Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00321/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 March 2019	**On 3 April 2019**

Before

THE HON. LORD UIST SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SEBASTIAN [G]

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr Habtemariam, Anglia Immigration Law

DECISION AND REASONS

1. The Secretary of State appeals against the decision of the First-tier Tribunal made on 28 November 2018 to allow Mr [G]'s appeal against a decision to make a deportation order. That decision was made pursuant to Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), so the appeal was under those regulations.

2. The respondent has lived in the United Kingdom since 2004, and has worked during that period. It is not in dispute that he has acquired the permanent right of residence.

3. In 2009 the respondent was convicted of possessing a prohibited weapon and tracking a conveyance without consent for which he received a community order. On 13 October 2017 he was convicted of downloading 117 indecent photographs or pseudo photographs of a child and was sentenced to 12 months' imprisonment and was made the subject of a sexual harm prevention order.

4. In his letter of 1 May 2018 setting out the reasons for making the decision to deport the respondent the Secretary of State explained why it was considered that he did not qualify for the enhanced protection offered by reg. 27 (4) of the EEA Regulations [16] – [21]; and, that he poses a significant and unacceptable risk of harm to children in the United Kingdom [35] such that his deportation is justified on serious grounds of public policy [36]. The Secretary of State considered also that his removal was proportionate.

5. At the hearing before the First-tier Tribunal, it was accepted by the Secretary of State that the appropriate level of test to be applied was that of "imperative grounds" as set out in reg. 27 (4). That concession is set out at paragraph [3] of the decision and is clearly recorded in the record of proceedings. The Secretary of State has not sought to resile from that concession.

6. Having noted that concession, the judge directed himself [9] that the respondent could only be deported on "serious grounds of public policy or public security". He noted [12] that there was a risk assessment recently prepared showing him to be of low risk of harm to the general public and a medium risk of harm to children because of the nature of the offence [12]; that he had been engaging with Victim Awareness work; and was complying with his licence condition. The judge found [14] that the respondent is totally integrated into society here and that [15] he did not represent a proportionate and sufficiently serious threat to the public in the United Kingdom. The judge therefore allowed the appeal on that basis.

7. The Secretary of State sought permission to appeal on the grounds that the judge had erred in concluding that the respondent did not presented a sufficiently serious threat in that he had failed properly to take into account:

   (i) That the respondent was required to sign on the Sex Offenders Register for 10 years;

   (ii) That the respondent was subject to a Sexual Harm Prevention Order of an indefinite duration;

   (iii) The observation in the OASys report that even if at a low risk of reoffending, this would present a medium risk of harm to children;

   (iv) A concern that the respondent had denied his guilt;

8. On 31 January 2019 the Upper Tribunal granted permission to appeal on all grounds.

9. At the hearing Mr Melvin was unable to identify the OASYs report referred to in the grounds.

10. Mr Habtemariam asked us to note the concession by the Secretary of State that the correct test to be applied in this case was "imperative grounds of public security", and so, although the judge appeared to have erred when he applied the lower "serious grounds of public policy and public security", this was not material as the threat the respondent posed could not on any view reach the high threshold of imperative grounds.

11. In response, Mr Melvin did not seek to persuade us either that the concession was incorrect, or that the high threshold was met.

The Law

12. The EEA Regulations provide so far is material:

'**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.

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(17).

(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.).'

13. We remind ourselves first that categorisation of whether a person falls within reg. 27 (4) is a legal categorisation but was, as is noted in Lopes v SSHD [2019] EWCA Civ 199 at [40], that is based on an evaluation of the facts, and thus was a concession open to the Secretary of State to make; in any event, this was not challenged in the grounds of appeal nor in submissions made to us.

14. It is evident from the case law that the imperative grounds threshold is high; and, unlike the other tests relates only to public security and not public policy.

15. In PI v Oberbürgermeisterin der Stadt Remscheid [2012] EUECJ (C-348/09) the court said this:

> "19. According to the Court, it follows from the wording and scheme of Article 28(3) of Directive 2004/38 that, by subjecting all expulsion measures in the cases referred to in that provision to the existence of 'imperative grounds' of public security, a concept which is considerably stricter than that of 'serious grounds' within the meaning of Article 28(2), the European Union legislature clearly intended to limit measures based on Article 28(3) to 'exceptional circumstances', as set out in recital 24 in the preamble to that directive (*Tsakouridis*, paragraph 40).
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> 20. The concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words 'imperative grounds' (*Tsakouridis*, paragraph 41)."

16. It should be recalled that PI had been convicted of the sexual assault, sexual coercion and rape of a minor. The acts which gave rise to that conviction took place between

1990 and 2001. From 1992, PI compelled his victim to have sexual intercourse with him or perform other sexual acts on an almost weekly basis by using force and threatening to kill her mother or brother. The victim of the criminal offences was his former partner's daughter, who was 8 years old when the offences commenced. The offences in question are of considerably greater gravity than those perpetrated by the respondent.

17. We bear in mind that it is for the Secretary of State to show that the imperative grounds were met. We do not consider, despite how appalling the respondent's crimes are, that the risk he presents, meets that high threshold as identified in PI, nor did Mr Melvin seek to persuade us that is so. It is of note in this context that the most recent probation report states he is a low risk using the Active Risk Management tool with is a risk assessment specific to male sexual offenders. It is of note also that in the pre-sentence report in the assessment of the risk of serious harm, no opinion of such a risk is stated.

18. Accordingly, for these reasons, we conclude that the Secretary of State has not shown the decision of the First-tier Tribunal involved the making of an error of law capable of affecting the outcome.

Summary of Conclusions

The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

Signed Date 22 March 2019

Upper Tribunal Judge Rintoul