Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/12164/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 August 2017	**On 14 December 2017**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PATRICK JOSEPH NOLAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: None

DECISION AND REASONS

1. In a decision of 29 August 2017 (which followed a hearing on 29 August 2017), I set aside the decision of First-tier Tribunal (FtT) Judge Mailer sent on 17 February 2017

allowing the appeal of the respondent (hereafter the claimant). The claimant had appealed to Judge Mailer against the decision made by the appellant (hereafter "the Immigration Officer" ("IO")) on 12 September 2016 to refuse him admission to the UK under the Immigration (European Economic Area) Regulations 2006 on the grounds that he is an EEA national from Ireland whose exclusion was justified on serious grounds of public policy.

2. At the hearing there was no appearance by or on behalf of the claimant. Mr Whitwell represented the IO. In view of the lack of any communication with the Tribunal I decided to exercise my discretion to hear the appeal in the absence of one of the parties. I then heard brief submissions from Mr Whitwell in the course of which he submitted that the IO's reference to "serious" was a typing error. In my subsequent written decision, having set aside the decision of Judge Mailer, I issued the following directions:

> **"DIRECTIONS**
>
> I am not presently in a position to re-make the decision. Before I proceed to re-make the decision, I direct that within 28 days from this decision being sent:
>
> 1) The IO serve on the Tribunal with a copy to the claimant a written statement confirming whether or not the use of the word 'serious' in the exclusion decision was a typographical error and clarifying the basis on which the exclusion was made. (I have already received the interview record from Mr Whitwell but the respondent should also serve a copy on the claimant.)
>
> 2) The claimant serves on the Tribunal (with copy to the appellant) any probation or any other similar report (if any) in existence prior to 17 February 2017 in support of his claim that he has been categorised as a "low risk" of re-offending**."**

3. In response Mr Whitwell for the IO sent a Police National Computer check particularising the claimant's criminal offending in Ireland which was said to support the IO's description of the length of the claimant's sentence. This record showed that the claimant had first been convicted on 29 November 2013 for 5 sexual offences for which he received sentences of 3 years imprisonment for the first offence and 4 years consecutive for the second and third (being bound over in respect of the third for 7 years). The record also documented that his overseas conviction made Mr Nolan liable for Visor Registration if in the UK. Mr Whitwell also included an email from the Stanstead Command Border Force Casework Team stating in respect of the claimant that:

> "It has been established from interviewing Mr Nolan that at the time of his refusal he had been residing in the UK for 3 months, as such he would not have

qualified for permanent residence. Border Force Stanstead therefore maintains that the Appellant's conduct constitutes 'serious' grounds for refusal, this is not a concession as to the [claimant's] acquisition of permanent residence and we consider that the [claimant] is to be assessed against the baseline level of protection afforded under the Regulations, which even taking that into account, his exclusion remains justified".

4. From the claimant, the Upper Tribunal received two letters, one dated 22 September 2017 the other 2 October 2017, the latter essentially correcting the dating of the former. The latter, headed, "Letter of Clarification", from Forensic Psychological Services, Kilkenny, Ireland, stated that it had carried out 2 risk assessments, one in 2014 and one in 2015. In 2014 Mr Nolan's level of risk "was assessed actuarially as this provided an objective measure of the likelihood of his committing a sexual offence in the future. Mr Nolan's overall level of risk of re-offending in the future was deemed to be moderate-low". The letter added that Mr Nolan's risk of future sexual offending was reassessed using the same instruments, in 2015. It was noted that his "risk of future sexual acting out had reduced at that point in time and was reassessed as being in the low risk range". Contributing factors to this assessment were stated as being: his capacity for relationship stability; his general social withdrawal and rejection; his poor problem-solving skills; his negative emotionality; and the age and gender of the victim. This letter, signed by a Senior Counselling and Forensic Psychologist, concluded by stating that "[i]t is likely that Mr Nolan's poor problem-solving skills, rather than dishonesty on his part, contributed to his failure to notify the necessary professionals of his relocation to England".

5. I did not envisage when issuing my further directions that there would be a need for a further oral hearing and the responses I have received from the parties enable me to proceed to re-make the decision on the papers.

6. The claimant was convicted in November 2003 in Ireland of five counts of sexual assault of a minor (his son) aged 14. He received a sentence of four years which resulted in him being placed on the sex offenders register in Ireland and subject to the requirements therein, which included notifying the Garda of his change of address (including outside of Ireland). The claimant accepts that he failed on two occasions to notify the requisite authorities of his whereabouts.

7. It is clear that the claimant has never acquired permanent residence in the UK, having only resided here for 3 months prior to the IO decision refusing him admission. That means that in assessing his case under the Immigration (European Economic Area) Regulations 2006, his exclusion from the UK could only be justified on grounds of public policy, public security or public health. Put another way, he was only entitled to the baseline level of protection, not the higher levels of protection against exclusion or removal available to those who have acquired permanent residence or been her for 10 years or more. All decisions taken on public policy, public security and public health grounds must comply with the requirements set out at regulation 21. These include that the decision must comply

with the principle of proportionality((5)(a)) and must be based exclusively on the personal conduct of the person concerned (5(b)) and the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society ((5)(c)).

