



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00448/2017

THE IMMIGRATION ACTS

Heard at Field House

On Wednesday 18 December 2019

**Decision & Reasons
Promulgated
On Friday 10 January
2020**

Before

**UPPER TRIBUNAL JUDGE SMITH
UPPER TRIBUNAL JUDGE KEITH**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

O'NEIL GEORGE SMITH

Respondent

Representation:

For the Appellant: Ms A Fijiwala, Senior Home Office Presenting Officer
For the Respondent: Ms R Chapman, Counsel instructed by Wesley Gryk solicitors

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. However, for ease of reference we refer to the parties as they were before the First-tier

Tribunal. The Respondent appeals against a decision of First-tier Tribunal Judge S Taylor promulgated on 9 August 2019 (“the Decision”) allowing the Appellant’s appeal against the Respondent’s decision dated 27 July 2017 making a deportation order against him under Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”).

2. The Appellant, although a national of Jamaica, is the family member of a Polish national who he married on 15 June 2009. He was issued with a residence card on that basis on 23 September 2010 which was renewed in 2015 for a further five years. The Respondent disputed the Appellant’s continued entitlement to reside under EU law as it was not accepted that the Appellant’s wife had been exercising her Treaty rights in the UK throughout the period. However, having heard evidence and submissions, the Judge concluded at [26] of the Decision that the Appellant had acquired a permanent right of residence and therefore that the Respondent had to show that there were serious grounds justifying the Appellant’s deportation. That finding is not challenged by the Respondent.
3. The issue which the Judge had to determine therefore, applying regulation 27 of the EEA Regulations is whether there were serious grounds of public policy and public security requiring the Appellant’s deportation on the basis that the Appellant constitutes a genuine, present and sufficiently serious threat to the fundamental interests of society. The Judge concluded at [30] of the Decision that the Appellant does not present a genuine and present threat and allowed the appeal on that basis.
4. The Respondent’s grounds assert a material misdirection in law. As we come to in more detail below, she submits that the Judge failed to take account of certain relevant factors and case law and that there is therefore an error of law disclosed by the Decision.
5. Permission to appeal was refused by First-tier Tribunal Judge Povey on 30 September 2019 in the following terms:

“... 3. The Appellant was subject to a deportation order issued under the EEA Regulations 2016. He had been convicted of taking a child without authority and sentenced to four years imprisonment in September 2015. By the time of the appeal hearing, the Appellant had been released on licence for 18 months. The Appellant had a permanent right to reside in the UK. The Judge directed himself correctly on the applicable legal tests under Regulation 27 of the EEA Regulations 2016. In assessing whether the Appellant posed a genuine, present and serious threat, regard was had to recent letters from the Probation Service and an updated OASYS report (at [29]). The Judge concluded that whilst the Appellant was assessed as posing a medium risk, this, according to the Probation Service, would only crystallise into serious harm if there were a material change of circumstances. The Judge found that the Appellant was in a stable relationship, his partner was about to give birth to their child, there

was no evidence of any drug or alcohol issues, the Appellant had not re-offended since release and had complied fully with his probation and licence conditions. On that basis, the Judge was entitled to find that the applicable test under Regulation 27 was not met and gave clear reasons for that conclusion at [30].

4. As such, the grounds disclosed no arguable errors of law and permission to appeal is refused.”

6. Following renewal of the application for permission to appeal to this Tribunal, permission was granted by Upper Tribunal Judge Jackson on 14 November 2019 in the following terms:

“The grounds of appeal are that the First-tier Tribunal materially erred in law in failing to consider the Appellant’s past conduct as an indicator of future risk; failing to attach sufficient weight to the Probation Service’s assessment that the appellant presents a serious risk; failing to assess the seriousness of the consequences of reoffending and failing to attach sufficient weight to the Judge’s sentencing remarks showing the public revulsion and aggravating circumstances of the offence. These errors were material to the assessment of whether the appellant poses a genuine, present and sufficiently serious threat to the fundamental interests of society and whether his deportation is justified on serious grounds of public policy.

