Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00262/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House
On 24 November 2020

Decision & Reasons Promulgated
On 9 June 2021

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

B M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Bellara, Counsel, instructed by Western Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

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

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 both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings

1. The Appellant is a citizen of Portugal. His date of birth is 19 July 1977.

2. I make an order for anonymity to protect the identity of the Appellant's son, a minor.

3. On 5 April 2018 the Secretary of State made a deportation order pursuant to Regulation 24(3) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") against the Appellant. This followed his conviction on 6 October 2016 in relation to three counts of making indecent photographs or pseudo photographs of children, possession with intent to supply a class A drug and possession with intent to supply a class B drug. In addition the Appellant was convicted of possession of a class B drug. The Appellant was sentenced to 38 months imprisonment. He was made subject to a sexual harm prevention order. He is required to sign the sex offender's register for life.

4. The Appellant appealed against the Secretary of State's decision to deport him. His appeal was dismissed by the First-tier Tribunal in a decision that was promulgated on 15 July 2019. The Upper Tribunal (a panel comprising Upper Tribunal Judge Lindsley and Upper Tribunal Judge McWilliam) found that the First-tier Tribunal made a material error and set aside its decision. The error of law decision reads as follows:-

> "12. The judge addressed risk factors at paras. 66 and 70. Essentially the judge agreed with the sentencing judge in 2016 that the Appellant remains in denial as to the desire on his part to access indecent images of young children and she concluded that he 'appears to minimise his responsibility'. The judge found that the nature of the offences demonstrated 'poor judgment' and the Appellant 'refuses or is unable to recognise the real damage of the offences'.
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> 13. Whilst the judge was entitled to take a view about the Appellant's lack of self-awareness, she did not sufficiently engage with the evidence of the OASys Report (specifically the triggers identified therein as increasing the risk of reoffending) together with the Appellant's evidence about his present circumstances. This was material to the assessment of risk. The Appellant was unrepresented. His evidence was capable of supporting that the trigger factors identified in the OASys Report were not engaged. Whilst the sentencing judge opined that the Appellant was in denial about why he was looking at the images and that he did not accept the Appellant's explanation that he was trying to distract himself from self-harming and having suicidal thoughts, he also identified him as suffering from depression, being estranged from his family, vulnerable and lonely. The OASys Report identified particular risk factors including drug taking and relationships. The Appellant's evidence before the FtT was that he was working, had the support of his daughter and family who lived close by and that he is not taking drugs. The Appellant's daughter's evidence was capable of supporting this. He was living with his brother whilst at the time of the commission of the offences he was living alone. There was additional evidence of support from family members. If the Appellant was still in denial, whilst this is capable of indicating a level of risk of offending, it is not determinative of the issues in this appeal. A more nuanced assessment of risk is required, taking into account all material evidence.

14. The judge at para. 73 said there was sufficient evidence of the Appellant's role as a father. Whilst the Appellant did not live with MM, there was evidence from the child's mother that he was a good father and close to his children. There is no assessment by the judge of the child's best interests. This error infects the assessment of proportionality. In addition, at para. 74 the judge considered the situation of the Appellant's son as though this was a case where the Appellant was claiming to have a derivative right of residence which is not the approach to proportionality.

15. Had the judge not made the errors identified in the grounds, we cannot be certain that she would have reached the same conclusions. There is another serious error in the decision regarding the level of protection afforded to this Appellant and whether this was properly understood and applied by the judge. Whilst she correctly recorded that the Presenting Officer conceded that the Appellant had permanent residence and she set out the correct law, at no point in the decision did she indicate the level of protection afforded to the Appellant or find that the decision to deport him was justified on serious grounds of public policy. Paras. 47 and 58 in our view further muddies the water. The judge found that there is 'a real risk of the Appellant's further commission of a criminal offence in the future'. This was based on the Appellant being 'unable to recognise the real damage of the offences'. The judge had to decide whether the decision was justified on serious grounds of public policy because of the threat presented by the Appellant within the framework of the 2016 Regulations."

5. The panel made a series of directions about the filing and service of evidence under Rule 15(2A) of the 2008 Procedure Rules. We directed the Appellant to serve and file a consolidated bundle not later than fourteen days before the hearing.

