**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: DA/00392/2020**

**THE IMMIGRATION ACTS**

| **Heard remotely at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On the 16 February 2022** | **On the 21 March 2022** |

**Before**

**THE HON. MRS JUSTICE FOSTER,**
**SITTING AS A JUDGE OF THE UPPER TRIBUNAL**
**and**
**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**CEZARY SIEKIERSKI**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms A Kowalik, Solicitor
For the respondent: Mr S Kotas, Senior Home Office Presenting Officer

## DECISION AND REASONS

### Introduction

**1.** This is an appeal against the decision of First-tier Tribunal Judge Bulpitt ("the judge"), promulgated on 22 June 2021. By that decision, the judge dismissed the Appellant's appeal against the Respondent's decision, dated 4 December 2020, to make a deportation order pursuant to regulation 23

of the Immigration (European Economic Area) Regulations 2016 ("the Regulations") and (it appears) to refuse a human rights claim.

**2.** The Appellant is a citizen of Poland, born in 1987. He arrived in United Kingdom in October 2014, accompanied by his wife, M, and their three children, then aged 9, 3, and 7 months. The family unit began residing in the same property as another Polish citizen, Ms K, and her two children. It appears as though the Appellant separated from M and began a relationship with Ms K, despite both family units continuing to reside in that property. In 2019, Ms K had a child by the Appellant.

**3.** The Appellant was subsequently arrested and charged with one count of controlling coercive behaviour in an intimate or family relationship; Ms K being the victim and the offending having taken place over the course of two years and eight months. The Appellant entered a late guilty plea on the morning of his trial. On 12 October 2020, HHJ Melville, QC, sentenced the Appellant to 19 months' imprisonment and imposed a Restraining Order in respect of Ms K and her three children. The Sentencing Remarks referred to the Appellant's inhumane and cruel behaviour towards Ms K and described the evidence as suggesting "a brutality on your part beyond human understanding."

**4.** On 7 December 2020, an OASys report was completed. This stated that the Appellant presented a low risk of re-offending, a medium risk of serious harm to children and the public, and a high risk of such harm to known adults. The Appellant was released from prison on 29 December 2020 and went to live in approved premises. He was then seemingly reconciled with M and was eventually permitted by the Probation Service to reside with her and their three children in late March 2021.

**5.** The Appellant remained subject to conditions of his licence until after the hearing before the First-tier Tribunal.

## The Respondent's decision

**6.** The Respondent initiated deportation proceedings and, in her decision of 4 December 2020, concluded that:

(a) the Appellant had not acquired a permanent right of residence in United Kingdom;

(b) the nature of the offending, the Sentencing Remarks, the OASys assessment, and the absence of evidence of rehabilitation, showed that the Appellant constituted a genuine, present and sufficiently serious threat to the public;

(c) deportation would be proportionate;

(d) in respect of Article 8 ECHR ("Article 8"), deportation was also proportionate, having regard to, amongst other matters, the best interests of the three relevant children.

**7.** Whilst the heading of the decision letter only referred to the Regulations and a decision to make a deportation order, there is a subsequent reference to the refusal of a human rights claim. It is said that there was a right of appeal against both decisions. In the event, nothing in this case turns on any jurisdictional issue.

## The decision of the First-tier Tribunal

**8.** The judge began his decision with an accurate recital of the relevant provisions of the Regulations and a correct self-direction on the location of the burden of proof, resting as it did on the Respondent to show that the Appellant was a genuine, present and sufficiently serious threat to the fundamental interests of society and that his deportation would be proportionate: [3]-[6]. These two matters are indeed stated to have been the central issues in the appeal: [10]. At [15], the judge confirmed that he had considered all of the evidence presented, both documentary and oral, and that his findings been reached only after consideration of this evidence "in the round".

