Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00448/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 December 2018	**On 09 January 2019**

Before

THE HONOURABLE MRS JUSTICE COCKERILL
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O'NEIL [S]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Respondent: Mr A Slatter, Counsel instructed by Eagle Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department, from the decision of the First-tier Judge, Judge Aujla, dated 11 June 2018, by which the judge allowed an appeal under the Immigration (EEA) Regulations 2016 against the decision of the Secretary of State dated 27 July 2017 to make a deportation order in relation to the appellant in that case who is now the respondent to this appeal, Mr Smith.

2. The decision was made by the Secretary of State that in view of Mr Smith's criminal conviction he posed a genuine, present and sufficiently serious threat to the interests of public policy if he were allowed to remain in the United Kingdom, and that his deportation was therefore justified under Regulation 27. The criminal conviction in question was that on 17 September 2015 at the Crown Court at Snaresbrook. Mr Smith was convicted of taking a child without lawful authority from 12 April 2015 to 15 April 2015. He was sentenced to four years' imprisonment, being released on licence on 31 August 2017 having served half the period of his sentence.

3. The appeal to the First-tier Tribunal was brought on the basis that the deportation would be disproportionate and in breach of the appellant's rights under the Regulations, as well as being in breach of his rights under Article 8 and Article 3, though the Article 3 ground was abandoned during the course of that argument.

4. Following oral evidence, the First-tier Tribunal Judge found at paragraph 42 of the decision that the appellant had committed a very serious offence for which he was sentenced to four years' imprisonment and then reflecting on the test says: -

> "In determining that issue, I have taken all the evidence into account including, in particular the OASys report which was completed on 09 May 2017 before the Appellant was released on licence after serving half the sentence. Risk was assessed generally at high-level to children. However, since his release from custody the Appellant's situation has improved. The letter from probation on page 255 of the Appellant's bundle stated the following which I find helpful and relevant to my consideration …"

He then went on to quote that e-mail which deals with Mr Smith's compliance with his supervision licence, his acknowledgement of the offence and the impact on his victim which it was said "he fully acknowledges" and reiterates his regret regarding the commission of the offence. It reflects the fact that he had obtained employment working as a chef in a restaurant and has regular contact with his children and it acknowledges that there has been no current intelligence or concerns reported in relation to Mr Smith or his bail address.

5. The First-tier Judge went on to say: -

> "I assess the risk as on the date of the hearing before me. Whilst not forgetting that the Appellant had committed a very serious offence which is clearly demonstrated by the length of the sentence that he was given, I find that at present there is no clear evidence to suggest that the Appellant represented a genuine, present and sufficiently serious threat …"

The judge then went on to deal with the question of proportionality on the basis that there might, nonetheless, have been a serious threat. At paragraph 44 that is considered, and at paragraph 50 he concludes: -

> "I have balanced the Appellant's personal circumstances against the need to deport him on account of his criminality. Having carried out a careful balancing exercise, I find that the Appellant's deportation would in the circumstances be disproportionate."

6. The respondent sought permission to appeal, which was initially turned down by the First-tier Judge but was granted by Upper Tribunal Judge Allen on 1 November 2018, on the basis that it was arguable that the judge erred in the evaluation of risk in that, although he noted the appellant had been assessed as being generally at high level of risk to children, that was not factored into the evaluation of the threat to society and proportionality.

7. The Secretary of State contends that the First-tier Tribunal Judge erred in relation to the assessment of risk and that in turn affected the proportionality assessment which was carried out in the alternative. In relation to the first point, the Secretary of State says that the judge refers to the OASys Report but demonstrates very little real engagement with that report. Rather, there is a focus upon one e-mail which was quoted at [42]. The judge appears to give primacy to that, albeit that it was just an abridged e-mail update and not a comprehensive further assessment. The Secretary of State contends that the OASys report was a comprehensive assessment and that the judge, in giving primacy to the e-mail assessment, did not as he should have done, look at the documents in the round.

