committed within a very short time span which mitigates, in my view, their seriousness. Important, not to say crucial, forensic evidence only came to light this morning and I have no doubt that that had some bearing on your decision to plead guilty to Count 3, and since it was such important evidence and came so very late in the day, I take the unusual step of saying that you should receive the maximum discount for your pleas of guilty today. It has had the undoubted benefit of meaning that the complainant does not have to give evidence and for that you deserve credit.
>
> I have read much about you, both from employers, from the rugby club of which you were obviously a valued member and from friends who have known you a long time. All those factors I take into account, but of course I cannot forget that these are serious offences.
>
> Reconciling all those conflicting factors as best I can, I impose the least sentence which in my view is appropriate. That will be one of three years imprisonment on each of the two counts. 166 days that you have served so far on remand will be taken into account when serving that sentence and I am quite satisfied that when you are released you will be able to find employment and take up the threads of your life again and I am also very confident that you will never appear in any court again."

33. As we have said, Mr Nathan placed some weight upon these comments in making his submission that the appellant at worst presented a low risk of future offending and at best presented no risk at all.

34. It is established law that we should take into account the remarks of the sentencing judge concerning the circumstances of the individual's offending and the view taken as to its seriousness and in relation to any future risk of offending, not least because the sentencing judge will have directly addressed his or her mind to those issues, on the basis of the best evidence available at the time, in reaching what he or she considers to be the appropriate sentence.

35. Leaving aside the discount given for the appellant's guilty pleas, the judge's sentencing remarks do not, in our judgment, indicate that she thought that the appellant would present no risk in the future. Her comment that his two offences were "entirely out of character" is no more than a description that these offences are the first for which he had appeared before the courts. It is a statement which could be made in relation to any first time offender. That said, however, her comment that she was "very confident" that the appellant "will never appear in any court again" is a strong comment, albeit one which we consider to be a statement of hope or aspiration by the judge. It is, nevertheless, a matter which we must take into account as reflecting the judge's opinion on the evidence before her.

36. There is, of course, further evidence before us which we must also take into account.

37. First, there is the NOMS Report which appears undated but which was requested on 4 April 2013. That report appears to have been based upon the OASys Report dated 6 September 2012. The report states that the likelihood of the appellant being reconvicted is "low" on an OASys score of between 0-40 (section 4). The report concludes that the reconviction score is "13 per cent" (see section 6). The risk of re-offending relates to the appellant's ex-partner and "potentially females in future intimate relationships" (see section 3). Not surprisingly, given to what the risk of re-offending relates, the risk of "serious harm" is stated to be "high". That is, of course, not an assessment of the likelihood that the appellant will re-offend but that if he did the level of harm that may result.

38. It was on the basis of that report that Judge Jones concluded that the appellant presented a "low" risk of re-offending and was the basis of her finding that he presented a "genuine, present and sufficiently serious threat" within reg. 21(5)(c).

39. We have, in addition, a number of further expert views concerning the appellant's behaviour, including the potential impact upon his behaviour of his desire to seek, and maintain, access to his children through the court proceedings.

40. It is not a matter of dispute that the appellant has since the end of 2014 obtained a court order granting him first, indirect contact with his children and now subsequently direct conduct supervised by the CAFCASS Guardian, Ms Lund. We consider these developments significant.

41. Secondly, we turn first to the expert report of Dr Gardner at pages 15-56 of the appellant's bundle. Dr Gardner is a Consultant Clinical Psychologist and her expertise is not challenged. We have considered it carefully and take the view that it is a balanced report based upon interviews with the appellant, his ex-partner and the CAFCASS Guardian.

42. It recognises shortcomings in the appellant's behaviour. At para 4.7.5 it states that the appellant:

> "has no real insight into the behaviour, which resulted in his conviction for rape/attempted rape against [KV]. He continues to say that he never raped or

> attempted to rape [KV] and that he was forced to plead guilty to one offence to reduce his sentence. He asserted with evidence of a significant emotional change that he had never done anything to her."

43. We should add that the appellant also maintained his innocence of the offences in his oral evidence before us although he accepted that he had to recognise his conviction for the purposes of the appeal.

44. Likewise at para 4.7.8, Dr Gardner states that:

> "It is my view that when he is under threat and is expressing strong feelings he is not consistently consciously aware or in control of his behaviour and aware of the effect that his behaviour has on others. This is consistent with [the appellant] having very little insight."

45. Nevertheless, Dr Gardner comments very positively indeed upon the appellant's commitment to, and love for, his two children, F and K. At para 1.1.13, she comments both on that attachment and also the appellant's future behaviour as follows:

> "I have provided the view that a very significant protective factor with regard to any risks/potential risks posed by [the appellant] is his profound love and commitment to his children. It was evident during this assessment that [the appellant] has a profound affection for his children and very much wants to re-establish his relationship with [F] and develop his relationship with both children. It is also important to note that [the appellant] has applied to the court for contact with the children in an entirely appropriate manner, which indicates his ability to manage his tendency to inappropriately take control. This compliance with authority and procedure is in my view a significant protective factor and a positive indicator with regard to prognosis for compliance in arrangements for contact."