**9.** The judge's primary findings of fact can be summarised as follows:

(a) the Appellant had maintained "close links" with his family in Poland: [17];

(b) the Appellant had not been a "qualified person" during his residence in the United Kingdom for the purposes of the Regulations; he had only been in employment for approximately one month: [20];

(c) the Appellant had remained "heavily involved" in the lives of M and the three children during the period in which she was in a relationship with Ms K: [21];

(d) that relationship had continued for approximately 5 years: [21];

(e) the Appellant had perpetrated an abusive relationship with Ms K and that the details of the offending were as described in the Sentencing Remarks and the OASys report. The judge described those details as "chilling" and provided several examples of what had occurred. It was "quite clear" that the nature of the offending marked the Appellant as someone who presented "a very grave risk to the public.": [22]-[24];

(f) the behaviour of the Appellant and M following Ms K's departure from the property in 2019 was "entirely consistent" with the controlling behaviour which constituted the abuse in the first place (we record here that M was never arrested in respect of her conduct). It was "no surprise at all" that the OASys report assessed the risk of serious harm as it did: [25];

(g) the Appellant did, as at the date of hearing, have a genuine and subsisting relationship with M and a genuine and subsisting parental relationship with the three children. Clearly, there were no such relationships with Ms K or her youngest child: [27].

**10.** The judge then addressed the first core issue, namely whether the Appellant represented a genuine, present and sufficiently serious risk to the fundamental interests of society. The judge had no doubt that the Appellant posed a serious threat to the maintenance of public order, the prevention of social harm, the protection of the public, and the maintenance of public confidence in the ability to take action against EEA national offenders: [29]. As to whether that serious threat was a present one, the judge rejected the contention that the Appellant's reunification with his family reduced any risk, finding that evidence from M was "utterly unrealistic and implausible", that she had clearly been unable to prevent the past offending, and that the same would apply in the future: [31]. A detailed email from the Appellant's Offender Manager, dated 14 June 2021, was considered. Some progress was noted in respect of compliance with supervision. However, the judge regarded other aspects of the email as raising real concerns. It was recorded that the Appellant had been unwilling to take responsibility for his offending and was "in denial" of the main elements of his past behaviour. There had been only "basic work" undertaken to address the Appellant's offending. At that point in time, the Appellant remained assessed as a high risk to known adults: [33]. At [34], the judge set out his overall conclusion and found that the Appellant continued to present a genuine and sufficiently serious threat to the fundamental interests of society. In particular, he stated that there was a "very serious risk" to any female with whom he might engage in a relationship and to any children she may have.

**11.** The judge then moved on to consider the issue of proportionality. A variety of factors were considered, including: a lack of cultural and social integration in the United Kingdom; the relatively brief length of residence here; significant cultural and social ties with Poland; and the limited nature of work undertaken in conjunction with the Probation Service for reasons including the Appellant's lack of English. Viewing the Appellant's circumstances in isolation, the judge concluded that deportation would be proportionate: [35]-[36].

**12.** The position of M and the three children was then considered. Having regard to their circumstances as a whole, the judge concluded that it would not be "unduly harsh" for them to be separated from the Appellant: [39]. The alternative scenario of the family unit going to Poland was then

addressed; the judge concluding that the family's ties to Poland and the fact that the children (in reality, the older two) had already lived in the country of their nationality to a point in time beyond infanthood, indicated that a relocation would not be unduly harsh, despite the challenges involved: [40].

**13.** Thus, in the context of the assessment of proportionality under the Regulations, the judge concluded that deportation would be lawful and the appeal under those Regulations fell to be dismissed: [41]-[42].

**14.** At [43], the judge expressed some hesitation as to whether there was in fact any appeal before him relating to the refusal of a human rights claim. Sensibly, he took a 'belt and braces' approach and considered the case in the context of section 117C of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"), concluding that his findings in respect of the proportionality exercise under the Regulations was to be read over to this aspect of his decision. Neither of the exceptions under section 117C(4) or (5) of the 2002 Act applied and the Appellant had not shown the existence of very compelling circumstances.

