Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00006/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 December 2018	**On 10 January 2019**

Before

THE HONOURABLE MRS JUSTICE COCKERILL
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE CANAVAN

Between

MR ALI HAFEEZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss F Shaw (Counsel), Wilson Solicitors LLP
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought by the Appellant the decision of FtTJ O'Hagan ("the judge" dated 2 October 2018. By that decision ("the decision") the judge refused an appeal against the decision of the Respondent dated 8 December 2017 to make a deportation order in respect of the Appellant.

2. Permission to appeal against the judge's decision was granted by FtTJ Froom on 25 October 2018, saying "it is arguable that the [judge] erred by failing to explain how he concluded there were imperative grounds of public [security] justifying the appellant's deportation in the light of the need to show the threat posed by the appellant is exceptionally serious."

3. The Appellant is a German national born in Germany on 21 July 1995. He is now 23 years of age. He is the eldest child of six and had until his conviction and subsequent deportation resided with his family in the UK since his arrival in 2006. The Appellant was granted a registration certificate as a German National on 14 December 2009, following his father's application to register his family as EEA nationals.

4. The present case arises out of the Appellant's conviction at St Albans Crown Court on two counts of rape committed while he was aged seventeen in June 2013 for which he received a sentence of six years, one count of robbery committed against the same victim on the same date (three years concurrent); and one count of dangerous driving for which he received a sentence of 12 months consecutive to the six years received for the index offence. He had an earlier conviction for theft from a motor vehicle for which he had received a conditional discharge.

5. The facts of the principal offences were (in brief) as follows, as recorded by the sentencing judge. The victim was a 27 year old sex worker. On the night in question she had consented to go with the Appellant in his car for paid sexual services. On arrival at the destination car park, the Appellant put a knife to her throat, described her as "scum" and forced her to perform oral sex on him, following which he raped her vaginally. During the course of this assault he held her by the throat and told her "Move like you want it, bitch". He then stole her money from where she had hidden it in her shoe. The offences were apparently motivated both by a desire for sexual gratification and some form of inchoate revenge, it being his case that he had been robbed by another sex worker.

6. The Appellant, who the trial judge noted was a highly intelligent and articulate young man with ambitions to become a lawyer, constructed an elaborate and dishonest defence, involving calling his father to give dishonest evidence. It was described by the judge as a cynical manipulation of the criminal process "using a degree of sophistication and cunning beyond that of many adults, and certainly beyond your chronological age". The trial judge concluded "that shows the sort of person you are".

7. The trial judge also noted a "very clear lack of empathy, insight or understanding". The judge decided not to impose an extended sentence because of the length of the sentence planned and the Appellant's chronological age.

8. The sentencing remarks also deal with the dangerous driving incident, which was committed while on bail and involved a high speed chase trying

to evade the police and involving running a number of red lights and recording speeds of over 100 miles per hour. Again the defence to this charge involved a dishonest attempt to evade justice.

9. On 19 April 2016, following his conviction, the Appellant was served with a notice of liability to deport. He responded on 20 January 2017 setting out why he considered that he should not be deported.

10. On 8 December 2017 the Respondent made a decision under Regulations 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") to remove the Appellant from the UK on public policy/public security grounds. It is this decision which was appealed against.

11. The decision noted that there was no evidence of his parents exercising treaty rights or having comprehensive insurance in place for the period that he was a dependent child. The decision therefore did not accept that the Appellant had been resident in the UK in accordance with the 2016 Regulations for a continuous period of five years and stated that the Respondent considered that the Appellant had not acquired a permanent right of residence. It went on to decide:

    a. That the Appellant represented a genuine, present and sufficiently serious threat to the public to justify his deportation on grounds of public policy;

    b. Even had he had permanent residence rights either the hurdles of serious grounds of public policy or the higher test of imperative grounds of public security would have been met.

12. The Appellant lodged an in time notice of appeal against the decision. He completed his custodial sentence on 4 January 2018. He was released on immigration bail on 31 January 2018. He is on licence until 15 June 2021. He has not committed any further offences. He was prior to deportation residing with his mother and siblings in the family home.

13. The legal framework was placed before us in some detail by Ms Shaw who appeared for the Appellant here and before the FTtJ. We are very grateful for her full and clear skeleton argument. The legal framework is essentially common ground and we do not need to deal with it at length.

14. In summary the expulsion of EEA citizens and family members on grounds of public policy or national security is expressly designed to be limited. There are three layers of protection set out in the 2016 Regulations which are applicable in this case: residence, permanent residence and Regulation 27(4) which includes continuous residence for at least 10 years.