46. Dr Gardner's view is that continued supervised contact with the appellant's children is in their best interests and that it is desirable for the appellant to undergo programmes concerned with parenting and also in relation to domestic physical and sexual violence. At para 4.5.4 she says:

> "It is my view that it would be very much in the interests of the children and also of [the appellant] if he would engage in intervention designed for sexual offenders. There are also programmes associated with the Power to Change Programme aimed at facilitating the development of insight in perpetrators of domestic physical and sexual violence."

47. She then continues to comment:

> "If [the appellant] were to engage in such intervention that is available ... it is my view that he has the intelligence and potential sensitivity to develop a significant level of insight."

48. Dr Gardner's view concerning the importance of maintaining contact between the appellant and his children and the "very significant protective factor" of his love and commitment to his children is repeated at para 4.5.6 even after Dr Gardner notes at para 4.5.4 that it is

> "unlikely that [the appellant] would have fully engaged in any intervention that would have enabled him to develop appropriate insight into the offences."

49. That is a reference to the fact that the appellant was unable, through unavailability, to engage in any programmes whilst in custody.

50. The point nevertheless remains that Dr Gardner recommends supervised contact and emphasises the importance that the programme will have in allowing the appellant to address and understand issues concerning his behaviour.

51. Mr Richards put to the appellant in cross-examination that, in effect, his denial of his guilt made any such courses pointless. The appellant's response, which we found persuasive, was that he was prepared to attend these courses and indeed would be seeking to do so shortly because it was important to him to maintain contact with his children and he could only do so if he attended these programmes. That, we note, is part of the agreement appended to the court proceedings between the appellant, his ex-partner and CAFCASS.

52. Thirdly, the report of the CAFCASS Guardian, Ms Lund dated 13 October 2014 also supports supervised contact between the appellant and his two children. She notes that that is the wish of the elder child, F, who is 12 years old and the younger child, K is curious to know about her father. The CAFCASS Guardian also recommends that the appellant attend a parenting skills course and programmes for perpetrators of domestic violence and states that: "I will undertake enquiries as to the availability of both programmes."

53. In cross-examination, Mr Richards explored with the appellant whether he was serious about attending such courses. He had not done so before Christmas. The appellant's explanation was that he was working as a lorry driver and that was a busy work period when he could earn enough money to pay his solicitor's bills which he said were high. He had every intention of attending courses.

54. We entirely accept the appellant's explanation. There is no doubt that the appellant has been faced with solicitor's bills which have to paid, we were told, on the basis that he is paid something in the order of £8 per hour. His explanation has an undoubted 'ring of truth' about it. Equally, the availability of courses seems to be a matter which Ms Lund has undertaken to make enquiries about and provide the appellant with an opportunity to attend. We accept that it is the appellant's intention to attend these courses. In response to Mr Richards' submission, we do not accept that simply because the appellant continues to deny his offending that these courses will prove valueless. Certainly, Dr Gardner, who is an expert, did not think so since she recommended these courses despite being well aware that the appellant continued to deny his offences. When he attends, the appellant will necessarily have

to engage with the programmes in order to complete them successfully. That very engagement may well, in our view, consistently with Dr Gardner's opinion, enable the appellant to gain the relevant "insight" which Dr Gardner concludes he currently lacks. The programmes may well provide the key to the currently closed doors in the appellant's mind. We had no doubt of his sincerity because, like Dr Gardner, we are satisfied that he is determined to maintain his contact with F and K with whom he has a very strong paternal attachment.

55. The appellant's resolve to maintain contact and conduct himself so as to maintain it is supported by the CAFCASS Guardian, Ms Lund, as reported in the email of 6 January 2015. She reports favourably on the contact, initially with F and subsequently with F and K. She comments:

> "[The appellant] was very appropriate with both children, very sensitive and interacted with them both well. Both children want contact to continue and whereas mother does not want to see [the appellant] she knows that the children want to see their father."

56. Referring to a further contact hearing scheduled for 2 March 2015, Ms Lund's view is reported that:

> "If things stay the same, she will be recommending that contact should continue. It is very beneficial for both children to see and have contact with their father. She is very supportive of [the appellant] staying in the UK to have contact and agrees that if he was deported [the appellant] would be unlikely to see his children for many years as their mother would not take the children to see [the appellant] as she does not want to have any contact with him. It is likely, particularly in K's case that the children will forget their father if he is deported. The children need to have regular contact with their father."