## The grounds of appeal and grant of permission

**15.** The grounds of appeal make two assertions: first, that the judge erred in his assessment of whether the Appellant represented a present threat; and second, that the judge had failed consider section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act"), as that provision relates to the best interests and welfare of relevant children.

**16.** Permission to appeal was granted by First-tier Tribunal Judge Parkes on 9 July 2021. Under the heading "Reasons for decision", Judge Parkes took the view that the Appellant's first ground of appeal was unarguable, but that the second had some merit. He stated that permission was limited to the second ground only. However, in what has been described as the operative part of the decision notice (i.e. above the horizontal line), it is simply stated that permission was "granted".

**17.** During the course of pre-hearing case management, Upper Tribunal Judge Norton-Taylor considered the purported limited grant of permission and issued a note to the parties on 11 February 2022. This referred to Safi and Others (permission to appeal decisions) [2018] UKUT 388 (IAC), in which it was held that a grant of permission would only be effectively limited if this was stated above the horizontal line in a decision notice. The parties were invited to address this issue at the hearing. In the event, Mr Kotas provided concise written submissions on the issue, contending that Safi was, in effect, wrong and that the grant of permission in the present case was indeed limited to the second ground only. There were no submissions from Ms Kowalik.

**18.** In the event, we have concluded, for reasons which will become clear, that the Respondent's arguments on Safi do not require consideration in this case. The respectable submissions put forward may be re-deployed in proceedings in which the issue has a material bearing and where skeleton arguments and relevant authorities have been provided by both parties.

## The hearing

**19.** We heard oral submissions from both representatives. These are a matter of record and need not be set out in full here.

**20.** In summary, Ms Kowalik relied on the grounds of appeal and her skeleton argument. In respect of the first ground, she submitted that the judge had effectively based his conclusions on risk solely on the Appellant's past offending. By implication, there had been a failure to assess the rehabilitative steps undertaken. On the second ground, it was submitted that the judge had not taken account of the effect of deportation on the children, had not struck the right balance, and had concentrated on the Appellant's offending without due regard to section 55 of the 2009 Act.

**21.** Mr Kotas was content to make submissions on the first ground of appeal, notwithstanding his position on Safi. He relied on the Respondent's skeleton argument and urged us to exercise caution before interfering with the judge's decision, submitting that the first ground of appeal was nothing more than a complaint with conclusions that were sustainable. The judge had taken relevant evidence on risk into account. As regards the children, whilst there was no express reference to section 55 of the 2009 Act, this was not a material error. The judge had considered relevant factors and there was nothing significant disclosed by the evidence which the judge had not referred to.

**22.** As regards the procedural issue described in paragraph 17, above, Mr Kotas relied on his written submissions and we did not call on him to elaborate further.

## Conclusions on error of law

**23.** At the end of the hearing we announced our decision that there were no material errors of law in the judge's decision and the Appellant's appeal would be dismissed. We now set out our reasons for that conclusion.

**24.** At the outset, we remind ourselves of the need for restraint before interfering with a decision of the First-tier Tribunal. Exhortations from the Court of Appeal to this effect are numerous: see, for example, Lowe [2021] EWCA Civ 62 and Herrera [2018] EWCA Civ 412.

**25.** There has been no suggestion that the judge misdirected himself as to the applicable legal framework in this case and it is quite clear that he did not.

**26.** It was common ground before the judge that the Appellant did not have a permanent right of residence in United Kingdom. Thus, the assessment of risk and proportionality fell to be considered against the lowest level of protection afforded by the Regulations.

**27.** On the evidence before him, and for the reasons given, the primary findings of fact set out at [16]-[27] were plainly open to the judge. Indeed, the grounds of appeal and oral submissions have not mounted any discernible challenge to those findings.

**28.** It is equally plain that the judge was entitled to conclude that, having regard to the nature and particular circumstances of the offending, the Appellant represented a genuine and sufficiently serious threat affecting several of the fundamental interests of society. The judge's references at [29] to the robust Sentencing Remarks of HHJ Melville, QC, combined with his own detailed findings of fact, were more than sufficient to support that conclusion.

