



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00577/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 19 June 2018

Decision & Reasons Promulgated  
On 5 July 2018

Before

THE HONOURABLE MRS JUSTICE MOULDER  
UPPER TRIBUNAL JUDGE SMITH

Between

K M  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr E Raw, Counsel, instructed by Middlesex Law Chambers  
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

An anonymity order was made by the First-tier Tribunal. No application was made to discharge that order and it is appropriate to continue it. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

## DECISION AND REASONS

1. This is an appeal against the decision of the First-tier Tribunal promulgated on 6 April 2018, which dismissed the Appellant's appeal against the Respondent's decision dated 6 September 2017 to make a deportation order against him under the Immigration (European Economic Area) Regulations 2016. Permission to appeal was granted on all grounds by a decision of 3 May 2018.
2. The background to this matter is as follows. The Appellant was born on 10 December 1993. He is a citizen of Pakistan. He arrived in the UK in June 2009 and in December 2009 he was issued with a residence card as a member of the family of an EEA national. In December 2014 he applied for a permanent residence card. This application was refused on 23 April 2015. On 8 July 2015, the Appellant was convicted of sexual assault, intentionally touching a female. He was seen on CCTV masturbating on a bus and then touched a woman with his erect penis under his trousers. He pleaded guilty and received a twelve week' suspended sentence. On 1 June 2017 he was convicted of sexual assault on a female. The female was a girl under eighteen years. The offence was that he squeezed her breasts. To that offence he also pleaded guilty and was sentenced to three months' imprisonment.
3. By a decision dated 14 June 2017 the Secretary of State initially issued a decision to deport the Appellant on the basis that "as a result of your criminality your deportation is considered to be conducive to the public good and you are liable to deportation by virtue of Section 3(5)(a) of the Immigration Act 1971." The file was thereafter transferred to the Respondent's EEA Criminal Casework team, the Respondent having recognised that the Appellant is the family member of an EEA national. By decision of 6 September 2017 the respondent made a deportation order.
4. The Appellant appealed against that decision to the First Tier Tribunal. On the day of the hearing the Appellant applied for an adjournment of the hearing to allow the appellant to produce a probation report and information from the Appellant's current probation officer. The application to adjourn was refused.
5. By a decision dated 6 April 2018, the appeal was dismissed, the Judge concluding that the decision to make a deportation order dated 6 September 2017 was proportionate and satisfied the requirements of Regulations 23(6) and 27 of the Immigration (European Economic Area) Regulations 2016. The Judge was also satisfied that the decision was proportionate for the purposes of Article 8 ECHR.
6. Permission was given on the five grounds of appeal although before us this morning Counsel has concentrated on ground one. The grounds were firstly, that the First-tier Tribunal Judge ought to have adjourned the appeal to allow a report from the Probation Service to be put before the Tribunal. Secondly, that the Judge was in error in finding that the Appellant posed a genuine, present and sufficiently serious threat to justify deportation. Thirdly, the Judge placed too much weight on the Appellant's previous criminal convictions contrary to the EEA Regulations. Fourthly, that the Judge reversed the burden of proof by requiring the Appellant to prove that he did not pose a threat to the public and fifthly, that the Judge was in error in finding that deportation was proportionate.

7. It was submitted for the Appellant that the Probation Service could have given evidence on the risk of re-offending and this might have assisted the court: the decision-maker must consider whether the offender has a propensity to reoffend in a similar way (Secretary of State for the Home Department v Straszewski [2015] EWCA Civ at [24]).
8. No application for fresh evidence in the form of any report from the Probation Service has been made. However, Counsel has placed before us today a letter from Slough Children's Services dated 15 June 2018. That letter refers to the requirement that the Appellant is not to have any unsupervised contact with the children of the person to whom the letter is addressed and that if the Appellant has overnight stays the addressee should make safe arrangements so the children are not in the same house as the Appellant. In our view that letter does not assist the Appellant requiring as it does that the Appellant should not currently have unsupervised contact with children.
9. Counsel for the Appellant referred us to paragraph 27 of the EEA Regulations and in particular sub-section (5), which states that (so far as material to the issues):

“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-

...

(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;

...

(e) a person's previous criminal convictions do not in themselves justify the decision.”
10. For the Secretary of State, it was submitted that the Judge gave full reasons why in the circumstances the Judge was not prepared to adjourn the hearing and that in any event this Tribunal remains in the dark about the effect that any probation report would have had.
11. In refusing the adjournment for a probation report the Judge noted that the Tribunal had issued directions for the Appellant to file any pre-sentence report or parole report not later than ten days before the hearing. The Judge further took the view that the Appellant had had six months to obtain a witness statement from his current probation officer and in refusing the adjournment the Judge took the view that the Appellant and his parents could tell the Judge about the probation report, which apparently indicated that he was at low risk of offending and that the Appellant could tell the court about his work with the Probation Service. There is nothing before this tribunal which explains why the Appellant was unable to comply with the directions or unable to provide a report from the Probation Service.

