Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00262/2015

THE IMMIGRATION ACTS

Heard at: Manchester
On: 15th June 2016

Decision & Reasons Promulgated
On: 5th July 2016

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

RG
(anonymity direction made)

Respondent

Representation:
For the Appellant: Mr Harrison, Senior Home Office Presenting Officer
For the Respondent: Mr Markus, Counsel instructed by Malik Legal Solicitors

DETERMINATION AND REASONS

1. The Respondent (RG) is a national of India born in 1971. He is a foreign criminal who has had a deportation order signed against him. As such he does not personally merit an order for anonymity. His case does however involve his British child. The identification of the Respondent could lead to the identification of that child and for that reason alone I make an order for anonymity in the following terms:

> "Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Respondent (original appellant) in this determination identified as RG. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

2. On the 7th April 2016 the First-tier Tribunal (Judge Ransley) allowed the Respondent's appeal against a decision to refuse to deport him with reference to Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 ("the Regs"). The Secretary of State now has permission to appeal against that decision, granted by First-tier Tribunal Judge Davidge on the 3rd May 2016.

Background and Matters in Issue

3. RG came to the United Kingdom in 2003 with leave to enter as a student. In 2004 he married Ms KS, a Polish national. On the 15th November 2015 he was granted a residence card confirming his permanent right of residence as the family member of an EEA national exercising treaty rights.

4. On the 19th February 2013 RG was convicted at Liverpool Crown Court of eight counts of voyeurism and offences relating to the Control of Prostitution. In summary he had been involved in the administration of a number of brothels and escort agencies in Liverpool. He is a professional accountant and had in effect managed these businesses. There were 40-50 sex workers in his employ and he had taken 30-35% of their earnings. A BBC report on the crime estimated that he had earned £94, 730 in a two year period. He was sentenced to a total of 2 years 6 months in prison and was placed on the Sex Offender's Register for a period of ten years. He was made subject to a Sex Offender's Prevention Order which would remain in force for seven years.

5. The decision to deport RG was made on the 24th June 2015. The decision included a decision to certify under Regulation 24AA. A challenge to the certification failed on judicial review and although the Court of Appeal subsequently set the Order of the Upper Tribunal aside, that came too late to prevent RG's removal. He was deported to India on the 16th November 2015. He was not therefore present at the appeal before Judge Ransley.

6. The appeal proceeded by way of submissions only. An application to adjourn to enable RG's wife to give evidence was withdrawn after her evidence was agreed by the Secretary of State's representative. The parties agreed the legal framework. RG had acquired a permanent right of residence in the United Kingdom and as such could only be deported if the Secretary of State could show, in accordance with Regulation 21(3), that his deportation was justified on "serious grounds" of public policy. The Secretary of State

accepted that this was a high threshold, but submitted that the seriousness of RG's offences showed that test to be met. Having heard submissions Judge Ransley made the following findings:

- The offences were very serious
- RG had been assessed to be of "low risk" of reoffending in a NOMS report dated June 2015. This had been accepted by the Secretary of State who could not go behind it to submit that he in fact represented a current threat
- The Secretary of State is not entitled as a matter of law to use "general deterrence" as a justification for the expulsion decision
- Although RGs inclusion on the Sex Offender's Register and the imposition of a Sex Offender's Prevention Order were measures taken to manage any future risk of reoffending, those measures themselves were not indicators as to the level of risk
- RG had completed the relevant Offender Behaviour programme and had expressed remorse about his behaviour
- RG has a genuine and subsisting relationship with his wife and child (born 2012) in the UK
- The Secretary of State was correct not argue that the family unit (including an EEA national mother and British citizen child) should relocate to India
- The length of RGs residence indicates a significant degree of integration into British society
- His wife and child provide a "protective role" and further reduce the risk of reoffending
- Weight was given to the possibility that the family could relocate to Poland where RG's wife had relatives
- It was not however accepted that RG would have a better chance of rehabilitation in Poland than he would in the UK since he did not speak Polish

Having considered all of those factors, the Tribunal found that the test in Reg 21(3) could not be met and allowed the appeal.