The grounds are all arguable. Although the First-tier Tribunal has expressly referred to the seriousness and nature of the offence as well as the consequences for the victim and her family, and the assessment that the Appellant posed a medium risk; these are matters which are arguably not properly taken into account in the conclusion that the Appellant did not represent a genuine and present threat; nor that there were serious grounds of public policy and public security for the purposes of deportation. The first of those conclusions in particular is arguably contrary to the risk assessment from the Probation Service and lacks reasons as to why despite that, he does not represent a genuine and present threat.

The First-Tier Tribunal’s decision does contain arguable errors of law capable of affecting the outcome of the appeal and permission to appeal is therefore granted.”

7. The appeal comes before us to determine whether there is a material error of law in the Decision and if so either to re-make the decision or to remit to the First-tier Tribunal to do so.

RESPONDENT’S GROUNDS AND APPELLANT’S RESPONSE

8. The Respondent’s grounds appear under one heading of “Material misdirection in law” and are discursive in nature. Ms Fijiwala very helpfully grouped those under two headings which we come to below. We note also that, in response to our question, Ms Fijiwala confirmed that it was no part of the Respondent’s case that the Judge’s conclusions are perverse or irrational.

9. We had the benefit of a Rule 24 statement from the Appellant dated 3 September 2019 which Ms Chapman adopted as the basis of her submissions.

Ground One

10. The Respondent's ground one is as pleaded at paragraphs [7], [8] and [14]. In summary, Ms Fijiwala submitted that the Judge had failed to take into account the seriousness of the Appellant's offence and his failure to accept responsibility for that offence when assessing whether he posed a threat, had failed to consider the seriousness of the threat if the risk of reoffending did occur (relying on what is said by the Court of Appeal at [18] of its judgment in Kamki v Secretary of State for the Home Department [2017] EWCA Civ 1715: "Kamki") and failed to appreciate that the OASys report and Probation Service letters on which reliance was placed still indicated that the Appellant presents a medium risk.
11. In response, the Appellant submits in his Rule 24 statement that the Respondent's grounds are misleading as to the risk which the Appellant presents which had been downgraded to medium from high. Ms Chapman drew our attention to certain parts of the risk assessments to which we refer below. She also directed our attention to [27] of the Decision which she said showed that the Judge had taken into account the seriousness of the offence. As to the judgment in Kamki, she pointed out that [18] of the judgment records a concession made by the appellant's Counsel in that case and the issue is not thereafter considered by the Court. In any event, she repeats her submission that the Judge has considered the seriousness of the offence and the Appellant's failure to take responsibility for it. Although we were not taken to it, [14] of the grounds refers to the case of MA (Pakistan) v Secretary of State for the Home Department [2014] EWCA Civ 163 which held that even a low risk is relevant to a deportation decision. As the Appellant points out in his Rule 24 statement, MA (Pakistan) does not involve deportation in the EU law context. We do not need therefore to consider that case. We have no difficulty with the proposition that even a low risk is material to an assessment of threat level but that is encompassed within the test whether the risk is a genuine one in this context and the Judge's conclusion here is that it was not. The issue for us remains whether the Judge has materially misdirected himself when reaching that conclusion.

Ground Two

12. Turning then to the Respondent's ground two, this concerns an asserted failure by the Judge to take into account public revulsion at the nature of the offence in this case which, as we come to below, involved the abduction of a child with sexual motive. Of course, in the EU law context, such factors as deterrence and revulsion are not ordinarily relevant because the assessment of risk must be based on the current

threat and the deportation decision cannot be founded on the basis of past criminal conduct alone. However, the Respondent draws attention to the case of R v Bouchereau [1977] EUECJ R-30/77 (27 October 1977) ("Bouchereau"). The Court of Appeal has recently held that the principles set out in Bouchereau continue to apply (in Secretary of State for the Home Department v Robinson (Jamaica) [2018] EWCA Civ 85: "Robinson"). Public revulsion can therefore be relevant in certain types of cases. Ms Fijiwala accepted that the Respondent had not relied on this in her decision letter (although that pre-dates the judgment in Robinson). She submitted however that the Judge should have been on notice as to the need to consider this issue due to the nature of the offence. That was therefore a separate error.