8. In relation to the second point, the Secretary of state submits that the question of proportionality is one which is necessarily infected by the question of the approach which the judge took on risk and that the approach to proportionality is erroneous in that it does not deal with the question of the children not residing with Mr Smith, which it said is a highly material factor. At [46] it also does not deal with his ability to transfer to work in Jamaica as a healthy adult male and it appears at [49] to descend into speculation as to other factors which are not material.

9. On behalf of Mr Smith, it was submitted before us that there is no error of law and this is all a question of weight which the judge was entitled to put on various factors. Following the authority of **Vasconcelos**, the judge was not bound by the risk assessment in the OASys Report and was entitled to depart from it and to take into account other matters, which is what he did. We were reminded of the authority of **Greenwood**, in particular paragraphs 15 to 16 and the need to be scrupulous as to whether there is an error of law. It was submitted that this is essentially a perversity challenge and that, in fact, the First-tier Judge could perfectly well have concluded that there was no genuine risk based solely on the OASys Report given various factors within that such as the fact that his offending took place during an estrangement from his wife to whom he is now reconciled, and that there appear to be signs of engaging with the offending behaviour.

10. It was also submitted that when it comes to the question of the proportionality assessment that Mr Smith is in fact entitled to the highest level of protection under the Regulations. It was submitted that it was immaterial to the question of proportionality whether the First-tier Judge got the question of risk wrong, as the exercise of proportionality was not something which could be said to be infected by the question of the historical assessment.

11. We have listened carefully to the submissions which have been advanced before us. We will deal first with the question of this top level of protection because that is a simple point which can be cleared out of the way straightaway. We conclude that the argument based on Mr Smith being entitled to the top level of protection is erroneous. Apart from the fact that it was not argued in front of the First-tier Tribunal Judge, it is misconceived on the wording of the Regulations where the imperative of the protection applies only to EEA nationals, which Mr Smith is not.

12. So far as the more substantive arguments, which were advanced before us, we concur with the submissions which were advanced on behalf of the Secretary of State. It appears to us that the FTT Judge did err in that he did not engage fully with the OASys Report. There was an assessment of high risk of harm in relation to children., which was noted. However, the judge did not note the medium risk to the public and known adults as well. That is a matter which would need to be considered carefully in the context, albeit that the risk of reoffending being determined as low. The double nature of risk, pursuant to the authority of **Kamki** [2017] EWCA Civ 1715, is something which needs to be taken into account, and so all those factors need to be properly engaged with. The second point relates to the email. When one reads paragraph 42 of the determination, it does not read as if the First-tier Judge, with the greatest of respect to him, has looked at the OASys Report and informed himself as to how the assessment of high risk came to be made. Although noting the fact of high risk, the judge nevertheless seems to assume that the email has displaced the report. That is a conclusion, which it seems to us, is not a rational one given, that when one reads that e-mail, it does not deal at all with the question of the risk of reoffending or with the particular risks of serious harm to children or medium risk to the public which are the material parts of the OASys Report. Thus, it may be said that the learned judge's reasoning did not follow from the materials before him, or one may say that it evidences an irrational approach to the evidence. We find that if one were to engage with the OASys Report, it is hard to see how one could rationally conclude that there was no evidence of risk.

13. We also find that the learned judge's approach was erroneous, in that he did not appear to have given weight to how one assesses the question of serious harm as indicated by **Kamki,** which requires the judge to look both at the likelihood of reoffending and the seriousness of consequences if such reoffending occurs. In addition, the approach of the judge also failed to resolve the key issue as to whether Mr Smith accepted the verdict of the jury. That is a question which obviously has some direct relevance to

the ongoing assessment of risk. This is, it seems to us, a matter which is required to be dealt with, in particular given that this was a very serious offence, preying on a vulnerable child, with the potential for serious long-term harm to her and her family. As such, any reoffending, were it to occur, would present a very serious possibility of long-term harm to others.

