



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00151/2019

THE IMMIGRATION ACTS

Heard at Manchester (via Skype)
On 9 February 2021

Decision & Reasons Promulgated
On 5 March 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

TIAGO PINTO
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chakmakjian, instructed by Reiss Edwards Solicitors.

For the Respondent: Mrs Aboni, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. By a decision promulgated on the 12 November 2020 the Upper Tribunal found a judge of the First-tier Tribunal (FTT) has erred in law for the reasons stated and directed that the appeal be listed for a further hearing to allow the Upper Tribunal to substitute a decision to either allow or dismiss the appeal. This decision follows that hearing.

Background

2. Mr Pinto is a citizen of Portugal who was born on the 7 June 1990. There are a number of preserved findings from the FTT decision. These include his immigration history which is based upon a claim to have entered the UK with his parents in 1992, his criminal convictions which are set out below, and the presence of his parents and brother in the UK.
3. On 15 November 2017 Mr Pinto was convicted on three counts of making indecent photographs or pseudo-photographs of children for which he was sentenced to a term of imprisonment on each count of 12 months, 6 months and 2 months respectively, all suspended for a period of 18 months, made the subject of an unpaid work requirement of 120 hours, 60 days rehabilitation requirement and 100 days programme requirement, was made the subject of a Sex Offenders Notice requirement for 10 years, and subject to a Sexual Harm Prevention Order for life.
4. On 3 August 2018 Mr Pinto was convicted of a breach of the Sex Offender Prevention Order on two counts of making indecent photographs or pseudo-photographs of children, and failure to comply with the community requirements of the suspended sentence order.
5. The sentencing remarks of His Honour Judge Hillen are as follows:

... Tiago Pinto you are 28 years old and on 15 November of last year 2017, you appeared before me. At that stage having, before your plea of guilty, been a person of good character and a man who demonstrated your ability to be a decent citizen, but what you had done was to become firstly as is revealed in the presentence report that was before me on the 15 November 2017, addicted to pornography and whilst you have stated that you had no sexual interest in children, that had led you to come across on the Internet, images of children. Children who were being sexually abused and who had undergone what was described in that report as pain and misery and distress in those images being photographed in order that people like you could gain sexual gratification, masturbation whilst watching those images and having come across those images, you then as is indicated in that report, sought out further images, so that you had on your electronic devices at that stage in that matter, a very large number of Category A images as well as other images.

Inevitably that led me to the conclusion that the only appropriate sentence was a custodial sentence. However, you had admitted before me to your solicitors, to the Probation Service, that you had this serious problem which you wished to address and so I on that occasion, was persuaded by the probation report, by the information before me, by the advocate who was mitigating and through them of course from yourself, that you were a person capable of reform and in the light of that I suspended the sentence on the conditions which you well know. You did engage, as is indicated in the progress report with the Probation Service, you did complete the unpaid work but behind that you were secretly accessing child pornography again. Mr Aslam as always making careful and skilled submissions to me, describe that as being a ghost of the past not a resurrection. I do not accept that. You quite deliberately sought to continue disguising that from those who were trying to help you as is apparent in the progress report. You deliberately accessed those images, not only that, but you quite deliberately, at least in relation to the Dell computer tower, which had access to the pair to pair software, deliberately breached the Sexual Harm Prevention Order which I imposed not only to protect the public, but to help you by keeping you on the straight and narrow. Now what of course you did was to access child pornography at a much lower level than that which had been the case hitherto, but I do not accept Mr Aslam's submission, as eloquent as they were, that this was a ghost of a resurrection. This was a quite deliberate breach.

You will remember that when I sentenced you on 15 November last year, I said what I say to all defendants upon whom I impose suspended sentences, that the first condition of any suspended sentence is that you do not commit any offence punishable by imprisonment anywhere in the United Kingdom during the 18 months, the operational period of the suspended sentence. You did that. It was not as has been described to me a lapse, it was deliberate seeking out of those images and a deliberate breach of the Order that the court had made, both in respect of the Sexual Harm Prevention Order and the Suspended Sentence Order. I am required by law to impose all or part of the Suspended Sentence Order unless it would be unjust to do so and I can see no reason in your case having read carefully your letter, the letter of your mother who sits in court obviously in distress at yet again having to witness her son in the dock and the very careful report of the psychologist who is [inaudible] Jackson, who makes various recommendations. Once you are released from the prison sentence, I hope that whether as part of your licence or generally with the help of your family who are clearly supportive of you, that you do so engage, but for the moment you are going to remain in prison for some time. You have access, as is indicated in paragraph 5.1 of the psychologist's report, the Horizon programme within the prison system and you should take every opportunity to seek help within the prison system, though I have to appreciate that the length of the sentence that I have concluded is appropriate in this case, will not mean that you can get on a full course, but that is going to be down now to you once you are released. Therefore, for the two offences of possession of the indecent images of Class C, as you have already heard, had that stood alone and there had not been a suspended sentence, the starting point would have been a Community Order with a range of up to 6 months. The sentence that I would have imposed is one of three months' imprisonment had you pleaded not guilty and been convicted by a jury, I would reduce that to two months, a full third reduction, concurrent the one with the other. In respect of the telephones, I accept the mitigation in respect of the failure to disclose those to the police, I accept the mitigation of the ownership of those telephones, but they were in your possession. For that reason, I will impose a sentence in respect of that matter only of one months imprisonment, but in respect of the Dell tower, which had the pair to pair access on it, that was a flagrant breach. It was from that Dell tower that you downloaded onto the USB stick, some of the images which you were viewing for further sexual gratification, therefore the sentence would have been six months imprisonment for that breach. I reduce that to four months. That will be concurrent with the one months, but consecutive to the two-months on the first two charges, making the total of six months imprisonment in all and I will impose the 12 months suspended that I sentenced you to last year following the guidelines on New Sentences Criminal Justice Act 2003, paragraph 2.2.21. I will make that consecutive, making a total of 18 months imprisonment in all.

...

I should warn you of this, that the Sexual Prevention Order was made for a period of ten years from November last year and that will continue. If you breach that again, you will be liable to be sentenced for up to 5 years imprisonment and the fact that you now have a previous conviction for breaching that Sexual Harm Prevention Order will be treated as an aggravating factor.

