



**Upper Tribunal
(Immigration and Asylum Chamber)
DA/00645/2018**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice

On 29 April 2019

**Decision &
Promulgated
On 20 May 2019**

Reasons

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

W S M

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Lee, instructed by M Reale Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Brazil. He appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 27 September 2018 to deport him from the United Kingdom. The appeal was dismissed, but subsequently the appellant sought and was granted permission to appeal to the Upper Tribunal.
2. The appellant has been in a relationship with Mrs D since October 2016, and they married on 17 March 2018. On 8 July 2017 the appellant, who was aged 21 at the time, committed two offences of sexual activity with a female child under the age of 16. The victim was 14 years old at the time. He was sentenced to a total of fourteen months' imprisonment and was

also made subject to a Sexual Harm Prevention Order until further order under s.103 of the Sexual Offences Act 2003.

3. The deportation decision was made on the basis that he represented a genuine, present and sufficiently serious threat to the public to justify his deportation on grounds of public policy. He appealed that decision on the basis that it breached his rights under the EU treaties and was contrary to his Article 8 rights.
4. The judge noted that the maximum penalty for the offence of sexual activity with a child is fourteen years' imprisonment and that the sentence imposed on the appellant was nowhere near that maximum. He considered however that it reflected five different activities which the appellant engaged in with the 14 year old female during the course of the incident, two of which involved her penetration. The judge noted that there were elements that the appellant was trusted, but his offending was not spontaneous and there was planning including an internet search of the term "underage girl". The appellant met the victim on two nights in a row.
5. The judge went on to say, at paragraph 38 of his decision, that the appellant's offending demonstrated that he had an attraction to females below the age of consent and was prepared to act on it. The judge noted that the appellant had also searched out material on the internet under the term "underage girl". He had prioritised his sexual gratification over the victim's welfare. He had made a comment that he almost lost interest in her as she was too easy. The judge said that he found it hard to accept that the appellant's attraction to females below the age of consent and his attitude to females, evidenced by the comment he had referred to, would have disappeared as a consequence of the custodial sentence.
6. The judge took the view that the Sexual Harm Prevention Order and the prohibitions contained in its schedule demonstrated very clearly that the sentencing judge took the view that the appellant continued to present a risk or the order would not have been made. He noted that the appellant was expected to be a father at the time when the offences were committed. He also said that he had seen nothing which might alleviate the concern that the appellant would in future engage in such behaviour again in response to another life event which he would surely experience. He had not engaged in any work whilst in custody to equip him to deal with his attraction to females under the age of consent and had told the judge, which caused the judge much concern, that he had not requested any such help. As a consequence the judge concluded that the appellant's conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. As a consequence the appeal was dismissed under the EEA Regulations and was also dismissed on human rights grounds.
7. As noted above, the appellant sought and was granted permission to appeal against the judge's decision, and Mr Lee, who had drafted the

grounds, developed the points made in those grounds in his submissions, reflecting the admirable terseness and relevance of those grounds.

8. He accepted that on any view the offence was serious, but the test was whether there were good reasons for finding a present and sufficiently serious danger to society. It was argued that the judge had erred in finding that to be the case.
9. In his sentencing remarks the judge considered that counts 1 to 4 fell into category 1 of the Sexual Offences Definitive Guideline and counts 2, 3 and 5 fell into category 2. The judge was just persuaded that the right level of culpability was within category B. And commented that this was not grooming behaviour in the conventional sense and it was short lived and it was not an abuse of trust although there were elements that the appellant was trusted. The judge said that the thing that caused him the most concern was the label of significant planning. It was fully accepted that this behaviour on the appellant's behalf was not spontaneous. The difficulty was when planning became significant but there clearly was planning. They had met two nights in a row and exchanged pictures and at the end of June on the 29th he had done searches on the internet with a search term of underage girl in remarkably similar terms to what he then searched for to what happened that night. This led the judge to conclude that this was at the very upper end of the range.
10. Mr Lee went on to make the point that the offence was one where the appellant and the victim were known to each other socially and it was accepted that he had no previous convictions, either in the United Kingdom or elsewhere.
11. Mr Lee took issue with what the judge said at the start of paragraph 38 of his decision that the appellant's offending demonstrated that he had an attraction to females below the age of consent and was prepared to act on it. There was no evidence either in the criminal proceedings or the immigration appeal of any such propensity. He had known that the victim was under the age of consent, but there was no evidence that that was part of a wider propensity to seek sexual gratification through children. There was not enough to say that the offence was evidence of a particular propensity. Mr Lee noted in passing that there were quite a number of countries where 14 was the age of consent. This was not a major point but it was not indicative of a propensity.
12. The judge had touched on the other reason of the internet search and the comment that he had almost lost interest in her as she was too easy but they were secondary to the first sentence of paragraph 38. So he was a relatively young man and the offence was committed against a girl he knew socially, and there was no question of it being within category A of culpability. In the circumstances it was not open to the judge to find there was evidence of propensity and that, it was argued, was the error of law.
13. In his submissions Mr Kotas argued that the guidelines did not necessarily wholly assist with regard to future risk. They were linked to the points set

out in the guidelines and he had not been sentenced with regard to future risk so they were of little help.