12. Counsel for the Appellant submitted that this tribunal should not punish the Appellant for any failure on the part of the lawyers as it is relevant evidence. Whether or not it was a failure by the lawyers, there is no evidence in our view that the outcome of the appeal would have been affected given that the Judge proceeded on the basis that the probation report stated that the Appellant was low risk. The decision of the Judge was well within the case management powers of the Tribunal. In the circumstances, given the reasons provided by the Judge, it was not, in our view, procedurally unfair for the Judge to reach this conclusion.
13. Counsel for the Appellant submitted that the probation report might have made a difference; in written submissions Counsel submitted that only the probation service properly equipped to give evidence on the issue of the risk of the Appellant reoffending. However, Counsel appeared to concede before us that a Judge is not bound to accept a probation report. In any event, in paragraph [49] of the judgment the Judge justified the conclusion reached. The factors which the Judge took into account in reaching her conclusion in relation to this Appellant was the lack of any rehabilitation courses, which the Appellant acknowledged he had not taken, and the lack of insight into his offending behaviour, in particular the lack of candour in advancing a witness statement in which the Appellant failed to disclose the second offence, of which by the time of the witness statement he had already been convicted. The Judge also took into account the Appellant's dishonesty in the Appellant's evidence concerning the issue of whether or not the Appellant had family in Pakistan and nowhere to live.
14. In the light of the findings of the Judge the refusal to adjourn does not amount to an error of law. The question of whether to adjourn was a matter which was entirely within the case management powers of the Judge and for the reasons set out above, the evidence of the probation service was not "central" to determining the issue. There were a number of factors which were referred to in the judgment which led the Judge to the conclusion that the Appellant posed a genuine, present and sufficiently serious threat to justify deportation.
15. That leads on to the second ground as to whether or not the Judge was in error in finding that the Appellant posed a sufficiently serious threat to justify deportation.
16. It was submitted for the Appellant that there is no strict rule in relation to "seriousness" under the EEA regulations but that EEA nationals ought to enjoy greater protection than aliens (Straszewski at [13]). Further it was submitted that under section 117D of the Nationality Immigration and Asylum Act 2002 the appellant would not be treated as a "foreign criminal", unless convicted of an offence for which he received a sentence of 12 months or greater or it is an offence involving serious harm or he is a persistent offender. Accordingly, the offending would not be sufficiently serious to fall within rule 398.
17. The dictum relied upon by counsel for the appellant from Straszewski was referring to EEA nationals who have acquired a right of permanent residence in the UK and therefore enjoyed enhanced protection (see para 22 of the judgment). This was not such a case. The reliance on rule 398 is in our view misplaced. Rule 398 is considering the issue of the balancing exercise in the context of Article 8 and not the issue under regulation 27 (5) of whether the conduct represents a "sufficiently serious threat

affecting one of the fundamental interests of society". As the Secretary of State's Presenting Officer submitted and we accept, sexual offences of this kind, and we note in particular the second offence relating to a minor, are sufficiently serious in nature such that when taken with the other factors referred to by the Judge, entitled her to conclude in the round that it constitutes a "sufficiently serious threat affecting one of the fundamental interests of society" and thus justifies deportation.

18. In our view the Judge did not place too much weight on the previous convictions but considered what had transpired subsequently to the first offence being committed. Not only had the Appellant re-offended but he had not admitted his offending by failing to disclose it in his witness statement and, he acknowledged, had carried out no rehabilitation. The Judge therefore reached the conclusion that the Appellant posed a sufficiently serious threat, not only on the basis of the previous convictions but on the circumstances and evidence which was before the Judge. There is no error in that regard.
19. In relation to ground three, that was the ground that too much weight was placed on the Appellant's previous criminal convictions, which we have dealt with above.
20. In relation to ground four, it was asserted that the Judge reversed the burden of proof by requiring the Appellant to prove that he did not pose a threat to the public. We accept the submission of the Secretary of State's Presenting Officer that the Judge's remarks, read in context, in particular, the problems with the evidence as identified by the Judge, did not amount to a reversal of the burden of proof.
21. The final ground, that there was an error in finding that the deportation was proportionate, is, in our view, not made out. The presumption is that the public interest requires deportation and the circumstances of this case did not outweigh the public interest.
22. For all these reasons, we find that the grounds do not disclose a material error of law and we uphold the First-tier Tribunal's decision.

### **Notice of Decision**

**The decision of First-tier Tribunal Judge Sullivan promulgated on 6 April 2018 does not contain any material error of law. We therefore uphold that decision with the result that the Appellant's appeal remains dismissed.**

Signed

Dated: 4 July 2018



PP Mrs Justice Moulder