6. There are three categories for this type of offence divided into Category A, B and C. In each group there is a further division of possession, distribution and/or production of the images. Mr Pinto was charged and convicted of making indecent photographs of children but as 'production' includes the taking or making of any image at source, for instance the original image, the making of an image by simple downloading is treated as 'possession' for the purposes of sentencing.
7. The OASys report dated 26 February 2019 refers to 1082 category A images (995 still and 87 moving), 667 category B images (653 still and 14 moving) and 9989 category C images (9837 still and 152 moving) which Mr Pinto pleaded guilty to

having downloaded on or before 6 January 2017. It is also noted that following forensic analysis of his computer by the police a total of 11,738 indecent images of children were found to have been downloaded since 2015.

8. The three categories, A, B and C, are defined in the sentencing guidelines as:

	Possession	Production**
Category A	Possession of images involving penetrative sexual activity. Possession of images involving sexual activity with an animal or sadism.	Creating images involving penetrative sexual activity. Creating images involving sexual activity with an animal or sadism.
Category B	Possession of images involving non-penetrative sexual activity.	Creating images involving non-penetrative sexual activity.
Category C	Possession of other indecent images not falling within categories A or B.	Creating other indecent images not falling within categories A or B.

The law

9. Mr Pinto is an EU citizen. Under Article 20 of the Brexit Withdrawal Agreement the conduct of EU Citizens, their family members, and other persons, who exercise Citizens' rights under the Withdrawal Agreement, where that conduct occurred before the end of the transition period, 31 December 2020, shall be considered under the provisions of Directive 2004/38/EC which gives effect to the free movement of persons. This means that in this appeal it is the EU standards and not the UK standard that applies to any decision to deport, which are more favourable to Mr Pinto than those applying under UK law.
10. In Straszewski [2015] EWCA Civ 1245 it was said that it was for the Member State to justify its action where the removal of an EEA national would prima facie interfere with treaty rights.
11. In Arranz (EEA regulations – deportation – test) [2017] UKUT 294 the Upper Tribunal held that the burden of proof lay on the Secretary of State to prove that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
12. That the burden of proof lies on the Secretary of State has recently been accepted by the Inner House of the Court of Session in SA v Secretary of State for the Home Department [2018] CSIH 28.

13. The Directive provides three levels of protection for European nationals who commit crime in the UK:
1. the basic protection, for those who have not acquired a permanent right of residence;
 2. a mid-level for those who have permanent residence; and
 3. a third level, offering much greater protection for those who have been in the UK for a continuous period of 10 years prior to the making of the deportation decision.
14. The basic protection regime: Under the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations') the provisions relating to European nationals who had not yet acquired permanent residence in the UK are to be found in Regulation 27(5). Regulation 27 as a whole reads:

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 a right of permanent residence under regulation 15 and who 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.

(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.

(7) In the case of a relevant decision taken on grounds of public health –

- (a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010; or
- (b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

(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.).

15. If there is no real risk of reoffending then there is no power to deport a national of another Member State on the grounds of public policy: SSHD v Dumliauskas, Wozniak and ME (Netherlands) [2015] EWCA Civ 145.
16. If an individual's conduct is found to represent 'a genuine, present and sufficiently serious threat' then, and only then, will a tribunal consider whether the other potential protections set out in the regulations should militate against deportation: MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC). This

requires a court or tribunal to ask whether the decision is 'proportionate' under 27(5)(a), which requires consideration of the factors under the new Regulation 27(6) which reads:

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

When considering the prospects of rehabilitation of European offenders, the following matters are relevant:

family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like...However, lack of access to a Probation Officer or equivalent in the other Member State should not, in general, preclude deportation.

Discussion

Level of protection.

17. At the error of law hearing the Secretary of States representative conceded that Mr Pinto had acquired permanent residence in the UK but disputed his entitlement to the highest level of protection. Regulation 27(3) of the 2016 Regulations states that a deportation decision cannot be made in respect of a person with permanent residence 'except on serious grounds of public policy and public security'.
18. In relation to Mr Pinto, although he has been in the UK since 1992 European law requires there to have been an unbroken period of 'continuous' residence for the 10 years *before the deportation decision was made*.
19. The leading case on this issue is Vomero [2016] UKSC 49 in which the Supreme Court referred to the European Court of Justice the question whether enhanced protection against deportation under Directive 2004/38 art.28(3)(a) depended on an EU citizen's possession of a right of permanent residence within art.16 and art.28(2). It further asked how the time period under which enhanced protection could be acquired was to be calculated. The CJEU decided (C316/16 and C-424/16) that it was necessary for the EU citizen to have a right of permanent residence to benefit from the 10-year protection. They clarified that the 10-year period does run back from the date of the expulsion decision but where a Union citizen had already resided in the Member State for 10 years before detention that did not automatically mean that the person was deprived of the benefit of the enhanced protection. An overall assessment of the person's situation may lead to the conclusion that notwithstanding the detention, the integrative links between the person and the host Member State have not been broken. Those aspects include the strength of the integrative links forged before detention, the nature of

- the offences which resulted in detention, the circumstances in which the offence was committed and the conduct of the person during the period of detention.
20. Mr Pinto lives with his family, but the 2016 Regulations, schedule 1 para 2, says that having extensive familial and societal links with persons of the same nationality or language does not amount to integration; a significant degree of wider cultural and societal integration must be present before a person is regarded as integrated. Paragraph 4 says that little weight is to be attached to the integration of an EEA national if the alleged links were formed at or around the same time as the commission of an offence, an act otherwise affecting the fundamental interests of society, or the person was in custody.
 21. Mr Pinto has been educated and worked until his conviction in the UK and has been supported by his family both during his imprisonment and since his release.
 22. Mrs Aboni relied upon the refusal letter in support of the Secretary of States position that notwithstanding the evidence of previous integration into the UK those links had been broken. The relevant section of the refusal letter reads:
 15. As already stated above, in your response to the Notice of liability, you claim to have entered the United Kingdom at the age of 2/3 and have been educated here, at primary, secondary, college and subsequently at university level. Having claimed to have entered at the age of 2/3 years, you would have been a dependent child of a parent, who was or is exercising treaty rights and had or has comprehensive sickness insurance cover in the United Kingdom over the period that you were a dependent child. You have provided no such evidence that your parent/parents have exercised treaty rights in the United Kingdom for a continuous period of five years in accordance with the EEA Regulations 2016.
 16. You have further claimed to have worked several jobs and that you have been in consistent employment prior to your incarceration. You asserted that you and your family have lived in the United Kingdom for over 25 years, however, you have not provided sufficient documentary evidence of exercising treaty rights or of residence in your own right in accordance with the EEA Regulations for a continuous period of 5 years or more.
 17. As you have not acquired a permanent right of residence under the EEA regulations 2016, consideration has been given to whether your deportation is justified on grounds of public policy. For the same reasons explained above, it is not accepted that you have been continuously resident in the United Kingdom for 10 years in accordance with the EEA Regulations 2016. Consequently, consideration has not been given to whether your deportation is justified and imperative grounds of public security.
 23. Mr Chakmakjian relied upon the respondent's own guidance entitled 'Public policy, public security or public health decisions', Version 4, dated 31 December 2020 which states "*Where the person had weak social and cultural integrative links with the UK prior to imprisonment, it may be more likely that imprisonment could break those links. Where the person has been in the UK since they were a young child, have undertaken their entire education in the UK and have not lived in another EEA country for more than 2 years, that may indicate that they have strong integrative links with the UK that have not been broken by the period of imprisonment, depending on all of the facts of the case.*"

