IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004342/3
First tier Number: DA/00050/2022
EA/06107/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 6th of February 2024

Before

UPPER TRIBUNAL JUDGE LANE

Between

Secretary of State for the Home Department

Appellant

and

ROBERT KORZENIECKI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Lindsay, Senior Presenting Officer
For the Respondent: Mr Ell

Heard at Phoenix House (Bradford) on 2 February 2024

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and to the respondent as the appellant as they appeared respectively before the First-tier Tribunal. The appellant is a male citizen of Poland born on 8 December 1967. On 2 February 2021, at Derby Crown Court the appellant was convicted of 3 counts of making indecent photograph or pseudo-photograph of children. On 2 March 2021, the court sentenced the appellant to a total of 1 6 months imprisonment (3 months concurrent with the sentence on the first count of 13 months imprisonment) and the appellant was made the subject of a sexual harm prevention order for ten years. On 6 April 2022, the Respondent made a decision to deport the appellant.

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The appellant appealed to the First-tier Tribunal on the grounds that the decision is in breach of Community law and his human rights. In a decision promulgated on 22 August 2022, the First-tier Tribunal allowed the appeal. The Secretary of State now appeals to the Upper Tribunal.

2. Granting permission Upper Tribunal Judge Pickup wrote:

   The grounds are poorly drafted and somewhat difficult to follow. However, in summary, they assert that the Judge erred in (i) applying an elevated threshold or incorrect test; and (ii) failed to give reasons or any adequate reasons for findings on a material matter, namely by failing to take proper account of the public interest considerations in schedule 1 of the 2016 Regulations.

   The appellant had acquired permanent residence and, therefore, under Regulation 27(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."

   It is arguable that the judge misdirected themselves and conflated the relevant tests by stating at [51] of the decision: "… I must also be satisfied that the threat is genuine and present. If the 29 2 Appellant had not acquired permanent residence, I would have found the assessment very difficult. However, the Respondent has to demonstrate that there are 'serious grounds' for believing that the threat is genuine and present and this is a higher threshold."

   Reading the decision as a whole, it is also arguable that the public interest considerations have been ignored or misapplied.

   For the reasons explained above, an arguable material error of law is disclosed by the grounds.

3. I am grateful to both advocates for their lucid and concise submissions and to Mr Ell for his helpful skeleton argument. I find that the First-tier Tribunal has fallen into legal error in its application of the Regulations to the facts.

4. The appeal concerns the application of Immigration (European Economic Area) Regulations 2016 (as amended) Regulation 27:

   Decisions taken on grounds of public policy, public security and public health

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   (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.
   (…)
   (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.

5. First, I find that the judge's reasoning is, in parts of the decision, very unclear. At [49], the judge writes that '<u>the Presenting Officer submitted that, given that the likely victims are children, then, the fact that the Appellant still poses a risk is sufficient to demonstrate that there are serious grounds for believing that the threat is genuine, present and sufficiently serious.</u>' Immediately thereafter, in the next paragraph [50], the judge clearly indicates his agreement with the Presenting Officer's preceding submission (' The index offence involves a substantial number of images of children, and<u>, I agree with the presenting officer.</u>') [my emphasis in both instances]. I take the judge's statement to mean that the judge found that the test under the Regulations had been met. Indeed, the judge then writes: 'The Respondent has satisfied me that the potential threat the Appellant poses to one of the fundamental interests of society is sufficiently serious.' I find that a reader of paragraphs [50-51] would readily understand that the judge had found that the test under Regulation 27 (5) (C)) had been met. However (and here I agree with Mr Lindsay) the decision then departs from that unambiguous finding in the subsequent paragraphs which are, in my opinion, legally flawed. The judge erred by making a seemingly unequivocal finding as to the relevant test by then unpicking his own finding unnecessarily. The judge's reasoning is, in my opinion, flawed by a lack of clarity.

6. Secondly, following on from [2] above, I agree with Mr Lindsay that the judge fails to show that, having found the threat sufficiently serious, it is not also genuine and present. The present nature of the threat need not, as the Regulations make clear, 'be imminent.' I observe that the appellant is subject to a sexual harm prevention order for 10 years. Moreover, it is implicit in the finding at [50] that the threat must be genuine; had the judge found it to be false, then he would not have reached the finding he did at [50]. I agree with Mr Lindsay that, whilst the test has separate elements, once the threshold of sufficient seriousness is crossed there is no need to assess those elements again on some notional scale of severity.

7. Thirdly, in reaching his conclusion that the risk posed by the appellant is not genuine and present, the judge writes at [52]:

Dr Cordwell clearly considered the dynamic factors and, nonetheless concluded that the Appellant represents a low to medium risk. I pause to note that, in my view this is

consistent with the Appellant being subject to level 1 of MAPPA [Multi-Agency Public Protection Arrangements], which suggests the authorities are not unduly concerned about the risk the Appellant poses.

Mr Ell submitted that the judge's reference to the expert having 'considered the dynamic factors' was intended to emphasise that Dr Cordwell's opinion had been reached by considering all the evidence, including the judge's sentencing remarks and the sentence itself and for that reason the judge had given substantial weight to his evidence. The judge was, of course, entitled to attach weight as he considered appropriate but that submission suggests that the judge in effect delegated part of his own fact-finding task to the expert. Mr Lindsay submitted that the judge's reasoning would mean that any offender subject to MAPPA 1 could not pose a genuine and present threat. Whilst I would not go as far as that, I do find that the judge's remarks at [52] sit uneasily with his finding at [50]. Again, the decision is flawed by a lack of clarity.

8. Fourthly, at [54] the judge wrote:

> Further, the Respondent has not suggested that the safeguards put in place in the UK, would be available in Poland. Dr Cordwell has attached weight to the Appellant's compliance with the SHPO and I am satisfied that the risk of him committing further offences would be higher if he was deported to Poland. This is a further factor that weighs in the Appellant's favour.

The reasoning is again problematic. I agree with Mr Lindsay that there was no evidence that Poland does or does not have the same safeguards as the United Kingdom; as a advanced European democracy, one might as readily assume that it does as it that it does not. In any event, it is not clear what relevance what might happen in Poland has in determining whether the Regulation 27 test is met. The factors addressed by the judge at [54] are, as Mr Lindsay submitted, relevant to the assessment of proportionality of any decision taken on the grounds of public policy and public security. I agree with Mr Lindsay that the judge has considered immaterial matters in reaching his finding that the test in the Regulations has not been met.

9. For the reasons I have given, I set aside the First-tier Tribunal's decision. Mr Lindsay urged me to set aside the findings of fact, but to retain the judge's finding at [50] and to remake the decision in the Upper Tribunal. Mr Ell submitted that, should I find an error of law on the grounds advanced by the Secretary of State, it would follow that the judge's entire analysis has been tainted by error and consequently that there should be a hearing *de novo* in the First-tier Tribunal. I agree with Mr Ell and for the reason he gives. The decision will be remade in the First-tier Tribunal after a hearing *de novo.*

<u>Notice of Decision</u>

The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand. The appeal is returned to the First-tier Tribunal for that Tribunal to remake the decision following a hearing *de novo.*

C. N. Lane

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 2 February 2024