8. Before proceeding to re-make my decision, it is necessary to consider the further evidence submitted by the claimant in response to my Directions. I am not impressed by the quality of the 'Letter of Clarification' submitted by the Forensic Psychological Services. This is not simply because it is not a report but a report of reports. Nor is it simply that it does not demonstrate a clear methodology in relation to assessment of the risk of re-offending in the context of the range of factors such as are provided in the UK under the auspices of Multi-agency protection arrangements (MAPPA) reports. It is also because of what it fails to address. It does not for instance record when the claimant was interviewed or what questions were asked of him or what replies he gave. It does not address the extent to which it was considered the claimant had rehabilitated or what the claimant said that persuaded them the risk was moderate-low and whether in particular that was based on an objective assessment rather than merely reliant on the claimant's say so. The reference to actuarial assessment is not enough to establish that this was, as claimed, "objective". I do not find it helpful that the only material observation made about the claimant's failure to register his address was that this was "likely to be due to poor problem-solving skills rather than dishonesty on his part". That may or may not be true, but it is impossible to glean from this report on what basis this evaluation was arrived at. How long the claimant was interviewed for, what documents were before the psychologist concerned, is not stated. Further, in support of the conclusion that the claimant's risk of future sexual offending was in 2015 reassessed as being in the 'low risk range; "contributing factors" are said to include 'his general social withdrawal and rejection', his negative emotionality and the age and gender of his victim. Such factors on their face are equally capable of being factors pointing to a high risk. I accept that because the claimant was well beyond his prescribed period of probation it may not have been possible to obtain a report from government services, but that does not redeem the failings of this letter. In short, I do not consider I can attach any significant weight to this letter.

9. Taking all relevant considerations into account, I conclude that the decision of the IO to exclude the claimant was and remains justified grounds of public, policy or public security. My reasons are as follows.

10. In favour of the claimant is the fact that the the public policy exception constitutes a derogation from the right of residence of Union citizens/EEA nationals and their family members, which must be interpreted strictly and the scope of which cannot be determined unilaterally by the Member States (see, to that effect **Rendón Marín,** C-165/14, EU:C:2016:675, paragraph 58). Further, the claimant's offences all took place as long ago as 2003. A person's previous criminal convictions do not in themselves justify a public policy decision (regulation 21(5)(e)). Whilst I attach very

little weight to it (for reasons given above), I note that a Forensic Psychological Service operating in Ireland has assessed him as presently a low risk of reoffending.

11. However, I consider the factors counting in favour of the claimant to be considerably outweighed by those counting against him. First, the offence is indubitably a serious one, as reflected not only in the length of sentence (four and three years to be served consecutively, along with an additional sentence of four years bound over for seven years). Second the nature of the offence is a particularly serious one. As the Court of Justice of the EU (CJEU) has confirmed in a number of cases, most recently in **E** (Citizenship of the Union - Right to move and reside freely in the territory of the Member States: Judgment) [2017] EUECJ C-193/16 (13 July 2017) in paragraph 20 of which the Court stated:

> "In that regard, it must be noted that, in accordance with Article 83(1) TFEU, the sexual exploitation of children is one of the areas of particularly serious crime with a cross-border dimension in which the European Union legislature may intervene. Therefore, it is open to the Member States to regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population …"

12. The Court in the **E** case was concerned with whether such offences were capable of being covered by the concept of 'imperative grounds of public security' (governing the highest level of protection against exclusion), but its reasoning applies a fortiori to the mere issue of whether such offences are capable of being covered by public policy grounds in view of their seriousness.

13. Third, although the offences had been committed as long ago in 2003, the claimant had recently breached the requirement to notify the Garda of his change of address for the purposes of the national sex offenders register in Ireland on two occasions and one (if not both) of these was in the trans-border context of movement to the UK. The claimant himself has sought to explain this by saying "I found it very difficult to do so". The "Letter of Clarification" from the Forensic Psychologist put this failure down to "poor problem-solving skills". I do not find either of these explanations satisfactory. The claimant must have known that he was under an obligation to report his address and that this was critical to being able to show he was no longer a real risk of reoffending. Such failure indicates in my judgement that the claimant continued - and continues - to represent a genuine, present and sufficiently serious threat to the fundamental interests of society.

14. Fourth, there is scant evidence to suggest that the claimant has had had any meaningful length of residence in the UK or that he has socially and culturally integrated into British society.

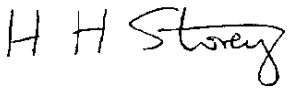
15. For the above reasons I conclude that the claimant's exclusion was justified on public policy, public security and public health grounds and remains so. It was not a disproportionate measure on the basis of the given evidence.

16. To summarise:

    I have already found that the FtT judge materially erred in law.

    The decision I re-make is to dismiss the claimant's appeal.

Signed: Date: 13 December 2017



Dr H H Storey
Judge of the Upper Tribunal