The Appeal

7. The Secretary of State's grounds of appeal are detailed but in summary it is contended that the First-tier Tribunal erred in the following material respects:

   i) The First-tier Tribunal misdirected itself in law in treating a low risk of reoffending as determinative of the question of whether RG poses a genuine present and sufficiently serious threat. A low risk does not negate the risk entirely;

ii) The First-tier Tribunal misdirected itself to the significance of the Sexual Offenders Prevention Order which was explicitly on it face imposed to "protect the public from offenders convicted of a sexual or violent offence who pose a risk of sexual harm to the public …";

iii) The determination's assessment of why the 'serious grounds' threshold is not met is inadequate and contrary to the decision of the Court of Appeal in Muse and Ors v ECO [2012] EWCA Civ 10 which stated that the decision needs to show "what conclusions were reached and how they were reached on essential issues";

iv) There would only be a *Zambrano* breach if RG's child were *required* to leave the United Kingdom. The Secretary of State was not requiring the EEA/British members of this family to leave the EU, but it was a matter of choice for them if they wanted to go to India;

v) The Tribunal erred in its assessment that his rehabilitation would not be assisted in Poland because he is not a Polish national. His wife is Polish and could assist him

8. The appeal was opposed on all grounds by Mr Markus. He submitted that the Secretary of State now appears to be challenging matters that had expressly been conceded at the First-tier; the Secretary of State was trying to re-argue the case because she did not agree with the decision. It had been accepted by Mr McBride that there was a low risk of re-offending; there had been similarly an express concession of the *Zambrano* point.

Findings

9. The legal framework for the deportation of EEA nationals or their family members is set out in Regulations 19 and 21 of the Regs. Regulation 21 reads:

> "**21. —** (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 permanent right of residence under regulation 15 except on **serious grounds of public policy or 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 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 necessary in his best interests, 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(**1**).
>
> (5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
>
> (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.
>
> (6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

10. It is abundantly clear from the determination that the First-tier Tribunal applied this framework, and that it understood the threshold that was to be applied in assessing whether there were "serious grounds" for RG's removal. At paragraph 20 the determination sets out the following submission made on behalf of RG:

> "In all cases the public policy exception must be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify expulsion only insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat (emphasis added) to the requirements of public policy: Regulation 25(5), 21 (5)(e)".

This submission was accepted as a correct statement of the law by the HOPO on the day (Mr McBride), by the Tribunal and indeed by the SPO before me (Mr Harrison).

11. The Secretary of State's case rested on the fact of RG's conviction, and the submission that the imposition of the Sexual Offences Prevention Order established that there were serious grounds to believe that RG presented a genuine, present and sufficiently serious threat affecting one of the

fundamental interests of society. This argument is squarely considered at paragraph 21 (d). The Tribunal was not *discounting* the fact that the order had been imposed, or that there remained a possibility that RG presented *some* risk to the public. The point that is made is that the evidence had to be read as a whole. The Secretary of State had already conceded that there was a low risk of re-offending (as found in the specialist NOMS report); the Tribunal accepted RG's expression of remorse; it further found that his wife and child would offer a protective role against any re-offending. In those circumstances it could not sensibly construe there to be a genuine present and sufficiently serious risk simply because of the imposition of this order. Insofar as the grounds suggest that the test in Reg 21 could be made out if a low risk were established, they are wrong in law.

12. There is nothing to the argument that the determination was flawed for lack of reasons. A summary of the determination's findings is given above. They are easily understood. The Tribunal found that RG had committed a serious criminal offence of a sexual nature, that he presented a low risk of reoffending and that it was a possibility that he could move to Poland with his wife and child. Against that it balanced the assessment of the probation service, his own evidence as to his future conduct, the effect of his removal on his family, the family's level of integration in the UK and the low prospects of any further rehabilitation in Poland. Those were all matters that the Tribunal could legitimately take into account. Its reasoning is perfectly clear.

13. As to the *Zambrano* point I am unsure where this takes the Secretary of State. Mr Harrison to his credit did not seek to pursue this ground. The point had been agreed in the First-tier. The Secretary of State expressly declined to submit that the whole family should move to India. The remaining questions were whether it was proportionate to expect them to all move to Poland or for mother and child to remain here without father. Those were questions asked and answered in the determination.

Decisions

14. The decision of the First-tier Tribunal does not contain an error such that it should be set aside. The decision is upheld.

15. An anonymity order is made for the reasons given above.

Upper Tribunal Judge Bruce
1st July 2016