24. The type of information referred to as being absent in the refusal was provided to the First-tier Tribunal; establishing Mr Pinto's father has worked in the United Kingdom exercising treaty rights. It is also the case that the concession that at least 'permanent residence' had been acquired by Mr Pinto is recognition by the respondent that matters have moved on considerably since the assessment in the refusal letter.
25. In Warsame [2016] EWCA Civ 16 the Court of Appeal held that in Secretary of State for the Home Department v MG (Portugal) (Case C-400/12) it was established that the ten-year period of residence required to benefit from the enhanced protection of imperative grounds must in principle be continuous and be calculated by counting back from the date of the deportation decision.
26. In the present case, Mr Pinto was sentenced to a total of 1 year and 6 months' imprisonment following his conviction, backdated to the date he was remanded in custody, the period spent in custody on remand counting towards the sentence for the underlying offence. The 10-year period must, however, be assessed by counting backwards from the decision to deport, made on 29 February 2019.
27. During that 10-year period, Mr Pinto had been in custody, on remand following his arrest, and later as a prisoner following his conviction, and sentence. On that basis Mrs Aboni argues the continuous 10-year period was broken.
28. It is also the case that the continuous period was broken as a result of a sentence for a serious offence, a classification which is discussed in more detail below, and it was not the appellant's first conviction for an offence involving a similar *modus operandi*.
29. Integration includes recognition of the laws applicable to the state in which the person claiming such resides. In this case, notwithstanding the support of his family and knowing his actions were illegal, and notwithstanding the sanction imposed upon Mr Pinto by the criminal courts in handing down a suspended sentence by a judge of the Blackfriars Crown Court on 15 November 2017, he decided such applicable laws were not binding upon him and showed no regard whatsoever for the opportunity that he had been offered to avoid imprisonment, or the family support, as clearly demonstrated by his breach of the suspended sentence and other associated orders.
30. In Mr Pinto's witness statements, he identifies his connection with the UK as being primarily based upon his family. In the witness statement dated 8 November 2019 he refers to primary and secondary education in United Kingdom, studying a programme of forensic science at the London Metropolitan University and previous full-time employment. At [5] Mr Pinto states:
 5. I have been an introvert or my life and do not have an extensive circle of friends as a result. I am also a naturally shy person and my social life is rarely extended beyond family vacations and outings. I confide in my older brother, with whom we share a very strong bond and who my regards to be my best friend. He has been nothing but a positive force in my life and continues to inspire and encourage me to repair the roles I have done to find a new path for myself.
31. Returning to the 2016 Regulations, schedule 1 para 2, says that having extensive familial and societal links with persons of the same nationality or language does

- not amount to integration; a significant degree of wider cultural and societal integration must be present before a person is regarded as integrated,
32. I find Mr Pinto has failed to establish a significant degree of wider cultural or societal links to the United Kingdom. I find despite the length of time Mr Pinto has been in the United Kingdom he has not demonstrated strong integration and that whatever level of integration he had was substantially weakened by his initial offending; even though not lost due to the length of time in the UK and issues identified in the respondent's guidance noted above, and lack of imprisonment.
 33. I find, however, that the strength of such integration was undermined and the integrative links he relies upon broken as a result of the second offending and his imprisonment which was clearly accepted by the Sentencing Judge as a deliberate further period of deliberate offending, and not a 'ghost of the past', sufficient to warrant a finding Mr Pinto is not entitled to the higher level of protection. That is my primary finding on this issue.
 34. In light of the Secretary of State's concession that Mr Pinto has a right of permanent residence in the United Kingdom, it is the middle level of protection that is applicable to this appeal.

If Mr Pinto was entitled to the higher level of protection (an alternative finding)

35. In the alternative, in case the primary finding relating to entitlement to the middle level of protection is considered incorrect on the facts, the situation for Mr Pinto is discussed below.
36. In MG and VC (Ireland) [2006] UKAIT 00053 the Tribunal considered that this last test "... is at the very highest level of the calculus introduced by the 2006 Regulations and Directive 2004/38/EC" and took the view that the phrase did not 'cover the ordinary risk to society arising from the commission of further offences by a convicted criminal. That is the risk which has in the past been met by the removal decisions based on grounds of public policy'.
37. In LG (Italy) v SSHD [2008] EWCA Civ 190 the Court of Appeal confirmed that a European national who had been in the UK for 10 years could only be deported on imperative grounds, commenting that those grounds bore a marked difference to the less stringent test applicable to deportation of those with shorter periods of residence. The 'imperative grounds' test presents a very high threshold: a compelling risk to public security must be demonstrated (though this did not necessarily mean a risk to national security). The Court of Appeal said that 'risk to the safety of the public or a section of the public' seemed reasonably consistent with the ordinary meaning of the test. The Court seemed to be of the opinion that the severity of the offence committed was not necessarily one to make removal 'imperative'.
38. In VP (Italy) v SSHD [2010] EWCA Civ 806 the Court of Appeal endorsed LG (Italy) v SSHD and said that imperative grounds of public security required not simply a serious matter of public policy but an actual risk to public security so compelling that it justified an exceptional course of removing someone who had become integrated by many years residence in the host state. The severity of the

offence could be a starting point for consideration but there had to be something more to justify a conclusion that that removal was imperative to the interests of public security.