14. We also note that the probation report makes it clear that the acceptance by the appellant of his guilt, or not, is relevant to the risk of future reoffending. It appears that the appellant does not accept his guilt in his evidence. Although the First-tier Judge did refer to the risk to children, he did so in broad terms and without alluding to the nature of the risk. We conclude that there was effectively no basis upon such evidence as was before the First-tier Tribunal Judge, for him to rationally conclude that the risk of harm to children had changed and also there was no evidence of change. There is little indication that the First-tier Tribunal Judge brought the potential consequences of reoffending into consideration. The result is that the judge erred in his approach, by failing to give proper or any weight to important factors in the assessment of whether the appellant represented a genuine, present and sufficiently serious threat. We find that there was irrationality in his approach, as well as a failure to give proper consideration to relevant and important evidential matters, such as to amount to a material error of law.

15. We are also concerned that the First-tier Judge may not have engaged fully with the facts of the appellant's conviction. That conviction was taking a 12 year old girl, who is not a family member, for reasons which the sentencing judge found to be entirely sexual. This was a 12 year old girl who had been abandoned by her mother. The appellant, who was at the time the best part of 40 years of age, approached her and gained her trust, asking her completely inappropriate sexual questions, and then induced her to go with him and kept her with him for twelve hours, releasing her only after the news carried items indicating that she was being searched for by the police.

16. Although, Judge Aujla, notes that this was a serious offence, the level of criminality and the details of that criminality do not seem to us to have been fully engaged with.

17. We accept the submission that when one comes to the question of proportionality it is impossible to divorce the question of risk entirely from the question of proportionality. Although there are a number of factors which require to go into the proportionality equation, it is a matter which cannot be determined in the absence of some consideration of the (*ex hypothesi*) risk. That, the First-tier Judge does not seem to have done. There are also a number of matters which one would expect to be determined if a comprehensive proportionality assessment were to be conducted. Such relevant matters include the appellant's personal circumstances, his age, his state of health, his family and economic circumstances, his length of residence in the United Kingdom, the social

and cultural integration into the United Kingdom and the extent to which he had links with his country of origin.

18. We are concerned that not all such factors have been dealt with or fully considered. There would seem to be no real balancing of the public interest in relation to the question of risk. There are questions over the conclusions in relation to Mr Smith's ability to integrate in Jamaica because there is no real reason on the evidence to see why he could not secure accommodation, employment or rehabilitation programmes in Jamaica, and that is not really dealt with. The issue of integration in Jamaica is a live one, given that he had spent most of his life until 26 years of age there is also not grappled with.

19. As to rehabilitation, there was little evidence to support the proposition that such prospects were better in the UK. Further the assertion that there was substantial evidence that he had been successfully rehabilitated does not entirely fit with the fact that he seems to have failed to accept responsibility for his actions or to engage with programmes in prison to address his offending.

20. The judge's assessment as to the best interests of the children seems not to overtly recognise that Mr Smith has not been resident with their mothers. They did not visit him in prison. The social worker's report, which was relied on in relation to the effect on the children, is not in fact particular to Mr Smith but sets out generic comments as to the general importance of black father figures where the children are of mixed race. Although clearly a relevant factor such must be placed in the overall context of the appellant's contact and relationship with his children.

21. For all the reasons set out above we allow the appeal by the Secretary of State to the extent that the decision of the First-tier Tribunal be set aside to be remade.

22. Our view is that, given the multiplicity of issues that are to be canvassed, it would be appropriate to go back to the First-tier Tribunal for a proper reconsideration of all the evidence and to make the necessary findings. We are mindful of the Senior President's practice direction.

23. Accordingly, the First-tier Tribunal will give such directions as are required.

24. No anonymity direction is made.

Signed Date 4 January 2019

The Hon. Mrs Justice Cockerill DBE