6. The matter came before a panel on 12 March 2020 (Upper Tribunal Judge McWilliam and Upper Tribunal Judge O'Callaghan). On this occasion Mr Ballara representing the Appellant made an application for an adjournment. He told the Tribunal that the Appellant's daughter and his ex-wife were unable to attend the hearing to give evidence because they were unwell with flu-like symptoms. He informed the panel that their evidence was crucial. Mr Jarvis who was representing the Secretary of State did not oppose the application. However, the panel expressed concern that the Appellant had failed to comply with the directions of the Tribunal. The panel reminded the Appellant's solicitors of their obligations under Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Further directions were made, including that the parties were to file and serve skeleton arguments. The matter was listed before me on 24 November 2020 for a remote hearing.

The Appellant's criminality

7. As a result of a police search of his home, the Appellant was found to have 320 indecent images on his computer which included images categorised as the most serious category A images, including those of children under 10. He was sentenced to three offences of making indecent images.

8. He pleaded guilty to possession with intent to supply class A drugs, possession with intend to supply class B drugs and possession of class B drugs. He was found to be in possession of 30 grams of cocaine and a kilo of cannabis. The Appellant entered a guilty plea on the basis that he did not know that cocaine had been stored at his home. On 17 November 2016 he was sentenced to 38 months imprisonment for all offences.

9. The salient parts of His Honour Judge Moss's sentencing comments read as follows

> "… you have been here a number of years with no previous convictions. You suffer from depression and are estranged from your family. You were living in a one bedroom rented flat, it appears to this court that you are someone, who is ... somewhat vulnerable, lonely and without very much prospect for making very much of your life. If I have not said it already you have no previous convictions.
>
> The police attended your address in relation to indecent images and found on your computer a total of 320 images, the most serious being count 1, category A images including two movie files; there were ten of those involving young girls age under 10 who were displaying distress.
>
> I do not accept your explanation for why you were looking at those images, which is that you were trying to distract yourself from self-harming and having suicidal thoughts. I think you are in denial about your interest in children. This is an entirely separate offence from the drugs, the guidelines indicate a starting point of twelve months' custody.
>
> In light of everything I have heard, and also to ensure that there is sufficient time for you to seek help whilst you are in custody from the prison hospital authorities, and that when you are released which you will be having served half of your sentence, you will be on licence and I hope that you will maintain contact with Mental Health Services in order to sustain what I hope will be some progress for you in custody, and indeed hope you will avoid involvement with drugs.
>
> If you breach the terms of your licence on release you are liable to be recalled to prison to serve the remainder of your sentence.
>
> The report that I have suggests that there is no intervention required in relation to your viewing of indecent images. I am not persuaded by the reasoning of the author of the report, and it seems to me the opportunity should be taken, if available to you, to address the fact that you were attracted to viewing indecent images of young children".

The Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations")

10. The Appellant appeals against deportation under the 2016 Regulations. The relevant parts of which provide: -

Decisions taken on grounds of public policy, public security and public health

27.— (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 right of permanent residence under regulation 15 except on serious grounds of public policy and 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 a right of permanent residence under regulation 15 and who 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 in the best interests of the person concerned, 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.

(5) 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—

(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 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;

(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;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a

disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010; or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

The Appellant's evidence

11. The Appellant did not submit any further evidence but he relied on the evidence that was before the First-tier Tribunal. He gave evidence through a Portuguese interpreter, as did his ex-wife, "AM".

12. The Appellant and AM made witness statements, dated 21 April 2020 and May 2020 respectively. The Appellant's adult daughters, "RM" and "GM" prepared statements of 6 May 2020. There were witness statements from wider family, the Appellant's brother and his wife.

13. There was a letter in the Appellant's bundle from YTD Limited of 25 November 2020 which confirms that the Appellant was recruited as a warehouse operator starting from 1 January 2019 and that he had been working full-time since then.

14. The Appellant in his witness statement says he married his ex-wife on 21 January 2006. They have three children, RM (born on 17 March 1995), GM (born on 27 November 1998) and the Appellant's youngest child "N" (born on 1 November 2003). The Appellant has lived in the UK since 1 April 2007. He and his wife separated in 2011. They divorced in 2016.