39. The presence of the child sexual abuse element of the case requires consideration of the cross-border element of the appeal. The images record severe harm to children aged between 2 and 13 years, wherever the pictures were taken.
40. In relation to sexual offences, in PI v Oberbürgermeisterin der Stadt Remscheid (Case C348/09) CJEU (Grand Chamber) the Italian Appellant had been sentenced in Germany to seven years' imprisonment for sexual abuse, coercion and rape of a minor daughter of his former partner between 1990 and 2001. On appeal a question was referred to the CJEU about whether his offences constituted imperative grounds of public security which might justify a measure expelling a Union citizen who had resided in the host Member State for more than ten years. It was held that essentially, Member States retained the freedom to determine the requirements of public security in accordance with the national needs and that could vary from one Member State to another and also from one era to another. In order to determine whether the offences might be covered by the concept of imperative grounds of public security, a range of different factors had to be taken into account. Most importantly, Article 83(1) TFEU provided that the sexual abuse and exploitation of children was one of the areas of particularly serious crime with a cross-border dimension in which the EU legislature might intervene. The serious nature of those kinds of offences was also apparent from the UN Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union (paras 24 – 27). However, should the national court find that, according to the particular values of the legal order of the Member State in which it had jurisdiction, offences such as those committed posed a direct threat to the calm and physical security of the population, that should not necessarily lead to the expulsion of the person concerned. Expulsion was conditional on the requirement that the personal conduct of the person concerned must represent a genuine, present threat affecting one of the fundamental interests of society, which implied, in general, the existence in the individual of a propensity to act in the same way in the future (paras 29 – 30 and 34). In principle therefore this kind of behaviour might justify expulsion in the most serious cases.
41. In the case of E v Subdelegacion del Gobierno en Alava (Case C – 193/16) the CJEU referred to the above case when noting that it was open to Member States to regard the sexual exploitation of children as a particularly serious threat capable of being covered by the concept of “imperative grounds of public security” as long as the manner in which the offences were committed discloses particularly serious characteristics.
42. In that judgment the Court found that “in accordance with Article 83 (1) TFEU, the sexual exploitation of children is one of the areas of particularly serious crime with a cross-border dimension in which the European Union legislature may intervene. Therefore, it is open to the Member State to regard criminal offences such as those referred to in the second paragraph of Article 83 (1) TFEU as constituting a particularly serious threat to one of the fundamental interests of

society, which might pose a direct threat to the calm and physical security of the population and thus is capable of being covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion order under Article 28 (3) of Directive 2004/38, as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it".

43. Article 83(1) Treaty Functioning of the European Union (TFEU) reads:

The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

44. The respondent in this case clearly views the offences committed by Mr Pinto, specifically in relation to the 'production' of the child pornographic content disclosed in the images downloaded by him, to constitute a particularly serious threat to one of the fundamental interests in society; posing a direct threat to the calm and physical security of the population capable of being covered by the concept of imperative grounds of public security. I find such a view to be made out on the evidence. Such a stance has not been shown to be irrational on the facts or outside the power or right of the UK government.
45. It is not known where the children who were subject to the sexual and other abuse who appeared in the videos and still images downloaded by Mr Pinto are based, but it is not disputed that those children were abused. The cross-border element is also referred to in the OASys report.
46. Whilst it is accepted that Mr Pinto has not, to date, personally raped or indecently assaulted a child, and his convictions relate to the possession of indecent images of children, it cannot be ignored that possessing 995 images falling into category A is indicative of a substantial number of children being subjected to rape or penetrative sexual acts for the purposes of sexual gratification of those such as Mr Pinto, who create the market for such images by purchasing and downloading them. This is the personal conduct of Mr Pinto which I find there is a real risk of being repeated for the reasons set out below. Whether an individual in one case rapes one child as opposed to a case in which an individual downloads 995 images which cannot be of the same child and possibly represent hundreds of

children being sexually abused, does not prevent the requisite test being established on the facts.

47. In the OASys report the Probation Officer writes at paragraph R6.1:

“The schedule of images provide an insight into the nature of the images downloaded. It shows that there are moving and still images of children as young as 2 with file names such as “3yo Girl sucks dad Great blow jobs”. Images include children being tied up, been subjected to oral and penetrative rape, and with injuries consistent of physical abuse.”

48. In relation to the impact upon the victim the Probation Officer writes:

Impact on the victim

It is clear that there is a devastating impact on the victim which is likely to be long lasting. The images displayed serious sexual harm being inflicted on the children, ranging from oral to penetrative rape and also showed children being tied up and experiencing other physical abuse. Aside from the physical harm caused, there is also clear psychological and emotional harm, in respect of having difficulties placing trust in adults, difficulties managing future relationship, feeling angry and resentful and feeling powerless to get out of their cycle of abuse. This also has the potential to be long lasting.

49. When discussing the issue of risk of serious harm from the appellant the Probation Officer writes at paragraph R10.1:

Who is at risk

The following groups are deemed by us being at risk:

Children: this risk is specially towards females aged between two and thirteen years and are considered as vulnerable. It is clear that the children are being placed in these situations stipulated in the video against their will, either through a lack of understanding due to their age or through the threat or actual use of physical violence. In addition it is also clear that these children are not receiving appropriate supervision and care from an adult to have the ability to take them away from the situation.

There are no indications that harm was inflicted by Mr Machado-Pinto directly. However it is clear that his actions of downloading inappropriate material, helps to feed the interest within this market. Subsequently this attracts individuals who cause direct harm to these children, to create images in order to sustain and satisfy this interest.

50. In relation to the nature of the risk the Probation Officer writes:

The nature of the risk is identified as the following:

Physical - it is likely that those children featured in the video and still images would have experienced physical harm in terms of being assaulted in a sexual manner. In some cases excessive force would have been with the potential for the resulting harm to be long lasting and effective development in later life

Emotional harm - this is respect of feeling scared, overwhelmed, disgusted, upset and powerless. It is possible that they may not have the opportunities to escape this abuse therefore this harm has the

potential to be long lasting. In the future they may have difficulties managing the emotions in respect of feeling angry and resentful. They may also feel a sense of suspicion and paranoia around others.

Psychological harm: this is in terms of being manipulated and betrayed by an adult whom they may have trusted and respected. It is likely that this would have a long-term effect and lead to difficulties later on in their childhood and early adulthood. This is in respect of having difficulties placing trust in adults and others, particularly in managing a successful relationships and allowing them to help them move forward in their lives.