13. Ms Chapman pointed out that, prior to the Court of Appeal's judgment in Robinson, it had been thought that the principles in Bouchereau no longer applied. The Court of Appeal concluded at [80] to [84] that the Tribunal's judgment to that effect in CS had been wrongly decided.
14. Ms Chapman pointed out that, in any event, the offence in this case did not fall within the exceptional type of case envisaged in Bouchereau. Whilst she accepted that the sentencing Judge had referred to the Appellant's motivation as sexual, it had been accepted that there was no sexual activity involved. She also noted that the Respondent had not raised this issue and there was nothing on the face of the facts which required the Judge to consider it in the absence of such reliance.
15. With that summary of the issues between the parties, we now turn to look at the Decision and the evidence before the Judge.

DISCUSSION AND CONCLUSION

16. The relevant section of the Decision to which we were taken is at [27] to [30] as follows:

"27. My starting point for the consideration of this appeal is the nature of the offence. The nature of the offence has been outlined earlier in this decision and there is no doubt that the appellant committed a very serious offence for which he was imprisoned for a period of four years. The grievous nature of the offence is reflected in the length of the sentence. As stated in the decision letter, taking a child without authority is among the very worst kind of offences and the public rightly expects children to be protected. As stated in the decision letter, it is not only the victim who suffers as the result of the crime, which may have lasting effects on the child, but the offence also causes considerable distress to members of the child's family and fear in society. The appellant took a young girl, aged 12 or 13, who was in a vulnerable position on the streets, late at night and took her to his home, she was missing for a period of around 12 hours. One can only begin to imagine the distress and panic of the child's parents, knowing their young child had been missing on the streets of London for a whole night. It was only when the appellant realised that he had been on television with the child that he thought to report the matter to the police, after her parents had reported

her missing and CCTV footage of the child with the appellant was broadcast. I consider that the offence committed by the appellant strikes at the very core of society, one in which parents have confidence that their children can go out and be safe. In considering this appeal I must apply the factors set out in Regulation 27(5), where at (5)c I must consider if the offence is one which affects one of the fundamentals of society. I am satisfied that the offence committed by the appellant is one which affects the fundamentals of society, and I am additionally concerned that the appellant still does not appear to appreciate the gravity of his offence, and just considers that he 'made a mistake' by not reporting the child missing to the police. If the appellant was not being considered as a family member of an EEA citizen, he had been sentenced to four years and it would only be in highly exceptional circumstances that deportation could be avoided, especially for an offence of this nature.

28. In deciding this appeal I am required to apply the criteria set out in Regulation 27(5), where at (5)c the conduct of the appellant must represent a genuine, present and sufficiently serious threat to one of the fundamentals of society. As stated above, I am satisfied that the offence was a threat to one of the fundamentals of society, however I must also be satisfied that the threat is genuine and present. I note that the decision to deport was made in July 2017, while the appellant was nearing the end of serving his prison sentence, and the decision was made on the basis of information then available. For various reasons, including that this appeal has been heard once and sent back to this Tribunal for a re-hearing, it is now two years later and the appellant has been out of detention for over a year and a half. I must consider the position as it is currently, including the reports as to how the appellant has progressed and managed since his release. The appellant has submitted a very long 40 page report by an independent psychologist which concludes, at paragraph 9.0.5 that the appellant has never presented a high risk of serious harm to the public, adults or children. I attach little weight to this report as I consider that this report flies in the face of the known facts that the appellant was convicted of a serious offence of abduction of a minor as well as assaulting an adult. However I attach weight to the updated OASys report dated July 2019, and two letters from the National Probation Service dated 9th July 2019 and 10th December 2018.

29. The letter from the Probation Service dated 9th July 2019 advises that the appellant continues to be of medium risk to the public. Medium risk is briefly defined as there being identifiable indicators of risk of serious harm, potential to cause serious harm but unlikely unless there is a change of circumstances, for example failure to take medication, loss of accommodation or relationship. The appellant is scored at low risk of reoffending and a low risk of violent re-offending. The letter advises that the appellant has been motivated to address his offending behaviour and recently started a structured programme. At his first session he understood the material and received positive feedback. Since his release into the community there had been no further offences and no police intelligence reported against the appellant. There was no evidence of substance or alcohol misuse and no current evidence of a safeguarding issue. The probation officer was satisfied that the appellant's risk was stable. His current licence was due to expire on 31st August 2019 and he would no longer be subject to statutory supervision. The appellant had