57. Whilst the issue of the children's best interests is not directly relevant in determining the issue under reg. 21(5)(c), this evidence, which we accept and which is entirely consistently with all that we were shown, demonstrates the importance of continued contact between the appellant and his children and that he is endeavouring to maintain that contact which, in our view, is entirely contingent upon his future good behaviour including attending the required courses.

58. Finally, the appellant's Probation Officer, Ms Fisher in her letter of 2 October 2014 directed to the family court dealing with the contact proceedings, concludes that the appellant has given no indication that he poses "a risk to his children". Having noted the NOMS Report assessment shortly after the appellant was imprisoned, Ms Fisher comments:

> "[The appellant] pleaded not guilty to this offence and has not shifted on this position, however this does not imply he poses an ongoing risk to female partners."

59. She then continues that the risk of "medium harm" relates not to any lack of "progress" or because of "any risk associated thoughts or behaviour" but "due to the seriousness of the charge made against him."

60. We were also told by the appellant in his evidence that he has been in a new relationship for one year and twelve days. His new partner was present at the hearing. He was not cross-examined in relation to that relationship and we have no reason to doubt the appellant's evidence which we accept.

61. It follows, therefore, that since the appellant's release from prison in May 2013 he has not re-offended including within the specific risk category that he was considered to fall within, namely to his ex-partner or future partners.

62. In assessing what risk, if any, the appellant poses in the future we must take into account all the evidence as at the date of this hearing. We see no reason to doubt that his behaviour has been exemplary since his release from prison.

63. We now turn to the four question posed in BF (Portugal) set out above at para 26.

64. First, the "relevant personal conduct" of the appellant is his criminal offending, namely his conviction for rape and attempted rape of his ex-partner in April 2012 for which he received a prison sentence of three years. The appellant has no previous convictions and no offences have been committed subsequently (BF Question (1)).

65. Secondly, as required by EU law, we must consider whether the appellant represents a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" (BF questions (2) and (3)).

66. In itself, the appellant's previous criminal conviction cannot justify a decision to deport him as an EU national on "public policy" grounds. That is because a "present" threat looks to the future rather than merely to the past. In that respect, there is a divergence between the approach in an EU deportation case, as we have already noted above, and a deportation concerning a non-EU national where past criminal convictions may, in themselves, be sufficiently serious to justify an individual's deportation in the public interest (see OH (Serbia) v SSHD [2008] EWCA Civ 694).

67. There can be no doubt that the nature of any potential re-offending by the appellant, given the seriousness of those offences, would affect "one of the fundamental interests of society", namely the protection of the public. The issue in this appeal is whether or not there is a "genuine, present and sufficiently serious threat", in effect, of that offending re-occurring.

68. The NOMS Report classified the appellant's risk as "low" and went so far as to place the risk at "13 per cent". We have taken into account, as a significant and important factor, the views of the sentencing judge. As we have already noted, we do not understand her views to exclude the possibility of future offending. The Judge was, however, plainly of the view that the appellant posed no real threat in the future.

69. We do consider that the subsequent expert and professional evidence taken together with the conduct of the appellant since his release from prison does, in our judgment, diminish that "low" risk identified in the NOMS Report. We are particularly impressed and persuaded by the evidence of the appellant and the experts concerning his commitment to his children and to maintain contact with them which provides a very strong incentive indeed, in our view, for the appellant both to attend what professionals consider to be helpful programmes and to maintain future good behaviour, including future offending or face the almost inevitable consequence that contact with his children will be significantly reduced or taken away. We do not consider that the appellant's continued denial of the offence is inconsistent with that view, indeed, that was the point being made by his probation officer, Ms Fisher, in her letter of 2 October 2014 with which we agree.

70. The expert and other evidence in this appeal is of a singular quality pointing in the appellant's favour. Whilst we cannot exclude altogether a risk of re-offending, the evidence before us establishes, in our judgment, that that risk is speculative, remote and not concrete.

71. There is no suggestion that the appellant has a "propensity" to commit sexual offences and, in our judgment, applying Blake J's view in Essa, we do not consider there is an "unacceptably high" risk of the appellant re-offending such that he would present a "genuine, present and sufficiently serious threat" as required by reg. 21(5)(c). We make that finding bearing well in mind the nature of the appellant's offending and the degree of condemnation that will be rightly directed against his behaviour. However, the legal regime for removing or deporting EU criminals is more restrictive than it is for other "foreign national" criminals and the public interest required to justify deportation in EU cases is significantly narrower than in cases involving the deportation of non-EU nationals..

72. On the basis of our finding, the appellant cannot be removed or deported as an EU national. The issue of proportionality, does not arise (BF question 4). The foundation requirement in reg. 21(5)(c) has not been established by the respondent.

73. As a result of that decision, no purpose is served by considering the appellant's deportation under Art 8.

74. For the above reasons, the appellant's appeal is allowed under the EEA Regulations.

Signed

A Grubb
Judge of the Upper Tribunal

28 January 2015