51. I find the offences committed by Mr Pinto of downloading sexually explicit images of children being abused, even in the privacy of his own bedroom, were clearly part of a chain or network of persons criminality sexually exploiting children for gain, posing a real and substantial threat to the individual child concerned. I find the required degree of seriousness to be made out by the Secretary of State on the facts even if Mr Pinto is entitled to the high level of protection. I find the offences have particularly serious characteristics based upon the risk to children as identified in the OASys report of Mr Pinto fuelling a market for such images resulting in the rape and sexual abuse of children, the impact of such offences upon those children, and from a special need to combat such offending on a common basis in all civilised society, in light of the real risk of his further offending.

Finding on risk

52. Whatever the level of protection to which Mr Pinto is entitled it is important to establish whether there is a risk of reoffending for if no risk exists, he cannot be deported under EU law.
53. A point raised during the hearing was that the witness statements from the family speak extensively of the steps they are taking to limit Mr Pinto's access to the computer that the family have in their flat in London. A question was raised by the Tribunal as to whether there were any checks imposed upon his smart phone which he accepted, in reply to a question from the Tribunal, he had. There was no evidence that the family monitored Mr Pinto's usage of his smart phone which is a device capable of accessing the Internet and, more likely than not, the Internet sites from which Mr Pinto is able to obtain the type of images referred to in the charge sheet. The use of a telephone in the breach of orders imposed for the first set of offences was commented upon by the Sentencing Judge in the second criminal case.
54. In light of the importance of this aspect Mr Pinto was given an opportunity to file additional evidence with a copy to be served upon Mrs Aboni who was given a right of reply. A response has been received by way of a copy email from Mr Pinto's Offender Manager received 11 February 2021 in the following terms: *"I am the current offender manager of the concerned In relation to the below points I can confirm the following 1) Mobile phone is registered with police 2) Internet monitoring software is on the family PC at the home address – not on mobile phone however mobile phone can be checked during a visit 3) As part of being a registered sex offender unannounced home visits are conducted and have been conducted on the concerned. I offer*

this information as a factual response to the below questions and do not offer it in support or to the detriment of any ongoing case for Mr Pinto , these are just the current facts”.

55. I am satisfied in light of this information that the authorities are aware that Mr Pinto possesses at least one smart phone and has the capability to ascertain what sites he visits either as a result of the search history of the device or by other means.
56. Mr Pinto is assessed as posing a medium risk to children within the community following a comprehensive assessment by the assigned Probation Officer with the National Offender Management Service, such category being defined as ‘there being identifiable indicators of risk of serious harm. The offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse’.
57. Mr Pinto is also subject to supervision under the MAPPA scheme, currently at level 1, has been admitted to the Horizon programme, an intervention delivered to men who have a sexual conviction as part of an antisocial criminal orientation and are considered to be at a medium, high or very high risk of reconviction. Letters from Probation Service dated 8 October 2019 confirming an appointment for the first individual session on 23 October 2019 and first group session on 12 November 2019 have been provided.
58. Mr Pinto is also subject to a Sexual Harm Prevention Order (SHPO) for a period of 10 years from November 2017. This is an order imposed on an individual who it is considered to pose a risk of sexual harm to either the general public or a certain group of people or individual person(s).
59. Mr Pinto suggests he will not reoffend referring to his awareness of his offending, its causes, attendance on the Horizon course and support from family. Those statements have been noted together with the correspondence from the Probation Service, and it is not disputed that there is a genuine desire amongst Mr Pinto’s family for him to be permitted to remain in the United Kingdom and for them to do all they can to ensure he does not offend again in the future.
60. Mr Pinto has also provided a copy of a report from a Chartered Psychologist, dated 14 October 2018, prepared at the request of the solicitors who represented him before the Blackfriars Crown Court for the purposes of mitigating sentence on the basis it was said Mr Pinto (referred to in the report as the Defendant) recognises he has a problem and his willingness to receive treatment with reference to Mr Pinto partly completing the Horizon Course in prison. The psychologist’s opinion set out in section 5 is in the following terms:

5. Opinion

- 5.1 To give my opinion on whether the Defendant recognises he has a problem and his willingness to receive treatment. He has already partly completed the Horizon Course in prison.

- 5.1.1 Tiago has been consistent through both these proceedings and the 2017 proceedings in verbalising that his use of pornography is a problem, and

he wishes to receive help. There are two significant factors that have inhibited meaningful change in his behaviour - one is his psychological functioning and context, and the other is the type of support he needs but he has not yet had access to.

- 5.1.2 Tiago's personality overall includes a tendency to be self-conscious, socially withdrawn and isolated, without friends and without a support network outside his family. He lacks confidence, being meek, self-denigrating, non-assertive, and rarely forceful. He will take the path of non-resistance rather than confront an issue. The result of this is that he lacks motivation to do things and is ineffectual in creating change around him. He lacks self-discipline, underpinning much of his behaviour, including his use of pornography. It is positive that he has a slightly higher than average level of self awareness and an at least average level of honesty.
- 5.1.3 Tiago's social isolation is not his choice but is underpinned by his social anxiety, feelings of depression and lack of confidence/self esteem. He wishes to develop friendships and have a partner and is aware that his isolation - especially the lack of a relationship with a woman - contributes to his use of pornography. He reported that he did not have difficulties with friendships when at school and his pornography only became a problem in his mid-twenties. He was able to identify the link between this problem and the context/psychological state he was in.
- 5.1.4 Tiago needs to have a two-part approach for change. One is to receive individual therapy to focus on his use of pornography and which will also need to involve his personal profile. The other part is for him to become less socially isolated and more active in other aspects of his life by becoming involved in activities. The therapy could also contribute to this. It may be that a probationary officer would be appropriate to help Tiago identify a plan for this, and to support him following this consistently. His previous choice of activities to become more active - getting a tattoo, skydiving - have not been appropriate for this. Playing football would be, if he could be more integrated with the other players.
- 5.1.5 The support or therapy that Tiago needs to achieve change would be Cognitive Behaviour Therapy/CBT. CBT is generally for only be for up to 6 months and less the therapist advises differently once involved with Tiago. As Tiago's personality and context is quite entrenched, it is likely to take longer, I think a year. If he became fully involved with this, the likely prognosis is positive. He should be encouraged to consider the additional benefits of this for helping explore the depression/anxiety he has experienced and giving him the tools to deal with this and his urge to use pornography for any future incidents. It would be appropriate if the therapist could have access to this personality assessment.
- 5.1.6 The therapist will often require a 1-2 week gap between CBT sessions to allow the person taking part to practice their 'homework'. This is a vital part of the therapy that involves the person taking part making changes in their day-to-day thoughts and behaviour as have been identified in the

sessions, such as replacing a negative thought with a more helpful one that has been developed in CBT or recognising that a certain behaviour will make them feel worse and doing something more helpful. This homework can be discussed during the sessions. The advantage of CBT is that the skills learnt during this process can be practised and developed by the person taking part after the therapy has finished, which makes it more likely that changes in thoughts and behaviour will be long term. The therapy is usually structured so that the person taking part takes progressively more control of sessions throughout its course, encouraging them to feel empowered to continue working independently once it is finished. This means that CBT is suited for long-term problems such as anxiety/depression, even though the therapy itself is relatively short-term, only lasting on average 3–6 months.