**29.** The Appellant's case before us rests on the contention that the judge had simply looked backwards to the offending and had failed to properly assess risk in light of the evidence on rehabilitation.

**30.** We reject that analysis of the judge's decision. The past conduct was clearly relevant to (but not dispositive of) the question of whether the Appellant represented a genuine, present and sufficiently serious threat: see regulation 27(5)(c) of the Regulations. The judge was entitled, indeed bound, to take account of this factor. It is manifestly the case, however, that the judge did not end his assessment there. What is said at [31]-[33] demonstrates that he had regard to unarguably relevant evidence going to the question of whether the Appellant posed a risk as at the date of hearing. The judge was decidedly unimpressed with M's evidence and this had a bearing on future risk. More significantly, the judge was fully entitled to place weight on the email from the Appellant's Offender Manager, which represented the current views of a relevant professional (that email pre-dated the hearing by only three days). On any view, the observations contained in the email and referred to by the judge at [33] undermined the suggestion that the Appellant no longer represented a present threat.

**31.** As to the "low" risk of re-offending stated in the OASys report, we are satisfied that the judge had regard to all the evidence before him, including this. The report formed a central aspect of the evidential picture and it is implicit in the judge's overall assessment that the risk of re-offending was factored in. We also bear in mind that that aspect of risk had to be evaluated together with the consequences if any re-offending of a similar nature did occur. In the present case, there was a medium risk of serious harm to children and the public and a high risk to known adults.

**32.** In light of the foregoing, the first ground of appeal fails.

**33.** We turn to the second ground. It is right that the judge did not expressly refer to section 55 of the 2009 Act. That omission is not, of itself, an error of law: see, for example, AJ (India) [2011] EWCA Civ 1191, at paragraph 43. Substance is more important than form.

**34.** On a narrow reading of the Appellant's second ground, what we say in the preceding paragraph disposes of this element of his challenge. However, for the sake of completeness we deem it appropriate to address the wider issue implicit in the ground, namely the alleged failure to have considered the children's circumstances.

**35.** The judge did not expressly set out a separate "best interests" assessment for each of the children. As a matter of form, it might have been better if he had, but, as mentioned previously, it is the substance of what has been done which is ultimately the focus of our attention. At [39] and [40] the judge specifically considered the children and concluded that it would not be unduly harsh for them to be separated from the Appellant or for the family unit to relocate to Poland. Two points arise from this. First, an unduly harsh assessment necessarily involves the best interests of the children concerned. We would be slow to infer that the judge overlooked this, albeit that he did not state it in terms. Second, it is clear the judge had regard to all the evidence before him. That evidence, as it related to the children, was thin, to say the least. We agree with Mr Kotas' submission that nothing in the underlying evidence raised any significant issues relating to best interests which required express consideration by the judge. There was, for example, no evidence of health or developmental difficulties, no expert reports, and no evidence of any substance from the respective schools.

**36.** Ms Kowalik suggested that the judge had impermissibly concentrated on the Appellant's offending when assessing the children's circumstances. We disagree. The conclusions on undue harshness were stated prior to any consideration of the risk posed by the Appellant: see [39]-[41].

**37.** Finally, in so far as the judge needed to go on and consider Article 8 as a discrete issue in the appeal, he was in our judgment entitled to transpose his conclusions on undue harshness over to that consideration. There were no other factors not previously considered that required evaluation under Article 8, or at least none to which our attention was brought. We note too that none of the children were "qualifying children" for the purposes of section 117C of the 2002 Act.

**38.** The second ground of appeal also fails.

## Anonymity

**39.** The First-tier Tribunal did not make an anonymity direction and we see no proper reason for adopting a different approach in light of the importance of open justice. The fact that children are involved is not of itself a reason to require anonymity.

## Notice of Decision

**40. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision shall stand.**

**41. The appeal is accordingly dismissed.**

Signed: H Norton-Taylor Date: 24 February 2022

Upper Tribunal Judge Norton-Taylor