



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00315/2018

THE IMMIGRATION ACTS

Heard at Field House
On 8th November 2018

Decision & Reasons Promulgated
On 19th November 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RMDA

Respondent/Claimant

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer

For the Respondent/Claimant: Mr P Turner of Counsel instructed by Sabz Solicitors LLP

DECISION AND REASONS

1. The claimant in this matter was born on 13th August 1987 and is a dual national of Portugal and South Africa. He acquired Portuguese citizenship on the basis of his ancestral descent but has never actually lived in Portugal and does not speak Portuguese.
2. The claimant sought to appeal against the decision of the Secretary of State for the Home Department of 14th February 2018. It is a detailed decision.
3. The claimant came to the United Kingdom on 1st June 2007 to be with his father who is an EEA national exercising treaty rights. On 30th August 2016 a raid at his home revealed his father's laptop contained many indecent images of children. It would seem that it was the responsibility of the claimant for having downloaded such

material upon the laptop. Between his arrest and his appearance before the Kingston Crown Court further indecent images were downloaded upon the laptop.

4. The claimant was sentenced on 1st September 2017 to twelve months' imprisonment for the offence and made the subject of a sexual harm prevention order and sex offenders notification requirement for a period of ten years.
5. It was the decision of the Secretary of State for the Home Department that the claimant should be deported on the grounds of public policy, public security and public health, the relevant provision being that of Regulation 27 of the Immigration (European Economic Area) Regulations 2016.

Such provides, particularly at Regulation 27(3) that a relevant decision may not be taken in respect of a person with a right of permanent residence and on Regulation 15 except on serious grounds of public policy and public security.

27(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”.

Paragraph 27(5)(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.

6. Further, Regulation 27(6) provides (before taking a relevant decision on the grounds of public policy and public security in relation to a person who is resident in the United Kingdom), the decision maker must take into account considerations such as the age, state of health, family economic situation; length of residence in the United Kingdom; social and cultural integration into the United Kingdom and the extent of links with country of origin.
7. Such considerations are amplified in Schedule 1 to the 2016 Regulations.
8. Such considerations are as follows:-
 - “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.

...

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.”.
9. In terms of the fundamental interests of society they are set out in Section 7 of Schedule 1 and include maintaining public order, preventing social harm and protecting the public and acting in the best interests of a child.
10. The Secretary of State for the Home Department, in the relevant decision, was not satisfied on the basis of the documentation presented, that the claimant had been present for ten years prior to the relevant decision. It was accepted that certainly he had been for five years with a right of permanent residence and therefore that the decision was taken on the basis of serious grounds of public policy and public security that the claimant represented a genuine present and sufficiently serious threat.
11. The claimant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Lal on 3rd September 2018. The appeal was upheld.
12. Thus it was that the Secretary of State for the Home Department (as the appellant) seeks to contend that that decision was in error of law, such that it should be set aside and remade. Leave to appeal to the Upper Tribunal was granted on the basis that it was arguable that language of Regulation 27(4) of the Immigration (EEA) Regulations 2016 had not been applied, nor that the list of factors set out in Schedule 1 to the 2016 Regulations had been considered properly.
13. The First-tier Tribunal Judge found as a fact that the claimant had been exercising treaty rights for in excess of ten years accepting the evidence of the claimant that he had been in the United Kingdom since 1st June 2007. That clearly was a finding of fact properly open to the Judge to make. The Judge went on however to find that there was no credible evidence to show that he posed an imperative risk on the grounds of public policy or public security. Such was of course not the proper test to apply in those circumstances, rather that there were “imperative grounds” of public security.
14. In finding the ten year period there had been no consideration on the issue of integration.
15. Had the matter stood in that situation I would have had no hesitation in finding an error of law in the approach, such that the matter should be reheard.
16. However, the Judge went on to consider matters in the alternative, namely whether the claimant presented a genuine, present and sufficiently serious threat. Once again

the judge seems to have somewhat changed the wording referring to “serious risk to anyone else at the present time”.

17. Reference is made to the OASys Report dated 12th February 2018. At AG37 is an overall assessment of the matter. The issues identified as giving rise to the offence being those of mixing with bad company; being bored; taking drugs.
18. It records that the claimant is very motivated to address his offending and very capable of changing or reducing his offending.
19. The factors which would inhibit change would be relapsing to drug abuse with the aim of enhancing his need for sexual gratification, resulting in associating with like-minded peers with a culture of viewing indecent images of children.
20. The positive factors to be maintained or developed are continuing abstinence and motivation to avoid associating with such peers. The internet sex offenders treatment programme is one that is recommended to reduce his offending.
21. In terms of risk in community a medium risk is identified in relation to children and to public.
22. The likelihood of reoffending is described as low.
23. The judge noted in the decision that the claimant was remorseful as to his behaviour and had shown insight into the circumstances which led to his convictions and the need to abstain from illicit drugs as well as the company he keeps.
24. It was noted that the claimant now had commenced on drug rehabilitation work as well as sex offenders work as confirmed by a letter dated 18th July 2018 from Her Majesty’s Prison and Probation Service.
25. In terms of the aspect of boredom the Judge found there to be a reasonable prospect of accessing work. It was said that he lives with his father who appears to be supportive, although it is to be noted that the offences occurred whilst he was living with his father and using his father’s laptop.
26. Mr Turner submits that the factors as identified by the judge were such as to significantly reduce the risk of offending and consequently the claimant did not meet the threshold now of sufficiently serious threat. He submits that the challenge, as made by the Secretary of State for the Home Department in the grounds of challenge, are merely disagreement with those conclusions which were properly open to the Judge to have made.
27. This of course was a hearing in September 2018. The remedial work had only commenced in July of that year. No work had yet been found.
28. Although the submissions of Mr Turner are attractive, it seems to me that the public interest does demand that proper consideration be given to the matters, applying the proper considerations which the statute and Regulations require. The test is a

“genuine present and sufficiently serious threat” and it is a matter of concern that nowhere does the wording appear accurately in the decision, except as I have indicated in a slightly different form at paragraph 20.

29. It seems to me that there is a proper need as required by the Regulations to consider the question of integration as well as rehabilitation. It may well be that when all the factors are properly considered the claimant may be successful in the overall outcome, particularly if, as he indicates, he takes steps to address the offending behaviour and to sustain from drugs. It is not clear as to what steps are to be taken to refrain from his association with peer groups. He may indeed obtain the additional protect of imperative grounds.
30. The Court of Appeal in **Kamki** [2017] EWCA Civ 1715 considered very much the issue of risk as identified in an OASys Report, particularly as set out in paragraph 35 thereof as seeing the distinction between reoffending and a risk of committing similar offences. It is to be noted of course that the offence considered in **Kamki** may have been of a much higher order than the claimant faces, but nevertheless it is important to properly analyse what risk it is said is being posed thereunder the OASys Report.
31. It seems to me therefore that it is a material error of law for the judge, not having approached the matter on the basis as set out in Regulation 27 or Schedule 1, such that the decision should be set aside to be remade by way of the proper considerations to all aspects thereof.

Notice of Decision

32. The decision of the First-tier Tribunal should be set aside to be remade. Both parties requested that that be remade before the First-tier Tribunal given the number of factual findings that are required to be made, those to then be applied to the legal requirements.

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

Unless and until a Tribunal or court directs otherwise, the claimant 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 claimant and to the appellant. Failure to comply with this direction could lead to contempt of court proceedings.

Signed



Date 13 November 2018

Upper Tribunal Judge King TD