5.1.7 Within NHS, CBT is available from the mental health service through a referral from Tiago's GP.

61. There is also recorded in the report at paragraph 4.1.22 the following observation:

4.1.22 Asked about his purchase/use of the 'small realistic ass & vagina & baby clothes' (case file summary 2.8.18) he put his head in his hands briefly and said he just tried it. In the previous proceedings the evidence against Tiago contained Category A, B and C material. In these current proceedings the evidence has only category C, with the addition of the realistic vagina and children's clothes. Overall Tiago's use of pornography does not present as having reduced significantly since the previous proceedings other than there being no evidence of his use of category A or B within these proceedings. There is no evidence of his intention to move from use of pornography to practice what he views with children.

62. The report from the psychologist clearly identifies two aspects of the work required by Mr Pinto to address the reasons behind his offending which clearly suggests a two-pronged approach, "One is to receive individual therapy to focus on his use of pornography and which will also need to involve his personal profile. The other part is for him to become less socially isolated and more active in other aspects of his life by becoming involved in activities". The psychologist's report was written in 2018 but when asked during the course of the hearing whether Mr Pinto had undertaken any CBT treatment it was confirmed he had not. The report has not been updated.

63. Whilst Mr Pinto has completed the Horizon course there is no statistical or subjective evidence to indicate whether this will or will not guarantee that he will not reoffend in the future. Recidivism rates for those convicted of sexual offences, in which category I place Mr Pinto, are higher than some other categories and not low. Whilst it is noted Mr Pinto states in his witness statements that he will not reoffend again it would have been made crystal clear to him during the course of the sentencing exercise when he received the suspended sentences of the serious consequences of reoffending, which seems to have had no impact upon him. The

judge was clearly persuaded at that time that Mr Pintos assertions he will not offend in the future and will deal with his 'problem' were genuine, which was proved not to be the case.

64. Whilst Mr Pinto may have taken up running this is clearly an individual pastime with there being no evidence of his running as part of a running club or community group which would reduce his level of isolation.
65. It is of concern that Mr Pinto's underlying personality and character and how that manifests itself when he seeks personal sexual gratification, remains as it was previously. There is no evidence of work having been undertaken of a sufficient degree in relation to the 'triggers' or for how, in relation to his emotional management, Mr Pinto deals with this element. It was identified in the OASys report that the factors that may inhibit change in Mr Pinto are:
- In the event he appears to spend a lot of time living in isolation.
 - He feels unable to process and manage his emotions, particularly around his self-confidence.
 - He lacks an ability to address his sexual thoughts and his management of this.
 - Failure to address his offending behaviour.
 - Loss of employment.
 - A breakdown of his relationship with his family.
66. Although the evidence indicates Mr Pinto is spending more time with his family including learning to cook and spending time with his brother, and there is no evidence of a breakdown of his relationship with his family at this point, all the other issues highlighted above do not appear to have been adequately dealt with save through the Horizon programme, but not through the intense trained intervention recommended by the psychologist through CBT. Until that occurs with evidence of a successful outcome, I find there is a credible real risk of harm to children as identified in the OASys report, through Mr Pinto reoffending.
67. The argument advanced by Mr Chakmakjian in his submission that Mr Pinto's offending should be viewed in a similar manner to a person who buys drugs from a dealer and who is therefore not responsible for the manufacture or production of such drugs is noted, but it is not made out such analogy is correct in light of the substantial harm caused to the young children, some as young as 2, in the production of the material downloaded by Mr Pinto. Children have specific protection in the law and through the UN Rights of the Child and are identified as vulnerable. It is not appropriate to compare a child to a heroin poppy or a coca plant.
68. Whilst it is accepted Mr Pinto did not rape the children and has not physically sexual abused a child in the UK yet, his offending was clearly a perverted campaign of sexually deviant behaviour. Mr Pinto displays evidence of being a potentially dangerous individual. The evidence shows the nature of the images and refers to his search for more shocking elements to fuel his sexual desires as they grew. Mr Pinto claims he 'stumbled' across images of this nature, but it is

noted that would have been before 2015 after which time the police found a substantial number of images had been downloaded onto his computer. The nature of the images increased in severity and included Category A images. He clearly chose to continue to download and view such images until he was caught.

69. Then evidence also shows the sole reason for Mr Pinto's offending was for his personal sexual gratification. Mr Pinto revelled in the 'thrill' and was seeking 'excitement'. The element of his personality that gives rise to the same is that identified by the psychologist which has not been dealt with by CBT or otherwise.
70. This is a case involving not only images but the purchase by Mr Pinto of baby clothes and a replica of a 'small ass and vagina', which he no doubt viewed as sex toys connected with his desire for gratification connected to children. This demonstrates a more troubling approach to his 'enjoyment'. Mr Pinto claims to have no sexual interest in children, but the evidence is all of his seeking images of children being sexually abused and using the same in both still photographic and moving video form for his gratification, combined with replica items more associated with children than an adult female, which is very troubling.
71. I find the required degree of risk is made out by the respondent of Mr Pinto re-offending in such a manner as to pose a real risk to children aged between 2 and 13. I find Mr Pinto's personal conduct represent a serious genuine, present threat affecting one of the fundamental interests of society to protect those who are the most vulnerable, from the sexual abuse and exploitation of children.
72. The evidence clearly demonstrates that such images are part of a chain of causation of commercial exploitation of the children through means of sexual abuse. Mr Pinto in downloading the images would have been fully aware of the ages of the children involved, the acts to which they have been subjected, and that his purchase of such items will directly lead to the provision of more of the same. In the modern digital world, the distinction between those directly causing the abuse and those it is reasonable to find will be aware their actions contribute to such abuse is lessened. Whilst there was no detailed discussion about culpability at the hearing it is clear that Mr Pinto is culpable.