15. At the time of the offences he was depressed and had suicidal thoughts post the breakdown of his marriage. He was vulnerable and "fell into wrong hands".The Appellant regrets his criminality. He has rehabilitated and reformed. He is remorseful, which is reflected in his constant efforts to better himself and tackle the root of his offending. He has completed a number of courses.

16. The Appellant and his ex-wife have made arrangements for him to be actively involved in the lives of their children. His daughters are adults but they are still dependent on him. His son, N, has autistic spectrum disorder and attended a special needs school. He now attends college. AM appreciates that the children would suffer if he was no longer present. He would be unable to financially maintain the family. The Appellant was supported by his family throughout the time when he was in prison.

17. The Appellant in oral evidence he said that he presently sees N every Sunday. They go to the cinema together and shopping. They have lunch at McDonald's. He cannot

give him support with his college work but he incentivises him. It was very hard for N while the Appellant was in prison. His mother told him that the Appellant was travelling to explain his absence. During the period he did not do well at school, however now he has started to succeed. N does not know that the Appellant may be deported. He gives his ex-wife £80, £50 or sometimes £200 a month.

18. The ties that the Appellant once had in Portugal and Brazil have now been severed. He does not have the capital to rebuild his life in either. He would not be able to cope without his family.

19. In oral evidence, the Appellant said that he was misunderstood by the sentencing judge. He was aware that what he did was wrong and the consequences of his actions. At the time of offending he was sick. He was suffering from depression. He had never used or accessed those websites before. He went into a depression after the breakdown of his marriage in 2011. He was self-harming and thinking of ending his life. He is not a paedophile. Each time he tries to explain why he accessed those sites he is told that he does not accept responsibility. He is no longer in contact with the two men who were involved with the drug offences. He assisted the police in apprehending them. The Appellant used drugs in exchange for letting them use his accommodation. They gave him an ounce of cannabis per month for doing so. While in prison he did courses in English and maths.

20. The Appellant has got to know himself much better since going to prison. He has psychological help. He is working. He does not use drugs. During cross-examination he explained what he meant when he said that he had been misunderstood by the sentencing judge. He said that he was put in a corner and asked why and he tried to respond and this made matters worse. The judge heard what he wanted to hear. He was searching the internet about suicide and images came up which he tried to delete.

21. The Appellant said that he takes an interest in life again. He is getting to know himself better. He has had sessions with a nurse and he has been helped by the Samaritans. He had Colour Therapy in prison.

22. The Appellant's ex-wife gave oral evidence which was broadly consistent with that of the Appellant.

Submissions

23. The parties relied on skeleton arguments which I will summarise.

24. The Secretary of State conceded that the Appellant has a permanent right of residence. It was not accepted that the Appellant is entitled to the highest level of protection under the 2016 Regulations.

25. To calculate whether the Appellant has acquired enhanced protection requires the decision maker to count back from the date of deportation: Secretary of State for the Home Department v Franco Vomero [2016] UKSC 49 which in this case is 5 April

2018. This period was significantly interrupted by the Appellant's imprisonment for very serious sexual and drug related offences.

26. In Onuekwere v Secretary of State for the Home Department (case C-378/12) [2014] 1 WLR 2420, the CJEU confirmed as follows at paragraph 26:

> "The imposition of a prison sentence by the national court is such as to show the noncompliance by the person concerned with the values expressed by the society of the host member state in its criminal law …".

27. In Secretary of State for the Home Department v Denis Viscu [2019] EWCA Civ 1052 Flaux LJ (with whom the other members of the court agreed) stated at [44]:

> "(i) that the degree of protection against expulsion to which a union national resident in another member state is entitled under the Directive is dependent upon the degree of integration of that individual in the member state;
>
> (ii) that, in general, a custodial sentence is indicative of a rejection of societal values and thus of a severing of integrative links with the member state; but
>
> (iii) that the extent to which there is such a severing of integrative links will depend upon an overall assessment of the individual's situation at the time of the expulsion decision".

28. An overall assessment of the Appellant's situation taking account of his offending behaviour and the control measures resultingly imposed, demonstrates that as at the relevant date his integrative links with the UK were wholly severed. The Appellant cannot benefit from enhanced imperative protection from expulsion. Accordingly, the appeal must be assessed against the medium level of protection under the Regulation.