been fully compliant with his supervision licence, he was in a stable relationship with his wife, they were expecting their first child and he stated that he wished to focus on being a role model for his children. The probation report dated 10th December 2018 reported that the appellant had fully complied with his weekly supervision appointments. During his weekly reporting no concerns were raised and a police check confirmed that there was no police concerns or intelligence against the appellant. He continued to address his offending behaviour, there was no escalation of risk and no safeguarding concerns. He continued to have stability and was employed as a chef in a local restaurant. The appellant was re-assessed as medium risk. The OASys report confirmed a reassessment of medium risk.

30. Noting the conclusions of the OASys report, and the probation letters, I find that the appellant was no longer assessed as a high risk but was medium risk, which was a category which assessed that he was unlikely to cause serious harm unless there was a change of circumstances. The appellant had no issues with drugs, alcohol or medication, he was in a long term relationship being married 10 years and they were expecting a baby. He had not committed offences since 2015 and there was no adverse police intelligence, he had now been employed for over a year with the same employer and he had complied with all requirements of the probation service. Given the contents of the probation reports I cannot be satisfied that the appellant represents a genuine and present threat, as required by Regulation 27, notwithstanding the serious and disturbing nature of the index offence. Applying Regulation 27 I cannot find that the appellant meets the test of serious grounds of public policy and public security. Even if the appellant did not have permanent residence, given the conclusion of the probation reports I could not find that even the tests of the lower requirement of public policy and public security had been met, as Regulation 27 applies to both tests.”

17. The OASys report and letters from the Probation Service to which the Judge refers at [29] of the Decision are to be found at pages [108] to [145] of the Appellant’s bundle. Ms Chapman drew our attention to the risk scores as set out in those documents. In the letter dated 9 July 2019, the Appellant risk of reconviction is low (13% within 12 months and 24% within 24 months). Assessment under the Violence Predictor which predicts reoffending involving non-sexual violence leads to a score of 6% within 12 months and 11% within 24 months which is a low risk. In relation to General Predictor which predicts general offending the Appellant scores 6% within 12 months and 10% within 24 months and is also ranked as low. Those scores appear in the OASys report at R11.12 under the heading of “Current Situation”. That report concludes that the Appellant “is currently assessed as posing a medium risk to the public, known adult and children” because of the nature of the offence. The Appellant’s licence expired on 31 August 2019. The Probation Service letter dated 10 December 2018 confirms the downgrading of the risk posed by the Appellant from high to medium.
18. We make the following observations about this evidence. As Ms Chapman pointed out and we accept, the evidence, in particular the

letter dated 9 July 2019, is a very full and detailed assessment as to risk. Second, the summary of that evidence as considered by the Judge at [29] of the Decision is not challenged. What is at issue is whether the assessment reached based on that evidence contains errors due to failures to consider certain factors. Third, the risk assessment contained in those documents is one carried out following the Appellant's release from prison and therefore reflects an assessment of the current risk following consideration of his behaviour whilst at liberty.

19. Turning then to the Respondent's ground one, dealing first with whether the Judge properly took account of the seriousness of the offence, the nature of it and the Appellant's failure to accept his culpability, we are satisfied that he did. We do not accept Ms Fijiwala's submission that [27] of the Decision does not form part of the Judge's consideration of the overall risk. It is evident when paragraphs [27] to [30] are read together that they are all part of the overall reasoning leading to the conclusion reached at [30]. The Judge therefore took account of the seriousness and nature of the offence as well as the Appellant's "failure to appreciate the gravity of his offence".
20. Dealing then with the point arising from the judgment in Kamki, whilst we accept as Ms Chapman submitted that what is said at [18] is based on a concession, the Court expressed its agreement with that concession as realistic. The concession there made is that "it is legitimate to look both at the likelihood of re-offending occurring and at the seriousness of the consequences if it does". That concession has to be read in context because it appears that the previous position of the appellant in that case was that it was not legitimate to consider what would happen if the risk arose; this appears to have been the reason why permission to appeal was granted applying the second appeals test. Further, the concession was not that a Judge is bound to have regard to that factor; due no doubt to the way in which the issue arose in Kamki that was not relevant. However, in this case we do not need to consider whether that follows from the concession made in Kamki because, in any event, our view is that the Judge did take into account the seriousness of the harm which would be caused in the event that the risk arose. At [29] of the Decision the Judge referred to the definition of medium risk which, as he rightly noted, was a risk of "serious harm". That is reflected in the Judge's conclusions at [30] where he again refers to the risk being one of "serious harm". It is also notable that the Judge did not say in his conclusions that the risk posed by the Appellant if it arose would not be "sufficiently serious". His conclusion is that the risk was not genuine and present given the content of the risk assessments and the factors referred to therein.
21. Finally in relation to ground one, as we note at [11] above, we accept the proposition that even low risk does not mean no risk. However, in the EU law context, the issue is whether the risk is a current and real one. The Judge recognised that medium risk still meant that there was a risk. However, the categorisation meant that the risk was unlikely to