15. It is this latter provision which primarily comes into play in the present case since the judge proceeded on the basis that the Appellant had acquired a permanent right of residence and was prepared to assume in

his favour that he had acquired the highest level of protection. We do not consider that the judge did decide this point; he specifically said that this was an assumption. Taken together with what he later said at [49] ("since I have found that the higher test of imperative grounds is met, it follows that I am satisfied that the lower tests are also met. Whatever way I assess the case, the outcome is the same") we conclude that he proceeded on this basis without deciding the point. This is a logical way to proceed given that if he concluded the test of "imperative grounds" was in any event met, it was unnecessary to decide the question of the level of protection to which the Appellant was in fact entitled. An issue remains, at least contingently, as to whether the Appellant did indeed meet the requirements of that highest level of protection; but given the basis of the judge's decision and the basis upon which the appeal is brought the focus is primarily on Regulation 27(4) which provides for removal only on "imperative grounds of public security".

16. That term is not defined. It is considered in a number of authorities to which we were referred, including *MG and VC (Ireland)* [2006] UKAIT 00053, *LG (Italy) v SSHD* [2008] EWCA Civ 190, *LG and CC (EEA Regs: residence, imprisonment removal) Italy v SSHD* [2009] UKAIT, *VP (Italy) v SSHD* [2010] EWCA Civ 806, *Tsakouridis and PI v Oberburgermeisterin der Stadt Remscheid (Freedom of movement of Persons)* Case C-348/09 and *SSHD v Eduardo Rui Monteiro Barbusa Semendo* (DA/00096/2015). However it was accepted on behalf of the Appellant that the law was correctly stated in the following passage from [110] in *LG and CC* which was cited by the judge at [37] of his decision:

> "… we cannot accept the elevation of offences to "imperative grounds" purely on the basis of a custodial sentence of five years or more being imposed. As was said by Carnwath LJ in LG (see paragraph 32(3)), there is no indication why the severity of the offence in itself is enough to make removal "imperative" in the interests of public security. Such an offence may be the starting point for consideration, but there must be something more, in scale or kind, to justify the conclusion that the individual poses "a particularly serious risk to the safety of the public or a section of the public"."

17. On this basis it was not contended that the judge had applied the wrong legal test; the contention which was advanced for the Appellant was that the decision was one which was not reasonably open to the judge bearing in mind the Appellant's circumstances, in particular given the following factors:

    a. The Appellant's high level of integration, bearing in mind the factors listed above and the fact that integration was not broken while in prison, in that he had frequent visits from family and undertook and successfully completed a number of courses

    b. What is said to be a misevaluation of the facts, including a failure to give sufficient weight to the absence of a finding of dangerousness, which, being a lower hurdle than the 27(4) hurdle is said to logically preclude a finding under that head, and

a failure to take into account the evidence of an independent psychiatric report by Dr Davies.

18. Against this submission the Respondent contends that there is an error of law in the decision of the judge, but it is one which favours the Respondent, namely that the judge erred in applying the imperative grounds test and not a serious grounds test based on the evidence; and that accordingly there was no material error of law in the Appellant's favour because on any analysis the Appellant met the "serious grounds" test. As to the Appellant's perversity challenge, the Respondent contended that given the findings of fact, and the fact that no single finding of fact is said to be perverse, the challenge cannot possibly succeed. It contends that the findings the judge makes on the appellant's evidence are of great importance.

19. Having carefully considered these submissions and the decision we conclude that the decision is one which was reasonably open to the judge, and is not tainted by irrationality or perversity.

20. The starting point is that it is common ground that the judge applied the correct test as a matter of law. He was entitled to look at the evidence and consider whether there was something more in the evidence before him, in scale or kind, to justify the conclusion that the individual poses "a particularly serious risk to the safety of the public or a section of the public".

21. That is exactly what the judge scrupulously did. He rightly took as his starting point the seriousness of the offence and rightly concluded that that was not sufficient [38]. He then went on to consider other factors, in particular:

    a. The seriousness of the offence even within the spectrum of rape cases [39];

    b. The disregard/contempt for others evidenced by the rape, the robbery and the motoring offence [39]. Together these two factors were said to elevate the offending into matters of "the utmost seriousness";

    c. The evidence which the judge had heard which only served to heighten his concerns, in particular as regards his failure to accept his guilt and his disregard and contempt not just for the victim but towards women and particularly sex workers [40];

    d. The evidence as to rehabilitation [41] which he assessed as providing a somewhat mixed picture:

        i. Credit was given for the work done; but at the same time the judge noted that this has to be taken together with the negative factor of failure to accept guilt which he said "is a potent indicator that he has not particularly benefitted from those courses".

ii. The OASys report was briefly but clearly carefully assessed;

iii. Issues as to bullying running a shop fighting and manipulation of prisoners and staff were noted, as was the Appellant's unconvincing response to these points;

e. The risk of reoffending was weighed and independently assessed concluding that there was a "substantial" "real and significant" and "at best medium" risk of reoffending [42];

f. His engagement in the limited time post release was considered [42];

g. The judge then went on to consider in some detail the Appellant's age, state of health, family and economic situation as well as his length or residence and integration [45-7] as well as the impact of deportation on the Appellant's rehabilitation [48].