Proportionality

73. The finding as to the applicable level of protection and real risk presented by Mr Pinto, sufficient to satisfy the relevant test, does not necessarily mean, however, that he can be deported under EU law. It is still necessary to consider Regulation 27.
74. In relation to those issues, I find as follows (with the replies to the specific issues being in italics following the wording of the regulation:

27.— (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health. *The decision is clearly being taken on the grounds of public policy and public security, there being no issue of public health raised in this appeal.*

(2) A relevant decision may not be taken to serve economic ends. *There is no evidence the relevant decision has been 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. *The case law shows the nature of offences involving child exploitation are sufficient to engage imperative grounds of public security a higher threshold than that applicable to those entitled to a permanent right of residence under regulation 15, surpassing the serious ground threshold. In any event, that the serious grounds of public policy and public security test is met is clearly made out.*

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

(a) has a right of permanent residence under regulation 15 and who 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.

Noted, but the case law shows offences involving child sexual exploitation may be sufficient to engage imperative grounds of public security as noted above. In this appeal the relevant decision can be taken on imperative grounds, indicating that even if the appellant is entitled to the higher level of protection (the alternative finding) the necessary threshold enabling the respondent to deport him has been crossed.

(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; *this issue is considered in further detail below.*

(b) the decision must be based exclusively on the personal conduct of the person concerned; *the decision to deport is based exclusively on the personal conduct of the appellant.*

(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; *it has been found that the personal conduct of the appellant represents a sufficiently serious threat affecting one of the fundamental interests of society taking into account past conduct and the fact the threat does not need to be imminent for the reasons set out above.*

- (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision; *it has not been shown the decision is based upon matters isolated from the particulars of the case or which relate to considerations of general prevention where the same is not permitted. The specific sufficiently serious threat is to one of the fundamental interests of society, the protection of vulnerable children and prevention of their sexual exploitation arising directly from the personal conduct of the appellant.*
 - (e) a person's previous criminal convictions do not in themselves justify the decision; *the decision to deport is not based upon the appellant's previous criminal convictions but on the credible real risk of a repeat of such conduct leading to similar offending in the future.*
 - (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. *Although not a decision taken on the basis of deterrent only, which is available in UK domestic law but not applicable EU provisions, there is a preventative element of this decision in light of the real risk identified above, specific to the appellant.*
- (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.

Appellants age: the appellant was born on 7 June 1990 and is therefore 30 years of age.

Appellant's state of health: there is no evidence that the appellant is in anything other than in good physical and mental health bar the incidence of a general medical nature referred to in the copy GP notes provided and in the psychologist's report.

Appellant's family situation: the appellant lives with his parents and brother in the United Kingdom in a supportive family environment.

Appellant's economic situation: the appellant has worked previously but is currently unemployed which he blames upon the respondent retaining his identity document.

Appellant's length of residence in the United Kingdom: the appellant has been in the United Kingdom since his claimed date of entry in 1992.

Appellants social and cultural integration into the United Kingdom: the extent of the appellant's integration into the United Kingdom is discussed above. He is not found to be integrated despite the length of time in the UK, on the facts.

Appellant's links with Portugal: the appellant claims in his latest witness statement:

6. In the way of family, I have an estranged aunt living in Portugal with whom we do not have a close relationship or ongoing contact. The most recent communication we had goes back five years. I have no immediate family or close friends in Portugal. In addition, despite having been raised in a Portuguese speaking household, I do not speak or understand the language very well and when conversing with my parents I speaking English in response to what my parents say.

7. It would be extremely difficult to start my life anew in Portugal as I have been detached from my cultural and social ties in Portugal for the best part of my life. In effect, I would be forced to build a new life for myself, away from everything I know, a domestic environment, my family and home community where I have the necessary setup and support to successfully complete the rehabilitation process and integrate back into society, which requires commitment and dedication both on my part and I rely on the assistance of my family.

The appellant's mother in her latest witness statement states:

5. We have lived in the UK for the last 26 years of our lives and consider this country to be our home. We have no social, cultural or family ties to Portugal. Most of our immediate and extended family there have passed away, with the exception of my estranged sister-in-law with whom we have no contact for close relationship.

There was no challenge to the evidence concerning the appellant's family position in Portugal which indicates that he will experience problems in re-establishing himself although it was not made out that the same will be sufficient to make a decision disproportionate on their own, but I accept are matters that have to be considered together with all the other relevant facts, which I have done. It was not made out that even though the appellant's knowledge of Portuguese may be limited his understanding and use of the language was not sufficient to enable him to function or that he will not be able to reintegrate into or survive within Portugal. It was not made out that family in Portugal, albeit limited, could not be located. There was no evidence that any attempt had been made to trace family members in Portugal or to show that if they were located they will not be willing or able to offer advice and assistance to the appellant. It is not made out that society in Portugal is so different from that in the UK, such that the life skills developed by the appellant in the UK will not be of benefit to him in Portugal. The reference by the appellant to being brought up in a Portuguese speaking household is noted as is the appellants statement that whilst his parents may address him in Portuguese he replies in English,

which indicates a clear understanding of the Portuguese language. The appellant was previously employed in the United Kingdom and it was not made out he will not have credible employment opportunities based upon his experience and education, sufficient to enable him to reintegrate into Portuguese society.

Whilst it is accepted that the appellant's ties to the United Kingdom are considerably greater to those Portugal, the country to which the appellant will be deported, it is not made out that the strength of the family ties and family support that the appellant benefits from, but which did not prevent him offending and reoffending in the past, would mean he will be effectively abandoned in Portugal without emotional or financial support from them.

(7) In the case of a relevant decision taken on grounds of public health –

- (a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010; or
- (b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

This is not a public health appeal.

(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.). *See below.*

75. Schedule 1 of the 2016 Regulation, which has been factored into consideration of relevant issues, reads:

SCHEDULE 1 CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

Considerations of public policy and public security

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

Application of paragraph 1 to the United Kingdom

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.
3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.
4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as –
 - (a) the commission of a criminal offence;
 - (b) an act otherwise affecting the fundamental interests of society;
 - (c) the EEA national or family member of an EEA national was in custody.
5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.
6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including –
 - (a) entering, attempting to enter or assisting another person to enter or to attempt to enter, a marriage, civil partnership or durable partnership of convenience; or
 - (b) fraudulently obtaining or attempting to obtain, or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

The fundamental interests of society

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include –

- (a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;
- (b) maintaining public order;
- (c) preventing social harm;
- (d) preventing the evasion of taxes and duties;
- (e) protecting public services;
- (f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;
- (g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);
- (h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);
- (i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;
- (j) protecting the public;
- (k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);
- (l) countering terrorism and extremism and protecting shared values.