occur unless there was a change in circumstances ([29]). The Judge went on to consider the circumstances of the Appellant and whether those might change at [29] and [30] of the Decision and those form part of his conclusion that the risk was not one likely to occur and therefore not present.

22. We turn then to ground two. The principle to be derived from Bouchereau is as set out at [84] and [85] of the judgment in Robinson as follows:

“84....As I have said in my earlier analysis of *Bouchereau*, that case itself recognised that what one is looking for is a present threat to the requirement of public policy; but it also recognised that, **in an extreme case**, that threat might be evidenced by past conduct which has caused deep public revulsion.

85. However, with all of that said, I am also of the view that the sort of case that the ECJ had in mind in *Bouchereau*, when it referred to past conduct alone as potentially being sufficient, was not the present sort of case but **one whose facts are extreme**. It is neither necessary nor helpful to attempt an exhaustive definition but the sort of case that the court was thinking of was where, **for example, a person has committed grave offences of sexual abuse or violence against young children.**”

[our emphasis]

23. We accept that this appeal concerns an offence against a child and that the sentencing Judge noted the sexual motivation for the crime. However, as Ms Chapman points out, the Appellant was not involved in any sexual activity with the minor. As such, the facts of the case fall short of the example given in Robinson. Further, and in any event, as the Court noted in Robinson, the circumstances in which the principle arises are ones with extreme facts. Whilst this offence might be described as unusual, we are far from convinced that it could be said to be extreme. That brings us to the main reason why we do not find an error of law disclosed by this ground and that is because the Respondent did not suggest that the principle was relevant. It may well have been open to her to argue that this was such an extreme case that the principle applied but it is not raised in the decision letter and, even if that was because that letter pre-dated Robinson, there is nothing to show that any submission was made to the First-tier Tribunal Judge that the principle applied. Whilst it is open to a Judge to take into account a legal principle established in another case whether or not a submission is made that it applies, the Bouchereau principle is highly fact and case sensitive. The Judge was not therefore obliged to consider it unless its relevance was raised.
24. We have carefully considered whether it can be said that the Judge should have taken the point for himself in light of what he says about the nature and seriousness of the offence at [27] of the Decision. However, we have decided that he was not required to do so. What is there said is in an entirely different context. The Judge was there

considering whether the threat goes to the fundamental interests of society rather than whether the nature of the criminal conduct is so extreme as to give rise to public revulsion which of itself justifies deportation based on past conduct. Whilst the Judge's findings there are that the offence was a very serious one, we do not read that as finding that the case was so extreme as to bring the Bouchereau principle into play, particularly when neither party placed reliance on it.

25. For those reasons, we are satisfied that the grounds do not disclose any error of law in the Decision. Accordingly, we uphold the Decision with the consequence that the Appellant's appeal remains allowed.

Conclusion

26. For the above reasons, the Respondent's grounds do not establish any material error of law. We therefore uphold the Decision.

DECISION

We are satisfied that the First-tier Tribunal Decision of Judge S Taylor promulgated on 9 August 2019 does not contain any material error of law. We therefore uphold the Decision with the consequence that the appeal of the Appellant (Mr Smith) remains allowed.



Signed
Upper Tribunal Judge Smith

Dated: 18 December 2019