22. It was on this basis that the judge concluded at [49] that he was "satisfied that the requirements of the regulations are met, that there are imperative grounds of public security, and that deportation is a proportionate response to the appellant's conduct."

23. We note that it is not contended that the judge erred in principle in giving weight to any of the factors to which he did give have regard; it was accepted in argument that these were all matters to which the judge could properly bring into the assessment. In our judgment this makes the hurdle which the Appellant seeks to surmount extremely high. Clearly and persuasively as the case was put on his behalf, we consider that it does not succeed in meeting that hurdle.

24. The points which the judge takes into account and the findings which the judge makes on the Appellant's evidence are not simply relevant ones, which it was proper for him to consider – they are conclusions of great importance. The question which it is agreed the judge had to ask was whether there was something more in the material before him which justified the "imperative grounds" conclusion because of particularly serious risk to the public or a portion of it. It was right for him to ask at which end of the scale of seriousness within its type this offence fell and to evaluate the level and the nature of the risk by reference to all the material before him.

25. There were plainly extremely disturbing features of the Appellant's behaviour both in the offence, in his defence and in his subsequent behaviour in prison - as well as his evidence before the judge - which made it far from unreasonable for the judge to reach his conclusion as to risk. We do not consider that it can be said that any one part of the evidence was given undue weight. It was not the case that the judge found issues just with one aspect of the evidence; the judge, who was in the best position to evaluate the evidence in the round, firmly rejected the Appellant's case and his evidence, noting in his evidence to the tribunal a

continuing serious unaddressed issue as to acceptance of guilt and attitude to sex workers and to women generally.

26. We do not consider that the evidence as to the rehabilitative work undertaken in prison can be said necessarily to provide a strong factor against all of this. It was certainly open to the judge to conclude that in the light of the Appellant's apparent unwillingness or inability to accept his guilt that this was a potent indicator that he has not in fact benefitted from the courses and had not in fact made such progress with his rehabilitation as was contended. We consider that the judge's view on this was properly supported by his consideration of the issues which emerged as to the Appellant's behaviour in prison and the fact that (as with his defence to the substantive charges) he was ingenious in attempts to displace blame.

27. As for the argument that more emphasis should have been put on Dr Davies' report, this is a question of the weight to be given to an individual piece of evidence. It cannot be said that a failure to give weight to a report which accepted the Appellant as credible in saying he understood how to manage his risk was erroneous, in circumstances where the judge had heard and evaluated the Appellant's evidence, and found him not to be credible.

28. Nor do we accept that there is an error or a logical disjunction as regards the lack of a dangerousness finding by the trial judge. The tests to be applied are different. Further it is apparent, as alluded to above, that the absence of a dangerousness finding was based not on a positive view on the part of the trial judge that the Appellant was not dangerous, but on a conclusion that in the light of the length of sentence and the Appellant's youth a finding of dangerousness was not necessary. A conclusion of dangerousness in relation to a youth is reached only following the application of particular rigour (Dangerous Offenders Guideline paragraph 6.5.1). That approach sits perfectly consistently with the judge's later and more fully informed assessment.

29. As regards integration, while it might well be argued that integration has not been broken, we do not consider the judge's conclusion on this was outside the range of permissible answers, particularly given the indubitable physical separation from his family during his imprisonment and the correlative need to rely on the courses, which the judge concluded had not been particularly effective.

30. In essence therefore what one sees in the decision is a series of findings which were manifestly open to the judge to make, and which plainly reflect a careful and balanced approach to the exercise being undertaken. These are then considered appropriately. It cannot be said that the conclusion that the requisite test was met was one which on the basis of these evidential findings was not rational. Different tribunals might have reached different conclusions on this point, based on this evidence. Nor do we consider that there was any failure to explain how the test was met: the

test was clearly stated and applied with suitable explanation of each part of the decision and the overall evaluation.

31. Two other questions were raised during the course of argument:

    a. Whether the FtTJ erred in his approach to residence;

    b. Whether any error in the Appellant's favour (ie. an erroneous conclusion that he was entitled to "imperative grounds" protection) would be material in the light of the factual findings and their consequences for a "serious grounds" test.

32. In the light of our conclusions above that the imperative grounds test is in any event met these do not arise and we make no determinations in relation to them.

Notice of Decision

The First-tier Tribunal decision did not involve the making of an error of law

The First-tier Tribunal decision shall stand

Signed *S. Cockerill* Date 09 January 2019

The Honourable Mrs Justice Cockerill sitting as an Upper Tribunal Judge.