14. It was also argued with regard to paragraph 7 of the grounds that the factor of significant degree of planning could not properly be said not to have been a factor present in the offences, that being, it was argued, at odds with what the judge had said with regard to that matter in the sentencing remarks. It was also a point that there was a lack of rehabilitation while the appellant was in prison. The judge had been entitled to take that into account.
15. The Sexual Harm Prevention Order was relevant to the issue of future risk. The list set out in the Schedule of Prohibitions made it clear what the risk was and hence the order had been made and that was strong evidence of risk as the Regulation required. The judge had not placed undue weight on the length of the sentence. The decision was rational.
16. By way of reply Mr Lee argued that the point at paragraph 7 of the grounds was made out as the judge had accepted that the case was one that fell within Schedule B of culpability. As regards rehabilitation, the appellant had spent seven months in custody and he had been marked as a foreign national offender and there was practically no likelihood of him being offered any courses. As regards whether he was a risk, the Sexual Harm Prevention Order was triggered fairly lightly in cases such as this and there were good reasons also to suppose as the conditions had been made that it would not prove to be a serious danger going forwards given the nature of prohibitions. The decision was unsound.
17. I reserved my determination.
18. As Mr Lee has properly pointed out, the sentencing judge was persuaded, albeit it seems on balance, that the case was one which fell within Part B of the culpability category. This involves factors in category A not being present and those factors include significant degree of planning, grooming behaviour, abuse of trust and other matters. The sentencing judge noted that it was fully accepted that the behaviour on the appellant's part was not spontaneous and there clearly had been planning and the appellant had done searches on the internet with a search term of "underage girl".
19. It does not seem to me however that the First-tier Judge was precluded from coming to the conclusions that he did at paragraph 38 of his decision. He was entitled to attach the weight he did to the fact that the appellant carried out an internet search under the term "underage girl". The judge noted, at paragraph 37, that there had been planning. He did not describe it as a significant degree of planning as the term is set out in category A of the culpability list. The judge was aware that the appellant had not committed other offences, but it was open to him to bear in mind the absence of any work done while in custody to equip the appellant to deal with the attraction to females under the age of consent, and even bearing in mind Mr Lee's point about the degree of unlikelihood that such a course would have been offered to him, the judge was entitled to express a degree of concern that he did that the appellant had not requested any

such help. It was also not without relevance that he had said he almost lost interest in her as she was too easy. It was further open to the judge not to accept that the appellant had successfully reformed or rehabilitated.

20. Bringing these matters together, I considered that the judge did not err as a matter of law. It was open to him to conclude on the evidence before him that the appellant's offending demonstrated that he had an attraction to females below the age of consent and was prepared to act on it, bearing in mind there had been relevant planning including the internet search referred to above. In addition it was of relevance to take into account the making of the sexual harm prevention order. This among other things prohibits the defendant from living in the same household as any female under the age of 16 except his own children unless with the express approval of Social Services for the area and also having any unsupervised contact or communication of any kind with any female under the age of 16 except his own children other than one such as is inadvertent and unavoidable in the course of lawful daily life or to the consent of the child's parent or guardian (who had knowledge of his conviction) and with the express approval of Social Services for the area or using any device capable of accessing the internet unless it has the capacity to retain and display this through internet use and makes the device available on request for inspection by a police officer and also prohibited from deleting the internet history on any such device. The making of the order is a further matter of relevance. I bear in mind Mr Lee's point that it might be argued that the fact of the order is a point going to reduce risk, but the making of the order itself can I think be properly be seen as part of an appropriate evaluation as to the nature and degree of the risk posed by the appellant. In conclusion therefore I am of the view that the judge did not err in law in his assessment of the claim under the EEA Regulations (no challenge to the Article 8 decision having been made) and accordingly his decision dismissing the appeal is maintained.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.



Signed

Date 8 May 2019

Upper Tribunal Judge Allen

TO THE RESPONDENT
FEE AWARD

This is a fee exempt appeal.

A handwritten signature in black ink, appearing to be 'Allen', written in a cursive style.

Signed
Upper Tribunal Judge Allen

Date 8 May 2019