29. It is asserted that the Appellant's conduct constitutes a genuine, present and sufficiently serious threat. He was made subject to Multi-Agency Public Protection Arrangements (MAPPA) level 1 due to the continuing risk he poses to the public. He has been assessed as posing a medium risk of serious harm to children.

30. The sentencing judge was not persuaded by the reasoning of the author of a pre-sentence report (PSR) and rejected the Appellant's claimed reasons for viewing indecent images of children, stating that the Appellant was "in denial" about his "interest in children". The sentencing judge's conclusions are relevant to the assessment of the Appellant's credibility, as well as the threat he poses to society in the United Kingdom in general and in particular to children.

31. There are serious grounds of public policy. The Appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

32. The threat presented by the Appellant is a weighty factor. In MC (Essa principles recast) Portugal [2015] UKUT 520, the Upper Tribunal noted at paragraph 10 as follows:-

> "In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (Dumliauskas [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (Dumliauskas at [46] and [54])".

33. It is submitted that the Appellant is not integrated into UK society and accordingly his future prospects of rehabilitation cannot constitute a weighty factor. The Secretary of State relies on the refusal letter. The matters said to weigh in the Appellant's favour are outweighed in the balancing exercise. In respect of Article 8 the Appellant is unable to show that the effects of deportation would be unduly harsh upon any qualifying partner or child with reference to section 117C of the Nationality, Immigration and Asylum Act 2002. There will be no very significant obstacles to the Appellant's integration into society in Portugal which is an EU member state. There are no very compelling circumstances over and above the exceptions to deportation.

34. The Appellant submits that the Respondent's skeleton argument is based on the previous findings of the First-tier Tribunal despite the decision having been set aside. This is a fresh appeal. The starting point is that the Appellant has permanent residence. Any decision must be proportionate and based on his personal conduct with reference to Regulation 27(5) of the 2016 Regulations.

35. The Upper Tribunal is asked to note that the period of imprisonment does not break the continuity of residence with reference to Tsakouridis [2010] EUECJ C-145/09, [2011] Imm AR 267 and P.I. v Oberbürgermeisterin der Stadt Remscheid (Freedom of movement for persons) [2012] EUECJ C-348/09 (22 May 2012).

36. In deciding whether the Appellant is entitled to enhanced protection there must be an overall assessment of the Appellant's integration in the UK. Time in prison does not automatically break his integral links. The Appellant relies on B v Land Baden-Württemberg (C-316/16) and Secretary of State for the Home Department v Vomero (C-424/16). The Appellant arrived in the UK in 2007. He has been here for twelve years. He was imprisoned between November 2016 and April 2018. This does not break his integrative links here. The strength of the Appellant's appeal lies in his relationship with N. It is submitted that the Appellant is entitled to enhanced protection and that his deportation would be disproportionate. N's best interests are central to the balancing exercise.

37. Mr Tufan in oral submissions said that the Appellant's son is aged 17. He is approaching adulthood. It is suggested that he is suffering from autism, however there is no medical report to support this. Even if he is autistic, the Appellant's contribution is limited. There is supervised contact. He drew my attention to what he said were inconsistenices in the evidence. The Appellant does not show proper remorse. He remains a danger to the community. He was assessed as posing a low risk of reoffending and a medium risk of harm. Mr Tufan drew my attention to MA

(Pakistan) [2014] Civ 163 at paragraph 19 is concerned with a low risk of reoffending and JZ (Colombia) v SSHD [2018] EWCA Civ.

38. Mr Belara in response relied on his skeleton argument and asked me to attach weight to the evidence of the Appellant's ex- wife. Deportation cannot be justified on grounds of deterrence. The Appellant came here in 2007. He was sentenced in 2016, six months short of ten years. His integrative links were very strong before the Appellant went to prison.

39. The tribunal must take into account what the Appellant did before going to prison. It cannot be said that he has a propensity to commit offences. He has contact with his children and family in the UK. It is accepted that applying a mathematical calculation the Appellant cannot establish continuity of residence, however his integral links remain intact. Although the offences are very serious there is a low risk of reoffending. He is not a persistent offender. He does not have a drug problem. The Appellant plays a strong part in N's upbringing. He provides financial support to his family. It is in N's best interest that he remains here. It is unreasonable to expect N to visit him in Portugal. Such disruption would have a grave impact on N. The decision to deport the Appellant is not proportionate in the circumstances.

