



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00750/2017

THE IMMIGRATION ACTS

**Heard at: Birmingham City Tower
On: 17th September 2018**

**Decision and Reasons Promulgated
On: 13th February 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Yancho [D]

(no anonymity direction made)

Respondent

For the Appellant: Mr D.Mills, Senior Home Office Presenting Officer
For the Respondent: Mr E. Barr, Counsel instructed by Jasvir Jutla & Co Solicitors

DECISION AND REASONS

1. The Respondent is a national of Bulgaria born in 1979. The Secretary of State has decided, on public policy grounds, to deport him in accordance with Regulation 27 of the Immigration (European Economic Area) Regulations 2016. On the 20th March 2019 the First-tier Tribunal (Judge Juss) allowed his appeal against that decision. The Secretary of State now has permission to appeal.
2. The bare facts are these. The Respondent came to live and work in the United Kingdom in 2013. He has a partner here ('Ms M') and a child (I), who was born

in March 2017. Both of the Respondent's parents live and work in the United Kingdom. On the 30th May 2017 the Appellant was convicted at Leicester Crown Court of blackmail. He had secretly filmed a woman while having an intimate relationship with her and had then threatened to upload the film to the internet unless she paid him £4000. For this crime the Respondent was sentenced to 1 year and 4 months in prison.

3. The First-tier Tribunal found that since the Respondent had lived in the United Kingdom less than five years at the date of the Secretary of State's decision, he was entitled to only the "basic protection" offered by the Regulations. That said, the Tribunal was not satisfied that the Secretary of State had discharged the burden upon him to establish that the Respondent's conduct represented a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". The Tribunal notes that the Respondent had committed this single offence. He had admitted his guilt before the criminal court and had been sentenced on that basis. He had expressed remorse. The Secretary of State's conclusion that the Respondent presents a "real" threat to society was apparently based solely on the fact that he was in prison serving his sentence of imprisonment for this offence. On the evidence presented the Tribunal was not able to make a predictive assessment that the Respondent posed a risk in the future. That was not, in accordance with the Regulations, sufficient to discharge the burden. Furthermore, the Tribunal did not consider that deportation action was a proportionate response. The Secretary of State accepted that the Respondent had a genuine and subsisting parental relationship with his son and the Tribunal accepted the evidence of Ms M that if he were to be deported she would be left to bring up their son alone, since she is established in the United Kingdom and would not contemplate returning to Bulgaria. The appeal was thereby allowed, with reference to the Regulations and Article 8 ECHR.
4. The Secretary of State now appeals on the following grounds:
 - i) The Tribunal accepted that the Respondent had shown genuine remorse because of his guilty plea. The Secretary of State submits that a guilty plea is not determinative of a fundamental acceptance of criminal behaviour. The Tribunal does not weigh in the balance the fact that the Respondent described the offence as a "joke" in his live evidence;
 - ii) The Tribunal failed to weigh in the balance the fact that the Respondent is subject to a five-year restraining order, "compelling and incontrovertible evidence that he presents a risk to society";
 - iii) The Tribunal took immaterial factors into account in apparently attaching weight to the Secretary of State's failure to produce any of the relevant material from the probation service, such as an OASys report.

Discussion and Findings

5. There is no merit in ground (iii). Although the First-tier Tribunal describes the absence of an OASys report as a “remarkable feature” of this case it is not at all clear that it placed any weight on the *absence* of this evidence. The point made [at its paragraph 30] is that the burden lies on the Secretary of State to show that the individual concerned poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In order to discharge that burden the Secretary of State did no more than rely on the fact of the conviction, and that the Respondent was, at the date of the decision to deport, still in jail. It was in that context that the First-tier Tribunal mentioned the fact that there was no formal assessment of risk by the probation service.
6. In respect of ground (i) I accept Mr Mills’ submission that a guilty plea may be entered for entirely pragmatic reasons, but I am not satisfied that the plea was the sole basis for the Tribunal’s finding that the Respondent had shown genuine remorse. The Respondent had told the Tribunal himself that he was sorry about the offence, and this was found to be consistent with the fact that he had entered a plea of ‘guilty’, on a full-facts basis, at the earliest possible opportunity before the Crown Court. He had also told the sentencing judge that he felt remorse for what he had done. The Tribunal was entitled to accept that evidence. It cannot be said that it overlooked the fact that the Respondent had described his actions as a “joke”, since that matter is expressly set out at paragraph 8. It is apparent from the determination overall that the Tribunal proceeded on the basis that the Respondent was guilty of blackmail. It nowhere sought to diminish the significance of that very serious offence.
7. In respect of ground (ii) Mr Mills emphasised the point made in the written grounds that the Tribunal nowhere weighs in the balance the fact that the sentencing judge had imposed a five-year restraining order on the Respondent. This, he submitted, clearly went to whether the courts considered the Respondent to pose a continuing risk. I am satisfied that the restraining order (a civil sanction imposed under section 5 of the Protection from Harassment Act 1997) may be *a* material factor in the assessment of future risk. I cannot however be satisfied that that here the First-tier Tribunal can be properly criticised for not giving it express consideration. First, because it is not clear to me what risk this established over and above the imposition of the criminal sanction, but more importantly because it was not a matter relied upon by the Secretary of State at the hearing. Paragraph 12 of the determination records the Presenting Officer’s submissions. The HOPO does not rely on the Order to prove the Secretary of State’s case. Nor does the refusal letter, the material part of which is at paragraph 19:

“It is believed that you pose a genuine, present and sufficiently serious threat to the interests of the UK. The threat you pose is real, when taking

into account your conduct and the seriousness of your offence. The threat you pose is believed to be present, as you are currently serving a custodial sentence, you will remain on licence following your release until around 30 September 2018, and you have provided no evidence that you are rehabilitated or have taken any steps to address your thinking and behaviour”

8. In his oral submissions Mr Mills raised a point not argued in the grounds. At paragraph 32 of its determination the First-tier Tribunal says this: “The Appellant has not been a ‘persistent offender’ and there is no evidence that he is at high risk of offending”. Mr Mills challenges the formulation “high risk”. He correctly points out that the Regs require the Secretary of State only to establish a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”. ‘Sufficiently serious’ does not mean ‘high’. I am satisfied that the First-tier Tribunal did here misdirect itself. I am not however satisfied that the misdirection was material. That is because, on the evidence before the Tribunal, the Secretary of State was not able to discharge the burden under Regulation 27(5)(c). The First-tier Tribunal was not satisfied that there was any risk of reoffending; it was satisfied that the Respondent had shown genuine remorse and it was his only criminal offence.

Decisions

9. The determination of the First-tier Tribunal does not contain any material error of law and it is upheld.
10. There is no order for anonymity.

Upper Tribunal Judge Bruce
18th September 2018