**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: DA/00300/2016**

**THE IMMIGRATION ACTS**

| **Heard at the Royal Court of Justice** | **Decision & Reasons Promulgated** |
|---|---|
| **On 3rd July 2017** | **On 5th July 2017** |

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR MUSTAFA RAZA**
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr D. Clarke, Senior Presenting Officer
For the Respondent: Mr M. Cogan, instructed on behalf of Dawn Solicitors.

**DECISION AND REASONS**

1. The Secretary of State appeals, with permission, against the decision of the First-tier Tribunal (Judge Turquet) promulgated on the 19th May 2017 in which the Tribunal allowed the appeal of Mr Raza against the decision of the Secretary of State to make a deportation order against him under the provisions of Regulation 19(3)(b) of the Immigration (EEA) Regulations 2006 (hereinafter referred to as "the 2006 Regulations").

2. Although the Secretary of State is the Appellant before the Tribunal, I will for ease of reference refer to her as the Respondent as she was the Respondent in the First-tier Tribunal. Similarly I will refer to Mr Raza as the Appellant as he was the Appellant before the First-tier Tribunal. No application was made before the First-tier Tribunal or the Upper Tribunal concerning any grounds for an anonymity order.

3. The Appellant is a citizen of Pakistan. He entered the UK on a business Visa issued on 13 July 2006 valid for six months. He later applied for a residence card on the basis of his marriage to a Spanish national which was refused. He reapplied on 2 March 2013 and was issued with a residence card on 4 October 2013 valid until 1 October 2018. He subsequently pleaded guilty to offences of obtaining or seeking to obtain leave to enter or remain in the UK by deception and possession of false ID documents by deception and was sentenced to 8 months imprisonment on each charge with giving a total of 16 months imprisonment. The facts were that when he was issued with a business Visa it had been obtained fraudulently because in the application he stated that he would be returning to Pakistan at the end of the Visa because he had a wife there when in fact he was unmarried. He later obtained a false passport which he used to obtain employment.

4. As a consequence of that sentence of imprisonment, the Appellant was notified of his liability to be deported and on 2$^{1st}$ June 2016 the Secretary of State made a decision to deport him, having first taken into consideration the provisions of the Immigration (European Economic Area) Regulations 2006 under Regulation 19(3)(b) of the 2006 Regulations on account of his conviction on 6 November 2015 for possessing false identity document with intent and obtaining to enter the UK by deception which he was sentenced to 16 months imprisonment.

5. The relevant decision taken by the respondent made reference to his conviction in 2015 and that the Secretary of State had considered the offence for which he had been convicted and his conduct, in accordance with Regulation 21 of the 2006 Regulations. The decision set out that the Secretary of State was satisfied that he would pose a genuine, present and sufficiently threat to the interests of public policy if he were to be allowed to remain in the United Kingdom and that his deportation was justified under Regulation 21. The decision went on to state that the Secretary of State had decided under Regulation 19(3)(b) that he should be removed and an order made in accordance with Regulation 24(3) requiring him to leave the United Kingdom and prohibiting him from re-entering while the order is in force.

6. The reasons for that decision are set out in a letter of the Respondent.

7. The Appellant appealed against that decision to the First-tier Tribunal. The appeal came before the First-tier Tribunal (Judge Turquet) on the 2$^{nd}$ May 2017. In a decision promulgated on 19$^{th}$ May the judge allowed the appeal under the 2006 Regulations having found that the appellant did not represent a “genuine, present and sufficiently serious threat affecting one

of the fundamental interests of society." It is common ground that the appellant was a family member of an EEA national but that he had not resided in accordance with the Regulations for a period of 5 years and thus had not acquired a permanent right of residence ( see paragraphs 16-19 of the decision letter and paragraph 9 of the determination).

8. The Secretary of State sought permission to appeal that decision and permission was granted on the 12th June 2017 by Designated Judge Woodcraft.