What level of protection applies?

40. In the case of Hafeez v the Secretary of State for the Home Department [2020] EWCA Civ 406, the Court of Appeal said as follows:

> "37. In my view, periods of imprisonment (or detention in a young offenders' institution: *Viscu v SSHD* [2020] 1 All ER 988) do not count positively towards establishing ten years' residence. I have reached this conclusion for three reasons.
>
> 38. Firstly, that is the only interpretation which can be placed on the unqualified determination by the CJEU in paragraph [33] of *MG (Portugal)* that "periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in article 28(3)(a) of Directive 2004/38", before the court went on to add "and in principle such periods interrupt the continuity of the period of residence for the purposes of that provision". If the Court had wanted to qualify the first part of the paragraph with "generally" or "usually" or "in principle" it could have done so; but it did not.
>
> 39. Paragraphs [34] to [36] deal with the question of whether periods of imprisonment interrupt continuity of residence, with paragraph [35] referring to "the non-continuous nature of the period of residence during the ten years preceding the decision to expel". I do not see how this phraseology is consistent with the idea that time in custody counts positively towards the ten years. It rather supports the view that imprisonment presses a pause button. Mr Hafeez does not, on any view, have a non-continuous period of residence in the UK of ten years or more. Taking his claimed arrival date of 2006, at the time of the deportation decision he had between 11- and 12-years continuous residence if the three and a half years in custody count towards the total, but a non-continuous period of at most eight and a half years if they do not.

40. Secondly, allowing individuals to count periods of imprisonment towards the ten year period would produce unjustifiable inconsistency between the tests which must be satisfied to rely on the serious grounds or imperative grounds protections. As the CJEU made clear in *Onuekwere v Secretary of State for the Home Department* (Case C-378/12) [2014] 1 WLR 2420, a decision handed down on the same day and by the same panel as *MG (Portugal),* in calculating five years' residence, periods before and after time spent in custody cannot be aggregated. It seems contrary to common sense that one day in custody will reset the clock to zero and prevent an individual from relying on serious grounds protection, but that several years in custody can be used positively to establish ten years' residence and, subject to an "overall assessment" of whether continuity has in fact been broken, entitle an individual to the imperative grounds protection

41. Thirdly, such a distinction would produce arbitrary results. This can be illustrated by two hypothetical examples. A has resided in the United Kingdom for 11 years prior to his deportation decision. He has spent years 5-7 in custody, pursuant to a six year sentence for rape passed on the fourth anniversary of his arrival; so he only had two sets of four years residence (either side of the period of imprisonment) unblemished by imprisonment. He would not have acquired the right of permanent residence and thus has neither serious grounds protection nor imperative grounds protection.

42. B has also resided in the United Kingdom for 11 years prior to his deportation decision. He has spent years 7-9 in custody, pursuant to a six year sentence for rape passed on the sixth anniversary of his arrival; which meant that prior to entering prison he had more than five years' residence unblemished by any period of imprisonment. If Ms Hirst is right, he would have a right of permanent residence and, subject to an assessment of whether his integrative links had been broken, would also be able to argue that he had ten years' residence. Thus, despite residing in the United Kingdom for the same number of years as A, and serving time in prison for the same offence and the same number of years as A, B could be entitled to imperative grounds protection – two levels higher than A, who has only basic protection – simply because his period of custody commenced at a later stage.

43. For these reasons, I consider that the FTT judge was wrong to give the Appellant the benefit of the legal doubt on this point. As I said in *Hussein* at paragraph [18] (in a judgment handed down after the FTT and UT decisions in the present case), an individual relying on imperative grounds protection who has served time in custody must prove *both* that he has ten years' continuous (or non-continuous) residence ending with the date of the decision on a mathematical basis *and* that he was sufficiently integrated within the host State during that ten year period. In the present case, if the Appellant could not count his three and a half years in prison towards the necessary ten years' residence, he failed to qualify for imperative grounds protection under Regulation 27(4) for simple mathematical reasons. The question of whether his integrative links with the UK were broken by the three and a half years in custody (as to which see *Viscu,* another decision of this court given after the FTT and UT judgments in the present case) therefore does not arise.