Rehabilitation

In relation to the issue of rehabilitation, in *Essa* (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC) it was held that for those who at the time of determination are or remain a present threat to public policy but where the factors relevant to integration suggest that there are reasonable prospects of rehabilitation, those prospects can be a substantial relevant factor in the proportionality balance as to whether deportation is justified. If the claimant cannot constitute a present threat when rehabilitated, and is well advanced in rehabilitation in a host state where there is a substantial degree of integration, it

may well very well be disproportionate to proceed to deportation. At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, it cannot be seen how the prospects of rehabilitation could constitute a significant factor in the balance. Thus, recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with propensity to commit sexual or violent offences and the like may well fall into this category.

76. In MC (Essa principles recast) Portugal [2015] UKUT 00520 (IAC) it was held that:
- (i) Essa rehabilitation principles are specific to decisions taken on public policy, public security and public health grounds under regulation 21 of the 2006 EEA Regulations;
 - (ii) It is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (regulation 21(5)(c)) that it becomes relevant to consider whether the decision is proportionate taking into account all the considerations identified in regulation 21(5)-(6);
 - (iii) There is no specific reference in the expulsion provisions of either Directive 2004/38/EC or the 2006 EEA Regulations to rehabilitation, but it has been seen by the Court of Justice as an aspect of integration, which is one of the factors referred to in Article 28(1) and regulation 21(6) (Essa (2013) at [23]);
 - (iv) Rehabilitation is not an issue to be addressed in every EEA deportation or removal decision taken under regulation 21; it will not be relevant, for example, if rehabilitation has already been completed (Essa (2013) at [32]-[33]);
 - (v) Reference to prospects of rehabilitation concerns reasonable prospects of a person ceasing to commit crime (Essa (2013) at [35]), not the mere possibility of rehabilitation. Mere capability of rehabilitation is not to be equated with reasonable prospect of rehabilitation;
 - (vi) Where relevant (see (4) above) such prospects are a factor to be taken into account in the proportionality assessment required by regulation 21(5) and (6) ((Dumliauskas [41]));
 - (vii) Such prospects are to be taken into account even if not raised by the offender (Dumliauskas [52])
 - (viii) Gauging such prospects requires assessing the relative prospects of rehabilitation in the host Member State as compared with those in the Member State of origin, but, in the absence of evidence, it is not to be assumed that prospects are materially different in that other Member State (Dumliauskas [46], [52]- [53] and [59]);
 - (ix) Matters that are relevant when examining the prospects of the rehabilitation of offenders include family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like (Essa (2013) at [34]). However, lack of access to a Probation Officer or equivalent in the

other Member State should not, in general, preclude deportation (Dumliauskas [55])

- (x) In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (Dumliauskas [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (Dumliauskas at [46] and [54]).

77. Mr Pinto has not addressed this issue at all in his statement. His failure to actively engage in the CBT treatment recommended in 2018 casts serious doubt upon his prospects of rehabilitation.
78. It has not been shown that there is not an effective Probation Service in Portugal. Portugal has a Sex Offender Register indicating an awareness of this issue. At [53] of the refusal decision it is said there was no reason why the appellant could not continue to work towards rehabilitation in Portugal and that he did not need to remain in the United Kingdom to become rehabilitated. Mr Pinto has provided insufficient evidence to show the contrary is the case. I find on the material available to the Upper Tribunal that Mr Pinto will have equal prospects of being rehabilitated in Portugal as he has in the United Kingdom. It is not made out Mr Pinto needs to remain in the UK to become rehabilitated.
79. No evidence has been provided to show that the Probation Service in the UK or Mr Pinto's Offender Management could not liaise with the Probation Service in Portugal to ensure continuity of monitoring/assistance as required.
80. It is also not made out Mr Pinto will not be able to gain access to the type of CBT required to address the underlying issues surrounding his offending behaviour in Portugal. This is of particular importance for as noted in the OASys report, the underlying issues led to Mr Pinto seeking to satisfy his sexual desires by seeking more extreme images of children being abused and continue to by seeking out pornography that was more shocking to him.

Conclusion on proportionality of the deportation decision under EU law

81. I find the Secretary of State has established, when balancing all the competing aspects of this case in the round, that even in light of the length of time Mr Pinto has been in the United Kingdom and his previous integration which included into his family unit, that his deportation from the United Kingdom is proportionate under European law.
82. I find the respondents decision proportionate to any interference with Mr Pinto's right for free movement protected by EU law. It is not suggested any other family member will be forced to leave the UK if Mr Pinto is deported. They will be able to continue to exercise their treaty rights as before.

83. I find insufficient evidence has been provided to show that Mr Pinto will be unable to establish himself in Portugal, even if his aunt cannot be traced, in light of his age, education, and support from his family in the United Kingdom.

Conclusion on proportionality - Article 8 ECHR

84. In relation to article 8 ECHR, which is applicable to all parties whether European nationals or not, having considered in detail the provisions of section 117 of the 2002 Act, with particular reference to 117C which applies to a person subject to a decision to deport him from the United Kingdom, I do not find it made out that Mr Pinto satisfies any of the exceptions to deportation or established that there are very compelling circumstances or insurmountable obstacles to his integration into Portuguese society, sufficient to outweigh the strong public interest in his removal from the United Kingdom in light of the serious nature of his offences, the finding he continues to pose a risk of harm to the public or a section of the public, specifically children, and that he has failed to address the underlying issues in his personality which are said to have contributed to his criminal behaviour and which heightens the credible real risk of reoffending.
85. Mrs Aboni in her submissions stated the protected rights related to Mr Pinto’s private life as a necessary degree of dependency had not been established to show the private life recognised by article 8 existed. There is merit in this submission although the most important aspect of Mr Pinto’s private life is possibly the bond that he has with his family members in the UK which is been factored into the required balancing exercise.
86. Having considered the competing arguments I find the Secretary of State has established that any interference in a protected right is proportionate in any event, for the reasons set out above.

Decision

87. I dismiss the appeal.

Anonymity.

The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 25 February 2021