9. There is only one ground advanced on behalf of the Secretary of State in the written grounds relied upon by Mr Clarke. That is set out at paragraph 9. In those written grounds, it is asserted that the judge made an error of law at paragraph 30 when considering the appellant's convictions and that offences do not need to be of a similar nature for an offender to meet the lower threshold nor do they need to involve violence. The grounds go on to state that the appellant had committed serious offences but that the judge at paragraph 30 "totally fails to appreciate that he was working illegally". The appellant's conviction is described further at paragraphs 7 and 8 and at paragraph 9 it is submitted that the judge has "failed to give due consideration to these issues and this amounts to an error of law."

10. In his submissions Mr Clarke submitted that the judge failed to identify what the fundamental interests of society were by reference to his serious offending and that the judge had failed to give adequate weight to that in the decision reached. He further submitted that the judge did not properly consider risk of harm and that the probation report had not undertaken a full risk analysis and therefore the judge could not have relied upon it. Thus he submitted that there were errors of law in the decision which required it to be set aside.

11. Mr Cogan on behalf of the appellant submitted that the decision of the First-tier Tribunal should be upheld and that the judge properly considered the issue under Regulation 21 (5) (c) and whether the personal conduct of the appellant demonstrated a genuine, present and sufficiently serious threat to the public to justify his deportation. He submitted that it related to a future threat and it was open to the judge to place reliance upon the probation report. Whilst it was submitted there was no assessment of risk, Mr Cogan submitted that the OASY's report did consider the issue of risk but did so in the light of the nature of offending that he had been convicted of. The judge also took into account the unchallenged evidence relating to the work that he had undertaken in prison. Thus he submitted that the judge properly applied the law and that the decision was open to the judge to make on the evidence.

12. I have considered the respective submissions of each of the advocates in the light of the determination of the judge and the evidence before her. Having done so, I do not find that the judge erred in law in the decision reached and I shall set out my reasons for reaching that conclusion.

13. The judge set out the relevant law at paragraphs 26 – 28 of the determination and in particular by reference to regulation 21 (5) which required the decision to be based "exclusively on the conduct of the person concerned" and that the persons "previous convictions do not in themselves justify the decision." The judge had to consider whether the appellant presented a genuine, present and sufficiently serious threat to the public to justify deportation on grounds of public policy.

14. Earlier in the determination the judge had set out the circumstances of the appellant's conviction at [12] relating to the business Visa which he had obtained and that he had not returned to his country of origin but had later obtained a false passport in order to obtain employment. At [11] the judge set out in full the judges sentencing remarks. Those paragraphs made reference to the extent of the appellant's dishonest conduct and that those types of offences which concerned immigration control were not victimless and that it defrauded the taxpayer and that illegal working had a serious impact on communities. At paragraph [15] the judge referred to the appellant's offences as being "serious" and that it was the respondent's case that all the evidence indicated that he had a propensity to reoffend and that he represented a genuine, present and sufficiently serious threat to the public.

15. The judge also set out the appellant's evidence at [23) that he had taken employment which he knew was wrong but that he was now a "changed man" and that he would not risk reoffending and that he was living with his family. The report from prison was positive and that "he could not stress enough that he repents this crime" (see 23). The family had been hugely affected ( see [24]). The judge also heard evidence from the appellant's spouse at [25].

16. Having set out the legal framework, the judge went on to consider this question of whether the appellant's personal conduct could be said to be a genuine, present and sufficiently serious threat to fundamental interests of society. The judge considered the offences themselves at [30]. This is the paragraph which Secretary of State seeks to challenge as one in which Mr Clarke submits, the judge failed to give adequate weight to the appellant's serious offending. The determination should be read as a whole and in particular in the light of the judge's consideration of the sentencing remarks which were set out in full and to which she had regard and also the circumstances of the offence which was set out at paragraph 11 and 12 of the determination. At paragraph 30, the judge again made reference to his convictions of using false representations to gain entry by deception and by using a false passport to gain employment. The judge observed that the appellant had accepted responsibility for his criminality by his plea of guilty. Whilst the judge also observed that the appellant's commission of the offence was such that the appellant was not seeking to injure or steal from a person, that should not be read in isolation from the determination as a whole. At paragraph 33, the judge found that the crimes were serious as indicated by the sentence to which she had had regard earlier in the determination.