> 44. The Appellant thus only had a right of permanent residence and accordingly should have been afforded serious grounds protection under Regulation 27(3), but not imperative grounds protection under Regulation 27(4)".

41. The Appellant came to the United Kingdom in 2007. Counting back from the decision to deport him he has resided here for 11 years. However, the Appellant does not have ten years continuous residence ending with the date of deportation because his criminality and imprisonment interrupted continuity of residence. In Hafeez the Court of Appeal decided that periods of imprisonment do not count towards establishing ten years residence. For simple mathematical reasons, this Appellant does not qualify for enhanced protection.

Is the Appellant's deportation justified on serious grounds of public policy?

42. The Appellant has permanent residence under the 2016 Regulations, with the result that the tests in Regulations 27 (3) and 27 (5) must be satisfied if the Secretary of State's deportation is to be upheld. The burden of proving that a person represents a genuine, present and sufficiently threat affecting one of the fundamental interests of society under Regulation 27(5)(c) rests on the Secretary of State and the standard of proof is the balance of probabilities: Arranz (EEA Regulations - deportation - test) [2017] UKUT 294.

43. Regulation 27(5), which prevents reliance on a person's criminal convictions "in themselves", reproduces the effect of the ruling of the European Court of Justice in Case 30/77 [1977] ECR 1999 (*Bouchereau*) §28. The existence of a previous criminal conviction can, therefore, only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy. The Appellant's criminal convictions form the context for an assessment of his present threat to what is described in regulation 27(5)(c) as one of the fundamental interests of society.

44. The decision to remove the Appellant must be based exclusively on his personal conduct. Matters that do not directly relate to the particular case or which relate to considerations of general prevention do not justify a decision to remove him. Deterrence has no part to play. There is a need to look to the future. (It is not the Secretary of State's case as advanced before me that the *"Bouchereau"* exception applies) .

45. In Straszewski v SSHD [2015] EWCA Civ 1245, Moore – Blick LJ said the following about the test:

> "25. In the present case the Secretary of State sought to justify Mr. Straszewski's deportation on serious grounds of public policy or public security. "Public policy" for these purposes includes the policy which is reflected in the interest of the state in protecting its citizens from violent crime and the theft of their property. These are fundamental interests of society and therefore, although regulation 21(3) does not speak in terms of the risk of causing harm by future offending, in a case of this kind that is the risk which the Secretary of State is called upon to assess when considering

> deportation. That requires an evaluation to be made of the likelihood that the person concerned will offend again and what the consequences are likely to be if he does. In addition, the need for the conduct of the person concerned to represent a "sufficiently serious" threat to one of the fundamental interests of society requires the decision-maker to balance the risk of future harm against the need to give effect to the right of free movement. In any given case an evaluative exercise of that kind may admit of more than one answer. If so, provided that all appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in the sense of falling outside the range of permissible decisions".

46. The offences committed by the Appellant are very serious. There is no good reason to go behind the sentencing judge's comments. The Appellant has not faced up to the nature of the offences relating to images of children. In respect of the drug offences, I am satisfied that the Appellant is not a drug user. I am satisfied that at the time of the offences he was estranged from his family. Having heard evidence from him and AM, I am satisfied that he was at the time of offending vulnerable, depressed and lonely following the break down of his marriage.

47. The Secretary of State's case is that because the Appellant has not come to terms with his offences and is effectively in denial, there is a risk of reoffending. The sentencing judge's sentencing comments and the Appellant's attitude are relied on to support this. When sentencing the Appellant, the judge said that he was in denial. The judge did not agree with the author of the PSR who reached a different conclusion. The sentencing judge said that the Appellant should take the opportunity to address the fact that he is attracted to children. The Appellant has not done this. He remains in denial. While he undertook courses in prison, they were not rehabilitative courses.

48. I did not have sight of the PSR. It is likely to have been prepared by a probation officer following an assessment of the Appellant. I have, however, had the benefit of hearing the Appellant and AM give evidence some four years after he was sentenced. I had the benefit of an OASys report in which the Appellant was assessed in 2018 as presenting a low risk of re-offending. I must assess risk at the date of the hearing.

49. I accept that generally denial increases the risk of reoffending. In MA the Court of Appeal upheld the decision of the Upper Tribunal that the Appellant presented a risk for two reasons, the gravity of the offence and the Appellant's denial of criminality. In that case the Upper Tribunal rejected the assessment of low risk in the OASys report. Mr Tufan drew my attention to what the court said about "low risk". The Court of Appeal considered "low-risk" in an OASys report in the context of a deportation of a foreign criminal under domestic legislation and the application of s72 of the Nationality, Immigration and Asylum Act 2002 in circumstances where the gravity of the offence is of significant materiality. In this case, I accept the assessment in the OASys report. Of course, low risk is not to be equated with no risk. I make an assessment of risk, taking into account all material matters including factors which would increase or decrease the risk of re-offending. I also take into account the medium risk of harm should the Appellant re-offend and the Appellant's attitude as part of that assessment.

50. Having considered the evidence, I conclude that the risk of this Appellant re-offending is low notwithstanding that he denies having a sexual interest in young children and that he has not received help to address his offending. I attach weight to the OASys assessment. I also take on board that the risk of harm to children is medium, should the Appellant reoffend. However, I have taken into account the Appellant's fear of returning to prison and the importance to him of his relationship with his son, N. Both came across very strongly in the evidence before me (and in the OASys report, p25 of 53). The risk of re-offending was assessed by the author of the report in 2018 as being low. I find that the risk is less now than it was in 2018. The Appellant does not have any other convictions and his personal circumstances have significantly changed.

51. There was no corroboration of the Appellant and AM's evidence that N has autistic spectrum disorder. This was a point made by Mr Tufan. However, there is no reason for me to not believe their evidence about this. Both gave clear evidence about the child's problems. I found both witnesses to be credible. When assessing risk, N's dependency on his father is material. This acts as a deterrent.

52. The Appellant is close to his son and genuinely concerned for his welfare in the event of his deportation. Discrepancy in the evidence of the Appellant and that of AM was more than likely as a result of the time that has passed since they made their witness statements. Their oral evidence presented the picture at the date of the hearing. I accept that at the date of the hearing the Appellant was seeing his son weekly. I accept that the Appellant gives significant financial support to his family, although the amount is not fixed which explains discrepancies in the evidence on this issue.

53. In respect of the drugs matters, the Appellant conceded that he allowed his flat to be used to store drugs (there were two co-defendants). He pleaded guilty on the basis that he was not aware that cocaine was stored. He said in evidence that he was given cannabis in return for allowing his flat to be used by the co-defendants. There was clearly an element of vulnerability as commented on by the sentencing judge. The judge accepted that the Appellant was pressurised although this did not amount to duress. I am mindful that the defence of duress is very difficult to establish. The evidence very much supports the Appellant having had a mental breakdown after his separation having become temporarily estranged from his family. I am satisfied that following a divorce the Appellant was depressed and vulnerable.

54. I have taken into account that the Appellant is permitted by the Social Services to have regular contact with his son, albeit supervised. It is not, however, supervised by a social worker. It is supervised by his adult daughter. I infer from this that the Social Service's view that he does not present a threat to his family. There was no evidence of the duration of supervised contact, but N is aged eighteen on his next birthday. The evidence of AM was credible and persuasive. I accept that if she genuinely believed that the Appellant presented a risk to children, she would not permit N to have contact with him.

55. I have no doubt in this case that the consequences of re-offending will act as a deterrent. What is key to risk of reoffending is family support. The Appellant did not

have this at the date the offences. He now has a very strong connection with and support from AM and their children, particularly, N. He is employed and supports the family financially. Offending took place in the aftermath of a divorce when the Appellant was estranged from his family.

56. While the Appellant committed very serious offences, taking into account all the evidence and having conducted a fact specific assessment of risk, I find that the Secretary of State has not established that the Appellant represents a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society and that deportation is justified of grounds of serious grounds of public policy.

57. I have not had to consider the Appellant's appeal applying domestic law. He is an EU national. However, following the United Kingdom's withdrawal, if the Appellant re-offends and the Secretary of State decides to make a deportation order, he will no longer be afforded the benefit of EU law and any attempt to remain here will be more difficult for him.

Notice of Decision

The appeal is allowed

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

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 their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Joanna McWilliam* Date 4 January 2021

Upper Tribunal Judge McWilliam