17. Whilst the judge stated at paragraphs 30 and 33 that the offences were in a different category of offending of crime to that of robbery and violence, the judge was not stating that the offences themselves were not serious but was simply making an observation as to the different categories of offending. The findings at paragraph 30 were also open to the judge to make in the light of the issues set out in the decision letter. Whilst the respondent made reference to a caution for actual bodily harm, the Secretary of State had failed to provide any details of that offence either in the decision letter or at any time thereafter and thus it was open the judge to reach the conclusion that contrary to the respondent's assertion made in the decision letter, that the caution did not indicate that he posed a risk of harm. Furthermore it was open to the judge to find that the evidence did not reflect an escalation of offending as asserted in the refusal letter and cited the contents of the probation report at paragraph 30, "there have been no further offences of a violent nature committed and therefore in my assessment of full risk of harm analysis is not assessed as being required." The judge's finding was made in the context of the decision letter at paragraph 28 in which it was asserted that the nature of the offending showed that he had a potential to act violently. However the judge was entitled to find on the evidence that it was eight years since the caution , that it had not been considered serious enough to result in a charge and that there had been no indication that he was violent or had been involved in violence since that time.

18. Whilst Mr Clarke submits that the OASY's report was insufficient for the judge to reach a conclusion on the risk of offending, the judge was required to consider the evidence as a whole. The respondent's decision letter stated that "all the available evidence indicates that you have a propensity to reoffend". No evidence was identified in the decision letter to support that submission save for a recitation of the circumstances of the offences themselves. In those circumstances, it was open to the judge to consider the evidence of the appellant's offending, but also his conduct, his history and the probation reports. In that report, he had been assessed as posing a low risk of causing harm and a low risk of reoffending. The judge took into account the strength and stability of his relationship with a supportive family noting that he had heard evidence from the appellant's spouse and the two daughters had attended. The judge also had evidence concerning genuine remorse. The judge was also entitled to weigh in the balance the probation service record of his good behaviour in prison and at the time that he had spent constructively obtaining qualifications (see paragraph [31]), which were relevant to employment and thus to minimise risk further. He had been compliant with his licence which had expired at the time of the hearing.

19. Against that evidential background, it is not arguable that the First-tier Tribunal failed to give adequate weight to the appellant's offending or the seriousness of that offending or failed to consider the respondent's case. The judge gave adequate and sustainable reasons for placing weight on the probation report in conjunction with the other evidence that the judge identified, to find that the appellant did not pose the requisite level of risk.

20. As set out in the decision of **SSHD v Straszewski [2015] EWCA Civ 1245** at paragraph [25], it required an evaluation to be made of the likelihood that a person concerned would offend again and the consequences if he did so. In addition, the need for the conduct of the person concerned to represent a "sufficiently serious" threat to one of the fundamental interests of society required the decision maker to balance the risk of future harm against the need to give effect to the right of free movement.

21. The judge had expressly referred to Regulation 21(5)(c) and it is plain that this was in the judge's mind in those paragraphs where she considered the issue of risk of reoffending. Thus the judge did carry out an evaluative exercise of the evidence in this regard. As stated in the decision of **Straszewski**, in any given case an evaluative exercise of this kind may admit of more than one answer. If so, provided all the appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in a sense of falling outside the range of permissible decisions. It has not been advanced on behalf of the Secretary of State that the decision of the judge or his findings of fact were either irrational or perverse and in light of the foregoing, the judge properly considered the appropriate factors and made findings of fact based on the evidence before her.

22. Even if it may be said it was a generous decision, it is not one that fell outside the range of permissible decisions and was a decision open to her on the evidence presented before the Tribunal.

23. Therefore the grounds advanced on behalf of the Secretary of State are not made out and do not demonstrate any error of law in the decision of the First-tier Tribunal.

**Notice of Decision**

The decision of the First-tier Tribunal does not disclose an error of law and the decision stands.

No anonymity direction is made.

Signed Date: 4/7/2017

Upper Tribunal Judge Reeds